

## **1. Introduction**

The National Credit Act (the Act) came into operation at a time where consumer laws were somewhat unheard of in South Africa. Prior to the Act, the Credit Agreements Act and the Usury Act ruled the consumer credit industry and the only debt relief remedies available to the over-burdened consumer were sequestration and administration, which left a large portion of over-burdened consumers without an adequate remedy.

The Act brought with it provisions for the over over-indebted consumer as well as provisions on reckless credit. In order to assist the over-indebted consumer, the Act introduced debt review, a process whereby a duly registered debt counsellor is given the task to, firstly, determine whether the consumer is over-indebted, and secondly, to make a recommendation to Court as to the restructuring of the consumer's debt. The provisions relating to debt counselling have been rather popular in our Courts and brought with them a number of litigious cases.

One of these provisions is section 85. This section falls under the part of the Act dealing with over-indebtedness and reckless credit and allows the Court to either refer a matter to a debt counsellor or to declare the consumer over-indebted and make an order to restructure the consumer's debts.

Due to the nature of the remedy provided by section 85 and its wide application, it has been the subject of a number of High Court cases. Section 85 is often used as a defence in the application for summary judgement of immovable property.

In this paper my focus will be on the Court's application and interpretation of section 85 in summary judgement against immovable property.

## **2. Purpose of the National Credit Act**

As a provision in all legislation should be interpreted to give effect to the purpose of the particular legislation, it is important to first determine what the true intention and purpose of the National Credit Act is.

The Act has three main purposes, in terms of section 3; to promote and advance social and economic welfare of South Africans; to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumer.

There has been quite a debate as to what the purpose of the Act is. On the one hand it is held that the main purpose of the Act is to protect consumers and to adjust the unbalanced relationship between the credit provider and the

consumer. On the other it is held that there is no indication that it is consumer legislation and that its only purpose is to regulate the credit industry.

In my view it is not important to determine which of the two sides the Act intends to promote, but rather that there are certain purposes that it sets out and that those purposes should be kept in mind when interpreting certain parts of the Act. The Act clearly states that one of its purposes is to protect consumers. The Act also states in section 3(g) that one of the means to achieve the purpose of the Act is to address and prevent over-indebtedness of consumers and provide mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all his financial obligations.

In the case of *FirstRand Bank v Olivier* (2008) JOL 22139 (SE) judge Erasmus held that one of the purposes of the Act is to “provide for the debt re-organisation of a person who is over-indebted,” which was implemented by the debt review provisions. Thus, at the very least, one can conclude that the Act is there to assist the over-indebted consumer and that all provisions, especially those dealing with over-indebtedness, should be interpreted to give effect to this purpose.

## **2. Taking a closer look at section 85**

### *2.1 Introduction*

Section 85 of the National Credit Act states:

*“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) Declare that the consumer is over-indebted, as determined in accordance with the Part, and make any order contemplated in section 87 to relieve the consumer’s over-indebtedness.”*

Section 85 is found in Part D of Chapter 4 of the ACT. Part D deals specifically with over-indebtedness and reckless credit. There is no limitation placed on section 85 and thus it has a very wide application.

Section 86(2) of the Act states that should a credit provider have commenced with steps contemplated in section 129(1)(a), that agreement will be excluded from the debt review process. There have been a number of cases dealing with the interpretation of section 86(2) and whether it will exclude an agreement if a section 129(1)(a) notice has been delivered to the consumer. Be that as it may, section 85 will be available to the consumer whether or not he has received the section 129(1)(a) notice or not. If the Court holds that the section 129(1)(a) notice delivered to the consumer precludes that agreement from being included in the debt review process, section 85 will be the only alternative for the agreement from being restructured in terms of section 86(7)(c) or section 87.

## 2.2 “Despite any provision of law or agreement to the contrary”

As stated above, section 85 has very wide application. Section 85 is applicable to any credit agreement despite what any other law, agreement or even any other provision of the Act states. The Court is allowed to act in accordance with section 85 even if legal action has commenced. Section 85 can be raised when a credit provider, who has complied with all the legal requirements to enforce the agreement, approached the Court for an order against the defaulting consumer. It allows a Court to deny a credit provider judgement in order to assist the consumer. This provision is thus not there for the credit provider, but solely for the protection of the consumer in order to give effect to the purpose of the Act in addressing over-indebtedness.

What the Court needs to take into consideration when applying section 85 is that the legislature was aware of the infringement that section 85 will have on the credit provider’s contractual right to institute legal action against the consumer. The Court’s purpose is not to protect the credit provider’s interest, but rather to decide whether it will be fair, in the given circumstance, to allow such an infringement.

## 2.3 “In any Court proceeding in which a credit agreement is being considered”

A Court can make a decision according to section 85 in any proceedings before the Court in which a credit agreement is being considered. Thus, it would apply, *inter alia*, to an application for summary judgement or an application for voluntary sequestration.

As was held in *FirstRand Bank v Olivier*, in a case where section 85 is raised as a defence in a summary judgement application, it requires the Court to relax its requirements of Rule 32(3) of the Uniform Rules of Court. When a consumer

raises section 85, he is admitting liability to the plaintiff but requests the Court to use its discretion to make an order in terms of section 85.

In the case of *Standard Bank v Panayiotts* (2009) 6 (SA) 63 (KZD) judge Masipa held that the requirements of Rule 32 cannot be disregarded and that a defendant that raises section 85 needs to satisfy the Court that it is done in good faith and not merely as a delaying tactic.

Section 85 will also be applicable to a referral in terms of section 86(7)(c), where the credit provider has sent out a section 86(10) termination. The debt counsellor referring the matter should be able to request the Court to include the agreement in the debt restructuring proposal and make an order in terms of section 85(b).

What is important to note is that section 85 will only be applicable in cases where a credit agreement is being considered. Thus, the agreement being considered must fall within the definition of a credit agreement as defined in section 8 of the Act.

#### 2.4 *“If it is alleged that the consumer under a credit agreement is over-indebted”*

In order for section 85 to be applied the consumer must “allege” that he is over-indebted. To allege means to make a statement that is not yet proven. Thus, the provision does not require a consumer to prove his over-indebtedness but merely to allege it.

In *Standard Bank v Panayiotts* judge Masipa stated “Clearly the mere allegation of over-indebtedness can never be sufficient. The test would be that such over-indebtedness must be established on a balance of probabilities.” Masipa supported his argument with reference to section 79(1) in which the definition of over-indebtedness is set out.

It is true that in order to declare a consumer over-indebted, the requirements as set out in section 79 of the Act must be met. However, section 85 does not require the Court to make such a determination. It is important to distinguish between the requirements set out in section 85(a) and section 85(b). Section 85(a) states that the Court can refer the matter to a debt counsellor, with a request that the debt counsellor assess the consumer’s financial position and make a recommendation to the Court.

In the case of the *National Credit Regulator v Nedbank and Others* (2009, Case No 19638/2008, GSJ), the Court stated that a debt counsellor is a creature of statute and it is a debt counsellors duty in terms of section 86 of the Act to determine whether a consumer is over-indebted. Thus, it is not for the Court to

make a determination, and a report from the debt counsellors should be sufficient for purposes of section 86(7)(c). Thus, in case of a referral in terms of section 85(a) the Court need not make a determination of over-indebtedness, but refer the matter to a debt counsellor, requesting that the debt counsellor reports back to the Court.

Section 85 still allows the Court to use its discretion in making a referral in terms of section 85(a). There are a number of factors that the Court can refer to in order to be persuaded to use its discretion.

In the case of section 85(b) the Court can declare the consumer over-indebted and make an order in terms of section 87. Thus, in terms of section 85(b) the Court will have to be satisfied that the consumer is indeed over-indebted. In most cases the Court will not be able to make an order in terms of section 85(b) if the consumer has not had to opportunity to approach a debt counsellor.

Our Courts seem to have taken a different view of this provision. In many cases the Court requires the consumer to prove his over-indebtedness, requiring a full report from the debt counsellor proving that he is unable to serve his debts.

In the *Standard Bank v Panayiotts* case, judge Masipa held that in summary judgement, rule 32(2) requires the defendant to raise a *bona fide* defence. Masipa held that if a consumer raised over-indebtedness in terms of section 85 as a defence the consumer will have to prove his over-indebtedness in terms of section 79. I cannot agree with judge Masipa on this. Section 85 did not envisage the Court to make a determination of over-indebtedness, hence the reference to a debt counsellor. I do, however, agree that the consumer raising section 85 must be *bona fide*, but this can be proven by reference to other factors.

Judge Masipa goes so far as to say that, in order to satisfy the Court of the consumer's over-indebtedness, one must also consider the consumer's assets and liabilities. He held that the consumer's financial means, prospects and obligations must include the prospects of selling the goods in order to reduce the consumer's over-indebtedness. In my opinion this is too far removed from the definition of a consumer's "financial means, prospects and obligations" as set out in section 78(3). The Act, in no part, indicates that there is a duty on the consumer to sell all realisable assets to settle his debts. Debt review is not an application for sequestration and the same principles that apply to sequestration cannot be applied in an application for debt review.

The requirement that the consumer has to prove his over-indebtedness has been followed in a number of other cases. Judge Cleaver in *FirstRand bank v Swarts* (WC Case No 25699/2009 unreported 2010) held that the consumer did not place sufficient evidence before the Court to prove his over-indebtedness and that merely setting out his income and expenditure is not sufficient.

In *Standard Bank v Hales and Another* 2009 (3) SA 315 (D) Judge Gorven held that the mere admittance of the consumer's over-indebtedness is not sufficient for the Court to use its discretion in favour of the consumer.

## 2.5 "The Court may"

As correctly held in *FirsRand Bank v Olivier* the reference in section 85 to "may" indicates that the Court is not required to give an order in terms of section 85 but that it has a discretion to make an order. This discretion is very important as it allows the Court to look at the various aspects of the case and then determine whether the facts allow the Court to make an order in terms of section 85.

In the case of *First National Bank v Myburgh* 2002 (4) SA 176 (C), Judge Moosa held that the Court's discretion should not be exercised on the basis of speculation, but on the basis of the facts before the Court. Thus, the Court cannot base its decision on speculated circumstances or outcomes but rather on the evidence placed before it. In such a case, it is best for the Court to make a section 85(a) referral to allow the debt counsellor to place detailed facts before the Court and thus allow the Court to use its discretion wisely.

In the Court cases to date, the Courts have highlighted various factors that must be considered before an order in terms of section 85 will be made.

In *FirstRand Bank v Olivier*, Judge Erasmus firstly looked at the reason why the consumer did not respond to the section 129(1)(a) notice. In the case, Erasmus held that as the debt review process was fairly new the Court will not consider the consumer's failure to approach a debt counsellor prior to the receipt of the section 129(1)(a) notice. He went on to say that the consumer had to indicate the reasons why he had failed to approach a debt counsellor once the section 129(1)(a) was received. But in the same case, Judge Erasmus held that once a section 129(1)(a) was received, that agreement will be excluded from the debt review process in terms of section 86(2). This seems to leave the consumer with very little breathing room as Erasmus stated that the consumer cannot be held responsible for not approaching a debt counsellor prior to the section 129(1)(a) but that the consumer had to respond to the section 129(1)(a) notice. If the consumer did approach a debt counsellor after the section 129(1)(a) notice was received the agreement would not be able to be placed under debt review. Erasmus then resolved this predicament by stating that at the very least, once the 129(1)(a) notice was received the consumer should have attempted to resolve the dispute prior to approaching the Court. In this case the consumer did make various offers to the plaintiff prior to the summary judgement, which offers were all refused. The consumer's last resort was to use section 85.

Erasmus further considered the fact that the consumer's largest expense is the bond. In most consumers' case the bond is their largest expense, thus it is unclear why it was considered in the case. Erasmus also states that the consumer's living expenses, as was provided, is too low and "optimistic". This is a broad assumption from the Court, as Erasmus gave no indication as to why in his view the living expenses are too low. It is common cause that consumers' living expenses differ. Some can't live off R60 000 others survive on R2500.

Finally Erasmus held that if the consumer should be "relieved" of the burden of the bond he would be far better off financially. He did, however, not take into consideration that the house is likely to be sold below the market value as it will be sold on auction without reserve and that the chance of a shortfall remaining on the property is very likely.

Judge Masipa in *Standard Bank v Panayiotts* held that, as section 86(2) will prevent the agreement from being included in the debt review, it is only a Court that will be able to refer the matter to a debt counsellor. The Court must therefore be persuaded to use its discretion in favour of the consumer. Masipa held that the consumer will have to satisfy the Court as to the reason the consumer did not approach a debt counsellor prior to litigation. As in *Olivier*, Masipa also held that the consumer must indicate why he failed to respond to the section 129(1)(a) notice. The Court will have to consider whether the consumer wilfully ignored the section 129(1)(a) notice.

Importantly, Judge Masipa pointed out that the consumer did not consider the property involved as his main residence. The property was kept for an investment and the consumer requested the Court to make a referral in terms of section 85 to allow for "breathing room".

In the particular case the property was not maintained properly and thus the value of the property was depreciating. Judge Masipa held that the plaintiff cannot be expected to sit by as its security was losing value, "...in the present case the long-term plans and intentions of the defendant to improve the home and make a profit cannot be allowed to rob the plaintiff of what it is legally entitled to – a judgement in its favour when the defendant has clearly shown no defence."

In *Standard Bank v Hales*, Judge Gorven held that there are two factors that must be present before for a consumer to raise section 85 in Court; the proceedings in Court must be with regard to a credit agreement, and the consumer must allege that he is over-indebted.

Judge Gorven noted that as section 85 refers to "may" it clearly grants the Court discretion to grant the referral. The Court held that section 85 is a request by the defendant for the Court to exercise its discretion in their favour.

In the case *Gorven* highlighted that section 3 of the Act must be used as a backdrop by which all the provisions of the Act should be interpreted. Thus, a Court must apply its discretion in accordance with the purpose of the Act. He held that the party that requests such a referral must place as much relevant material before the Court as possible in order to persuade the Court to use its discretion.

In the case, a number of factors that a Court should consider before granting an order in terms of section 85 were mentioned.

The Court stated that the consumer must indicate how it came about that they defaulted under the agreement. The consumer must also indicate whether his financial position has changed and what he has done to remedy or minimise the default. This will allow a Court to determine whether the consumer's defence in terms of section 85 is in good faith, without requiring the consumer to prove his over-indebtedness.

The Court further stated that the consumer has to indicate whether he was aware of debt counselling before he received the section 129(1)(a) notice, and if so, why he did not approach a debt counsellor before receiving the notice. The consumer has to indicate whether he has approached the plaintiff (credit provider) with a proposal to reschedule his debt before summons was issued.

The consumer must also indicate how, if applicable, the other credit agreements, to which he is a party to, arose and whether those agreements caused or increased the consumer's over-indebtedness.

*Gorven* also indicated that the consumer must indicate to the Court how the debt will be repaid as well as the potential for success of the debt rescheduling. This would be difficult for the Consumer to prove at this stage, as this is the work of a debt counsellor. In the case, the consumers merely wanted to be referred to a debt counsellor in terms of section 85(a). Once a debt counsellor had been able to assess the situation, the Court would have been able to make a determination as to how the debt will be repaid and what the potential for success of the debt rescheduling will be.

Judge *Gorven* also took into consideration that, prior to the summons being served, the consumers had not paid their bond for 14 months and thus set doubt as to the good faith of the consumer.

If the property concerned is the consumer's main residence then the right to housing comes into play. In *FirstRand Bank v Maleke and Three similar cases* 2010 (1) SA 143 (GSJ), Judge Claassen stated that when a consumer alleges that the granting of the sale in execution will infringe on his right to housing, the consumer must indicate how it will infringe. A mere allegation is not enough.

In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC), Judge Mokgoro dealt extensively with the right to housing in the case of a judgement of sale in execution of the consumers home. This judgement was granted prior to the National Credit Act but the principles set in Jaftha still apply.

Judge Mokgoro listed various aspects that need to be considered when it comes to the granting of judgement for the sale in execution of a consumer's home. Mokgoro held that the reasons why the debt was incurred is of great importance and that the Court will have to consider the background of the debt.

The Court must also consider whether there are other reasonable ways in which the debt can be settled and must balance the judgement creditor's interest to obtain payment to the judgement debtor's right to adequate housing.

The size of the debt will also be relevant, as well as the consumer's past behaviour and reasons for failure to pay the debt.

Judge Mokgoro noted that the Court must always consider whether there are other alternatives available which might allow for the recovery of the debt, such as paying off one's debt in instalments. Mokgoro noted that the balancing is not between the credit providers not being able to recover their money and the consumer keeping the property; it is not an all or nothing process. Every effort should be made to find creative alternatives to solve the problem.

Mokgoro further held that the Court must also consider any attempts made by the consumer to pay off his debts.

Although there are various factors to consider by the Court in making an order in terms of section 85, it is important that the Court looks at the full picture, and as stated in the *Myburgh* case, that the Court uses its discretion based on the facts and not on speculation.

## 2.6 Section 85(a)

*(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);*

This provision will come into play in cases where a consumer did not have the opportunity or the time to approach a debt counsellor prior to the matter appearing in the Court. In a referral in terms of section 85(a) the Court would ideally only postpone the matter to a later date to afford the debt counsellor time to do a proper over-indebtedness assessment and to bring a debt restructuring proposal to the Court.

Once a debt counsellor has completed his assessment and drafted a debt restructuring proposal, it can be placed before the Court and the Court will then be able to use its discretion more accurately as it will have more information before it in order to make a better decision as to whether the debt review process will be appropriate for the specific consumer.

In the past, our Courts have been very reluctant to make an order in terms of section 85(a). It appears as though the Court is not willing to give the consumer the benefit of the doubt. When considering how small an effect a month's postponement of a case will have on the credit provider's rights, compared to that of the consumer's, it seems unreasonable to not give the consumer the opportunity to refer the matter to a debt counsellor.

The Court often complains that it does not have the consumer's full financial position before it and thus denies the application and the consumer's opportunity to consult a debt counsellor.

In *Standard Bank v Panayiotts*, Judge Masipa held that the consumer failed to indicate what payments will be made towards the plaintiff. However, the consumer did not have an opportunity to approach a debt counsellor with the specific account. Had the Court awarded section 85(a) the consumer would have been in a better position to set out a full picture before the Court and the Court would have been able to exercise its discretion more carefully.

In *Standard Bank v Hales*, Judge Gorven noted that the consumer has to place a proposal before the Court as to how the debt is to be paid, as well as the potential for success under debt counselling. In this case the defendants merely requested the Court to make a referral in terms of section 85(a). If the Court wants the parties, at time of summary judgement hearing, to place before the Court a proposal as to how the debt is to be paid, what is the purpose of section 85(a)? Once the Court has granted the leave in terms of section 85(a) the consumer will be able to set these factors before the Court in full detail.

With reference to the last line of section 85(a) it states that a debt counsellor will make a recommendation to the Court. In the *Panayiotts* case, Judge Masipa held that this "Court" referred to is not limited to the Magistrates' Court as it placed no limitation on "Court". It accordingly stated that if the High Court refers the matter to a debt counsellor, then the recommendation must also be made to the High Court. The Court will then, once it has received the recommendation, make an order as in terms of section 86(7)(c).

In *Jaftha v Schoeman*, Judge Mokgoro stated that if there are other reasonable ways in which the debt can be settled, the sale in execution would be undesirable. Section 86 provides for a formal mechanism to restructure a consumer's debt. As was noted, the *Jaftha* case was given prior to the Act and thus no reference is made to debt counselling in the case. But following the

spirit of the Constitution and the decision of the *Jaftha* case, if the circumstances allow it, the Court should make a referral in terms of section 85(a) to allow a debt counsellor to do a proper over-indebtedness assessment and to set out a detailed proposal before the Court, where a primary residence is involved. The infringement on the credit provider's contractual right, in the case of a section 85(a) referral, is fairly marginal when compared to the possible infringement on the consumer's right to housing.

## *2.7 Section 85(b)*

*(b) Declare that the consumer is over-indebted, as determined in accordance with the Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.*

What is interesting to note is that section 85(b) states that the Court can declare the consumer over-indebted. Section 85(a) make no such allowance and a consumer who requests the Court to make a referral in terms of section 85(a) need not prove his over-indebtedness but merely allege the fact. The Court can then refer the matter to a debt counsellor to make the assessment and bring a proposal to the Court.

Section 85(b) allows the Court in which the section 85 was brought to make an order declaring the consumer over-indebted and then to restructure the consumer's debt in accordance with section 87. This will typically be the case where the consumer brings only one credit agreement before the Court, or if a debt counsellor has already drafted a debt restructuring proposal. The Court can then make the proposal an order of Court.

In the case where there is only one credit provider, that brought the matter to Court in the first place, the restructuring should be fairly simple. However, if there is more than one credit provider, this will require the Court to ensure that when an order in terms of section 87 is made the other credit providers had an opportunity to defend the case that was placed before the Court.

In order for a Court to make a fair judgement in terms of section 85(b) it will require a detailed report of the consumer's financial position, which will include consideration of other agreements not currently before the Court. It will only be in rare cases that a Court will be able to make a judgement in terms of section 85(b).

## **Conclusion**

As indicated above, our Courts have to date been unwilling to give the consumer the benefit of the doubt when it came to a request by the consumer to make a referral in terms of section 85. The Courts make broad speculations as to value of the property and to the likelihood of success under debt counselling without really looking at all the facts.

The Courts need to be diligent in applying the purpose of the Act and ensure that an over-indebted consumer is afforded the opportunity to settle their debt without losing their assets.