# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

Case No: 662/2009

Case No: 500/2010

In the matter between:

**NEDBANK LIMITED** **First Appellant**

**FISTRAND BANK LIMITED** **Second Appellant**

**STANDARD BANK OF SOUTH AFRICA LIMITED** **Third Appellant**

**ABSA BANK LIMITED** **Fourth Appellant**

**JOHAN ERIK JUSELIUS** **Fifth Appellant**

**ONECOR (PTY) LIMITED** **Sixth Appellant**

and

**THE NATIONAL CREDIT REGULATOR** **First Respondent**

**JOHAN ERIK JUSELIUS** **Second Respondent**

**Neutral citation:** ***Nedbank v The National Credit Regulator*** **(662/2009 & 500/2010) [2011] ZASCA 35 (28 March 2011)**

**Coram:** MPATI P, NAVSA, BRAND, MAYA and MALAN JJA

**Heard:** **21 February 2011**

**Delivered:** **28 March 2011**

**Summary:** National Credit Act 34 of 2005 – interpretation of ss 86(2), 86(7) and (8), 87, 129 and 103(5).

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## ORDER

**On appeal from:** North Gauteng High Court (Pretoria) (B R Du Plessis J sitting as court of first instance):

All the appeals are dismissed.

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## JUDGMENT

Malan JA (MPATI P, NAVSA, BRAND, MAYA JJA concurring)

Introduction

[1] The National Credit Act 34 of 2005 (the NCA) came into full force and effect on 1 June 2007. The NCA is not an amendment of previous legislation dealing with consumer credit. It seeks to achieve much more and replaces legislation that governed consumer credit for more than a quarter of a century.[1] The objects are set out in s 3 and are directed at providing protection for the consumer and addressing imbalances that exist between consumers and credit providers. The NCA seeks –

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[1]See J W Scholtz in J W Scholtz, J M Otto, E van Zyl, C M van Heerden and N Campbell *Guide to the National Credit Act* (2008) Service Issue 2 p 2-1 (*Guide)*; J M Otto and R L Otto *The National Credit Act Explained* 2 ed (2010) p 3 and cf the remarks in *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) para 16ff.

'to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by –

...

(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;

(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.'

[2] The NCA must be interpreted in a manner that gives effect to these objects.[2] Appropriate foreign and international law may be considered in construing the NCA.[3] Unfortunately, the NCA cannot be described as the 'best drafted Act of Parliament which was ever passed,'[4] nor can the draftsman be said to have been blessed with the 'draftsmanship of a Chalmers'.[5] Numerous drafting errors, untidy expressions and inconsistencies make its interpretation a particularly trying exercise.[6] Indeed, these appeals demonstrate the numerous disputes that have arisen around the construction of the NCA. The interpretation of the NCA calls for a careful balancing of the competing

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[2]Section 2(1). Cf *ABSA Bank Ltd v De Villiers & another* 2009(5) SA 40 (C) para 27; *Ex parte Ford* and two similar cases 2009 (3) SA 376 (WC) para 20; *Standard Bank of South Africa Ltd v Hales & another* 2009 (3) SA 315 (D) paras 11 and 13; *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 (5) SA 618 (KZD) para 16.

[3]Section 2(2).

[4] This was how the Bills of Exchange Act 1882 was described in *Bank Polski v K J Mulder & Co* [1942] 1 All ER 396 at 398.

[5] Chalmers was the draftsman of the English Bills of Exchange Act, 1882. See *British Movietonews Ld v London and District Cinemas Ld* [1951] 1 KB 190 at 202.

[6] Cf *Firstrand Bank Ltd t/a First National Bank v Seyffert & another* and three similar cases (6) SA 429 (GSJ) para 10.

interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider.[7]

[3] This is an appeal by the Credit Regulator on the construction of ss 86(2) and 129 as well as appeals by the other parties relating to further sections of the NCA. I will deal with them under the appropriate headings.

Sections 86(2) and 129

[4] The Credit Regulator's appeal concerns prayer 1.13 of the notice of motion for a declarator in the following terms:

'The reference in section 86(2) to the taking of a step in terms of s 129 to enforce a credit agreement is a reference to the commencement of legal proceedings mentioned in section 129(1)(b) and does not include steps taken in terms of section 129(1)(a) ...'.

[5] None of the other parties opposed the relief sought in prayer 1.13 in the court below. In this court, however, the declarator sought was opposed. Du Plessis J refused to grant the order applied for because he was not satisfied that the parties were correct in their interpretation of s 86(2) and, in the absence of full argument, declined to make the order.[8]

[6] Section 86(2) reads as follows:

'An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement.'

Section 129(1) provides:

'If the consumer is in default under a credit agreement, the credit provider –

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before –

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[7] *BMW Financial Services (SA) (Pty) Ltd v Mudaly* para 16; *Firstrand Bank Ltd t/a First National Bank v Seyffert & another* and three similar cases para 10.

[8] *National Credit Regulator v Nedbank Ltd & others* 2009 (6) SA 295 (GNP) at 318I-319J.

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130.'

[7] The question posed by the Credit Regulator has been and still is the subject of considerable academic debate.[9] Boraine and Renke[10] remarked that '[t]o interpret s 86(2) to read that the delivery of the s 129(1)(a) notice to the consumer means that the credit provider has proceeded to take steps to enforce the agreement (with the effect that no application for debt review may be made) would be nonsensical as it is proposed in the s 129(1)(a) notice that the consumer refer the matter to a debt counsellor.'

[8] Despite the use of the word 'may' in s 129(1)(a) the notice referred to therein is indeed a mandatory requirement prior to litigation to enforce a credit agreement.[11] This is apparent when the subsection is read with ss 129(1)(b) and 130(1). Section 129(1) has been described as a 'gateway' or 'new pre-litigation layer to the enforcement process'. Delivery of the s 129(1)(a) notice was said to be a compulsory step 'devised by the legislature in an attempt to encourage parties to iron out their differences before

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[9] See C M van Heerden and J M Otto 'Debt enforcement in terms of the National Credit Act 34 of 2005' 2007 *TSAR* 655; Danie van Loggerenberg SC, Leon Dicker and Jacques Malan 'Aspects of debt enforcement under the National Credit Act' January/February 2008 *De Rebus* 40; C van Heerden in *Guide* p 11-10; A Boraine and S Renke 'Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 (Part 2)' (2008) 41 *De Jure* 1 p 9 and J M Otto and R L Otto *The National Credit Act Explained* 2 ed (2010) p 100; J M Otto 'Over-indebtedness and applications for debt review in terms of the National Credit Act: Consumers beware! *Firstrand Bank Ltd v Olivier*' (2009) 21 *SA Merc LJ* 272 p 276-7; and J M Otto 'Die oorbelaste skuldverbruiker: die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie' 2010 *TSAR* 399 p 405. See the discussion of the literature by Wallis J in *BMW Financial Services (SA) (Pty) Ltd v Mudaly* para 6ff.

[10] A Boraine and S Renke p 9 fn 186.

[11] Section 129(1)(b)(i). See *ABSA Bank Ltd v De Villiers* para 14; *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* para 27.

seeking court intervention.'[12] As such it was said to give effect to the object of the NCA set out in s 3(h),[13] by encouraging 'a consistent and accessible system of consensual resolution of disputes arising from credit agreements', and as such it is also consistent with s 3(i). This construction is the subject matter of the appeal by the Credit Regulator. It is not only the subject of the academic debate referred to but also of conflicting decisions.[14] An analysis of the relevant provisions is thus required.

[9] The notice required by s 129(1)(a) refers to a specific credit agreement in respect of which the consumer is in default. It must 'propose' that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud 'with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date'. The s 129(1)(a) notice deals with one credit agreement only and seeks to bring about a consensual resolution relating to that agreement. It does not contemplate a general debt restructuring as envisaged by ss 86 and 87.[15] As was stated by Wallis J in *Mudaly's* case,[16] '[t]he proposal is directed at achieving a situation where the consumer and the credit provider, through the agency of the debt counsellor, negotiate a resolution to the

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[12]Van Heerden in *Guide* p 12-7 and 12-8.

[13] Cf *Firstrand Bank Ltd v Olivier* 2009 (3) SA 353 (SE) para 18.

[14] The matter was left open in *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 (6) SA 63 (KZD) para 13 and note 4; and *Investec Bank Ltd & another v Mutemeri & another* 2010 (1) SA 265 (GSJ) paras 25 and 26. In the following decisions the courts held that a s 129(1)(a) notice barred a consumer from applying for debt review: *Nedbank Ltd v Motaung* (2245/07) [2007] ZAGPHC 367 (14 November 2007) (TPD); *Potgieter v Greenhouse Funding (Pty)* (08/31825) [2009] ZAGPJHC84 (26 June 2009); *Mercedes Benz Financial Services SA (Pty) Ltd v Viljoen* (18995/09) [2009] ZAGPPHC 145 (19 November 2009) para 6; *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* para 29; *Standard Bank of South Africa v Hales & another* para 21. Cases expressing the contrary view include *Starita v ABSA Bank Ltd & another* 2010 (3) SA 443 (GSJ) para 12 and *BMW Financial Services (SA) (Pty) Ltd v Mudaly* para 13ff.

[15]*BMW Financial Services (SA) (Pty) Ltd v Mudaly* para 12; *BMW Financial Services (SA) (Pty) Ltd v Donkin* para 10; *National Credit Regulator v Nedbank Ltd & others* at 319A.

[16]*BMW Financial Services (SA) (Pty) Ltd v Mudaly* para 11 and see his remarks in *BMW Financial Services (SA) (Pty) Ltd v Donkin* para 10.

consumer's particular difficulties under a particular credit agreement. It is a consensual process, the success or failure of which will depend upon whether the parties can arrive at a workable basis upon which to resolve the issues caused by the consumer's default.'

[10] The scope of s 86, on the other hand, is general and deals with an application by a consumer to be declared over-indebted.[17] It is concerned with the obligations under all the credit agreements to which he is a party.[18] A consumer is over-indebted if the preponderance of the available information at the time the determination is made, indicates that he will be unable to satisfy in a timely manner all his obligations under all the credit agreements to which he is a party having regard to his financial means, prospects and obligations and the probable propensity to satisfy them in a timely manner, as is indicated by his history of debt repayment.[19] The application to be declared over-indebted or, as it is referred to in the heading of s 86, for debt review, is made to a debt counsellor.[20] The outcome of this application may be an order of the Magistrate's Court declaring one or more of the credit agreements reckless or re-arranging one or more of the consumer's obligations.[21] As I have said, the notice envisaged by s 129(1)(a) is specific and refers to a particular credit agreement calling on the parties to resolve their dispute and agree on a plan to bring the payments up to date. It is not directed at a declaration of over-indebtedness at all.

[11] Section 86(2) states that an application for debt review 'may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in s 129 to enforce that agreement.' The section thus contemplates a debt review under which a specific credit agreement may be excluded. But even if a

[17] See, however, s 86(7)(b) which deals with a consumer who is not over-indebted but finds himself in what has been described as 'strained' circumstances (H C J Flemming *Flemming's National Credit Act* 2ed 139 ff).

[18] Section 86 does not deal with agreements other than those arising from credit agreements as contemplated by the NCA. Cf *Nelson Mandela Bay Metropolitan Municipality v Nobumba NO & others* 2010 (1) SA 579 (ECG) para 28 ff.

[19] Section 79(1) and see *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (W) paras 6-10.

[20] See the discussion below paras 16ff.

[21] Section 86(7)(c).

particular credit agreement falls outside the scope of debt review a court may, nevertheless, as provided for by s 85, in any court proceedings 'in which a credit agreement is being considered' and in which it is alleged that the consumer is over-indebted, refer that matter to a debt counsellor for evaluation and a recommendation in terms of s 86(7) or declare that the consumer is over-indebted and make any of the orders contemplated in s 87. Moreover, a court may also, in terms of s 83(1), in proceedings where a credit agreement is being considered, declare it to be reckless and make any of the orders provided for in s 83(2) and (3).

[12] Section 86(2) uses the words 'has proceeded to take the steps contemplated in section 129 to enforce that agreement'. 'Enforce', it seems, includes a reference to all contractual remedies including cancellation and ancillary relief,[22] and means the enforcement of those remedies by judicial means.[23] This seems to be the meaning of the word where it is used in Part C of Chapter 6. Section 129 itself is entitled 'Required procedures before debt enforcement' and s 129(1)(b) expressly provides that legal proceedings may not be commenced 'to enforce' the agreement before certain requirements are met.

[13] The language of s 86(2), particularly the plural 'steps contemplated in section 129' to enforce the agreement, was considered by Wallis J in *Mudaly's* case,[24] who opined –

'[t]hat seems incompatible with it merely requiring the giving of notice under s 129(1)(a), both because that is a single step and because it is not a step directed at enforcing the agreement, but at resolving the problem occasioned by the consumer's default. Consistently with the language used, this must then be a reference to s 129(1)(b), which refers to both the giving of notice and meeting the requirements in s 130.'

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[22] Cf *Naidoo v ABSA Bank Ltd* (391/09) [2010] ZASCA 72, 2010 (4) SA 597 (SCA) (27 May 2010).

[23] C van Heerden in *Guide* para 12.1 suggested that 'enforce' means the credit provider using any of his remedies: it refers to 'enforcement of a credit provider's remedies by means of legal proceedings'. See C M van Heerden and J M Otto 'Debt enforcement in terms of the National Credit Act 34 of 2005' 2007 *TSAR* 655.

[24] *BMW Financial Services (SA) (Pty) Ltd v Mudaly* para 13. See also *Investec Bank Ltd & another v Mutemeri* para 25; and *Starita v ABSA Bank Ltd & another* para 12.

In his view the relevant provision referred to in s 86(2) is s 129(1)(b) since that elucidates the use of the plural ‘steps’. However, he held that there was nothing in s 129(1)(b) to suggest that these steps included the commencement of legal proceedings.[25] The steps, he said, required by s 129(1)(b) prior to legal proceedings being commenced include the giving of notice in s 129(1)(a); the giving of notice to terminate a debt review in terms of s 86(10); and meeting the further requirements of s 130. The latter includes the lapse of certain time periods, followed by the failure of the consumer to remedy the default or his not responding to the notice or rejecting the credit provider’s proposals. Furthermore, where the credit agreement is an instalment agreement, secured loan or lease the credit provider may seek an order enforcing the remaining obligations under the agreement if the property has been sold and the net proceeds were insufficient to discharge all the consumer’s obligations.

[14] I do not agree with these conclusions. One of the objects of the NCA is the provision of a consistent and accessible system of consensual dispute resolution. A notice in terms of s 129(1)(a), however, does not exclude the resolution of a dispute relating to a specific credit agreement in this manner. The purpose of a s 129(1)(a) notice is the resolution of a dispute and the bringing up to date of payments under a specific credit agreement. While it is a ‘step’ prior to the commencement of legal proceedings it is also the first ‘step’ the credit provider ‘has proceeded to take … to enforce that agreement’ (s 86(2)). It does not exclude a debt review save in so far as it relates to the particular credit agreement under consideration. Nor does it exclude a general debt review pursuant to ss 83 and 85. Key to the construction of s 86(2) are the words ‘has proceeded to take the steps’ used in s 86(2). A ‘step’, amongst its meanings, includes ‘an action or movement which leads to a result; one of a series of proceedings

[25] *BMW Financial Services (SA) (Pty) Ltd v Mudaly* para 14. In para 15 he concluded: ‘In other words, it refers to the steps that must be taken by the credit provider in order to arrive at the point where they are entitled to commence legal proceedings to enforce the agreement. Those steps may be positive, such as the giving of notice, the acceptance of the surrender of the property and the sale of the property, or may be negative, such as the obligation to await the elapse of the time periods in s 130(1) and 130(1)(a). Whatever their character, once those steps have been taken the credit provider is entitled to commence legal proceedings. It is at that stage, as a matter of language, that s 86(2) debars the consumer from applying for debt review.’

or measures'.[26] To 'proceed' means 'to go on with an action' and also 'with stress on the progress or continuance of the action' to 'go on or continue what one has begun; to advance from the point already reached'.[27] By the use of the words 'has proceeded' and 'steps' an ongoing process is indicated of which the s 129(1)(a) notice is the first 'step'.[28] It is the only step expressly mentioned in s 129 although the other 'steps' or requirements referred to in s 130 are incorporated by reference.[29] Section 129(1)(b)(i) makes it clear that the notice in terms of s 129(1)(a) is a necessary 'step' before legal proceedings may be commenced. It follows that by giving the notice envisaged by s 129(1)(a) the credit provider 'has proceeded to take the steps contemplated in section 129 to enforce that agreement': a debt review relating to that specific agreement is thereafter excluded.[30]

[15] It follows that the court a quo was correct in not granting the declarator prayed for in prayer 1.13 of the notice of motion.

Sections 86(7) and (8) and 87

[16] The fifth appellant, Juselius, appealed against orders 1, 2, 4, 7 and 8 of the court below. They read as follows:

'1 On a proper interpretation of s 86(8)(b), it applies in the circumstances contemplated in s 86(7)(c).

2 In circumstances where s 86(8)(b) of the Act applies, a debt counsellor is obliged to refer his or her recommendation to a magistrates' court and the magistrate to whom the matter is allocated is in terms of s 87 obliged to conduct a hearing and make an order contemplated in either s 87(1)(a) or s 87(1)(b) of the National Credit Act, 2005.

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[26] *The Oxford Universal Dictionary Illustrated* (1965) *sv* 'step'.

[27] *The Oxford Universal Dictionary Illustrated* (1965) *sv* 'proceed'.

[28] See Flemming 143.

[29] *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) paras 29-31.

[30] I am not called upon to construe s 130(3)(c)(i) but the use of the words 'the matter' can only refer to the particular agreement in respect of which relief is sought. Nor does the word 'approached' refer to the time the summons is issued but to the time the order is requested (Flemming 203). It seems that the time 'the matter was before a debt counsellor' refers to s 130(1)(a) which again refers to the time periods of 10 days in s 130(1)(a) and 60 days in s 86(10) (not s 86(9) as s 130(1)(a) incorrectly states).

4 A referral by a debt counsellor to a magistrates' court under s 86(8)(b) (and s 86(7)(c)) of the National Credit Act, 2005 is an application within the meaning of the Magistrates' Courts Act, 1944 and the rules of the magistrates' courts and falls to be treated as such in terms of rule 55 of the rules.

7 Rule 9 of the magistrates' courts' rules pertaining to service is applicable to the service of process, any recommendation and other documents for the purpose of the referral and hearing contemplated in ss 86(7)(c), 86(8)(b) and 87 of the National Credit Act, 2005, but service of any such documents may, with the agreement of the affected parties, be by way of fax or email.

8 A debt counsellor who refers a matter to the magistrates' court in terms of ss 87(7)(c) and 86(8)(b) of the National Credit Act, 2005, has a duty to assist the court and should be available and able to render such assistance by way of furnishing evidence or making submissions as to his or her proposal or to answer any queries raised by the court.'

[17] Juselius contended that the making of orders pursuant to s 86(7) deals with relief sought following ss 86(7)(a) and (b) only and not pursuant to s 86(7)(c) as well. His argument was that the debt review system created by s 86(1) to (6) provides for the debt counsellor to ascertain whether the consumer is entitled to relief. The debt counsellor may then in terms of s 86(7)(c) make a proposal to the Magistrate's Court recommending either or both of the orders provided for: no hearing is required, nor is service necessary because the debt counsellor has determined that the consumer is over-indebted. The Magistrate's Court is then called on to conduct a hearing and may make the orders specified in s 87. It was submitted that neither a Rule 55 application nor service was required before the hearing in terms of s 87 could be held.

[18] As far as order 8 is concerned, Juselius suggested that the words after 'court' be deleted and replaced with 'has a duty to respond to and take all reasonable steps to assist the Court on request'. During the hearing of this appeal counsel for Juselius effectively conceded that an application in terms of Rule 55 by the debt counsellor in terms the Magistrates' Courts Rules of Court[31] was required before an order pursuant to s 86(7)(c) could be made.

[19] Section 86(6), (7), (8) and (9) provide:

'(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

[31] *GG* 33487 of 23 August 2010 which came into operation on 15 October 2010.

(b) if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.

(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

(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.

(8) If a debt counsellor makes a recommendation in terms of subsection 7(b) and –

(a) the consumer and each credit provider concerned accept that proposal, the debt counsellor must record the proposal in the form of an order, and if it is consented to by the consumer and each credit provider concerned, file it as a consent order in terms of section 138; or

(b) if paragraph (a) does not apply, the debt counsellor must refer the matter to the Magistrate's Court with the recommendation.

(9) If a debt counsellor rejects an application as contemplated in subsection 7(a), the consumer, with leave of the Magistrate's Court, may apply directly to the Magistrate's Court, in the prescribed manner and form, for an order contemplated in subsection 7(c).'

[20] Section 87(1) provides:

**'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); or

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

[21] The NCA contains many innovations. One of them concerns the right of a consumer to apply for debt review, to be declared over-indebted and to have his debts arising from credit agreements re-scheduled.[32] These matters are provided for in Part D of Chapter 4 of the NCA.[33] A consumer is over-indebted if he is unable to satisfy his obligations in a timely manner having regard to his financial means, prospects, obligations and history of debt repayment (s 79(1)). The creation of the office of a debt

[32] Persson 'Over-indebtedness – a growing problem' in Wahlgren (ed) *Scandinavian Studies in Law – What is Scandinavian Law?* (2007) 463 p 472 stated: 'Debt restructuring has a number of purposes, the main one being rehabilitation. People who are heavily indebted must be given the chance of solving their financial problems and in this way of leading (sic) more adequate and socially useful lives. This rehabilitative purpose, however has to be balanced against the individual creditors' rightful interest in asserting their financial claims. The institute of debt restructuring is designed to make even-handed provision for these somewhat contradictory interests ... A third purpose of debt restructuring is to favour the creditor collective in the sense of debtors coming to pay at least part of what is owing. Through debt restructuring the debtor usually pays more than would otherwise have been the case. If both the debtors and his (sic) creditors benefit, society will be spared a great deal of expense in various fields. It is also important that the debt restructuring system should not impair general payment morale and that it should be constructed so as to gain the confidence of the general public' (quoted by J M Otto 'Die oorbelaste skuldverbruiker: die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie' 2010 *TSAR* 399).

counsellor is another innovation and he plays a central role in the debt review process. To be appointed as a debt counsellor one must meet certain requirements and be suitably qualified. Training is a pre-requisite for appointment.[34] In the court a quo Du Plessis J correctly observed that a debt counsellor fulfils a statutory function.[35]

[22] An evaluation of a consumer's position to ascertain whether he is over-indebted is initiated in one of two ways. First, in any court proceedings where the allegation is made that the consumer is over-indebted, the court may refer the matter to a debt counsellor for evaluation and recommendation, or the court may itself declare the consumer over-indebted.[36] Secondly, the consumer may himself apply to a debt counsellor to be declared over-indebted.[37] He must then provide the details prescribed by regulation 24. An application fee is payable to the debt counsellor.[38] The debt counsellor must notify all credit providers listed in the application for debt review as well as all registered credit bureaux of the application.[39] He must evaluate the consumer's position, and both the consumer and the credit provider must co-operate to this end.[40] The debt counsellor must make his determination within 30 business days of receipt of the application.[41]

[23] The debt counsellor's evaluation may have one of the three outcomes set out in s 86(7): First, the debt counsellor may find that the consumer is not over-indebted and reject the consumer's application.[42] Where this occurs the consumer may himself, with

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[33] See Michelle Kelly-Louw 'The prevention and alleviation of consumer over-indebtedness' (2008) 20 *SA Merc LJ* 200.

[34] Section 44 read with reg 10 of the Regulations in terms of the National Credit Act 34 of 2005 GN R489 of 31 May 2006 as amended.

[35] At 311G-H.

[36] Section 85.

[37] Section 86(1).

[38] Section 86(3).

[39] Section 86(4)(b).

[40] Section 86(5).

[41] Regulation 24(6).

[42] Section 86(7)(a).

leave of the Magistrate's Court, apply directly to the Magistrate's Court for an order that one or more of his credit agreements be declared reckless credit and for a re-arrangement of his debts.[43] Secondly, the debt counsellor may conclude that the consumer is not over-indebted but is experiencing difficulty in paying his debts in a timely manner.[44] In that case the debt counsellor may recommend that the consumer and the credit provider voluntarily agree on a debt re-arrangement plan. If they reach an agreement it can be filed as a consent order with the Consumer Tribunal or a court.[45] If no agreement is reached the debt counsellor must refer the matter to the Magistrate's Court with that recommendation.[46] The Magistrate's Court may then either reject the recommendation or make an order that any credit agreement was reckless or an order re-arranging the consumer's obligations or both.[47] Declaring a credit agreement to be reckless has serious consequences: the court may set aside or suspend the agreement,[48] if no assessment of the creditworthiness of the consumer or of his understanding of the agreement had been made by the credit provider, or if the consumer did not understand or appreciate the risks, costs or obligations under the agreement.[49] If the consumer is merely over-indebted, the court may suspend the agreement without setting it aside.[50] Where the court finds that the agreement was reckless and that the consumer is over-indebted, it may suspend the agreement for a certain time period and restructure the debts.[51] Thirdly, the debt counsellor may conclude that the consumer is over-indebted.[52] He may then 'issue a proposal recommending that the Magistrate's Court make either or both of the following orders',

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[43] Section 86(9).

[44] Section 86)(7)(b).

[45] Section 86(8)(a) and s 138. It is not clear whether a court would have the power in terms of s 138 where a debt counsellor is involved.

[46] Section 86(8)(b).

[47] Section 87(1)(a) and (b).

[48] Section 83(2).

[49] Section 80(1)(b).

[50] Section 83(2) and (3).

[51] Section 83(3).

[52] Section 86(7)(c).

(i) that one or more of the consumer's credit agreements be declared reckless, or (ii) that one or more of the consumer's obligations be re-arranged.[53]

[24] A consumer who has applied for debt review in terms of s 86(1) or who has alleged in court that he is over-indebted may not incur any further charges under a credit facility or enter into a further credit agreement until one of the following events has occurred. First, the rejection by the debt counsellor of his application and expiry of the time within which he has to bring a direct application in terms of s 86(9). Secondly, the court's determination that he is not over-indebted or its rejection of the debt counsellor's proposals or the consumer's application. Thirdly, a re-arrangement order has been made or a re-arrangement agreement has been entered into and the consumer has fulfilled all his obligations under it.[54] The consequences for credit providers are equally serious. Subject to s 86(9) and (10) a credit provider who receives notice of proceedings under ss 83 and 85 or s 86(4)(b)(i) may not 'exercise or enforce by litigation or other judicial process any right or security under that credit agreement' until the consumer is in default and one of the events referred to has occurred or the consumer defaults on an obligation in terms of a re-arrangement agreed to between them or an order of court or the Tribunal.[55]

[25] In the court below Du Plessis J characterised the essence of the dispute arising from the contentions of Juselius as one relating to the procedure to be followed when a matter is referred to the Magistrate's Court under ss 86 and 87.[56] Section 87(1) requires the Magistrate's Court to 'conduct a hearing' and make the relevant orders 'having regard to the proposal and information before it and the consumer's financial means, prospects and obligations'. It has this power when dealing with a recommendation in terms of s 86(7)(b) and an application following the rejection by the debt counsellor of the consumer's application in terms of s 86(7)(a). The problem is that neither s 86(8) nor s 87(1) refers to s 86(7)(c) at all. Du Plessis J accepted that matters of over-indebtedness were by their very nature urgent but rejected the contention that a hearing

[53] Section 86(7)(c)(i) and (ii).

[54] Section 88(1).

[55] Section 88(3).

[56] At 307F-G.

before a Magistrate's Court was not required in matters falling under s 86(7)(c). In his view –

's 86(7)(c) requires cases of over-indebtedness to be referred to the magistrates' court so as to ensure judicial oversight of the entire process. A magistrates' court can only provide such oversight if it conducts a hearing and has regard to at least the matters referred to in s 87(1). It follows that by necessary implication the procedure set out in s 87(1) applies also to cases coming before the magistrate's court under s 86(7)(c).'[57]

[26] The same urgency, Du Plessis J said, also existed in cases falling under ss 86(9) and 86(7)(b). He further held that in proceeding with a matter falling under s 86(7)(b) and (c) the Magistrates' Courts Rules find application.[58] He concluded that the referral of a matter to the Magistrate's Court constituted 'an extraordinary procedure' because -

'it concerns a *lis* or suit between the consumer and his or her credit providers, but the initiative to refer it to the court is taken by a third party, the debt counsellor who acts as pro forma applicant. I say that the procedure concerns a suit because, by applying to be declared over-indebted, the consumer is seeking at least a rearrangement of one or more of his or her obligations… The procedure also is out of the ordinary because the debt counsellor is by law required, in given circumstances, to refer the matter to the magistrates' court or, put differently, to apply to the court.'[59]

Unless a specific procedure has been prescribed the Magistrates' Courts Rules apply. The consumer's initial application under s 86(1) for debt review must be in the form prescribed by regulation.[60] Where the consumer applies directly to court in terms of s 86(9) it must do so in the prescribed manner.[61] In cases falling under s 86(8)(b) the debt counsellor must refer his recommendation to the Magistrate's Court but no procedure, as in the case of an application in terms of s 86(1), is prescribed. Consequently, the court below held, the Magistrates' Court Act and Rules apply. The appropriate rule to follow is Rule 55 which deals with applications in the Magistrates' Courts.[62] I agree with the reasoning of the court below.

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[57] At 304I-305 B.

[58] At 309G–310 B.

[59] At 309D-F.

[60] Section 86(1) and NCA Form 16.

[61] NCA Form 18.

[62] At 310B-D.

[27] It seems to me that the risk involved in accepting the contentions advanced by Juselius, is that if no hearing is held following a s 86(7)(c) recommendation, a Magistrate's Court may endorse the debt counsellor's recommendation and re-arrange the debt without the credit providers having had the opportunity of being heard, at least not until after the order is made. The Magistrate's Court must in terms of s 87 conduct a hearing and may make any of the orders provided for in paragraphs (a) and (b) of s 87(1).[63] This is a 'hearing' in open court as contemplated in s 5 of the Magistrates' Courts Act 32 of 1944 and the court is a court of record as contemplated by s 4(1). A hearing is conducted in accordance with Rule 29 in action proceedings and in accordance with Rule 55 in application proceedings.

[28] There is nothing in the NCA that militates against this conclusion. The references to the 'Magistrate's Court' in ss 86(7)(c) and 87(1) were obviously intended as references to a 'court' in the strict sense of the word,[64] requiring the court to adjudicate the matter according to fundamental principles of justice which includes the holding of a hearing.[65] The Magistrates' Courts when exercising jurisdiction conferred by another statute follow their own Act and Rules unless there are indications in the enabling legislation allowing for a departure.[66] Rule 55 of the Magistrates' Courts Rules contains the machinery to permit the proper determination of a dispute regarding s 86(7)(c). The matter may be referred to trial and provision may be made for discovery and the examination of witnesses. In addition, provision is made for urgent and ex parte applications and it is for the court in the exercise of its judicial discretion to determine the proper procedure for an application for a restructuring order. There is no basis for the submission on behalf of Juselius that the debt counsellor may approach a Magistrate's Court ex parte. In each case the court should be persuaded that this is the

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[63]Section 2(7) of the NCA also provides that the provisions of the NCA are not to be construed as '(a) limiting, amending, repealing or otherwise altering any provision of any other Act …'.

[64]*Briel v Van Zyl; Rolenyathe v Lupton-Smith* 1985 (4) SA 163 at (T) 165E-F ('"Hof" beteken net een ding, naamlik die hof soos 'n hof gewoonlik onder die besondere statuut funksioneer' (at 167C-D)); *Minister of the Interior & another v Harris & others* 1952 (4) SA 769 (A) at 787E-789E; *S v Thompson & another* 1968 (3) SA 425 (E) at 427C-F.

[65]*Body Corporate Houghton Villas v Got Construction (Pty) Ltd* 2002 (1) SA 760 (W) at 762EG.

[66]*Rutenberg v Magistrate, Wynberg, & another* 1997 (4) SA 735 (C) at 750I-751C.

proper approach particularly where the consequences of a re-arrangement order or a finding of reckless credit are serious and potentially detrimental to credit providers.[67] There is no justification for holding that a different procedure applies in cases falling under s 86(7)(c) and those under s 86(7)(b) and (9).

[29] The omission in s 86(8) to refer to s 86(7)(c), however, remains. A court is empowered to modify the wording of a statute where it is necessary to give effect to what was the true intention of the legislature.[68] This power will readily be exercised where there are other indications in the legislation supporting the correction. In terms of s 86(7)(c) the debt counsellor may 'issue a proposal' that the Magistrate's Court make certain orders. It is not said that he 'must' do so but, given his duty in terms of subsec (6) and his position as statutory functionary, he 'must' issue the proposal. If the contentions of Juselius were to be accepted it would remain uncertain, in cases falling under s 86(7)(c), from where the Magistrate's Court, to which the matter has been referred, would derive its power to make any of the orders set out in s 87(1). By reading in the words 'and section 86(7)(c)' in declarator 4 of the order of the court below proper effect will be given to the intention of the legislature.

[30] It follows that the appeal of Juselius against orders 1, 2 and 4 of the court a quo should be dismissed.

Manner of service

[31] Juselius also appeals against order 7 made by the court a quo. The order reads:

'Rule 9 of the magistrates' courts rules pertaining to service is applicable to the service of process, any recommendation and other documents for the purpose of the referral and hearing contemplated in ss 86(7)(c), 86(8)(b) and 87 of the National Credit Act, 2005, but service of any such documents may, with the agreement of the affected parties, be by way of fax or email.'

[32] In view of the introduction of rule 9(3)(f) of the new Rules of the Magistrates' Courts from 15 October 2010, making service of certain documents by way of registered post or by hand possible, Juselius did not persist in this part of the appeal. Nor was his appeal against order 8 proceeded with.

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[67] Cf *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 (5) SA 618 (KZD) paras 39 to 42.

[68] *Durban City Council v Gray* 1951 (3) SA 568 (A) at 580B cited with approval in *S v Tieties* 1990 (2) SA 461 (A) at 463E-F; *Shenker v The Master & another* 1936 AD 136 at 143.

Section 103(5)

[33] The banks and other respondents appealed against order 11 which concerns s 103(5). The declarator reads as follows:

'11. On a proper interpretation of s 103(5) read with ss 101(1)(b)-(g) of the National Credit Act, 2005:
(a) the amounts contemplated in sections 101(1)(b) to (g) which accrue while the consumer is in default may not exceed, in aggregate, the unpaid balance of the principal debt when the default occurred;
(b) once the total charges referred to in ss 101(1)(b)-(g) equal the amount of the unpaid balance, no further charges may be levied;
(c) once the total charges referred to in ss 101(1)(b)-(g) equal the amount of the unpaid balance, payments made by a consumer thereafter during a period of default do not have the effect of permitting the credit provider to charge further interest while such default persists.'

[34] In the court a quo, Du Plessis J disposed of the contentions of the banks with the following remark:

'First, the subsection makes it plain that it applies despite "any provision of the common-law", which includes the *in duplum* rule. In the second place it is the amounts "that accrue" during the default that "may not, in aggregate, exceed the unpaid balance". During the period of default no more than the stated maximum can accrue. Put differently, the consumer's indebtedness in respect of cost of credit cannot grow by more than the stated maximum.'[69]

[35] Section 103(5) is controversial. Section 103 is headed 'Interest' and s 103(5) provides as follows:

'Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101(1)(b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs.'

Section 101 deals with the 'cost of credit' and prohibits a credit agreement to require the payment of money or other consideration by the consumer except '(a) the principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102'; (b) an initiation fee; (c) a service fee; (d) interest, which – '(i) must be expressed in percentage terms as an annual rate calculated in the prescribed manner; and (ii) must not exceed the applicable maximum prescribed rate

[69] At 320A-C.

determined in terms of section 105'; (e) the cost of any credit insurance; (f) default administration charges; and (g) collection costs.

[36] In its founding papers the Credit Regulator complained of the fact that banks sometimes interpreted s 103(5) as if it were a codification of the *in duplum* rule enabling them to levy interest as soon as the consumer made a further payment thereby reducing the outstanding interest. The Regulator contended that the effect of the subsection was that once the total charges referred to in s 102 were equal to the unpaid balance no further charges could be levied. The *in duplum* rule originated in Roman law, underwent development in later centuries and was consistently applied in South African courts from as early as 1830.[70]

[37] The following two aspects of the common law *in duplum* rule are relevant: First, where the total amount of arrear and *unpaid* interest has accrued to an amount equal to the outstanding capital sum, interest ceases to run, but any payment made by the debtor thereafter will lead to the amount of interest decreasing after which interest again starts to accrue to an amount equal to the outstanding capital amount.[71] The purpose of the rule is to 'ensure that debtors are not endlessly consumed by charges and also to ensure that debtors whose affairs are declining should not be entirely drained dry.'[72]

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[70] *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) at 476ff where reference is made (at 482B) to *Niekerk v Niekerk* (1830) 1 Menz 452.

[71] *Commercial Bank of Zimbabwe Ltd v M M Builders & Suppliers (Pvt) Ltd & others and three similar cases* 1997 (2) SA 285 (ZHC); and *Van Coppenhagen v Van Coppenhagen* 1947 (1) SA 576 (T) at 581 where it was stated: 'It is clear law … that when an amount of arrear interest reaches the amount of the capital, interest ceases to run. It is not merely that the excess of interest over an amount equal to the amount of the capital is irrecoverable. There can never be more interest accumulated than an amount equal to the capital sum.' In *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) at 652G-H it was said: '[N]o debtor can be required to pay arrear interest on a due debt arising from a loan or in any other way which is in excess of the capital sum due at the time of repayment.' See *Verulam Medicentre (Pty) Ltd v Ethekweni Municipality* 2005 (2) SA 451 (D) at 453C-D; *Union Government v Jordaan's Executor* 1916(1) TPD 411 at 412-3.

[72] *Sanlam Life Insurance Ltd v South African Breweries Ltd* at 652H-I. In *Stroebel v Stroebel* 1973 (2) SA 137 (T) at 138C-D it was said: 'Daar is in ons reg heelwat gesag vir die stelling dat rente nie die bedrag

Secondly, the *in duplum* rule is suspended *pendente lite*, and the *lis* is said to commence upon service of the initial process, whereafter interest runs again.[73] The common law rule thus effectively limits the interest recoverable by preventing interest from accruing further once it reaches the unpaid capital amount. Payment is appropriated to interest first, then to capital.[74] Interest, whether capitalised or not, remains interest.[75]

[38] In *LTA Construction Bpk v Administrateur, Transvaal*[76] Joubert JA remarked:

'Rente is die lewensbloed van die handelsverkeer. Die afskaffing van die renteverbod *in duplum* is in die huidige omstandighede nie die funksie van hierdie Hof nie. Hierdie Hof het geen bevoegheid om 'n nuttige, geldende, gemeenregtelike regsreël af te skaf nie. Dit is 'n aangeleentheid vir die Wetgewer.'

These were prophetic words. Has the legislature by enacting s 103(5) effectively abolished the common law *in duplum* rule in so far as it concerns credit agreements within the ambit of the NCA? Section 103(5) has been referred to in the literature as 'a codification' of the *in duplum* rule.[77] Section 103(5) is not a code[78] and embodies no more than a specific rule applicable to specific circumstances, that is, to credit

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van die kapitaal self te bowe mag gaan nie; sodra die onbetaalde rente 'n bedrag gelyk aan die van die kapitaal bereik, loop die rente nie meer nie: as die opgeloopte rente of 'n deel daarvan gedelg word, begin dit weer loop, maar net totdat dit nog eens so hoog as die kapitaal is.' See *Meyer v Catwalk Investments 354 (Pty) Ltd & andere* 2004 (6) SA 107 (T) at 115H-I and Monica L Vessio 'A limit on the limit on interest? The *in duplum* rule and the public policy backdrop' (2006) 39 *De Jure* 25.

[73] *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (A) at 834B-D: 'It appears … that the rule is concerned with public interest and protects borrowers from exploitation by lenders who permit interest to accumulate. If that is so, I fail to see how a creditor, who has instituted action can be said to exploit a debtor who, with the assistance of delays inherent in legal proceedings, keeps the creditor out of his money. No principle of public policy is involved in providing the debtor with protection *pendente lite* against interest in excess of the double. … A creditor can control the institution of litigation and can, by timeously instituting action, prevent the prejudice to the debtor and the application of the rule. The creditor, however, has no control over delays caused by the litigation process.' See also *Commissioner, South African Revenue Service v Woulidge* 2002 (1) SA 68 (SCA) para 12.

[74] *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* at 832E-F.

[75] *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* at 828I -829H.

[76] 1992 (1) SA 473 (A) at 482G-H.

agreements subject to the NCA. It is thus a statutory provision with limited operation.[79] It seeks not only to amend the common law *in duplum* rule but also to extend it. It deals with the same subject matter as the common law rule but this does not mean that it incorporates all or any of the aspects of the common law rule. It is a self-standing provision and must be construed as such. The rule of interpretation is that a statutory provision should not be interpreted so as to alter the common law more than is necessary unless the intention to do so is clearly reflected in the enactment, whether expressly or by necessary implication: '[I]t is a sound rule to construe a statute in conformity with the common law, save where and insofar as the statute itself evidences a plain intention on the part of the Legislature to alter the common law. In the latter case the presumption is that the Legislature did not intend to modify the common law to any extent greater than is provided in express terms or is a necessary inference from the provisions of the enactment.'[80] Steyn[81] cautioned:

''n Doelbewuste afwyking moet nie verwring word om in die vorms van die gemene reg te kan inpas nie.'

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[77] See eg J W Scholtz and E van Zyl in *Guide to the National Credit Act* p 10-17 who refers to the 'codified' *in duplum* rule and Jonathan Campbell 'The in duplum rule: relief for consumers of excessively priced small credit legitimised by the National Credit Act' (2010) 22 *SA Merc LJ* 1 p 4.

[78] The NCA is not a code, a word frequently encountered in the literature on the subject, particularly in respect of s 103(5), in the continental sense. It does not do away with the common law except as provided for, nor does it profess to be a comprehensive enactment dealing with all aspects of credit agreements. Understood in this manner there can be no objection to the use of the word 'codification' in respect of s 103(5) but there is no particular advantage in using it. See the comments by Denis V Cowen and Leonard Gering *Cowen The Law of Negotiable Instruments in South Africa* (1985) 5ed p 118-121 with reference to the English Bills of Exchange Act, 1882.

[79]See Michelle Kelly-Louw 'Better consumer protection under the statutory in duplum rule' (2007) 19 *SA Merc LJ* 337 who refers to the 'statutory' *in duplum* rule. See also J M Otto and R L Otto *The National Credit Act Explained* p 87.

[80]*Mills v Starwell Finance (Pty) Ltd* 1981 (3) SA 84 (N) at 87B-D and further *S v Leeuw* 1980 (3) SA 815 (A) at 823F-G; *Casserley v Stubbs* 1916 TPD 310 at 312; *Joss v Board of Executors* 1979 (SA 780 at 782A-C; *Gouws v Theologo & others* 1980 (2) SA 304 (W) at 306C-D; *Shell South Africa (Edms) Bpk v Gross h/a Motor Maintenance* 1980 (4) SA 151 (T) at 152H-153A; *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 818.

Section 103(5), it seems, signifies such an intention by providing in the introductory words '[d]espite any provision of the common law or a credit agreement to the contrary'. The NCA is not an act consolidating the law as it existed at the time of its enactment. It replaces legislation that governed consumer credit for more than a quarter of a century, recasting the whole body of law. The introduction of debt review procedures and innovations such as the power of courts to rearrange consumer obligations demonstrate dramatic departures from the previous state of the law.[82] The subsection must be construed against this background.

[39] Section 103(5) was intended to provide some redress for borrowers of expensive credit.[83] It includes within its ambit not only interest but also the other costs of credit which are set out in s 101(1)(b) to (g). Kelly-Louw[84] correctly summarised one of the differences brought about by its introduction:

'From this exposition it is apparent that the vital difference between the common-law and the statutory in duplum rules lies in the fact that under the common-law rule it is only interest (contractual and default) that ceases to run if it equals the outstanding capital amount. By contrast, under the statutory rule, all the amounts – such as the initiation fees, service fees, interest (contractual and default), costs of any credit insurance, default administration charges, and collection costs – cease to run if they combine to exceed the outstanding principal debt.

Clearly the statutory in duplum rule offers better consumer protection than its common-law counterpart. However, the statutory rule has worsened the position of credit providers.'

[40] The court a quo granted the declarator sought by the Credit Regulator. Each of the appellants advanced a different construction of s 103(5) and suggested variations of the declarator made. The variations are mainly directed at preserving the common law rule that payments of arrear and unpaid interest decrease the amount of interest owing and allow interest to run again up to the amount of the capital. They, however, require words to be read into the section that are simply not there. Nedbank emphasised the words 'accrue ... in aggregate', submitting that the section was intended to clarify and

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[81] L C Steyn *Die Uitleg van Wette* 5 ed (1981) p 99.

[82] See para 1 above and cf the approach in *Louw NO & others v Coetzee & others* [2003] 1 All SA 34 (SCA) para 16.

[83] Jonathan Campbell 'The excessive costs of credit on small money loans under the National Credit Act 34 of 2005' (2007) 19 *SA Merc LJ* 251 p 269.

[84]Michelle Kelly-Louw p 344.

codify the *in duplum* rule. It amended the rule by including the costs of credit in calculating the double and by setting the limit as the unpaid balance of the principal debt 'as at the time that the default occurs'. Nedbank appears to have conceded that the suspension of the rule *pendente lite* was done away with by s 103(5). Relying on *Margo & another v Gardner & another; Gardner & another v Margo & another*[85] where the common law rule was said to entail 'prevent[ing] unpaid interest from accruing further once it reache[d] the unpaid capital amount', it argued that no further charges will accrue for as long as the accumulated charges equalled the unpaid capital. If payment is thereafter made, the credit provider must appropriate it in terms of s 126(3) and should this result in the aggregate being less than the unpaid capital interest will accrue again. Had the legislature intended to depart radically from the common law it would, so the argument went, have used clearer language. On behalf of Nedbank a reformulation of the declarator was suggested to read as follows:

'On a proper interpretation of s 103(5) ... the amounts referred to in ss 101(1)(b) to (g) which accrue during the period of default cease to accrue further when but only for as long as the total of the unpaid amounts which have so accrued equal the unpaid balance of the principal debt under the credit agreement in question as at the time the default occurred.'

[41] On behalf of First Rand reliance was also placed on s 126(3). It was submitted that this section makes no difference between payments made during the time of default and the time when the consumer is not in default. Thus, so the argument proceeded, the credit provider may again charge interest until the double is reached. Referring to the presumption that the legislature did not intend to modify the common law to a greater extent than is provided in express terms or is a necessary inference, a recasting of the declarator in the following terms was sought:

'1.1 once the costs of credit referred to in Section 101(1)(b) to (g) equal the outstanding principal debt as at the date of default, such costs may once again accrue to an amount not exceeding the outstanding principal debt at the date of default in circumstances where a defaulting consumer during a period of default makes payments on his account, thereby reducing the costs of credit to below the proscribed threshold;

1.2 its operation is suspended pendente lite upon service of the initiating process and that once judgment has been granted, the costs of credit referred to in Section 101(1)(b) to (g) may run until it reaches the double of the capital amount in terms of the judgment.

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[85](564/09, 511/09) [2010] ZASCA 110; 2010 (6) SA 385 (SCA) (17 September 2010) para 12.

[42] On behalf of Standard Bank it was argued that the word 'accrue' in s 103(5) should be given the narrow meaning of 'due and payable' and not the wider one of 'entitled to'. In developing this argument reference was made to *Cactus Investments (Pty) Ltd v Commissioner for Inland Revenue*[86] where the meaning of the word 'accrued to' for the purposes of s 5(1) of the Income Tax Act 58 of 1962 was considered. The court in that case accepted that it meant 'has become entitled to'.[87] The court held that at common law, unless the parties otherwise agree, a lender of money became entitled to interest, payable at a future date, the moment he advances the funds to the borrower although the interest is only payable on a future date. Gross income includes not only income actually received but also rights of a non-capital nature, such as the interest under consideration, which accrued during the tax year and are capable of being valued in money.[88] It was submitted on behalf of Standard Bank that s 103(5) operated as a moratorium on the payment of the costs of credit listed in s 101(1), whilst the consumer was in default but that it did not affect the underlying obligation (ie the credit agreement) to make full payment in future. It sought a declaration in the following terms:

'The proper interpretation of section 103(5) of the NCA, read with sub-sections 101(1)(b) to (g), is that the section operates as a moratorium against payments whilst the consumer is in default, but does not affect an underlying obligation to make full payment in the future of the underlying obligation once the consumer is no longer in default.'

This interpretation, it was suggested, would give a consistent meaning to the different charges that may be recovered by the credit provider under s 101(1) and effect to the intention of the legislature, that all responsible consumer obligations be satisfied eventually: s 103(5) does not affect the underlying obligation to make payment of the different charges. What is affected is the time they fall due and the time is extended for the benefit of the consumer. 'Accrue', it was submitted, could not have the wider meaning of 'has become entitled to' because the right to receive interest accrues prior to the default.

[43] On behalf of ABSA s 126(3) was invoked and it was argued that payments made during default would prevent the aggregate amount of the costs of credit from reaching

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[86][1999] 1 All SA 345 (A). See also *Lategan v Commissioner for Inland Revenue* 1926 CPD 203 at 209; *Commissioner for Inland Revenue v Delfos* 1933 AD 242 at 251.

[87]At 3350a-b.

[88]At 349b-j.

the unpaid balance of the principal debt with the result that arrear interest and other charges could accumulate from time to time. It was argued that s 103(5) must be construed in conformity with the common law. Following this approach it was submitted that a declarator in the following form should have been made:

'(b) once the total charges referred to in section 101(1)(b) to (g), less any payment made by the consumer while in default, equal the amount of the unpaid balance of the principal debt as at the time that the default occurred, no further charges may be levied while such default persists.

(c) Once the total charges referred to in section 101(1)(b) to (g), less any payment made by the consumer while in default, equal the amount of the unpaid balance of the principal debt as at the time that the default occurred, payments made by the consumer thereafter during the period of default do not have the effect of permitting the credit provider to charge further interest while such default persists.'

[44] The appeal by Onecor follows very much the same approach by considering the extent to which s 103(5) departed from the common law. The argument distinguished between two or more 'notional accounts' to which payments had to be allocated. The word 'aggregate', it was suggested, meant no more than that for *in duplum* purposes the credit provider must debit all of the different items in s 101(1)((b) to (g) to the notional interest account. The submission was made that the legislature had not expressed an intention 'clearly, unambiguously and beyond reasonable doubt' to encroach on further rights of the credit providers whose rights were already curtailed by the common law rule. It was submitted that, on a linguistic interpretation, s 103(5) left unaffected the common law rule that once interest is paid it runs again up to the amount of the outstanding capital. Nor did the section abolish the common law rule that the running of interest is suspended *pendente lite*.

[45] The objects of the NCA include 'encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers'.[89] It seeks to promote equity in the credit market by 'balancing the respective rights and responsibilities of credit providers and consumers',[90] and promotes responsibility in the credit market by providing for a consistent system of debt restructuring, enforcement and judgment 'which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.'[91]

[89]Section 3(c)(i).

[90]Section 3(d).

[46] Accepting these objects, the question to be asked is what the 'responsible consumer obligations' are. Section 100(1) provides that a credit provider must not charge an amount to, or impose a monetary liability on, a consumer in respect of:

'(a) a credit fee or charge prohibited by this Act;

(b) an amount of a fee or charge exceeding the amount that may be charged consistent with this Act;

(c) an interest charge under a credit agreement exceeding the amount that may be charged consistent with this Act; or

(d) any fee, charge, commission, expense or other amount payable by the credit provider to any third party in respect of a credit agreement, except as contemplated in section 102 or elsewhere in this Act.'

[47] The interest that may be charged under a credit agreement must therefore be 'consistent' with the Act. Section 103 contains the provisions relating to interest. It follows that any interest charged must be 'consistent' with s 103. Section 103 thus expressly forms part of the credit agreement and defines the obligations of the parties. The 'responsible consumer obligations' must, it follows, be construed with reference to s 103. Section 103(5), in accordance with this approach, specifically provides '[d]espite any provision of the common law *or a credit agreement to the contrary*'. (My emphasis.) There is thus no contractual entitlement to interest (or to the other charges) except as allowed for by s 103. The intention of the legislature could not have been expressed in clearer terms. Section 103(5) does not merely give rise to a 'moratorium' on payments whilst the consumer is in default but indeed determines the latter's obligations under the credit agreement.

[48] Section 126(3) provides for the appropriation of payments: first, to due or unpaid interest charges; secondly, to due or unpaid fees or charges; and thirdly to the principal debt. This provision takes the matter no further. While it is correct that this section makes no distinction between payments before and after default it cannot affect the question whether a particular charge has 'accrued'. Payments during the time of default cannot revive obligations that never 'accrued'. Any payment made during the time of default which does not have the effect of ending the default simply reduces the outstanding principal debt.

[49] Much has been said about the word 'accrue', which is a word often encountered in the context of the common law *in duplum* rule where reference is made to the

[91] Section 3(h).

accumulation of arrear and unpaid interest.[92] But the word must be construed in the context of the statute under consideration.[93] The word 'accrue' would not usually be

used in the context of a fee such as the 'initiation fee' in s 101(1)(b) or a 'service fee' in s 101(1)(c) or the 'cost of any credit insurance' in s 101(1)(e) or 'default administration charges' in s 101(1)(f) or 'collection costs' in s 101(1)(g). One would rather refer to a fee that is earned or costs that are incurred or charges that are levied. However, s 103(5) does not provide that the fees, costs and charges 'accrue', but that the 'amounts contemplated in section 101(1)(b) to (g)', that is the amounts in respect of the fees, costs and charges, may not 'accrue' in aggregate to more than the stated limit, viz the amount of the principal debt at the time of default. This is really the point in issue: these amounts 'accrue' whether they are paid or not. Section 103(5) makes no distinction between paid and unpaid charges. These amounts will only 'accrue' if the credit provider has a contractual right to them. Once the amounts referred to in s 101(1)(b) to (g) that accrue during the period of default, whether or not they are paid, equal in aggregate the unpaid balance of the principal debt at the time the default occurs, no further charges may be levied. It is not that a moratorium against payment is introduced by s 103(5): no amount in respect of the fees, costs and charges may 'accrue' any further. Put differently, no enforceable right to the charges outlined in s 101(1)(b) to (g) thereafter arises. This, it seems, is the meaning of the word used in cases on the common law

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[92]See eg *Commercial Bank of Zimbabwe Ltd v M M Builders & Suppliers (Pvt) Ltd & others and Three Similar Cases* 1987 (2) SA 285 (ZHC) where it is said at 303C that 'interest, whether it accrues as simple or as compound interest, ceases to accumulate upon any amount of capital owing'. In *Margo* para 12 it was said that the common-law rule 'prevents unpaid interest from accruing further, once it reaches the unpaid capital amount'.

[93]*Petker v Makda* 1956 (1) SA 26 (SR) at 27H-28C. In *Black's Law Dictionary* 9ed the second meaning of 'accrue' is given as 'To accumulate periodically' and under 'interest' 'accrued interest' is referred to as '[i]nterest that is earned but not yet paid…'. *The Oxford Universal Dictionary Illustrated* (1965) refers to 'accrue' as (1) 'To fall … as a natural growth or increment; to come to an accession or advantage'; (2) 'To arise or spring … as a natural growth or result. Used esp. of interest …'. And further: 'interest begins to [accrue] from the moment … hence accrued interest … an accumulation by growth …'.

rule.[94] The words of s 103(5) simply do not allow for a different construction. If all the legislature intended was a restatement of the *in duplum* rule it would have said so and would not have included the introductory words to the subsection. It follows that Du Plessis J was correct to make the declaratory order in respect of s 103(5). The legislature had in mind the protection of the consumer who may, under the common law rule, end up by paying much more that the capital originally owing.

[50] It follows that the Credit Regulator's appeal and the other appeals should all be dismissed. No order for costs was sought.

All the appeals are dismissed.

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F R MALAN

JUDGE OF APPEAL

[94] See notes 71, 72 and 93 above.

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| | | |
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