

A critical examination of the role that the National Consumer Tribunal plays in debt relief with suggestions for reform

Tanya Woker

Professor

University of KwaZulu-Natal

Member of the National Consumer Tribunal

1. Introduction

The National Consumer Tribunal (the Tribunal) is an adjudicative body established by the National Credit Act.¹ The Tribunal is an administrative body but at least some of the disputes on which it adjudicates call for an approach which is judicial in nature.² The role of the Tribunal is to determine when conduct prohibited by the Act has occurred,³ to assist in the enforcement of the Act, and to assist consumers to resolve disputes and obtain redress against credit providers who have contravened the Act.⁴ Matters are usually referred to the Tribunal by the National Credit Regulator (the Regulator), however there are instances when consumers can approach the Tribunal without first laying a

1 Act 34 of 2005 (in terms of s26). Unless otherwise stated all references to the Act in this paper are to the National Credit Act.

2 Fleming J in *National Credit Regulator v Chatspare Pty Ltd* Case No NCT/08/2008/140 (1) (P) June 2008 (at 4).

3 Prohibited conduct is discussed in Para 2.3 below.

4 The Tribunal has jurisdiction through out South Africa, is a juristic person, is a Tribunal of record, and must exercise its functions in accordance with the Act or other applicable legislation (s26). The Tribunal has the power to impose administrative fines when it finds that there has been prohibited conduct (s151).The mandate of the Tribunal will be expanded to adjudicate on prohibited conduct under the Consumer Protection Act 68 of 2008. The Tribunal is composed of a chairperson and not less than 10 members who can be appointed on a full or part time basis (s26 (2)). At present there are 11 part time members and a chairperson who were appointed in September 2006. All the members are part time members and come from diverse backgrounds including law, academia, business, government and non-governmental organisations.

complaint with the Regulator.⁵ The aim of this paper is to focus on the role which the Tribunal plays in assisting South Africa's debt stressed consumers deal with their debt. It will

- identify those sections of the Act which empower the Tribunal to deal with debt related issues;
- explain the extent/limitation of the Tribunal's jurisdiction in respect of debt restructuring;
- explore the role of the Tribunal *vis-a-vis* the civil courts and other role players under the Act in respect of finding appropriate solutions to the problem of consumer debt;
- discuss the challenges the Tribunal faces when dealing with issues relating to debt stress;
- explain the Tribunal's procedures and way of operating; and
- high light some of the decisions of the Tribunal which deal with debt related issues.

2. Assistance to Debt stressed Consumers

The establishment of the Tribunal and its functions are set out in Chapter Two Part B of the Act, but in order to understand the role which the Tribunal plays in dealing with debt related issues it is necessary to study a number of different sections throughout the Act. These sections include those that deal with:

- the right of consumers to obtain information about their levels of indebtedness;
- charging of interest and fees by credit providers;
- prohibited conduct;

5 The complaints process is discussed in Para 4 below.

- debt re-arrangement (consent orders).

2.1 Consumer right to information

Consumers have the right to receive periodic statements of account.⁶ Consumers also have the right to request certain additional information such as statements regarding their current balance of account, and information regarding amounts credited or debited during a specific period, amounts currently overdue and amounts currently payable.⁷ This information is important for consumers to be able to establish their levels of indebtedness and to ensure that they do not become over-indebted. Consumers may dispute all or part of any particular credit or debit entered under their credit agreements and credit providers are obliged to explain the entries in writing and in reasonable detail.⁸

Consumers may also request statements of settlement amounts.⁹ When creditors fail to supply requested statements within the time required by the Act,¹⁰ consumers may apply to the Tribunal which has the power to order creditors to supply the required statements. Alternatively, the Tribunal has the power to determine the amounts in relation to which the statements are sought.¹¹

When there is a dispute about a particular entry the consumer must first attempt to resolve the matter with the credit provider,¹² and if he is not successful, the dispute must be referred to an alternative dispute resolution (ADR) agent.¹³ The ADR agent could be an ombud with jurisdiction, a consumer court or another ADR agent such as a debt counsellor.¹⁴ If this process is

6 S108.

7 S110.

8 S111.

9 S113.

10 The Act specifies different times depending on the information sought by the consumer. In some instances the information may be given orally.

11 s114.

12 As per s111.

13 S134 (4).

14 See discussion in Para 4 below.

unsuccessful the consumer may make an application to the Tribunal.¹⁵ If the Tribunal is satisfied that an entry, or the settlement amount, as shown on a statement is incorrect, the Tribunal may determine the matters in dispute and may make any appropriate order to correct the statement.¹⁶ The credit provider is prohibited from embarking on enforcement proceedings on the basis of a default arising from the disputed entry whilst the matter is under ADR or before the Tribunal.¹⁷

2.2 Charging of interest and fees

The Act specifies in detail the fees and interest which credit providers are entitled to charge (including the amount that may be charged).¹⁸ The Act also codifies the *in duplum* rule.¹⁹ This means that the costs which creditors are entitled to charge and that accrue during the time that consumers are in default under their credit agreements may not exceed the unpaid balance of the principle debt under their credit agreements at the time that the defaults occur.²⁰ Creditors that charge amounts in excess of those stipulated in the Act are engaged in prohibited conduct and a complaint can be laid with the Regulator.²¹ The Regulator must then investigate the matter and if satisfied that the complaint

15 S115(1).

16 S115(2).

17 S111(b).

18 Chapter 5 Part C (s100 - 106). A full discussion of these fees and the interest that may be charged is beyond the scope of this paper. Suffice to say that Regulation 42 prescribes formulas that must be used to calculate the maximum interest rate that may be charged with respect to different agreements. This is different to the position under the Usury Act 73 of 1968 where the maximum interest rate was prescribed. The Usury Act was repealed by the Act.

19 S103 (5). The *in duplum* rule is a common law rule, based on public policy, which imposes a maximum limit for interest charged in credit transactions. The statute has extended this rule to include not only interest but also fees charged.

20 *NCR v Nedbank Limited and others* 2009 (6) SA 295 GNP. This matter is presently on appeal as the respondents argued that the court's interpretation of the *in duplum* rule is incorrect.

21 S136.

relates to prohibited conduct it can refer the matter to the Tribunal for adjudication.²²

In *Motitsoe v Randburg Finance*,²³ which involved an application for a consent order, the Tribunal referred the matter to the Regulator because the Tribunal was of the view that the interest which the parties had agreed upon was in contravention of the Act. The facts were as follows: the consumer had obtained a loan of R3 000 from a credit grantor. Taking the loan, the fees and the interest into consideration, the consumer was expected to repay R6 180 to the credit provider (R1 030 for a period of 6 months). The loan constituted a short term loan which is a loan not exceeding R8 000 which is repayable over a period not exceeding 6 months.²⁴ When such a loan is granted the credit grantor is entitled to charge 5% interest per month.²⁵ Therefore, the maximum amount of interest which the credit grantor is entitled to charge is 30%. The Act states that this interest rate must be specified as a monthly interest rate whereas other interest rates are specified in terms of their annual interest rate.²⁶ In this particular matter the interest rate was recorded as 60% per annum. The consumer subsequently fell into arrears and at the time she approached a debt counsellor, she owed the credit grantor R7 800. The debt counsellor concluded an agreement between the two parties which recorded that the consumer would repay R538.97 to the credit grantor for a period of 30 months. The interest rate for this period was recorded as 60%. This meant that at the end of the period the consumer would have repaid R16 169.10 for a loan of R3000. The Tribunal refused to grant the consent order because an agreement to pay 60% interest per annum is in contravention of the Act.²⁷ The Tribunal was also of the view that the amount which the credit grantor would ultimately receive through the consent

22 S140 (c).

23 Case No NCT/253/2009/138 (1) (P) April 2010.

24 Reg 39 (2).

25 Reg 42 Table A.

26 Reg 42 (1) (b).

27 S100 (1) (c) and s101 (1) (d) (ii).

agreement, was in excess of what the credit grantor was entitled to receive, taking into account the statutory *in duplum* rule.²⁸ The matter was referred to the Regulator in order to investigate whether there had been any prohibited conduct on the part of the credit grantor.²⁹

2.3 Prohibited conduct.

One of the main functions of the Tribunal is to deal with prohibited conduct. This is defined as being any act or omission in contravention of the Act, other than conduct which constitutes an offence.³⁰ In order to establish all forms of prohibited conduct in the Act, it is necessary to peruse the whole Act,³¹ but for the purpose of this discussion the following conduct on the part of credit providers is relevant:

28 It was not possible to establish, from the consent agreement, exactly what the outstanding amount was on the principal debt when the consumer fell into arrears.

29 See also *National Credit Regulator v Chatspare Pty Ltd* NCT/08/2008/140 (1) (P) July 2008 where the credit grantor was ordered by the Tribunal to repay a consumer R20 701.16 with interest. The matter dealt with complaints in terms of the Usury Act. This Act was repealed by the National Credit Act but, in terms of the transitional provisions found in the National Credit Act (schedule 3), the new legislation was applicable to complaints which fell under the repealed legislation, including the Usury Act, for a period of three years. The Tribunal had the power, in terms of the transitional provisions to make any order in terms of s150 which a court could have under the repealed legislation. (S150 is the section which sets out the orders which the Tribunal has the power to make). In this matter, the credit grantor, a micro lender, was acting in contravention of the Exemption Notice issued under the Usury Act (GN 713 of 1 June 1999) and so should have been charging interest in accordance with the Usury Act rather than the interest permissible under the Exemption Notice. The Tribunal ordered that the excess interest be repaid. It was entitled to make such an order because in terms of s150 the Tribunal can order the repayment of excessive interest and such an order was an order which a court could have made under the Usury Act.

30 Conduct which constitutes an offence is dealt with by the criminal courts.

31 Other role players, such as debt counsellors and credit bureaux may also engage in conduct which is prohibited in terms of the Act. Even consumers can be prohibited from making a nuisance of themselves by constantly requesting statements (s65 (5)).

- failure to provide statements or information;
- charging of excess fees or charges;
- failure to follow proper procedures when goods purchased on credit are surrendered or when debts are enforced; and
- the conduct of pawn brokers.

The first two have been discussed above and so this section will focus on the latter two.

2.3.1 Debt collection procedures

The Act is very specific about the process which must be followed when a consumer surrenders goods which have been purchased on credit³² or when the credit grantor repossesses goods because the consumer is in default.³³ When goods that have been surrendered or repossessed are sold by the credit grantor and the consumer is dissatisfied with the sale, he may approach the Tribunal for that sale to be reviewed. This process is quite different from the process which credit grantors used to follow before the introduction of the Act but it seems that some credit grantors have yet to make the change. In 2009 the Ombudsman for Banking reported that in the last six months of 2008 his office recorded about 40 complaints about 'illegal' motor vehicle repossessions.

These procedures were dealt with by the Tribunal in *SS Mapeka v Wesbank*.³⁴ Mapeka applied for a review of the sale of his motor vehicle by the bank. The facts established that Mapeka had returned his motor vehicle to the bank with a letter in which he requested the bank to 'take the car to their storage until such time my employer has decided about my fate'. He also stated that he

32 S127. Consumers who have purchased goods on credit are entitled to return those goods to credit grantors and may terminate their agreements. Credit grantors must then follow the procedure set out in ss129 and 130 of the Act.

33 S123 and s131 which must be read with ss 129 and 130. See *Absa Bank Ltd v De Villiers* 2009 (5) SA 40.

34 *Mapeka vs Wesbank* NCT/29/2009/128(1) (P), 5 November 2009.

was prepared to continue to pay his installments 'as soon as the matter has been resolved'. From this letter it was clear that Mapeka did not intend to terminate his contract with Wesbank. The Act requires that a consumer who wishes to terminate a contract must give written notice to terminate to the credit grantor.³⁵ Once the agreement has been terminated the credit grantor must follow the procedures in the Act before the goods can be sold. The procedure is slightly more complicated when the creditor wishes to sell repossessed goods³⁶ but for the purposes of this discussion the following steps are important. The credit grantor must:

- give the consumer written notice setting out the estimated value of the goods;
- allow the consumer 10 business days after receiving this notice to decide to withdraw the terminating notice (unless the consumer is in default);
- if the consumer is in default or the consumer does not respond to the notice the credit provider must sell the goods as soon as practicable for the best price reasonably obtainable.

The important point to note is that credit grantors are not entitled to sell goods unless the agreements have been cancelled and consumers are aware of how much they are likely to receive when the goods are sold. This gives consumers the opportunity to change their minds. They may wish to continue paying for their goods, such as a motor vehicle, as the amount which will be credited to their loan

35 S127 (1) (a).

36 Before goods are repossessed when consumers are in default, credit grantors must send notices in terms of s129 advising consumers that they are in default and that they should approach a debt counsellor (or another similar person) for assistance. The intention behind s129 is to enable the parties to find solutions to the problem and to agree on plans to bring payments up to date. Credit providers may not commence with legal proceedings in terms of s130 unless they first furnish s129 notices to consumers and they comply with a number of provisions as set out in s130. See *Malan v Amalgamated Banks of South Africa (Absa)* Case No NCT/22/2008/149(1) (P) 30 Oct 2008 note 1.

account may not be sufficient to cover their outstanding debt. When there is still an amount outstanding after the goods are sold, consumers are obliged to settle this amount with their credit providers.³⁷ Therefore, it may not be worthwhile to have the goods sold, and an alternative procedure such as debt counselling may be more appropriate. In the *Mapeka* matter the contract between the parties was never cancelled,³⁸ nor did the credit grantor follow the procedures which should be followed when a consumer is in default,³⁹ therefore the Tribunal referred the matter to the National Credit Regulator in order to establish whether there was prohibited conduct on the part of the credit grantor.

As stated above, a consumer who has attempted to resolve his dispute regarding the sale of the goods with the credit provider and who is not satisfied with the outcome of the sale, may refer the matter to the Tribunal for a review of the sale process.⁴⁰ If the Tribunal is not satisfied that the credit provider sold the goods as soon as reasonably practicable, or for the best price reasonably obtainable, the Tribunal may order the credit provider to pay to the consumer an additional amount exceeding the net proceeds of the sale.⁴¹ This is what happened in *Frans Dumas v Motor Finance Corporation*.⁴² After the matter was referred to the Tribunal for review, the parties entered into a settlement agreement which was made an order of the Tribunal. Motor Finance Corporation agreed to issue a new certificate of balance reflecting a reduced amount owing by the consumer to the credit grantor.⁴³ The credit grantor also agreed to pay costs of R6000 and it agreed to file a report regarding new systems which it undertook to implement regarding the sale of motor vehicles which it repossesses or which consumers surrender.

37 S127 (7).

38 *Absa Bank Ltd v De Villiers* 2009 (5) SA 40 confirms that the credit grantor is obliged to cancel the agreement before the motor vehicle is repossessed.

39 A notice in terms of s129 should have been sent to the consumer.

40 S128.

41 S128 (2).

42 Case No NCT/15/2008/128(1) (P) 1 September 2008.

43 The judgment does not reflect the amount by which the outstanding debt was reduced.

2.3.2 Conduct of pawn brokers

Pawn transactions occur when credit grantors give loans to consumers and, at the same time, take possession of some item of property as security for the loan. Credit grantors are then entitled to sell the goods and retain all the proceeds of the sale if the consumers fail to settle their loans within a specified period of time.⁴⁴ The Act imposes certain obligations on pawn brokers.⁴⁵ In particular, they are required to keep the goods until the date on which the agreement ends and if consumers pay or tender to repay their loans, on or before the stipulated date, pawn brokers must return the goods to the consumers. Consumers may apply to the Tribunal when pawn brokers fail to honour these obligations. The Tribunal has the power to order pawn brokers to pay consumers an amount equal to fair market value of the goods if the goods were lost or destroyed due to factors outside the control of the pawn brokers or double the value if the pawn brokers were responsible for the loss of the goods.⁴⁶

2.4 Debt re-arrangement agreements (consent orders)

The Act has adopted new measures to assist consumer who are debt stressed. The aim of these new measures is to resolve over-indebtedness and to assist consumers with the restructuring of their debt, thereby making the repayment of debt more manageable for over committed consumers. Both the Magistrate's Courts and the Tribunal have a role to play in assisting such consumers depending on whether the consumer is over-indebted or merely stressed. Consumers who are struggling to repay their debts should apply to debt counsellors to have their debts reviewed.⁴⁷ Debt counsellors must determine whether consumers appear to be over-indebted and whether any credit

44 S1.

45 S99. It must be noted that often the goods are valued at far more than loans which have been granted.

46 S99 (2).

47 S86.

agreements appear to have been granted recklessly.⁴⁸ When a debt counsellor concludes that a consumer is over-indebted or that some or all of the credit has been granted recklessly, the debt counsellor must finalise the matter in the Magistrate's Court.⁴⁹ The Magistrate's Court has certain powers to alleviate over-indebtedness which are not granted to the Tribunal. For example, the Magistrate's Court may make an order that one or more of a consumer's agreements be declared to be reckless credit and/or that one or more of a consumer's debts be restructured. However, if a debt counsellor concludes that a consumer is not over-indebted but is nevertheless experiencing difficulty repaying his debts in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily agree on a plan of debt re-arrangement.⁵⁰ This debt re-arrangement can then be confirmed as a consent order by the Tribunal.⁵¹ It is a criminal offence to fail to comply with orders of the Tribunal⁵² and so by confirming an agreement as a consent order both consumers and their creditors have certainty regarding the repayment of the loan by the consumer.

3. Tribunal jurisdiction

The Tribunal has jurisdiction throughout South Africa.⁵³ Its orders have the status of the High Court,⁵⁴ but the Tribunal does not enjoy the inherent jurisdiction of the High Court. It must therefore exercise its functions in accordance with the Act.⁵⁵

48 S86 (7).

49 This process is discussed in detail in *NCR v Nedbank Ltd and others*.

50 S86(7) (b). This is discussed further in Para 3 below.

51 S138 (1). The parties may also approach the Magistrate's Court for a consent order.

52 S160 (1).

53 S26(1) (a).

54 S152.

55 In *Malan v Amalgamated Banks of South Africa (ABSA)* the consumer applied to the Tribunal for it to review or over-turn a Magistrate's Court decision. The Tribunal pointed out that it

The Act makes a clear distinction between the role of the courts and the role of the Tribunal. The courts and not the Tribunal may determine contractual disputes,⁵⁶ damages and an award of damages,⁵⁷ criminal matters, the re-arrangement of debt when the consumer is over-indebted and whether credit has been granted recklessly. As far as this discussion is concerned, it is important to note that only the Magistrate's Court may set aside some or all of the debtor's obligations or suspend the force and effect of a credit agreement which has been granted recklessly. The Tribunal does not have these powers. The Tribunal can however, confirm consent orders when consumers are not over-indebted but are experiencing difficulty repaying their debts. It is therefore necessary for debt counsellors to make judgment calls and decide whether consumers are over-indebted or merely experiencing difficulty repaying their debts. Consumers are over-indebted if the preponderance of available information at the time a determination is made indicates that consumers are or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumers are a party, having regard to their financial means and taking into consideration their history of debt repayment.⁵⁸ Alternatively, consumers may not be over-indebted, but may be experiencing difficulty satisfying all their obligations in a timely manner.⁵⁹ As far as consent orders are concerned, the

had no jurisdiction in terms of the Act to review decisions of the Magistrate's Courts nor could it act as a court of appeal. The proper forum for the consumer to approach was the High Court.

56 See, for example, *Global Pact 417 (Pty) Ltd and others v Mercedes Benz Financial Services (Pty) Ltd* (MBFS) Case No NCT/40/2009/149 (1) (P) 20 April 2010 where the applicants were asking the Tribunal to deal, not only with the credit aspects of the matter, but also with the manner in which certain trucks and trailers were sold. This was an initiative by MBFS to promote small BEE entrepreneurs in the transport sector. There were a number of complaints and the applicants alleged non-fulfillment of certain promises. The Tribunal pointed out however, that it could not pronounce on such contractual disputes because a 'resolution of contractual disputes is not within the legal mandate' of the Tribunal (at 7).

57 An award of damages may be included in a consent order confirmed by the Tribunal (s138 (2)), provided the consumer agrees.

58 S79.

59 S86(7) (b).

Tribunal, without hearing any evidence, may confirm an agreement as a consent order.⁶⁰ This begs the questions: what steps should the Tribunal take in order to satisfy itself that consumers are not over-indebted, but are merely experiencing difficulty in repaying their debt or should it rely simply on the word of debt counsellors that consumers are experiencing difficulty but not over-indebted. In *Liphoko v Absa Bank and others*⁶¹ the Tribunal refused to grant a consent order in circumstances where the consumer had a disposable income after all her necessary monthly expenses were paid of R1 033,68 in circumstances where she owed R36 017.67 to her creditors. Although the debt counsellor stated in the application that the consumer was not over-indebted, her history of debt repayment indicated that she would have extreme difficulty repaying this amount in a timely fashion. The Tribunal found that she was clearly over-indebted. In addition, there was evidence that some of the credit had been granted recklessly. The Tribunal was of the view that the matter had to be dealt with in the Magistrate's Court.⁶²

It is also important to note that failure to abide by a consent order is a criminal offence. So if a consent order is granted in circumstances where, within a few months, a consumer will no longer be able to abide by the consent orders because his costs for essential living expenses have increased, for example, food, electricity and schooling, the consumer will not only be in financial difficulty he will also face the threat of a criminal prosecution.⁶³

60 S138 (1).

61 Case No NCT/253/2009/138(1) (P) April 2010.

62 See also *NCR v Nedbank Ltd and others* where the court held that cases of over-indebtedness had to be referred to the Magistrate's Court so as to ensure judicial oversight of the entire process (at 304-305).

63 In terms of s88 (3) (b) (ii) if a consumer defaults on a consent order, the credit provider may proceed with litigation against the defaulting consumer.

4 Complaints process

When a dispute involves a complaint about prohibited conduct, the matter can be referred to the Regulator which will then conduct an investigation. There are a number of different ways in which a matter can be resolved, one of which is to refer the matter to the Tribunal for adjudication.⁶⁴ The Regulator may decline to refer a particular matter to the Tribunal and it then will issue a certificate of non-referral. A certificate may be issued on the basis that the complaint appears to be frivolous or vexatious or does not allege any facts which, if true, would constitute grounds for a remedy under the Act.⁶⁵ If the Regulator does issue such a certificate the consumer may apply directly to the Tribunal for the matter to be heard but the consumer must first obtain the Tribunal's consent for the matter to be heard and the matter must not have prescribed.⁶⁶

If the matter does not involve prohibited conduct but the parties are entitled to make an application to the Tribunal in terms of the Act, the parties must attempt to resolve the dispute before they proceed to the Tribunal.⁶⁷ An example is a dispute regarding the amount received from the sale of a motor vehicle. The consumer must attempt first to resolve the matter directly with the credit provider. If he or she unable to resolve the matter, the matter must be referred to an ombud with jurisdiction, a consumer court or an ADR agent.

4.1 Ombud with jurisdiction

When the credit grantor is a financial institution (bank) and a participant is a recognised scheme in terms of the Financial Services Ombud Schemes,⁶⁸ an ombud appointed by the scheme is a recognised ombud. In this instance the recognised ombud is the Ombudman for Banking Services. Therefore disputes

64 The process which the NCR is obliged to follow is set out in Chapter 7 Part B.

65 S139 (1) (a) and s140(1) (a).

66 S141 (1) (b) read with s61.

67 S134 (4).

68 Act 37 of 2004.

which consumers have with banks, other than those disputes which are referred to the Regulator, must be referred to this ombud before an application is made to the Tribunal.⁶⁹ The matter will then be dealt with in terms of this Ombudman's Terms of Reference and Code of Banking Practice.⁷⁰ If the consumer is still dissatisfied with the resolution of the matter, the consumer may apply to the Tribunal.

4.2 Consumer Courts

In terms of the Constitution⁷¹ consumer protection matters are matters of concurrent jurisdiction. Therefore each province has the power to enact its own consumer protection legislation. The national Consumer Affairs (Unfair Business Practices) Act⁷² established a Consumer Affairs Committee to deal with consumer issues. Provincial legislation mirrors this legislation but the consumer adjudicative bodies are usually referred to as 'consumer affairs courts'. These are not courts in the true sense, but rather administrative tribunals.⁷³ The national Consumer Affairs (Unfair Business Practices) Act will be repealed when the Consumer Protection Act becomes operative. Provinces are expected to

69 When dealing with disputed sales, it is necessary to consider s128 (1) and s134(4). S 128 (1) states that a consumer who has reasonably attempted to resolve a dispute regarding the sale with the credit provider, or through ADR, may apply to the Tribunal to review the sale. S134 (4) states that a consumer who is entitled to apply to the Tribunal must first attempt to settle the dispute with the credit provider and then through ADR. In the *Mapheka* matter, the Tribunal focused on s128 (1) and stated that as the consumer had attempted to resolve the dispute with the credit provider, the consumer was entitled to refer the matter to the Tribunal when the dispute was not resolved. The Tribunal did not however deal with s134 (4).

70 See www.obssa.co.za.

71 Constitution of South Africa, Act 108 of 1996.

72 Act 71 of 1988.

73 The exception is the Western Cape Consumer Affairs (Unfair Business Practices) Act 10 of 2002 which refers to a 'Consumer Affairs Tribunal' (s14). Consumer courts are defined in the Act as being 'a body of that name, or a consumer tribunal, established by provincial legislation' (s1). It is interesting to note that a court, in the Consumer Protection Act, is defined to specifically exclude consumer courts.

follow suit and should replace their consumer protection legislation with legislation which is similar to the national legislation.

Although provinces have been entitled to establish their own consumer courts since 1996, to date consumer courts have been established in three provinces only: Free State, Gauteng and Limpopo. Some provinces such as KwaZulu-Natal have not yet enacted legislation and others have legislation in place (for example, the Western Cape) but their courts are not functioning at all or are not functioning effectively. Nevertheless the Act provides that matters can be referred to these provincial courts and it appears that the legislature envisaged that these courts would play an extensive role in the resolution of consumer disputes. In terms of the Act, an order of a consumer court, has the same force and effect as if it were made by the Tribunal.⁷⁴ By making provision for the provinces and their consumer courts to play a role in dispute resolution, the legislature was attempting to ensure that poor and vulnerable consumers had access to redress. The fact that most of these courts are not operating means that the vast majority of South Africa's poor consumers are being denied this right.

4.3 Alternative Dispute Resolution Agents

For the purposes of this Act, an ADR agent will probably be a debt counsellor who is required to be registered in terms of the Act.⁷⁵ However, the Act does not specify this nor does it provide a mechanism by which persons or organisations may become recognised ADR agents. Therefore, any person or entity is free to advertise their services as an ADR agent.

If an ADR agent concludes that either party to conciliation, mediation or arbitration is not participating in the process in good faith, or that there is no possibility of the parties resolving their dispute through that process, the ADR agent must issue a certificate stating that the process has failed.⁷⁶ The matter

74 S140 (7).

75 S44.

76 S134 (5).

can then be referred to the Tribunal.⁷⁷ It must be noted that it is only ADR agents and not consumer courts or ombuds that are required to issue these certificates. It is assumed that this is because, if the matter is referred to an ombud or a consumer court, there will be a ruling from which the outcome can be established.

When a matter is resolved by one of the abovementioned entities, the resolution of the dispute may be recorded in the form of an order and this order may be submitted to a court or to the Tribunal to made a consent order.⁷⁸ The Regulator may not intervene before the Tribunal in respect of a consent order which has been arrived at in this manner.⁷⁹

5. Benefits of referring matters to the Tribunal

In some instances matters must be referred to the Tribunal before the matter can proceed in the civil courts. For example, when consumers have suffered loss or damage as a result of prohibited conduct, and want to institute proceedings to claim their damages, they must file a notice from the Chairperson of the Tribunal certifying that the conduct constituting the basis for the action has been found to be prohibited conduct or required conduct in terms of the Act.⁸⁰ In other words aggrieved consumers may not claim damages in the civil courts before obtaining such certificates. The advantage though is that these certificates are then regarded as conclusive proof of their contents, and are binding on civil courts.⁸¹ Civil courts will only be required to assess whether the prohibited conduct caused the damage or loss and the amount of such damages. It is however possible to include an award of damages as part of a consent order in which case it will not be necessary to proceed to in the civil courts. Once consumers accept an

77 S137 (3).

78 S135 (1).

79 S135 (2).

80 S164 (3) (b).

81 S164 (4).

amount as damages in a consent order they may not claim damages in the civil courts.⁸²

In other instances, such as with consent orders, consumers may choose to approach the civil courts or the Tribunal, provided the Tribunal has jurisdiction to deal with the matter. The Tribunal does not always have to have a hearing and can conclude the matter on the papers, but if a hearing is conducted this must be conducted in an inquisitorial manner, as expeditiously as possible, as informally as possible and in accordance with the principles of natural justice.⁸³ Parties appearing before the Tribunal do not have to be legally represented, the processes are relatively simple to follow and there are very few costs involved.⁸⁴ To use the words of Fleming J in *National Credit Regulator v Chatspare Pty Ltd*

'The complaint can be expressed in a laymen's undefined narratory style .. And proof on a balance of probabilities is adequate. ... The approach of the NCT should be that, subject to statute, the NCT is guided only by the rules of natural justice. In that context the object and test for using the inquisitorial power is not to pursue to a point against anyone who is not a consumer as if he were the enemy. The inquisitorial power exists to get to the bottom of facts that are material to reaching a correct finding on the properly raised complaint' (at 7-9).

When dealing with consent orders, it is not necessary for the Tribunal to hear any evidence and so matters can be dealt with 'in chambers'.⁸⁵ There is, therefore, a significant cost saving for consumers. The Tribunal may, however, call for oral evidence in appropriate cases. Although there may be a consent order, the

82 S164 (3).

83 S142.

84 The processes and costs are set out in the Tribunal Rules. See Government Gazette 30225 28 August 2007.

85 S135 (1) states that if a matter has been resolved the Tribunal or a court, *without hearing any evidence* (my emphasis), may confirm an agreement as a consent order.

Tribunal may not be satisfied that there has been true consent or that the parties understand the nature of the agreement. In some instances the Tribunal has been of the view that the consent order is contrary to the Act, particularly in cases when excess interest is charge such as in the *Liphoko* matter discussed above. In such circumstances, the Tribunal is of the view that granting the consent order will be tantamount to enforcing an illegal agreement, and so such consent orders have been refused. In some cases, evidence regarding the nature of the credit agreements concluded between the credit grantor and the consumer has been called for and in other cases, credit grantors have been summonsed to give evidence. Fleming J in the *Chatspare* matter pointed out that the Tribunal is not forbidden from hearing any evidence and that it is easy to envisage cases where some evidence ought to be given, but he did caution the Tribunal against creating a prerequisite that the Tribunal must be satisfied about the correctness of the settlement agreement between the parties. This would in fact import a right on the part of the Tribunal to veto a contract which the parties had concluded and which the courts will enforce 'as any other contract'. Nevertheless, there may be cases when the parties are contracting out of the protections created by the Act and so, in such cases, it would be appropriate to investigate the matter further and to refuse to accept the consent agreement.

An example which illustrates this is when a credit provider in the consent agreement wishes to claim interest which is at the very limit of the formula as set out in the Act. The legislature has elected not to set a particular rate but has chosen instead to use a formula for each type of credit agreement.⁸⁶ The idea then is that the interest rate must change as the Reserve Bank Repurchase Rate (repo rate) changes. Notwithstanding this, the parties to consent agreements elect to set a fixed interest rate. In some instances this rate was set at 36 or 37% per annum which may have been acceptable at the date on which the consent agreement was signed between the parties. However, by the time the matters were brought before the Tribunal the repo rate had decreased. This meant that the interest being charged was in contravention of the Act and the consent

86 See Regulation 42 Table A.

agreement could not be made an order of the Tribunal.⁸⁷ It is submitted that when the repo rate is reduced, credit grantors, notwithstanding that there may be consent orders, are obliged to reduce the interest rate which they are charging particular consumers, if the rates are higher than the maximum amount allowed in terms of the Regulations.⁸⁸ It is also submitted that the converse is not true. That is, if the repo rate increases, the interest rate in the consent order remains the same because it is not in contravention of the Act. Those credit grantors which elect a fixed interest rate of less than 20% will in most instances not be faced with these difficulties because the way in which the formula is structured means that the interest rate will never be higher than that permitted by the Act.⁸⁹

The Tribunal also has the power to grant interim relief.⁹⁰ At any time, whether or not hearings have commenced into complaints, complainants may apply to the Tribunal for an interim order in respect of those complaints. The Tribunal may grant such an order if there is evidence that the allegations may be true and the interim orders are reasonably necessary to prevent serious and irreparable harm to the complainants or prevent the purposes of the Act from being frustrated. For example, a consumer may apply for a interim order to prevent his house or his motor vehicle from being sold by a credit grantor. A complainant is defined as a person who has filed a complaint in terms of s136 (1), that is, a person who has filed a complaint concerning an alleged contravention of the Act with the Regulator. This means that an application for interim relief is only available to a complainant who has filed a complaint with the Regulator or who has referred a matter to the Tribunal in the event of the Regulator issuing a certificate of non-referral.⁹¹ For example, the complainant

87 This would be tantamount to enforcing an illegal contract.

88 See for example *Mpungane v Addcon (Pty) Ltd and others* Case No NCT/289/2009/138 (1) (P) April 2010.

89 For example in the case of unsecured credit transactions the formula is [(R.R x 2.2) + 20 %] per year.

90 S149.

91 See *Malan v Amalgamated Banks of SA (Absa)* at 4. In this particular matter Malan was applying for an interim order to prevent his house been repossessed or sold by Absa bank.

may lodge a complaint with the Regulator alleging that the credit grantor has instituted legal proceedings against him but did not follow the correct procedure by issuing a section 129 notice. Whilst this matter is being dealt with it may be necessary to issue an interim order preventing the motor vehicle from being sold. The interim order remains in place until the conclusion of the hearing into the complaint or for a period of six months.⁹² This six month period can be extended by the Tribunal provided good cause is shown for a further period which does not exceed six months.⁹³

6. Concluding remarks

The Tribunal is a new body established by the Act to deal with certain specific aspects of the legislation. The intention is to make it easier and less expensive for consumers and credit providers to resolve their disputes. There is no doubt that this is an important mechanism in the promotion of consumer rights in South Africa as well as in the promotion of responsible credit granting in the marketplace. However, the Tribunal has not been established in order to replace or supplant the ordinary courts. This limited role brings with it a set of challenges because the Tribunal must ensure that it acts within the four corners of the Act. There are interpretational difficulties, such as the distinction between over-indebted consumers and stressed consumers who are having difficulty satisfying their debts, and consumers themselves find it difficult to accept that the Tribunal sometimes does not have jurisdiction to deal with their matters. They must

However, the Tribunal had no jurisdiction to grant such an order because the matter had already been dealt with in the Magistrate's Court and summary judgment had already been granted. A consumer that wants to re-negotiate his debts through the debt counselling process is obliged to do so before legal proceedings commence (s86(2)).

92 S149 (2).

93 S149 (3).

approach the civil courts, something which is often beyond the means of many consumers.⁹⁴

The *Dumas* and *Mapeka* cases were amongst the first decisions handed down by the Tribunal and since then several other similar matters have been referred to the Tribunal. These decisions will send a very strong message to credit grantors that the methods of repossessing and selling goods, particularly motor vehicles, need to change and the message will undoubtedly eventually get through. As credit grantors become more aware of what is regarded as prohibited conduct it is less likely that they will engage in such conduct or will be prepared to sort the problem out before the matter finds its way to the Tribunal. On the other hand, care must be taken that credit grantors are not allowed to simply sort out problems when complaints are made and that they do not face the prospect of administrative fines.⁹⁵ If credit grantors know that it is unlikely that they will face the prospect of an administrative fine when they engage in prohibited conduct there may be no incentive for them to change their conduct on a wholesale basis.⁹⁶ They only have to deal with problems as and when

94 Some debt counsellors have reported that when they explained to consumers that they would have to apply to court to have their debts re-arranged and that this would require the services of an attorney who needed to be paid, the consumers left and never returned. In some instances debt counsellors have had to deal with an application for their de-registration by the Regulator because they have not followed the procedures set out in the Act. In some instances they have explained that this is because once consumers become aware of the costs involved in the debt counselling process they simply disappear leaving the debt counsellor with open files and credit grantors uncertain of how to proceed. See for example *NCR v Zulu* Case No NCT/53/2008/57(1)(T) August 2009.

95 When parties are found to have contravened the Act the Tribunal may impose administrative fines which may not exceed the greater of 10% of annual turnover in the preceding year or R1 000 000

96 In its 2009 Annual Report the Regulator explained that in the initial stages of implementation of the Act, the legislation was new to all parties and a more accommodating approach was adopted by the Regulator, but by now all are expected to know the Act and to conform to its requirements (*Annual Report* (2009) 24. From this it may be expected that the Regulator does intend to take a more robust approach towards transgressors.

complaints arise. Consumers who have had their matters resolved by the Regulator have no incentive to see the wrongdoers fined for their conduct and so, unless the Regulator decides to refer the matter to the Tribunal, a successful resolution for one complainant may be the end of the matter. However, there may be other consumers who are equally prejudiced but who have not complained. It is suggested that the most appropriate means of ensuring compliance with the Act within the market place as a whole is for the Regulator to refer prohibited conduct matters to the Tribunal, so that an appropriate order can be made. This order may include an administrative fine, the intention of which is to deter both the wrongdoer and similar role players from engaging in this conduct in the future.⁹⁷

One area where the Tribunal can play a significant role when assisting debt stressed consumers is in the area of consent orders. This is very important for consumers and creditors alike. Credit grantors want to be repaid and they are not in the business of selling houses or motor vehicles, so it is preferable for them to get their money back even if it is a little less than they envisaged or it takes a little longer. Consumers often find themselves in a difficult position and they need time to sort their problems out. Maybe they just need a little time, maybe some of their debts need to be suspended for a period of time so that they can pay some off now and others off later. This is particularly true if one creditor grantor has granted credit recklessly. If the debts need major restructuring and the consumer is over-indebted the matter needs to be dealt with by the Magistrate's Court. The Tribunal does not have jurisdiction to deal with the matter. At the moment there are interpretational difficulties with the Act in deciding when exactly a consumer is over-indebted and when he is merely

97 This procedure is similar to the procedure in terms of the Competition Act 89 of 1998. The Competition Tribunal has imposed significant administrative fines on those who contravene the Competition Act. The degree to which the respondent co-operated with the Competition Commission and the Tribunal is a factor which can be considered when a fine is imposed. See for example *Competition Commission v Pioneer Foods* Case No 15 CR/Feb07 and 50/CR/May 08 where an administrative fine of R195 718 614 was imposed on the respondent for price fixing.

stressed, but more than that it is suggested that this is one area where the Act should be amended and the Tribunal should be given more powers to deal not only with stressed consumers but also with those that are over-indebted. This is especially the case in circumstances where the debt re-arrangement is not contentious. Even when debtors are over-indebted, credit providers may agree to a debt re-arrangement because this is probably the best way of ensuring that they will ultimately be repaid. Amending the Act to allow the Tribunal to deal with such consent orders will certainly go a long way to alleviate the present difficulties which are being experienced in the Magistrate's Court process. At present there is a huge backlog in the Magistrate's Court,⁹⁸ debt stressed consumers have to pay expensive legal fees and the more complicated processes of the Magistrate's Courts must be followed.⁹⁹ If more of these matters could be dealt with in the Tribunal where procedures are quicker, less complicated and the cost is minimal more consumers and credit grantors will end up with an order which has the status of the High Court and which will give far more certainty to the finalisation of the problem. There are consequences for consumers if they renege on these agreements.

However, that being said, it is necessary to consider the capacity of the Tribunal to deal with a significantly increased work load. At present all members of the Tribunal only work for the Tribunal on a part time basis. In addition, their workload is expected to increase once the Consumer Protection Act comes into operation at the end of 2010. It is therefore fundamental to the effective functioning of both the Act and the Consumer Protection Act that the provincial

98 The Regulator reported that in 2009 less than 3000 of the more than 50 000 consumers who had applied for debt counselling had been dealt with in the Magistrate's Court (Regulator *Annual Report 2009*)

99 See *NCR v Nedbank and others*. See also *McLaren v Badenhorst* High Court of South Africa, Eastern Cape, Grahamstown, Case No CA 10/2010 2 June 2010 where the court held that the magistrates court was correct to hold that it had not jurisdiction to deal with a debt re-arrangement matter because the consumer was not resident in the court's area of jurisdiction, nor did the cause of action arise within the court's area of jurisdiction. This problem would not arise in the Tribunal, since it has jurisdiction throughout South Africa.

consumer courts begin operating as expected in terms of the legislation. Both Acts provide for a comprehensive role for these courts. Unless the provincial governments get their legislation into line with national legislation and their courts begin functioning effectively, proper consumer protection is being denied to the vast majority of South Africa's vulnerable consumers.

There is a significant network of organisations and entities which have to work together if we are to ensure that consumers are able to repay their debts and that the market functions effectively.¹⁰⁰ It is not possible for one entity or some of the entities to carry the burden of the Act on their own. It is necessary that each role player, whether they be debt counsellors, the Regulator, the ombuds, the Tribunal or the consumer courts function as envisaged in terms of the legislation to ensure that the goals as set out in the preamble to the Act are achieved.

In conclusion the following recommendations are made:

- The tenuous distinction between over-indebted consumers and debt stressed consumers should be removed and the legislation should be amended to give the Tribunal an expanded role to deal with over-indebted consumers.
- A more robust approach should be taken in the event that there is prohibited conduct and wrongdoers should not simply be allowed to resolve the complaints with individual consumers, they must also face the deterrent of administrative fines.

100 It must be noted that if consumers do not repay their debts and continue to be 'black listed' or under debt counselling, they cannot access credit and if they cannot access credit they cannot participate actively in the market (see section 88 which deals with the effect of debt review). The more consumers that are affected in this way, the greater the detriment to the South African economy. It is therefore not only important for individual consumers that they be rehabilitated as quickly as possible, it is also extremely important for the market as a whole.

- Concerted action must be taken to ensure that appropriate consumer protection legislation is in place in the provinces and that the consumer courts/tribunals are functioning effectively.