

**NATIONAL CREDIT REGULATOR VERSUS NEDBANK LTD AND THE
PRACTICE OF DEBT COUNSELLING IN SOUTH AFRICA**

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Summary

The National Credit Regulator approached the then Transvaal Provincial Division of the High Court in 2008 by way of a notice of motion. In this application the Regulator prayed in terms of section 16(1)(b) of the *National Credit Act* 34 of 2005 (the "NCA") for the proper interpretation of mainly sections 86 and 87 of the same Act. Due to uncertainty and confusion the Regulator lodged an application to obtain clarity on some of the difficulties that debt counsellors experience in practice. The matter was heard in the High Court (TPD) on 02/03/2009 and judgment was handed down by Du Plessis J on 21/08/2009.

This article discusses the fifteen prayers and the impact of the orders granted by the Court under three logical headings, namely:

- those that deal with the NCA and the Magistrate's Court;

Order 1 (on section 86(7)(c)), order 2 (an obligation to conduct a hearing), order 3 (the judicial role of the Magistrate's Court) and order 4 (the application procedure of the Magistrate's Court) defined the interaction between the NCA and the *Magistrate's Court Act* (the "MCA") very clearly. Since there is no *sui generis* procedure provided for in the NCA, it is submitted that the Court's approach is correct. However, the end result is that the over-indebted consumer is not supported to the degree the NCA envisages. For example: a rule 55 procedure of the MCA can be cumbersome and costly, while the NCA envisaged a fast and relatively inexpensive process.

- those that deal with the role of the debt counsellor in debt restructuring;

Order 5 (costs), order 6 (statutory function) and order 8 (the unique role of the debt counsellor), granted under this heading, are important. They define the role of the debt counsellor to be different from the run-of-the-mill applicant in terms of rule 55. He/she is even protected against some cost orders due to a statutory function. Because of this special function a question arises: should this difference in treatment not be even greater than custom presently permits or proposes? Since this function brings great responsibility and much paper work, should it not affect the fees that a debt counsellor may charge?

- those that deal with the court procedures.

Orders 7, 9, 10 and 11 in this section are welcomed, namely those that deal with the service of documents, the geographical jurisdiction and monetary limit of the court, reckless credit and the *in duplum* rule. However, the Court preferred to stay on the safe side with respect to emoluments attachments orders and the application of section 86(2) to section 129(1). The lack of direction on the question when formal debt enforcement in fact begins, is regrettable.

However, the declarator is a milestone in the history of the NCA. The orders impact significantly on the practice of debt review and will continue to shape the credit industry. Despite some disappointments it can be concluded that the declarator on the whole adds value to the practice of debt counselling in South Africa. It is now for the industry, the NCR, the legislators and scholars to take matters further.

Keywords: National Credit Regulator; National Credit Act 34 of 2005; Magistrate's Court Act 32 of 1944; Magistrate's Court; Declaratory order; Judicial discretion; Jurisdiction; Service; *In duplum* rule; Emoluments; attachment order; Debt review; Debt counsellor; Consumer; Credit provider; Application procedure.