

**SINK OR SWIM? DEBT REVIEW'S AMBIVALENT "LIFELINE" ---- A SECOND
SEQUEL TO "... A TALE OF TWO JUDGMENTS"**

***NEDBANK V ANDREWS* (240/2011) 2011 ZAECPEHC 29 (10 May 2011);
FIRSTRAND BANK LTD V EVANS 2011 4 SA 597 (KZD) AND *FIRSTRAND BANK
LTD V JANSE VAN RENSBURG* 2012 2 All SA 186 (ECP)**

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SUMMARY

The interface between the *National Credit Act* 34 of 2005 and the *Insolvency Act* 24 of 1936 has been the object of our courts' attention in a number of recent cases including *Ex parte Ford and Two Similar Cases* 2009 3 SA 376 (WCC), *Investec Bank Ltd v Mutemeri* 2010 1 SA 265 (GSJ), *Naidoo v ABSA Bank Ltd* 2010 4 SA 597 (SCA) and, more recently, *Nedbank v Andrews* (240/2011) 2011 ZAECPEHC 29 (10 May 2011), *FirstRand Bank Ltd v Evans* 2011 4 597 (KZD) and *FirstRand Bank Ltd v Janse van Rensburg* 2012 2 All SA 186 (ECP).

The question raised in all of the three most recent cases was whether or not a debtor's application for debt review in terms of the *National Credit Act* constitutes an "act of insolvency" in terms of section 8 of the *Insolvency Act*, upon which a creditor may rely in an application for the compulsory sequestration of the debtor's estate. If it does, it would mean that by resorting to the debt relief measures provided by the *National Credit Act* a debtor commits the very act on which a creditor may base an application for a sequestration order which, if granted, will render the debtor's estate insolvent and bring about the liquidation of his assets. From the debtor's perspective, this is probably precisely the situation that he seeks to avert by applying for debt review. Further, sequestration would frustrate the stated purpose of the *National Credit Act*, which is that debtors should take responsibility for their debts by satisfying them in full. Concurrent creditors might also ultimately receive a dividend which falls far short of what is due to them.

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The question of whether a debtor's resorting to debt review may or should be the very act that triggers his estate's sequestration and its attendant consequences is an important issue, the treatment of which impacts significantly on the efficacy of the South African consumer debt relief system. This article analyses the most recent judgments and considers whether or not statutory regulation of the position is required.

KEYWORDS: *National Credit Act 34 of 2005*; act of insolvency; *Insolvency Act 24 of 1936*; debt review; debt restructuring; debt re-arrangement; sequestration; debt enforcement; notice of inability pay debts