DO SEQUESTRATION PROCEEDINGS FALL WITHIN THE OVERALL AMBIT OF "ANY PROCEEDINGS" AS STIPULATED IN SECTION 130(3) OF THE NATIONAL CREDIT ACT 34 OF 2005?*

Naidoo v Absa Bank Limited [2010] 4 All SA 496 (SCA)

1 Introduction and overview

Naidoo v Absa Bank Limited is one of the few cases by a court in which the interface between the insolvency law and the National Credit Act 34 of 2005 arose since the commencement of the latter in 2006. Other cases highlighting this interface include *Investec Bank Ltd v Mutemeri* (2010 (1) SA 265 (GSJ)) and *Ex Parte Ford* (2009 (3) SA 376 (WCC).

The enactment of the National Credit Act has had significant consequences for the scope of remedies available to both debtors and creditors in terms of the insolvency law. The National Credit Act did not change the Insolvency Act 24 of 1936 dramatically. Section 84 of the Insolvency Act, which deals with goods delivered in terms of an instalment agreement to a debtor whose estate became subsequently sequestrated, was one section which was changed by the National Credit Act. However, the National Credit Act is now dealing exclusively with certain debts and the enforcement of those debts. These are debts arising out of credit agreements and therefore excluding the application of insolvency law when dealing with such debts.

Section 4 of the National Credit Act determines when the Act is applicable. It provides that:

> "Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except –
>
> (a) a credit agreement in terms of which the consumer is –
>
> (i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1);
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> (ii) the state; or
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> (iii) an organ of state;
>
> (b) a large agreement, as described in section 9(4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at

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the time the agreement is made, below the threshold value determined by the Minister in terms of section 7(1);

(c) a credit agreement in terms of which the credit provider is the Reserve Bank of South Africa; or

(d) a credit agreement in respect of which the credit provider is located outside the Republic, approved by the Minister on application by the consumer in the prescribed manner and form."

The National Credit Act provides sophisticated measures during a situation when consumers who are parties to credit agreements, which are not exempted from the application of the National Credit Act, are unable to pay their debts. These measures include debt reviewing, the declaration of a credit agreement as reckless credit and debt restructuring *(*see s 86(7) of the National Credit Act for the recommendations which a debt counsellor may make after reviewing a consumer's debts). In terms of section 86(7)(c) of the National Credit Act, debt restructuring may take various forms which include the following:

"(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;

(bb) postponing during a specified period the dates on which payments are due under the agreement;

(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6."

In all other instances, normal civil remedies such as a garnishee order, sale in execution, an order for payment in instalments and the measures of the insolvency law are still means of redress available to a creditor. It is submitted that this will not be the only time in South Africa where a possible overlap of remedies available under both insolvency law and under the National Credit Act will be adjudicated. Future motions will either try to enforce the application of the insolvency law or question its application, arguing for the application of the more specialized National Credit Act as seen in *Naidoo v Absa Bank Limited*.

2 *Naidoo v Absa Bank Limited*

2 1 Background

This case came before the Supreme Court of Appeal on appeal from the Durban High Court. The appellant's estate was sequestrated by the Durban High Court on application by the respondent. The sequestration of the estate followed the appellant's failure to meet payments to the respondent which were due in terms of certain instalment-sale agreements and two home-loan agreements. Since all these agreements were credit agreements within the definition of credit agreement in the National Credit Act, this Act was applicable to the agreements and the remedies in the Act available to the respondent who was the credit provider (see s 1 of the National Credit Act for a comprehensive definition of a credit provider).

The appellant argued that, before the respondent could apply for the sequestration of his estate, it had to comply with the procedures stipulated in section 129(1) of the National Credit Act. Section 129(1) requires that certain procedures are to be complied with before any debt enforcement can take place. It provides that:

> "(1) If the consumer is in default under a credit agreement, the credit provider –
>
> (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
>
> (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before –
>
> (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
>
> (ii) meeting any further requirements set out in section 130."

The appellant further argued that the words in section 130(3), "despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies ...", suggest that all legal proceedings arising as a result of a credit agreement to which the National Credit Act applies, fall within its overall ambit. Section 130(3) determines that:

> "Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that –
>
> (a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;"

It was therefore argued that the procedures in the National Credit Act which should be followed before a debt is enforced, do not only cover circumstances relating to the enforcement of a credit agreement but any proceedings concerning a credit agreement. According to the appellant it would thus also include sequestration proceedings since the unpaid claims which formed the subject of the sequestration application, arose from credit agreements.

The appellant queried whether there should have been successful sequestration proceedings since the debts which were the core of the dispute, arose from credit agreements. The appellant also contended that section 130(3) of the National Credit Act, when read in conjunction with section 129(1) of the National Credit Act, should be interpreted to "cover circumstances relating not only to the enforcement of credit agreement but also to include sequestration proceedings since the unpaid claims, which are the subject of the sequestration application, arise from credit agreements." (*Naidoo v Absa Bank Limited supra* 498.)

The appellant was of the belief that sequestration proceedings should not have been instituted before there was compliance with section 129(1)(a) of the National Credit Act. The court had to decide whether the required procedures as stated by section 129(1) of National Credit Act, which should

be followed before the enforcement of a debt which arose from a credit agreement, also relates to sequestration proceedings. The appellant was of the opinion that the required procedures stated in section 129(1), read with section 130(3), should include sequestration proceedings since the debt in this case, which was the subject of the sequestration application, arose from credit agreements to which the National Credit Act applies.

2 2 The court's decision

The court decided that sequestration proceedings are not the kind of proceedings to which section 129(1)(b) of the National Credit Act refers. It also stated that section 130(3) should not be read in isolation, since such an isolated interpretation may confirm the meaning which the appellant contends for. It further said that sections 129–133 of the National Credit Act deal with debt enforcement and that section 130(3) should be interpreted within that context. The court referred to and accepted the conclusions made in the *Investec Bank v Mutemeri*, where it was concluded that an order for the sequestration of a debtor's estate does not constitute an order for the enforcement of the sequestrating creditor's claim, as sequestration proceedings may be instituted without the debt being due and therefore sequestration does not resemble a legal proceeding to enforce an agreement. It also acknowledged the special nature of a sequestration order, by referring to the Supreme Court of Appeal's longstanding position, that a sequestration order is a "species of execution, affecting not only the rights of the two litigants but also of third parties, and involves the distribution of the insolvent's property to various creditors …" *(Naidoo v Absa Bank Limited supra* 499).

Consequently the court concluded that the scope of section 129(1), when read with section 130(3), could not be extended to include sequestration proceedings. Now that the nature of sequestration proceedings in the context of South Africa's credit legislation has been clarified by the Supreme Court of Appeal, it is submitted that future cases will not necessarily revolve around the nature of sequestration proceedings as such, in the context of the credit legislation, but related questions to what we have seen in *Ex Parte Ford* might arise.

3 *Ex Parte Ford* and *Naidoo v Absa Bank Limited* compared

3 1 Ex Parte Ford

In *Ex Parte Ford* three applicants applied for the voluntary surrender of their estates. The greater part of the applicants' debts was incurred due to credit agreements and overdraft facilities extended to them by financial institutions or money lenders. The applicants were completely over-indebted. The court observed that: "It was also striking on the papers how disproportionately high the amount of this type of debt was in each case in relation to the relatively modest incomes of the applicants" (*Ex Parte Ford supra* 378). The court questioned how it was possible for the applicants to obtain credit way beyond their ability to afford and that the credit providers could easily have

ascertained the applicants' ability to afford credit facilities if reasonable enquiries were made before granting the credit. It observed that the applicants' documents presented grounds for a strong suspicion of reckless credit extension. It further said that one of the objectives of the National Credit Act is to discourage reckless credit extension. It was argued on behalf of the applicants that the National Credit Act would only be applicable if court proceedings were intended to consider a credit agreement and that in this case there were no credit agreements considered before the court. The court disagreed with this observation and stated as follows:

> "The limitation of the provision [section 85 of the National Credit Act] to proceedings in which a credit agreement is being considered does not imply that the proceedings in question are restricted only to those in which the enforcement of a credit agreement is the issue [… and] where the over-indebtedness is almost exclusively related to debts arising from credit agreements, require the court to take those agreements and its effect into account."

The question which the court ultimately had to answer was which remedies were the most relevant to the situation of the applicants, namely those in terms of the National Credit Act or those measures available in terms of the insolvency law. It acknowledged that the legislature gave recognition that insolvency may arise from other misfortunes besides credit agreements and observed as follows:

> "Insolvents whose misfortune arises out of credit agreement transactions would be well advised, [….], to take into account the policy and objects of the NCA, and also the special remedies under that Act, before opting to apply for the surrender of their estates under the Insolvency Act, rather than availing of the provisions under the NCA" (*Ex Parte Ford supra* 382).

In the case of the three applicants, the court decided that the sophisticated measures available under the National Credit Act, such as "disallowance of the recovery of the debt if it arises from reckless credit, to staying the accrual of interest thereon and ranking liability", were not explored sufficiently.

It recognized the superiority of the National Credit Act in cases where debts had arisen mainly because of credit agreements. It thus took into account the special remedies available in terms of the National Credit Act, which should be considered, before applying for those available in terms of the Insolvency Act. The court further said that the applicants' failure to make use of the more sophisticated remedies available in terms of the National Credit Act has been explained inadequately and that the monetary advantage to creditors if voluntary surrender of estate is allowed is marginal. The application for voluntary surrender was rejected.

Ex Parte Ford, however, should be distinguished from the decision in *Naidoo v Absa Bank Limited* as the question before the court differed. In *Ex Parte Ford* the question was whether voluntary surrender of the applicants' estate was the appropriate remedy as almost all of the applicants' debts arose from credit agreements as defined by the National Credit Act. In *Naidoo v Absa Bank* Limited the question was whether the respondent first had to comply with the procedure which should be followed as stipulated in section 129(1) before it could apply for sequestration proceedings and

whether sequestration proceedings fall within the ambit of "any proceedings" as stipulated in section 130(3)(a) of the National Credit Act.

3 2 Differences between the two cases

Firstly, *Ex Parte Ford* was dealing with section 85 of the National Credit Act, which can be found in chapter 4 of the Act. It provides for the position regarding over-indebtedness and reckless credit. Secondly, no successful sequestration order had been made as the question was which of the remedies, either those in terms of the Insolvency Act or those available in terms of the National Credit Act, were the relevant ones for the applicants. The court acknowledged in this case that insolvency might arise from other misfortunes and not only from over-indebtedness arising from credit agreements. In this case, however, the over-indebtedness arose mostly from credit agreements. It was emphasized that the primary object of the machinery of voluntary surrender was not to relief-harassed debtors. Both the Insolvency Act and the National Credit Act intended "not to deprive the creditors of their claims but merely to regulate the manner and extent of their payment" (*Nel NO v Body Corporate of the Seaways Building* 1996 (1) SA 131 (A) 138E).

In *Naidoo v Absa Bank Limited*, on the other hand, a successful sequestration order was already obtained in the Durban High Court. The Supreme Court of Appeal had to determine whether the sequestration order was correctly awarded if the required procedures stated in section 129(1) read with section 130(3)(a) of the National Credit Act, which needed to be complied with before a debt could be enforced, could also be interpreted to include insolvency proceedings. As mentioned above the court decided that the sequestration proceedings were not debt-enforcement proceedings and therefore did not have to comply with the required procedure as laid down by section 129(1) of the National Credit Act. The appellant was also unsuccessful with his argument regarding section 130(3)(a) of the National Credit Act and the court stated that section 130(3) "must be interpreted in the context of that part of the Chapter within which it is situated – not in isolation and outside of its context" (*Naidoo v Absa Bank Limited supra* 500). The court felt that the language of section 130(3)(a) did not extend the scope of section 129(1) and therefore sequestration proceedings did not fall within the ambit of the sections if read together.

4 Applying the rules of interpretation of statutes to the decision in *Naidoo v Absa Bank Limited*

> "The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court 'must promote the spirit, purport and objects of the Bill of Rights' when interpreting any legislation. That is the command of section 39(2)."

These were the words of Ncgobo J (as he then was) in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* ((2004) 7 BCLR 687). When the comprehensive scope of the National Credit Act is considered, the question arises whether the court in *Naidoo v Absa Bank* gave the correct interpretation to section 129(1), read with section 130(3) of the National

Credit Act. Over the years comprehensive principles regarding the interpretation of statutes have been developed by the courts. An often quoted dictum made by Innes CJ in *Dadoo Ltd v Krugersdorp Municipal Council* (1920 AD) reflects the South African courts' position when it gets to the interpretation of statutes. The *dictum* made by the court states as follows:

> "Speaking generally, every statute embodies some policy or is designed to carry out some object. When the language employed admits of doubt, it falls to be interpreted by the Court according to recognized rules of construction, paying regard, in the first place, to the ordinary meaning of the words used, but departing from such meaning under certain circumstances, if satisfied that such departure would give effect to the policy and object contemplated. I do not pause to discuss the question of the extent to which a departure from the ordinary meaning of the language is justified, because the construction of the statutory clauses before us is not in controversy. They are plain and unambiguous. But there must, of course, be a limit to such departure. *A Judge has authority to interpret, but not to legislate*, *and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable*, in order to give effect to what he may think to be the policy or object of the particular measure" (*Dadoo Ltd v Krugersdorp Municipal Council supra* 543 (author's own emphasis)).

This famous dictum has been referred to in various cases such as *Standard Bank Investment Corporation v The Competition Commission; Liberty Life Association of Africa Ltd v Competition Commission* (2000 (2) SA 797 (SCA)) which was dealing with the interpretation of certain sections in the Competition Act 89 of 1998 (253–254), *SA Airways (Pty) Ltd v Aviation Union of SA* ([2011] 3 All SA 72 (SCA) 81) which was dealing with the interpretation of section 197 of the Labour Relations Act 66 of 1995. In *SA Airways (Pty) Ltd v Aviation Union of SA* (*supra* 81) the court said that by quoting the dictum from *Dadoo Ltd v Krugersdorp Municipal Council*, the Supreme Court of Appeal "stressed the limits of judicial interpretation and held that to do otherwise would be to fail to respect the separation of powers and to usurp the function of the legislator". The court went on to say that in its view "the advent of the Constitution has not changed this fundamental principle" (*SA Airways (Pty) Ltd v Aviation Union of SA supra* 81), thus referring to the *dictum* in *Dadoo Ltd v Krugersdorp Municipal Council*.

When considering this principle, the question arises whether the court in *Naidoo v Absa Bank Limited* gave sufficient consideration to the interpretation principles as laid down in various judgments when it gave its interpretation of section 129(1), read with section 130(3)(a) of the National Credit Act. By taking into consideration the established principles regarding interpretation of statutes, it has to be asked whether the decision by the court reflects the intention of the legislature when enacting the National Credit Act. One of the purposes of the National Credit Act as stated in section 3(h) is to provide for "a consistent and accessible system of consensual resolution of disputes arising from credit agreements". In *Naidoo v Absa Bank Limited*, even though there was an application for sequestration of an estate, the court had to look at the credit agreements between the parties since the debts in question (and the respondent's reason for applying for sequestration) arose mainly from credit agreements. The fact that the respondent went as far as applying for the sequestration of the appellant's

estate, makes it reasonable to assume that the respondent might have requested compliance with the credit agreement first; when there was failure to make payment and no compliance by the appellant, it decided to proceed with sequestration proceedings due to the non-payment of the debts which arose from the credit agreements. Sequestration proceedings might not have been instituted if there was compliance with the terms of the credit agreements, namely by making payments as agreed in terms of the agreement. If a dispute due to the default was the precursor of the sequestration proceedings, the procedures provided for in the National Credit Act would have been more appropriate to the position.

Even though South African law recognizes the *sui generis* nature of sequestration proceedings, it is submitted that this alone should not be a reason to keep sequestration proceedings out of the ambit of "any proceedings" as meant in section 130(3)(a) of the National Credit Act, if the legislature intended for it to be covered. It is trite that the purpose of sequestration proceedings is not to enforce a creditor's claim, despite this being one of the motives of the creditor *(*see *eg*, *Collet v Priest* 1931 AD 290; *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd* 1976 (2) SA 856; and *WP Koöperatief Bpk v Louw* 1995 (4) SA 978 (C)). Sequestration proceedings have already in 1931 been placed in an own category by the predecessor of the Supreme Court of Appeal, the Appellate Division. In *Collett v Priest* the court had to decide whether to allow an appeal against a sequestration order. The relevant legislation at that time stated that appeals were only allowed in a "civil suit". Therefore the court had to determine what qualified as a civil suit. The court held that a civil suit constituted "proceedings in which one party sues for or claims something from another and that no proceeding which lacks this feature, such as sequestration proceedings, […] can be properly described as a "suit or action" or as a "suit …" (*Collet v Priest supra* 131). It further stated that "sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent" (*Collet v Priest supra* 299). It was thus decided that sequestration proceedings as such did not qualify as a "civil suit".

By simply giving the words "any proceedings" in section 130(3)(a) its ordinary meaning, it seems that the legislature intended that the National Credit Act should apply to all proceedings commenced in a court of which credit agreements are the cause. It is submitted that sequestration proceedings, notwithstanding the fact that it does not qualify as debt enforcement proceedings, should fall within the ambit of "any proceedings" as meant by section 130(3)(a) of the National Credit Act. The following are provided as reasons for this observation: only because the concept of "any proceedings" is found in the chapter of the National Credit Act which deals with debt-enforcement procedures, does not necessarily mean that it has to be interpreted within that chapter only. Such a narrow interpretation would obviously exclude sequestration proceedings as such proceedings are not debt enforcement proceedings. It is, however, submitted that a wider interpretation is possible if the words "any proceedings" would have been interpreted not only within the chapter of the National Credit Act within which it can be found, but also within the context of the wider subject-matter

of the National Credit Act, namely the regulation of credit and credit agreements. If this wider subject-matter would have been considered when the words "any proceedings" were interpreted, then the sequestration proceedings in *Naidoo v Absa Bank Limited* would have fallen within its scope as the debt, which was the main reason for the application for sequestration proceedings, arose mainly from credit agreements. Judge Ncgobo (as he then was) made the following observation in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (*supra* 725), where he said: "The emerging trend in statutory construction is to have regard to the context in which words occur, even where the words to be construed are clear and unambiguous." The words "any proceedings" are clear and unambiguous and if interpreted within the wider context of credit agreements instead of debt-enforcement proceedings only, then sequestration proceedings would fall within its scope. In *Thoroughbred Breeders' Association v Price Waterhouse* ((2001) 4 SA 551 (SCA) 600) the court said:

> "The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning."

This observation by the Supreme Court of Appeal may be used to support the interpretation contended for by the author, namely that section 129(1), read with section 130(3), could have been interpreted within the context of the wider subject-matter, which is credit agreements and not only within the context of debt enforcement.

5 Final comments and concluding remarks

A few observations can be made against the decision in *Naidoo v Absa Bank* Limited as the judgment will have implications for both credit providers and consumers alike, who are parties to credit agreements and who may face a similar position in future. Firstly, it is submitted that debtors will not only find it difficult to apply for voluntary sequestration of their estates where the underlying *causa* of the debt is a credit agreement because of the availability of the measures in terms of the National Credit Act (see *Ex Parte Ford* supra), but since the judgment in *Naidoo v Absa Bank Limited* it might also be difficult for debtors to prevent their creditors from using the mechanisms available under insolvency law in instances where credit agreements are the underlying *causa* for their debts. This consequently places the creditor in a more favourable position and the creditor does not necessarily have to rely on the remedies available in terms of the National Credit Act, even though credit agreements are the reasons for the existence of the debt. For as long as a dispute under the credit agreement is not the matter before the court, the creditor may make use of sequestration proceedings. It is submitted that creditors may thus be successful with sequestration proceedings, even though the greater part of their debtors' debt arose from credit agreements, if they rely on the decision in Naidoo v Absa Bank Limited.

Secondly, another factor which may be of importance when considering the court's decision is the overall extent to which South Africans make use of credit. Many South Africans make use of credit (agreements) to acquire

essential basic goods and services. While the National Credit Act is generally designed to benefit both creditors (credit provider) and debtors (consumers), its overall focus is on the consumer. The consumer is protected from irresponsible credit-granting by a credit provider since one of the aims of the National Credit Act is "to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting". The consumer is allowed to be given time by means of the processes provided in the National Credit Act to correct any default. Credit providers on the other hand have now a structured statutory process to follow when a consumer is in default in regard to a credit agreement. This provides the credit provider with certainty in regard to what have to be done when there is default on the part of the consumer and may even exclude expensive legal processes. With the position after *Naidoo v Absa Bank Limited*, a dispute might arise between a credit provider and a consumer because of defaults on the side of the consumer and the credit provider may possibly try to circumvent the National Credit Act by applying for sequestration of the consumer's estate. This can be done by arguing that it is not the credit agreement that is argued before the court but that the credit provider's intention is to set the mechanisms of the insolvency law in motion. Such a circumvention of the National Credit Act by the credit provider in applying for sequestration of the debtor's estate, in cases where the greater part of debts arose from credit agreements, could not have been the intention of the legislature when drafting the National Credit Act. Since many people within South Africa are credit consumers, it is submitted that the court's decision would have been more beneficial if sequestration proceedings would have been included in the meaning of "any proceedings" as stipulated by section 130(3)(a) of the National Credit Act. Such an interpretation would be beneficial as fewer people's estates would be sequestrated, especially if the greater part of their debts arose from credit agreements. Even though the credit agreement might not be the issue before the court, if an application is made for sequestration and if the greater part of the debt arose from a credit agreement, the court should consider the credit agreement in question. This consequently means that the court will have to give consideration to the sophisticated mechanisms in the National Credit Act. If sequestration proceedings would have been included within the ambit of "all proceedings", as stated in section 130(3)(a) of the National Credit Act, it might have had a positive impact on the number of consumer insolvencies if it is kept in mind that consumers mostly become indebted by using credit agreements. Instead consumers would have been assisted in terms of the mechanisms available under the National Credit Act, such as debt restructuring.

Lastly, one of the purposes of the National Credit Act is indicated as "providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements;" *(*see the Preamble of the National Credit Act). This judgment might not improve the situation surrounding consumer insolvencies as credit providers who may experience the smallest problems with "consensual resolution" of disputes relating to credit agreements, might still prefer sequestration proceedings. It is submitted with respect, that with the court's interpretation of section 129(1), read with 130(3)(a), it shifted the focus from the core reason why the National Credit

Act could have been applied, which is the existence of credit agreements between the appellant and the respondent.

Today, South Africa has sophisticated credit legislation in place which must be taken into account when dealing with defaults by a consumer who is a party to a credit agreement which falls under the National Credit Act, even though such an agreement is not the matter before the court. Sequestration proceedings should only be allowed when the sophisticated measures available under the National Credit Act fail. It is, with respect, submitted that the court, in its interpretation of section 130(3)(a) of the National Credit Act, should have given more consideration to the wider subject-matter of the Act and its rationale, namely the regulation of credit agreements, and not only the narrow subject-matter, which is the enforcement of a debt. When it had to decide whether to allow the appeal or not, the court should have taken into consideration that a default in terms of the credit agreements was perhaps the key reason why the respondent applied for sequestration of the appellant's estate.

Sasha-Lee Afrika
Doctoral Candidate, Stellenbosch University