REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 37407/2018

(1) REPORTABLE: yes
(2) OF INTEREST TO OTHER JUDGES: yes

3 September 2019 **RT SUTHERLAND**

In the matter between

HERMANUS ADRIAAN JANSE VAN VUUREN	**APPLICANT**
AND	
NEIL FRANS ROETS	**1ST RESPONDENT**
RCS CARDS (PTY) LTD (GAME)	**2ND RESPONDENT**
EDCON (PTY) LTD	**3RD RESPONDENT**
THE STANDARD BANK OF SOUTH AFRICA	**4TH RESPONDENT**
TENACITY FINANCIAL SERVICES (PTY) LTD	**5TH RESPONDENT**
and	
THE BANKING ASSOCIATION OF SOUTH AFRICA	**1ST AMICUS CURIAE**

THE NATIONAL CREDIT REGULATOR	**2ND AMICUS CURIAE**
THE LAW SOCIETY OF SOUTH AFRICA	**3RD AMICUS CURIAE**
MICHELL BARNARD (NCR DC 94)	**4TH AMICUS CURIAE**

In the matter between

FABRIAN MATTHIAS NEL	**APPLICANT**

AND

NEIL FRANS ROETS (NCR DC 474)	**1ST RESPONDENT**
AFRICAN BANK LTD	**2ND RESPONDENT**
FNB A DIVISION OF FIRST RAND BANK LIMITED	**3RD RESPONDENT**
GET BUCKS (PTY) LTD	**4TH RESPONDENT**
NEDBANK LIMITED	**5TH RESPONDENT**

and

THE BANKING ASSOCIATION OF SOUTH AFRICA	**1ST AMICUS CURIAE**
THE NATIONAL CREDIT REGULATOR	**2ND AMICUS CURIAE**
THE LAW SOCIETY OF SOUTH AFRICA	**3RD AMICUS CURIAE**
MICHELL BARNARD (NCR DC 94)	**4TH AMICUS CURIAE**

JUDGMENT

SUTHERLAND J:

INTRODUCTION:

[1] This matter is about the interpretation of certain provisions of the National Credit Act 34 of 2005. (NCA) A controversy exists about whether the High Court has jurisdiction, as a court of first instance, to address the alleged plight of the two applicants. Both sought relief from the High Court to release them from debt review, essentially, on the premise that since their initial applications in terms of section 86(1) of the NCA, their financial positions had so improved that they could pay their way again, albeit that they had not discharged all of their indebtedness.

[2] Several decisions in different Divisions of the High Court had taken a different approach to the question of such jurisdiction. In the Western Cape, Kwazulu-Natal and Limpopo, there are decisions that no such jurisdiction can exist. In Gauteng, there are decisions that the High Court has such jurisdiction. As a result, the Judge President of the Gauteng Division, acting in terms of section 14(1)(a) of the Superior Courts Act referred certain questions to a Full Court of the Division to resolve the conflicts in the case law.

[3] The Judge President's referral reads thus:

"6. The following issues have been raised and are to be determined by the Full Court:

a. Is a High Court able to make an order confirming that an applicant is no longer over-indebted, where no valid declaration of over-indebtedness is before Court?

b. Where fresh facts arise since a debt counsellor's notification to all credit providers and every registered credit bureau of the consumer's application for debt review, or after the assessment and conclusion that a consumer appears to be over-indebted, and new facts demonstrate material change in the circumstances of a consumer causing such consumer to no longer be over-indebted, is the High Court the forum of first instance that the consumer should approach to provide an order to rectify his credit status with credit providers and credit bureaus?

c. Is the relief sought consistent with the scheme of the National Credit Act?

d. The concepts of 'over-indebtedness' (including that of financial difficulty falling short of 'over-indebtedness' contemplated by s 86(7)(b)) and the attendant remedy of 'debt review' within the meaning of the National Credit Act are statutory creations. How they work is governed entirely by the National Credit Act. In absence of a challenge to their constitutionality, are the Courts' powers delineated by these provisions?

e. Does section 71 of the National Credit Act afford an adequate remedy in the circumstances to expunge the record that the applicants were in debt review?

f. Is the only remedy at disposal of the applicants the limited relief provided for in terms of s 71 of the National Credit Act and is it further limited to be sought in the manner set out therein?

g. Would the Court in exercising its powers in terms of section 21 of the Superior Courts Act to grant such relief, be inappropriate considering the environment regulated by the National Credit Act?"

[4] Apart from the two applicants who were represented by one counsel, the only other participants in the matter were four *Amicae Curiae*: The Banking Association of SA, The National Credit Regulator, The Law Society of South Africa, and Ms Michelle Barnard, a Registered Debt Counsellor.

[5] The relevant facts, in respect of the two applicants, which were common cause are these:

Van Vuuren

5.1 Van Vuuren applied for debt review on 11 May 2015. Roets, a registered debt Counsellor accepted the application. Roets informed the creditors and the credit bureaux of the application on 12 May 2015, using the prescribed form 17.1. On 15 June 2015, Roets

decided that Van Vuuren was indeed over-indebted. Roets then submitted the obligatory form 17.2 notifying the creditors and the credit bureaux of the application. Such notice of the acceptance of an application has the effect of suspending legal process in respect of the debtor's obligations. On 23 July 2015, Van Vuuren's matter was sent to the Magistrates Court and an order was granted by the Magistrate on 12 November 2015, as contemplated in section 87(1)(b)(ii), rearranging his repayment obligations. Van Vuuren complied with the order. On 1 November 2016, 18 months after the initial application, Van Vuuren's financial circumstances improved so that he was able to pay his creditors on the original terms of the agreements and no longer needed to rely on the debt review relaxations of the order. The details of the order are lean and offer no clear picture of the details of the arrangement [HJ5.1- P 30]. Van Vuuren asked Roets to take the relevant steps to release him from debt review. Roets refused on the grounds that the circumstances did not entitle him to issue a clearance certificate. Moreover, Roets told him that the Magistrates Court had no power to release him, hence the only option was to approach the High court to do so.

Nel

5.2 Nel applied to Roets for debt review on 13 March 2016. The application was accepted and the creditors and credit bureaux notified of the application on 16 March 2016. On 21 April 2016, Roets decided Nel was over-indebted. He sent the creditors and bureaux the notification by means of form 17.1. On 20 May 2016, the matter was filed at the Magistrates court. However, unlike Van Vuuren, no order was ever made by the Magistrate. Nevertheless, Nel paid his creditors in accordance with Roets' proposal to the magistrate. In July 2017, Nel "voluntarily" withdrew from payments in accordance with the proposal and resumed payments in accordance with his original agreements with his creditors. Like

in the case of Van Vuuren, Nel asked Roets to release him and Roets refused on the basis that he lacked the power to do so, and informed him of the alleged dilemma.

[6] Thus, as to the predicament of the two applicants, their alleged plight is that they contend that they are trapped in debt review when they no longer need to facilitate their financial rehabilitation through that process. In broad terms, counsel for the applicant advanced an interpretation of the NCA that, so it was argued, conferred jurisdiction on the High Court to acknowledge they no longer 'need' to be subjected to the effects of debt review, i.e. barred from incurring further credit, and in consequence, the High Court must therefore order the termination of their status as persons subject to debt review. All the other participants contended that NCA conferred no such jurisdiction on the High court to grant the release as prayed. A close examination of the relevant sections of NCA to assess these arguments is required.

[7] How to conduct such an interpretation exercise is now trite.[1] A court must honour the text in the context of the Statute and apply a purposive approach. The NCA has been often criticised for poor draftsmanship; however, the task remains to divine business sense out of the text and not to varnish the text with a gloss inspired by one's own value judgments.

The debt review scheme of the NCA

[8] The NCA constitutes a scheme for the regulation of various aspects of the granting and receiving of credit. Among several models of regulation in the statute there is the model of "debt review". Its objective is plain – a formal intervention into the contractual relationships of debtors (called consumers in the NCA) whose capacity to comply with their contractual

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18]*

obligations to their creditors is compromised and a constructive rearrangement schedule to ultimately achieve payment to their creditors. Whilst the debt review process prevails the consumers cannot incur credit and their creditors cannot sue them. The pertinent sections are contained in chapter 4 of the NCA, part D (sections 78 -88). Also implicated in this model is section 71, which deals with the removal of the record of debt adjustment or judgment, and section 138, which addresses consent court orders.

[9] Although the locus of the present controversy is about how to exit the debt review process, it is necessary, for coherence, to traverse the model as a whole to grasp how one gets into debt review, no less than how to exit the process.

[10] There are distinct portals to three channels of access to debt review and a rearrangement of consumers' obligations.

[11] The primary channel is that through the portal of section 86(1) in which the consumer takes the initiative to approach a debt counsellor. By contrast, the second and third channels facilitate the prospects of debt review when a Court (any court) is seized with consideration of a credit agreement. These latter two channels are regulated respectively by section 83(1) and section 85(1). The addressing of reckless lending is the burden of section 83. Over indebtedness is the burden of section 85. Naturally, the circumstances of a reckless credit agreement and over-indebtedness can be wholly distinct but also often are intertwined.

[12] The distinctions between the criteria necessary to access debt review in these three channels are important. In section 86(1) the consumer 'claims' to be over indebted to a debt counsellor. In section 83(1) or 85(1) the trigger is a particular credit agreement being raised in

litigation; typically this litigation would not be at the instance of the consumer but rather a creditor seeking some form of relief to which consumer resists by alleging a reckless credit agreement or over-indebtedness or both.

[13] Each channel is examined in turn.

Section 86(1) Channel

[14] Under section 86(1) a debt counsellor, upon 'receipt' of the application for debt review from a consumer, incurs a duty to tell the creditors and the credit bureaux of the application having been made.[2] The benefits of immunity from being sued kicks in at once. At this stage the debt counsellor has yet to adopt a view about whether the consumer is indeed over-indebted.

[15] The Debt counsellor must then *assess* the application. Section 86(7) reads thus:

> "(7) If, as a result of an *assessment* conducted in terms of subsection (6), a debt counsellor reasonably concludes that-
>
> > *(a)* the consumer is not over-indebted, the debt counsellor must reject the application, even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into;
> > *(b)* the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement; or

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[2] 86(1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.

(2) ....
(3) A debt counsellor-
(a) ....
(b) ....
(4) On receipt of an application in terms of subsection (1), a debt counsellor must-
(a) provide the consumer with proof of receipt of the application;
(b) notify, in the prescribed manner and form-
(i) all credit providers that are listed in the application; and
(ii) every registered credit bureau.

(c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders-

(i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and

(ii) that one or more of the consumer's obligations be re-arranged by-

(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;

(bb) postponing during a specified period the dates on which payments are due under the agreement;

(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6."
(Underlining supplied)

[16] Faithful to the statute's imprecision in use of terminology, section 86 (6) refers to the 'determination' the debt counsellor makes in terms of section 86(7) as an 'assessment':

"Section 86(6) A debt counsellor who has accepted an application in terms of this section must *determine*, in the prescribed manner and within the prescribed time-

(a) whether the consumer appears to be over-indebted; and
(b) if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless."

[17] The critical aspect of section 86(7) is that it makes plain that the debt counsellor is empowered merely to make a 'proposal' (based on the assessment) to the Magistrate's Court which must act then in terms of its powers in terms of section 87. The Section 86 process is to be contrasted to the power of a court, which in terms of section 85(1)(b), can make *an order* in terms of section 87. The two channels therefor converge in an order in terms of section 87.

Section 85 Channel

[18] In section 85(1) the court which is required to 'consider' a credit agreement and hears an allegation that the consumer party to the agreement is over-indebted 'may' do one of two things.

[19] First, a court may avoid taking a view about the allegation of over-indebtedness by referring the consumer's 'circumstances' to a debt counsellor. Section 85(1) requires that court:

> "Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may-
>
> (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86 (7); or
>
> (b) ....

[20] The effect is to propel the consumer into the same position that a consumer would have been in if the consumer had made a section 86(1) application and the debt counsellor having received such application performs the task of 'determining' in terms of section 86(6)(a) whether or not there is over indebtedness. Axiomatically, section 86 regulates the further chain of events towards a Magistrate's order.

[21] Alternatively, a court, in terms of section 85(1)(b), may skip the involvement of a debt counsellor and go directly to the powers conferred on the Magistrates Court in section 87 to order a rearrangement.[3]

> "Section 85(1): Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may-
>
> (a) ....
>
> (b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness."

[22] Thus, a court, in such a case, acting in terms of section 85(1)(b), does not have regard to the procedure in section 86 at all and thus makes no 'determination' or 'assessment'(which

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[3] See: *Seyffert v FNB [2012] ZASCA 81 (30/05/12) at [15]* on the exercise of this discretion.

is merely a tentative viewpoint by a debt counsellor), but rather makes an order within the confines of the operative provisions of section 87.

Section 83 Channel

[23] The section 83 (1) channel contemplates access to the process in a court or in the tribunal created by the NCA. By contrast, the Tribunal plays no role in a section 85 process.

[24] The court or tribunal must "declare" a credit agreement reckless in order to trigger the powers embodied in the section. (By contrast the court in terms of section 85 may declare the consumer over-indebted.)

[25] Section 83 confers powers to deal specifically with both a reckless credit agreement and the consumer's consequential over-indebtedness. If the court or tribunal does make a declaration of recklessness, the court or tribunal is thereupon, also empowered, in terms of section 83(3)(b)(i), among other powers, to make an order as contemplated in section 87. As with the other two channels, there is convergence in an order as contemplated by section 87.

[26] There is a further procedure as contemplated by section 86(8)(a) which leads onto a consent order in terms of section 138. It is unnecessary for this case to traverse that aspect.

The effect of an order of rearrangement

[27] Section 87 is a pivotal provision in NCA: It provides:

> "87: Magistrate's Court may re-arrange consumer's obligations
>
> (1) If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86 (8) *(b)*, or a consumer applies to the Magistrate's Court in terms of section 86 (9), the Magistrate's

Court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means, prospects and obligations, may-

(a) reject the recommendation or application as the case may be; or

(b) make-

(i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) or (3), if the Magistrate's Court concludes that the agreement is reckless;

(ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86 (7) *(c)* (ii); [4]or

(iii) both orders contemplated in subparagraph (i) and (ii).

(2) The National Credit Regulator may not intervene before the Magistrate's Court in a matter referred to it in terms of this section."

(Underlining supplied)

[28] The effect of such an order is the subject matter of section 88. Section 88(1) has the function of freezing the consumer's rights to contract on credit and to prevent creditors from suing the consumer. Each of the three channels to debt review is identified in section 88(3). Upon notice of receipt of an application, or a 'notice' of the court proceedings in section 83 or 85 the freeze is effective. (Neither section 83 nor section 85 states how creditors are to get 'notice' of such proceedings.)

[29] The freeze endures until the conditions stipulated in section 88(1) or (2) occur.[5] These are the primary exit requirements. These sections read:

"Section 88: Effect of debt review or re-arrangement order or agreement

(1) A consumer who has filed an application in terms of section 86 (1), or who has alleged in court that the consumer is over-indebted, must not incur any further charges under a credit facility or enter into any further credit agreement, other than a consolidation agreement, with any credit provider until one of the following events has occurred:

(a) The debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86 (9) has expired without the consumer having so applied;

(b) the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application; or

(c) a court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.

(2) If a consumer fulfils obligations by way of a consolidation agreement as contemplated in subsection (1) *(c)*, or this subsection, the effect of subsection (1) continues until the consumer

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[5] A corresponding freeze on action by creditors co-exists: Section 88(3)

> fulfils all the obligations under the consolidation agreement, unless the consumer again fulfilled the obligations by way of a consolidation agreement."

[30] Notable, from this traverse of the text, is that there is no authority conferred on any court to make an order releasing the consumer in respect of whom the Magistrate has made a section 87(1) order from the effects of that order.

How might the two applicants exit the debt review process?

[31] In both instances, the complaint is that the applicants are trapped with no way out of debt review, bar an application to the High court. Implied in this complaint is that they are being treated unfairly and ought to be allowed to escape the strictures both voluntarily sought to be imposed upon them. The thesis advanced on their behalf to support this idea is addressed hereafter and rejected.

[32] The predicament in which Nel finds himself, ie where no order of rearrangement has been made, is resolved by his debt counsellor presenting the proposal, which apparently is gathering dust at the office of the court, to the Magistrate and, together therewith, submitting the additional information about his revived fortunes, whereupon the Magistrate must, as section 87 (1) stipulates "conduct a hearing and having regard to the proposal and information before it and the consumer's financial means prospects and obligations" decide whether to reject the recommendation or otherwise. On the facts alleged by Nel, which allegations for the purposes of this judgment are not interrogated, the Magistrate must, logically, reject the proposal because, in terms of section 88(1)(b) the Magistrate must conclude, logically, that Nel is not over-indebted.[6]

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[6] See: *Botha v Bernice Koekemoer & Others Unreported, (2017/7723 , 11/05/19)*, Limpopo Division, per Muller J where this view is shared.

[33] In Van Vuuren's case, the position is quite different. Where a section 87 order by a Magistrate was made, the consumer is bound to the provisions of section 88(1)(c) and 88(2): In short, until all the consumer's obligations under a rearrangement are discharged or all novated obligations in terms of a consolidation agreement are discharged.

[34] But another provision regulates an exit: Section 71, in which it is provided:

> "Removal of record of debt adjustment or judgment
>
> (1) A consumer whose debts have been re-arranged in terms of Part D of this Chapter, must be issued with a clearance certificate by a debt counsellor within seven days after the consumer has-
> *(a)* satisfied all the obligations under every credit agreement that was subject to that debt re-arrangement order or agreement, in accordance with that order or agreement; or
> *(b)* demonstrated-
> (i) financial ability to satisfy the future obligations in terms of the re-arrangement order or agreement under-
> *(aa)* a mortgage agreement which secures a credit agreement for the purchase or improvement of immovable property; or
> *(bb)* any other long term agreement as may be prescribed;
> (ii) that there are no arrears on the re-arranged agreements contemplated in subparagraph (i); and
> (iii) that all obligations under every credit agreement included in the re-arrangement order or agreement, other than those contemplated in subparagraph (i), have been settled in full.
> (2) ....
> (3) If a debt counsellor decides not to issue or fails to issue a clearance certificate as contemplated in subsection (1), the consumer may apply to the Tribunal to review that decision, and if the Tribunal is satisfied that the consumer is entitled to the certificate in terms of subsection (1), the Tribunal may order the debt counsellor to issue a clearance certificate to the consumer.
> (4) *(a)* A debt counsellor must within seven days after the issuance of the clearance certificate, file a certified copy of that certificate, with the national register established in terms of section 69 of this Act and all registered credit bureaux.
> *(b)* If the debt counsellor fails to file a certified copy of a clearance certificate as contemplated in subsection (1), a consumer may file a certified copy of such certificate with the National Credit Regulator and lodge a complaint against such debt counsellor with the National Credit Regulator.
> (5) Upon receiving a copy of a clearance certificate, a credit bureau, or the national credit register, must expunge from its records-
> *(a)* the fact that the consumer was subject to the relevant debt re-arrangement order or agreement;
> *(b)* any information relating to any default by the consumer that may have-
> (i) precipitated the debt re-arrangement; or
> (ii) been considered in making the debt re-arrangement order or agreement; and
> *(c)* any record that a particular credit agreement was subject to the relevant debt re-arrangement order or agreement.
> (6) Upon receiving a copy of a court order rescinding any judgment, a credit bureau must expunge from its records all information relating to that judgment.

(7)....."
(underlining supplied)

[35] In summary, section 71 requires that a debt counsellor, under the stipulated conditions, may issue a clearance certificate. If the debt counsellor fails to give a clearance certificate, the consumer must lodge a complaint with the Tribunal. It must be emphasised that what the Tribunal does is not deal with a *rescission* of the Magistrate's order – the order is *per se* undisturbed. If, on the facts alleged by Van Vuuren, he can satisfy section 71(1)(b) he can exit debt review. If the facts do not meet the prescripts, he cannot. To belabour the critical point – no Court has jurisdiction to order a release.[7]

[36] Ostensibly, the critical point for a consumer in the position of Van Vuuren is satisfying section 71(1)(b)(iii), i.e. "*that all obligations under every credit agreement included in the re-arrangement order or agreement, other than those contemplated in subparagraph (i), have been settled in full.*" According to his allegations he is at present satisfying the original agreements' obligations, but has not extinguished the indebtedness yet. If Van Vuuren cannot satisfy those requirements, he has, within the scheme of the statute and its policy choices, no right to exit. This outcome seems to be a policy choice by the legislature.

[37] Moreover, there is an additional problematic aspect of the text to consider. As pointed out by the Banking Association of South Africa, section 88(1) and Section 71(1) are not synchronised. A paradox results in terms of which the credit record is sanitised in terms of section 71 but the consumer remains frozen out of the credit market in terms of section 88(1). This anomaly is most probably the result of an oversight when amendments were effected in

[7] See: *Phaladi v Lamara* 2018 (3) SA 264 (WCC) at [21] & [26] where Binns- Ward J concluded likewise.

2014 and the need to correlate the outcomes was overlooked. Plainly the position could not have been intended and legislative repairs are needed.

The Interpretation thesis advanced by the applicants

[38] Counsel for the applicants offered a new thesis not foreshadowed by the heads of argument filed. We understand the thesis in the heads to have been abandoned, thus we ignore it.

[39] The key proposition was that the NCA confers jurisdiction on the High Court to order termination of debt review.

[40] The fresh argument sought to create a platform for that proposition based on the notion that a Magistrate's Court was empowered to make a 'declaration' on the question of reckless credit agreements but not in respect of the condition of over-indebtedness. – an idea drawn from the text of section 87(1). True enough, the terminological smorgasbord achieved by the text of the statute does use the term 'declare' expressly only in respect of reckless lending and does not use the word 'declare' expressly in respect of over indebtedness, contenting itself with stating that a court may 'order' a re-arrangement if the consumer is over-indebted. However, the significance of that distinction is exaggerated.[8]

[41] The thread of the argument ran on to contend that it is the debt counsellor who 'declares' a debtor over-indebted, the Court not having such power. However, that cannot be correct. The plain text in the relevant sections dealing with the role of the debt counsellor suggests

[8] See: *Mayana v Body Corporate of Cottonwood, Case No 2016/3068 (GJ) at [19] – [20]* per A Gautschi AJ on the power of magistrates court in relation to declarations proper and orders of court.

otherwise. Debt counsellors, at the height of their powers, adopt a tentative view that it 'seems' that the consumer is over-indebted and present to a Magistrate a proposal to rearrange the obligations on that premise. The Magistrate, in turn, has to conduct a hearing to make decisions as set out in section 87. The Magistrate is empowered to make orders if the criteria are satisfied. The debt counsellor is a facilitator, not a decision maker.

[42] The function of the argument invoking these distinctions was to underpin an argument that section 85(1) conferred jurisdiction on the High Court to order a termination of debt review. However, as a reading of the text of section 85 reveals, that meaning cannot be reached because the language of the section offers no cogent support - the only power created for any court, including the High Court, by section 85, is to set in motion a debt review process or itself to order a re-arrangement of debtors' obligations. In this context a court "declares" a consumer over indebted in terms of section 85(b). This power does not include a power to order an exit from debt review. The argument must fall at that hurdle.

[43] An exit from debt review, as alluded to earlier, where a Magistrate has made an order in terms of section 87, is by a clearance certificate being issued by the debt counsellor. Where no section 87 order is made, the debt counsellor's proposal together with other information evidencing the inappropriateness of an order is placed before the Magistrate to facilitate a rejection of the proposal.

The Conflicting Case law

[44] From the traverse of the statute it is plain that the High Court cannot assert jurisdiction in the manner held by the decisions in the Gauteng Division in *Manamela v Hein du Plessis & Others 2016/78244 (GJ); Mokubung v Mamela Consulting & Others 2016/87653 (GP);*

and Magadze v ADCAP 2016/57186(GP). They are hereby overruled. The premise that resort could be had to the court's inherent jurisdiction, common to all these decisions, was inappropriate. Moreover, the notion that the courts could supply a remedy that was not to be found within the four corners of the NCA was misconceived.

[45] Insofar as the decisions were influenced by the decision in *Rougier v Nedbank 2013 JOL 1167(GJ)*, a decision given before the extensive amendments effected in 2015 to the NCA, and expressly alluded to in *Manamela*, as regards the absence of jurisdiction of a Magistrate to grant an order releasing a consumer from the shackles of debt review, the reliance is misconceived. The decision in *Rougier* was invoked, as I understood the remarks in *Manamela*, at [4] – [5] of that judgment, as authority for the proposition that the absence of the jurisdiction of the Magistrate's Court to grant the relief sought; i.e. to exit debt review, meant that, hence by default, the High Court must be the only alternative forum to achieve that end.[9] The reasoning assumes that there ought to be a remedy rather than identifying the source of the right. In my view *Rougier,* which dealt with the rescission of a default judgment is of no relevance to the debate about exit routes from debt review. What is addressed in that judgment, and with which I agree, is the exposition of the NCA to demonstrate that the debt counsellor has no power to 'withdraw' the debt review process set in motion by a section 86(1) application received by that debt counsellor.[10] The debt counsellor either rejects the application because it does seem that there is no over-indebtedness, or the debt counsellor takes the view that there is over-indebtedness, informs the creditors and the bureaux and submits a proposal to the Magistrate's Court to rearrange the consumers obligations. The midway between these two poles is a voluntary arrangement with the creditors directly, in which case there is a *de facto* novation of the terms of the credit agreements.

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[9] The identical remarks were uttered in *Mokubung at [9].*
[10] See: *Botha v Koekemoer (Supra) at [19] – [26].*

[46] The decision by Binns-Ward J in *Phaladi v Lamara* 2018 (3) SA 264 (WCC) is endorsed unequivocally. At [17] – [21], the critical issue of the High Court's jurisdiction and the disjuncture in supposing it can exercise *ab initio* jurisdiction in an administrative procedure is addressed and disposed of thus:

> "[17] The upshot is that if the applicants have fulfilled all their obligations under the credit agreements that are subject to the debt rearrangement that are not mortgage agreements or long-term agreements identified in regulations made under the Act, they are entitled to obtain a clearance certificate in terms of s 71 of the Act. If they succeed in obtaining such a certificate, the record of the debt rearrangement will be expunged from the records in the credit bureaux. If they encounter problems in obtaining the relief to which they might contend they are entitled under s 71, their remedy lies in an approach to the National Consumer Tribunal. It is only the Tribunal that is empowered to assist them at first instance. The process is an administrative one. As pointed out by Thulare AJ in *Du Toit* supra, the role of the High Court in the legislative scheme is limited to dealing with judicial reviews of, or appeals from, the decisions of the Tribunal (see s 148(2) of the NCA). The NCA does not afford the High Court jurisdiction to deal at first instance with matters falling within the province of the Tribunal.
>
> [18] Mr *Bruinders*, counsel for the applicant in case No 20480/2017, sought to rely on s 88(1)*(b)* of the NCA and para 4.2 of the 'Explanatory Note to the Withdrawal Guidelines' issued by the National Credit Regulator. (The National Credit Regulator is empowered in terms of ss 16(1)*(a)* and *(b)* of the Act to issue guidelines and explanatory notes. The Regulator is obviously bound by the Act and its published opinions bearing on the interpretation of the Act are expressly acknowledged, in s 16(1)*(b)*, to be 'non-binding'.)
>
> [19] Paragraph 4.2 of the 'Explanatory Note to the Withdrawal Guidelines' reads as follows:
>
> **'Post declaration of over-indebtedness**
>
> • The debt counsellor has the statutory power to recommend that the consumer be declared over-indebted, however, the Magistrates Court in terms of Section 85*(b)*, Section 87(1) and/or Section 88(1)*(b)* of the Act has powers to declare the consumer over-indebted or not over-indebted.
>
> • If the debt counsellor has recommended that the consumer be declared over-indebted and the Form 17.2 has been issued to credit providers, the consumer must approach the Magistrates Court with the relevant jurisdiction to be declared not over-indebted and no longer under debt review.
>
> • A court application in terms of Section 87(1)*(a)* of the Act must be made to the Magistrates Court with relevant jurisdiction requesting the Court to reject the debt counsellor's recommendation that the consumer be found over-indebted; and declare the consumer no longer over-indebted.
>
> • The application must advise the Court that the consumer had been found over-indebted by the debt counsellor and a copy of the Form 17.2 is to be attached as an annexure.
>
> • The application must advise the relevant Magistrates Court that the consumer is no longer over-indebted and must include the consumer's financial circumstances at that time in motivation of the aforesaid.

- The application must further advise the relevant Magistrates Court that the consumer no longer needs to be under debt review.'

[20] It is convenient first to consider counsel's reliance on s 88(1)*(b)*. It is clear, if the provision is read contextually, that it does *not* contemplate an application to the magistrates' court for the purposes of declaring an already established state of over indebtedness to have come to an end, nor does it contemplate an application to bring an end to debt review pursuant to an agreed debt rearrangement pursuant to a recommendation in terms of s 86(7)*(b)*. Indeed, having regard to the provisions of s 71 of the NCA, discussed above, such a procedure would be superfluous. As mentioned, the legislative scheme is that the lifting of the consumer's disabilities attendant on debt review occurs by way of an administrative, not a judicial, process. Having regard to what is entailed, that seems to me in any event to be entirely fitting. Whilst acknowledging that the separation of powers does not give rise to a hermetic compartmentalisation, it would, in my view, have been an inappropriate allocation of constitutional functions to give the courts a surrogate role in the administrative framework of national credit regulation structures. The appeal/review role accorded to the High Court in terms of s 148 is, by contrast, constitutionally appropriate. (I have already dealt with the basis for the role given by the statute to the magistrates' court.)

[21] For the interpretation of s 88(1)*(b)* contended for by Mr *Bruinders* to be able to apply, the phrase 'the court has determined that the consumer is not over-indebted' would require to be read as 'the court has determined that the consumer is *no longer* over-indebted', thereby necessitating the deletion of the word 'not' and its replacement with 'no longer'. To deal with debt review following on an agreed debt rearrangement in terms of s 86(7)*(b)*, it would have to contain the wording 'has determined that the consumer is no longer subject to the effects of debt review' or other words to that effect. It is well established that in this context words cannot be read into a statute unless the implication is a necessary one in the sense that, without it, effect cannot be given to the statute as it stands. Mr *Bruinders'* argument did not fulfil the requirements of that test. The unambiguous effect of the statute is that an over-indebted or financially challenged consumer under debt review who enters into a debt rearrangement agreement can only terminate the debt review by settling his or her obligations to the extent required in terms of s 71 and demonstrating that he or she has satisfied the other requirements of s 71(1)(b)."

(Underlining supplied)

[47] The decision by Thulare AJ in *Regard du Toit v Benay Sager & Others [2017] ZAWCHC 141 (17 November 2017)* at [14] reached a similar conclusion about the absence of jurisdiction of the High Court, as did the decision in *Less v Vosloo [2019] JOL 39570 (KZP)* on the question of jurisdiction.[11]

[11] In *Less v Vosloo* it was also held that an application for a release from debt review could be made to a Magistrate. With this finding, we disagree for the reason already traversed.

Lacuna and conflicts in the provisions of the NCA

[48] In the arguments advanced by the *Amicus*, the Banking Association of South Africa, an able critique of the NCA was given to us. These arguments addressed the implications of various provisions and pointed to anomalies or lacuna in the scheme of the statute. A request was made that this Court recommend that certain legislative amendments be considered. These recommendations fall into two categories; first patent errors or non-correlation between sections that have a bearing on the same issue which, by their very nature are mere imperfections that arise from time to time because of oversights in construction of the apparatus of a statute.

[49] The conflict between section 88(1) and 71(1) has been addressed. Plainly amendments are appropriate to deal with that anomaly. Proposals for a revised text were advanced to the court. However, it seems unnecessary that the court place an imprimatur on a given proposed text; it suffices to note the anomaly.

[50] It was also suggested that other aspects of the scheme of the statute could be made explicit where they are, on the present text, implicit; eg Section 86 would benefit from a stipulation of a duty on the debt counsellor to put up a proposal to the Magistrate, such action be an assumed fact in section 87(1). In our view the implicit obligation suffices but indeed a time within which to do so would be a helpful but not a necessary improvement to the scheme of the model.

[51] The policy question whether consumers in the position of Van Vuuren ought to have a right to exit debt review is, in our view, not one to which we are compelled by the circumstances of the case to offer an answer. It may or may not be a good idea. But in the absence of an

argument that a consumer in such a position suffers a violation of a right, derived from the Constitution or otherwise, we decline to express a view.[12]

Conclusions

[52] The questions posed in the referral are therefore answered as follows: -

[53] Is a High Court able to make an order confirming that an applicant is no longer over-indebted, where no valid declaration of over-indebtedness is before Court?

53.1 No.

53.2 No textual or purposive interpretation exists that can cogently substantiate the idea that the High Court as jurisdiction as a court of first instance.

[54] Where fresh facts arise since a debt counsellor's notification to all credit providers and every registered credit bureau of the consumer's application for debt review, or after the assessment and conclusion that a consumer appears to be over-indebted, and new facts demonstrate material change in the circumstances of a consumer causing such consumer to no longer be over-indebted, is the High Court the forum of first instance that the consumer should approach to provide an order to rectify his credit status with credit providers and credit bureaus?

54.1 No.

54.2 A consumer who is not yet the subject of a Magistrate's order in terms of section 87, may together with the proposal of the debt counsellor present the additional facts to bring about

[12] In the context of this issue, several obvious errors in the Regulations were also pointed out. We need make no specific comments other than now that they have been drawn to the attention of the National Credit Regulator, swift remedial action is appropriate.

a rejection of the proposal. If a Magistrate has already made a rearrangement order, section 71 regulates the only route to termination of debt review, and its terms must be met.

[55] Is the relief sought [by the applicants] consistent with the scheme of the National Credit Act?

55.1 No.

55.2 No interpretation of the statute can support the relief sought; i.e. the High court may not order a release of the consumers from debt review.

[56] The concepts of 'over-indebtedness' (including that of financial difficulty falling short of 'over-indebtedness' contemplated by s 86(7)(b)) and the attendant remedy of 'debt review' within the meaning of the National Credit Act are statutory creations. How they work is governed entirely by the National Credit Act. In the absence of a challenge to their constitutionality, are the Courts' powers delineated by these provisions?

56.1 Yes.

56.2 As a wholly statutory conception, debt review does not trespass into the realm of the common law.

[57] Does section 71 of the National Credit Act afford an adequate remedy in the circumstances to expunge the record that the applicants were in debt review?

57.1 The question posed is about legislative policy and deliberately chosen objectives.

57.2 If the remedies provided for do not cater for certain eventualities, it is the province of the legislature to contemplate amendments based on its preferred policy choices.

57.3 The anomaly concerning section 71 and 88 must however be eliminated.

[58] Is the only remedy at the disposal of the applicants the limited relief provided for in terms of section 71 of the National Credit Act and is it further limited to be sought in the manner set out therein?

> The applicants *per se* have different remedies as addressed earlier; section 71 offers a remedy where a rearrangement order has been made, complicated by the effect of section 88(1).

[59] Would the Court in exercising its powers in terms of section 21 of the Superior Courts Act to grant such relief, be inappropriate considering the environment regulated by the National Credit Act?"

Yes, it would be inappropriate.

The Costs

[60] In our view, because the character of this application is to test purely legal aspects in order to clarify conflicts in the case law there should be no costs order made.

The order

[61] The court is required to answer the questions posed. The order is that:

(1) Question 6(a): No
(2) Question 6(b): No
(3) Question 6(c): No
(4) Question 6(d): Yes.
(5) Question 6(e): An answer is declined.
(6) Question 6(f): Yes, Section 71 is one remedy.
(7) Question 6(g): Yes.

SUTHERLAND J

I agree.

CARELSE J

I agree.

MAIER-FRAWLEY AJ

Date of hearing: 29 July 2019

Date of judgment: 3 September 2019

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