

Communiqué: Declaratory Order

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Salient Features of the Declaratory Order by Du Plessis J on 21 August 2009 – *The National Credit Regulator v Nedbank and others* (case no 19638/2008)

Introduction

The NCR launched an application to the High Court for clarity on several matters pertaining to debt counselling. Judgment was handed down on 21 August 2009. We have summarized the outcome of the court judgment and added some explanatory notes for ease of reference.

1. Determination by debt counsellor in terms of section 86(7)

The court pointed out that a consumer's application to a debt counsellor to be declared over-indebted can, according to section 86(7) of the National Credit Act (NCA), have three possible outcomes:

- The debt counsellor may find that the consumer is not over-indebted (**finding 1**). In such a case the debt counsellor must reject the application but the consumer may still approach the Magistrate's Court for relief in terms of section 86(9).
- The debt counsellor may find that, although the consumer is not over-indebted, he/she is experiencing, or is likely to experience, difficulties satisfying his/her obligations (**finding 2**). If the debt counsellor makes this finding, he must initiate a process aimed at a voluntary debt re-arrangement plan. This process can end up in the Magistrate's Court, either by means of a consent order in terms of section 86(8)(a) or a recommendation being referred to the Magistrate's Court in terms of section 86(8)(b), if consent cannot be obtained.
- The debt counsellor may find that the consumer is over-indebted (**finding 3**). In such a case the debt counsellor must, in terms of section 86(7)(c), issue a proposal recommending that the Magistrate's Court make an appropriate order in terms of section 86(7)(c) to declare one or more credit agreements to be reckless credit (if applicable) and/or to rearrange a consumer's obligations.

With regards to finding 3, the court found that section 86(7) **requires** the debt counsellor to seek an order from the Magistrate's Court so as to ensure judicial oversight of the entire process.

- The implication of the court's decision in this regard is therefore that **a debt counsellor is obliged to approach the court for an order in cases where finding 3 has been made.**

Although section 87(1) (requiring the Magistrate's Court to conduct a hearing) only refers to section 86(8)(b) (finding 2) and section 86(9) (a direct application following finding 1), the court found that **the requirement to conduct a hearing indeed applies to matters that have been referred to the Magistrate's Court under section 86(7)(c) (finding 3)**. The court pointed out that a Magistrate's Court can only provide the necessary judicial oversight if it conducts a hearing and is therefore obliged to conduct a hearing and make an order in terms of section 87(1)(a) or 87(1)(b) of the Act where finding 3 has been made. The debt counsellor's recommendation to the Magistrate's Court following finding 3 therefore entails the same process as in the case of finding 2.

It should, however, be noted that the court found that the **provisions of section 86(8)(a) (i.e. consent orders in cases of successful voluntary arrangement) do not apply to cases where the consumer was found to be over-indebted (finding 3)**. The court pointed out that finding 3 sets in motion a process that is not voluntary. Nothing however prevents the parties from seeking a consent order when they have settled a matter and agreed on a re-arrangement plan. For this purpose section 86(8)(a) is unnecessary.

Furthermore, the court also held that the NCA only provides for negotiations in the event of finding 2. In such a case the matter may only be referred to court if the process of voluntary re-arrangement did not culminate in an agreement by the consumer and each credit provider. The debt counsellor must be satisfied that negotiations have been concluded or are leading nowhere. However, **negotiations are not required in the event of finding that the consumer is over-indebted (finding 3)**. The parties may obviously enter into negotiations in order to settle the matter, but it is not prescribed by the NCA. It is therefore submitted that the effect of the court's decision in this regard is that debt counsellors, in cases where finding 3 has been made, are not obliged to send proposals to credit providers before a matter is referred to court.

In discharging his or her duties under section 87 the court held that the relevant magistrate fulfils **a judicial and not an administrative role**. Accordingly the magistrate need not comply with relevant provisions of the Constitution and the Promotion of Administrative Justice Act, 2000 ("PAJA") to devise appropriate procedures which will facilitate an inexpensive, fair and expeditious hearing.

2. Procedure

The court pointed out that the **power** of the Magistrate's Court to conduct a hearing and make orders in terms of section 86 and 87 is **derived from the NCA**, but the **procedure is governed by the Magistrates' Courts Act and the Rules** as the NCA is silent on this issue. In this regard the court found that:

- The debt counsellor, when referring a matter to court in terms of section 86(8)(b) and section 86(7)(c) is the applicant in the proceedings before the Magistrate's Court.
- It follows that the referral constitutes an application to court and therefore the appropriate rule to follow is Rule 55 of the Rules.
- The appropriate form to follow is Form "No 1 (Notice of Application General Form)" that appears in Annexure 1 to the Rules.

The implication of the court's decision in this regard is that relief is sought by the debt counsellor (as the applicant) on behalf of the consumer (as the first respondent) against the credit providers as further respondents.

The declaratory order affects certain items/issues (relating to the merits of the matter) that should be addressed in the founding affidavit of the debt counsellor:

- Particulars of the **debt counsellor as applicant** should be provided (full names, identity number, residential or work address, occupation and debt counsellor's registration number).
- Particulars of the **consumer as first respondent** (full names, identity number, residential or work address as well as occupation). The founding affidavit must also disclose whether the consumer is married in or out of community of property. If the consumer is married in community of property a joint debt review application will be made and the parties should both be cited as respondents.
- Particulars of the **credit providers** as second (or third) and further respondent(s) (full identity details of a natural person and/or a juristic person).

3. Jurisdiction

The affidavit should contain an allegation that the specific court has jurisdiction to entertain the matter.

The court held that the question of jurisdiction must be decided with reference to the Magistrates' Courts Act as it has held that the Act governs the procedure to be followed when matters are referred to the Magistrate's Court under sections 86 and 87 of the NCA.

As pointed out earlier, the court also held that a debt counsellor who refers a matter to the Magistrate's Court is the applicant in the matter and the consumer, the first respondent. Accordingly, the court held that the Magistrate's Court having jurisdiction in respect of the **person of the consumer** is the appropriate Court to be approached for an order in terms of section 86 and 87 of the NCA.

This implies that the Magistrate's Court in which area the consumer resides, would be the forum to which the application should be referred.

With regard to the issue of a monetary limit upon the jurisdiction of the Magistrate's Court to hear referrals under section 87 of the NCA, the court pointed out that the power to deal with referrals is derived from the NCA. As the NCA expressly provides that matters be referred to the Magistrate's Court and as it makes no mention of a **monetary limit** to that court's jurisdiction, the court held that there is no monetary limit to the relevant jurisdiction of the Magistrate's Court.

An allegation that one or more of the credit agreements purport to be reckless lending (if applicable), supported by full details of the agreement(s) and an averment of **reckless lending** in terms of sections 80(1)(a) or 80(1)(b)(i), alternatively section 80(1)(b)(ii) should be made in the founding affidavit if applicable.

The court held that a Magistrate's Court that finds any credit agreement reckless **only has the powers provided for in the Act**. It does not have a general power to interfere with the contractual obligations and rights of any party to a credit agreement. The court interpreted the relevant provisions of the NCA as follows:

1. Where the court finds that a credit agreement is reckless:

- (a) upon the grounds that the credit provider has failed to conduct the required assessment (section 80(1)(a)); or
- (b) upon the grounds that the credit provider, despite having conducted an assessment, has entered into a credit agreement in circumstances where the preponderance of information indicated that the consumer did not generally understand the risks, costs and obligations of such a credit agreement (section 80(1)(b)(i));

The court may make the orders contemplated in section 83(2) (i.e. an order setting aside the consumer's rights and obligations under an agreement, or an order suspending the force and effect of the agreement).

2. Where the court finds that a credit agreement is reckless:

- (a) upon the grounds that the credit provider, despite having conducted an assessment, has entered into a credit agreement in circumstances where the preponderance of information indicated that it would make the consumer over-indebted (section 80(1)(b)(ii)), and
- (b) the consumer is to be found over-indebted at the time of the court proceedings;

The court may make the orders in terms of section 83(3)(b)(i) and (ii) (i.e. an order suspending the force and effect of the agreement and for the restructuring of any other agreements).

4. Application of the in duplum rule

With regard to the statutory in duplum rule in terms of section 103(5) of the NCA the court confirmed the ceiling on the charges that can be added if a consumer is in default. Once the charges in terms of section 101(1)(b) to (g) (i.e. initiation fees, service fees, interest, cost of credit insurance, default administration charges and collection costs) equal the amount of the unpaid balance **no further charges** may be levied and any payments made by the consumer thereafter **does not permit the credit provider to charge any further interest** while the default persists.

5. Service

Generally first documents pertaining to all applications should be served by the sheriff as prescribed in rule 9 of the Magistrates' Courts Rules. The court confirmed that Rule 9 is applicable but added that service of documents pertaining to the referral and hearing contemplated in sections 86(7)(c), 86(8)(b) and 87 of the NCA may, **with the agreement of the affected parties, be by way of fax or e-mail**.

- The applicant should make sure that he/she is in possession of a consent letter from the relevant credit providers for each case.
- Debt counsellors must ensure that the credit providers' complete and correct reference/account numbers appear on the notice of motion.
- Debt counsellors should further ensure that they have proof of service for each credit provider.

6. Role of the debt counsellor when referring a matter to court

As the debt counsellor is the applicant in the matter, it is submitted that he/she may appear before a court in person. Alternatively, the debt counsellor may be represented by a practitioner who may call on the debt counsellor to give oral evidence.

With regard to the debt counsellor's functions in terms of section 86, the court held that his or her role is that of a **neutral, statutory functionary who does not seek to advance any particular party's cause**. Debt counsellors should therefore note that their role is that of an intermediary between the over-indebted consumer and the credit providers and that they should aim to strike a balance between the parties' conflicting needs and interests. They should not be regarded as the credit providers' adversary, but rather as a facilitator aiming to obtain a positive outcome for all parties.

The court held that a debt counsellor who refers a matter to court **"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."

7. Costs

With regard to the problem of cost orders against debt counsellors, the court held that **rule 33** of the Magistrates' Courts Rules is applicable to applications under section 86 and 87 of the NCA. However, the court emphasised that it should be kept in mind that the debt counsellor fulfils a **statutory obligation**. The debt counsellor is therefore not a litigant in the ordinary sense.

The court pointed out that a statutory functionary, meaning a debt counsellor, who fulfils a duty in terms of the act and is involved in court proceedings, is **not ordinarily ordered to pay the costs of any other party**. Adverse costs orders against such functionaries are ordinarily only made where the functionary acted improperly or mala fide.

8. Emoluments attachment orders

In this regard the court reiterated that the powers of the Magistrate's Court upon a referral are to be found in the NCA. The orders in terms of section 87 of the NCA are the only orders that the Magistrate's Court can make as the Magistrate's Court only has such powers as have been conferred upon it by an Act of Parliament. Accordingly, the issuing of an **order of the nature contemplated in section 65J of the Magistrates' Courts Act attaching the emoluments of the consumer, is not included**.

9. Credit agreements excluded from debt review applications – section 86(2)

With regard to the issue of section 86(2) referring to the taking of steps in terms of section 129 to enforce a credit agreement and the argument that it should be interpreted as a reference to the commencement of legal proceedings mentioned in section 129(1)(b) and not the steps taken in terms of section 129(1)(a) (i.e. the notice drawing the default to the notice of the consumer) the court did not grant the declaratory relief. All parties before the court agreed that the order must be made and therefore the court did not have full argument thereon. For this reason and in view thereof that there are many other persons with an interest in this order the court refused the order.

Generally the viewpoint that enforcement only commences once a summons has been issued and served is supported. The fact that all parties have agreed that the declaratory order in this regard should be granted provides further support for this viewpoint.

However, debt counsellors must be mindful of the possibility that credit providers may, on the basis of the court's refusal to grant the order, invoke the argument that a credit agreement has been excluded in terms of section 86(2) in cases where the section 129(1)(a) notice has been sent to the consumer before he/she has applied for debt review in terms of section 86(1) of the NCA.

10. Matters enrolled before the declaratory order judgment

The judgment did not deal with what the consequences will be for matters already placed on the court roll. These will be for example where the consumer is the applicant or the matter is set down where the debt counsellor resides and not where the consumer resides. In this regard, we recommend that debt counsellors discuss these issues with Magistrates in their area on the way forward.