DEBT COUNSELLING V DEBT ENFORCEMENT: SOME PROCEDURAL QUESTIONS ANSWERED

BMW Financial Services (SA) (Pty) Ltd v Donkin 2009 6 SA 63 (KZD)

1 Introduction

The National Credit Act 34 of 2005 (hereinafter the "NCA" or "Act") is an innovative but challenging piece of legislation. It provides for various novel approaches to debt enforcement in respect of credit agreements and has introduced debt-relief measures in respect of over-indebtedness and reckless credit that are new to South African consumer credit legislation. It is thus inevitable that in applying the provisions of the Act various issues will arise that will require interpretation and, therefore, intense scrutiny. In the recent judgment of *BMW Financial Services (SA) (Pty) Ltd v Donkin*, Wallis J was required to scrutinize various aspects relating to debt review and debt enforcement in order to decide the consumer's fate as influenced by the NCA (66; and see also s 130(1)(a)).

2 Facts and judgment

In September 2006 the plaintiff and defendant entered into an instalment sale agreement in respect of a BMW 120d motor vehicle. The total commitment over a five-year period was R385 791.30 and was payable in 59 instalments of R4 656.01 and a balloon payment of R110 086.40. The defendant's payments were irregular from the outset, but from September 2007 she fell steadily further into arrears and only made eight payments after the said date, some of only a minimal amount. On 7 August 2008 the plaintiff dispatched a letter of demand to the defendant by registered post, drawing the her attention to the arrears of R37 243.73 and requiring her to remedy the default. The notice was combined with a section 129(1)(a) notice and stated that unless she responded within ten days from delivery of the notice, the plaintiff would proceed to enforce the agreement. Section 129(1) provides as follows:

> "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."

Since the defendant did not respond to the notice, the plaintiff cancelled the agreement on 11 September 2008 and summons was issued on 25 November 2008. Wallis J remarked that the issuing of the summons commenced the proceedings in the present action. The plaintiff sought orders for delivery of the vehicle; confirmation of cancellation; payment of the difference between the outstanding amount and the greater of the vehicle's market value or selling price; as well as interest and costs (66).

The matter was opposed, summary judgment was sought and refused whereafter the matter was placed on the expedited roll. The plaintiff limited the case to an order for recovery of the vehicle and the parties agreed that the entitlement to such an order should be considered in view of certain facts raised by the defendant as the basis of her defence. The facts put forward by the defendant were that on 25 November 2008 she contacted a debt counsellor and provided him with information, namely her name and place of work, net income, living expenses, total debts and monthly repayments. The debt counsellor worked out that the defendant was approximately 60 percent over-indebted and explained the debt-review process whereafter the defendant made an appointment with the debt counsellor and expressed her willingness to subject herself to debt review. The appointment was scheduled for 4 December 2008 and the defendant was requested to submit relevant documentation at the planned meeting. At that meeting, Form 16 was completed and on approximately 18 December, the debt counsellor informed all credit providers and credit bureaux, by means of a Form 17.1, that the consumer had applied for debt review. Having received no response from credit providers, a further notice, confirming the defendant's over-indebtedness combined with a debt-restructuring proposal, was forwarded to credit providers on 3 March 2009. Again there was no response. On 27 March 2009, the debt counsellor set the matter down at the Durban Magistrate's Court for a debt restructuring hearing on 25 May 2009. The application for debt restructuring was subsequently postponed to 27 July 2009 (67).

Even though the plaintiff agreed to the facts as recorded in order to decide the issues set out below, the plaintiff reserved the right to challenge their correctness in future proceedings. The court was requested to deal with the defences as a matter of law in order to expedite the proceedings and to consider the question of the effect of cancellation of a credit agreement on the defendant's right to retain the vehicle. The matter was therefore argued on that basis that, in terms of rule 33(4), the question of the right to recovery of the vehicle pursuant to cancellation despite the defendant's financial position being referred to a debt counsellor for debt review and the right to invoke section 85, were separated from the remaining issues and all further proceedings were stayed until this matter had been decided (67).

The parties formulated the questions for consideration by the court as follows (67):

> "(1) Whether on the agreed facts the defendant made application for debt review as contemplated by s 86(1), read together with reg 24 of the regulations under the NCA, prior to institution of the action.
> (2) Whether in terms of s 130(3)(c)(i) the court is entitled to hear the matter, if the answer to (1) above is in the affirmative, even though the plaintiff proceeded to cancel the agreement on or about 12 September 2008.
> (3) Whether in terms of s 85 of the NCA, should the court make a decision that the defendant is over-indebted and after evidence exercise its discretion to refer the matter to a debt counsellor for a recommendation in terms of s 85(a), or in terms of s 85(b) declare the defendant to be over-indebted as determined in accordance with that part of the NCA and make any order contemplated in s 87 to relieve the consumer's over-indebtedness, that order would have the effect of reinstating the agreement for purposes of a restructuring order as contemplated by s 87, or whether that recommendation or order in terms of s 87 would relate only to any potential damages claims after the vehicle has been sold.
> (4) In the premises whether the defendant can avoid an order confirming cancellation of the agreement and return of the vehicle by reliance on s 85 of the Act."

The court indicated that even though the plaintiff's right to termination in the event of default by the defendant arises from a provision of the credit agreement, the right is qualified by section 123(1)(a) which allows termination only in accordance with the said section. The court quoted section 123(3) which provides as follows (68):

> "If a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6 to enforce and terminate that agreement."

The court remarked that Part C of Chapter 6 is headed "Debt enforcement by repossession or judgment" and quoted the whole of section 129(1). The defendant contended that she had applied for debt review as envisaged in section 86(1) prior to the commencement of proceedings and relied (68-69) on section 130(3)(c)(i) which provides as follows:

> "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) …
> (b) …
> (c) … the credit provider has not approached the court –
> (i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; ..."

The defendant contended that the plaintiff had approached the court during the time that the matter was before a debt counsellor, which was prohibited. The plaintiff responded primarily that the plaintiff's claim was not subject to the debt-review proceedings as a result of the provisions of section 86(2) of the Act, namely:

> "An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that

application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement."

The plaintiff's contention was based, firstly, on the argument that the steps contemplated in section 129 were taken once the section 129 notice had been provided and that it did not include the "commencement of legal proceedings". Secondly, it was argued that the application to the debt counsellor was only made on 4 December 2008, that is, when the Form 16 was duly completed. On either of these contentions, it was submitted that the agreement was excluded from the debt-review procedure (68 and 69).

The court stated that sections 86(2) and 130(3)(c)(i) are intended to ensure that there are no overlaps between the debt-review and debt-enforcement procedures. It observed that if a credit provider commences enforcement proceedings he first provides a section 129 notice, inviting a consumer to refer the matter to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction in order to attempt to resolve a dispute or reach an agreement as to a plan to enable the consumer to bring payments up to date. Thus, the court remarked, it is a consensual process mediated by the person to whom the agreement has been referred. The court indicated that this process is entirely distinct from the section 86 debt-review procedure, which is based on a consumer's over-indebtedness. Wallis J remarked that whilst a defaulting consumer may be over-indebted and a reference to a debt counsellor under section 129(1)(a) could lead to an agreement that a debt review is desired, it will not necessarily be the case. It could be that a consumer is not in financial distress and only wishes to resolve issues pertaining to one agreement specifically, whereas the debt-review process under section 86 presupposes that the consumer regards him- or herself as being over-indebted and wishes to find a solution to his entire financial position. The latter can be arrived at by way of the credit providers accepting the debt counsellor's proposal or through a court order from the Magistrate's Court. Wallis J indicated that the difference between a consumer approaching a debt counsellor subsequent to a section 129 notice and an application under section 86(1) is that the former does not result in a debt review in terms of section 86 (69 and 70).

He remarked that difficulties could arise where one debt counsellor (or other entity mentioned in section 129(1)) is dealing with an agreement and another debt counsellor is approached to conduct a debt review, which will include the agreement under consideration by the first debt counsellor. He stated that the Act does not provide for a mechanism to reconcile the two processes and does not afford priority to either which could result in differing outcomes. Wallis J therefore inferred that the legislature sought to exclude such possible differing outcomes through the reciprocal provisions of sections 86(2) and 130(3)(c)(i). In terms of section 86(2) a credit provider who has taken steps in terms of section 129(1)(a) to enforce the credit agreement would be excluded from any debt-review proceedings. Section 130(3)(c)(i) in turn provides that a court may not determine the matter once the consumer is before a debt counsellor. Thus, according to Wallis J, the prior process takes precedence over the latter (70).

The court remarked that one might think that the section 130(3)(c)(i) situation is restricted to a reference to a debt counsellor in lieu of a section 129(1)(a) notice, but that such an approach is too narrow. The court found that section 130(3)(c)(i) encompasses an application under section 86(1) and a response to a section 129(1)(a) notice on the ordinary meaning of the language used in section 130(3)(c)(i), since in both scenarios the matter is "before a debt counsellor". According to the court, the narrow construction would create the impossible situation that where a debt review is under way and an impatient credit provider proceeds to enforce the agreement, where the consumer did not respond to the section 129(1)(a) notice, the enforcement proceedings may proceed. The court remarked that such confusion would be aggravated by the fact that section 86(2) would not apply in these circumstances and that the particular agreement and accompanying debt would remain part of the debt-review proceedings. It held that such a narrow construction would cause inconsistency between a court-ordered arrangement and a judgment on the other hand. The court found the inconsistency, which does not arise under the broader construction, to be undesirable and therefore favoured the broader construction (70 and 71).

The court proceeded to answer the first two questions relevant to the matter. The defendant contended that the matter was before the debt counsellor on 25 November 2008 and that section 86(2) only comes into operation, thereby excluding a possible debt-review process, where both a section 129(1)(a) notice was provided *and* legal proceedings have commenced (own emphasis). The court remarked that even though there are arguments both ways, it accepted the contentions of the defendant without determining their correctness on the basis of the answer to the first question. Wallis J indicated that the answer to the first question also relieved him of the duty to resolve the possible problematic situation where an application for debt review and commencement of legal proceedings occur at the same time (71).

In considering the question whether the defendant actually applied for debt review, the court referred to section 86(1) which states that an application to a debt counsellor must be made "in the prescribed manner and form". The court subsequently considered regulation 24. The regulation sets out the documentation and information that a consumer who wishes to apply to a debt counsellor for a declaration of over-indebtedness should provide to a debt counsellor. Regulation 24 refers to Form 16, which the consumer should submit to the debt counsellor. However, the court found that Form 16 merely sets out the required information that a consumer should provide to a debt counsellor according to the regulation. A consumer is required to attach to Form 16 a copy of his salary slip and copies of all outstanding debt due (72).

Wallis J proceeded to list the consequences of debt review, namely that the consumer is listed as having applied as such at a credit bureau, the debt counsellor is empowered to investigate the consumer's affairs, the consumer may not enter into any further credit agreements until certain events have occurred (s 88(1)) and that court proceedings are precluded until completion of the process (s 130(3)(c)(i)). He remarked that a limitation is placed on the constitutional right of access to courts and that it is therefore important to

determine the exact moment that the debt-review process commences. Wallis J indicated that ordinarily a Form 16 would suffice, but where such form was omitted, regulation 24 sets out the information that should be provided to a debt counsellor. This information is important to provide the debt counsellor with a clear record in order to prepare and deliver Form 17.1 to credit providers within five days after receiving an application. The court held that the existence of such a record would ordinarily enable the date of the application for debt review to be established (73).

Wallis J cautioned that if information as envisaged in regulation 24(1) is provided without a Form 16 being completed there would be an increased risk of such information falling short of the requirements. He indicated that this raises the question as to the effect of non-compliance. The defendant, however, submitted that section 86(1), read together with regulation 24 requirements, is not strictly peremptory, but rather requires substantial compliance. However, the court, accepting for present purposes that something less than completion of Form 16 or provision of all the information required under regulation 24 might be acceptable, found that the defendant fell short of sufficient compliance. Essential information such as the consumer's identity number, addresses, phone numbers, income, living expenses, debts and information relating to her creditors were not provided. Without this information, the debt counsellor would not be in a position to furnish credit providers and credit bureaux with proper details relating to the identity of the consumer as required by law (73 and 74). Wallis J remarked that it was also not surprising that credit providers and credit bureaux were only informed of the application after the consumer had met with the debt counsellor on 4 December 2008 when Form 16 was completed. Even thought the consumer indicated that she was willing to subject herself to debt review prior to this date, what is required by regulation 24(b)(vi) is a "declaration and undertaking to commit to the debt restructuring". Furthermore, no consent to a credit bureau check in terms of regulation 24(b)(vii) and no confirmation of the correctness of the information provided in terms of regulation 24(b)(viii) were provided to the debt counsellor prior to the actual meeting. In the court's opinion all of these requirements are vitally important to commence debt-review proceedings (74).

Wallis J thus found that the communication between the defendant and the debt counsellor on 25 November 2008 did not amount to an application for debt review. The court's conclusion was reinforced by the fact that Form 16 was only completed on 4 December 2008, which would have been redundant had she already applied for debt review. Therefore it held that the defendant did not apply for debt review prior to commencement of the present action and consequently section 86(2) was applicable, barring the defendant from applying for debt review. The plaintiff was therefore excluded from the debt review process as instituted on 4 December 2008. As a result of the negative answer to the first question the court indicated that the second question fell away (74).

The court proceeded to consider the possibility of a duly-cancelled credit agreement being reinstated as a necessary consequence of the court's powers under section 85 read together with section 86(7). It remarked that if the cancellation cannot be reversed, the vehicle should be returned as the

plaintiff is the owner thereof and the defendant has no lawful claim thereto (74 and 75).

Section 85 provides that:

> "Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may –
> (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or
> (b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness."

The court accepted that the present action constituted "proceedings in which a credit agreement is being considered" and that "it is alleged that the consumer under a credit agreement is over-indebted", suffice to entitle the defendant to invoke section 85. However, it indicated that section 85 would not assist the defendant in resisting a claim for the return of the vehicle if there was no possibility under the relief in terms of the section, that a cancelled agreement may be reinstated. If the agreement was lawfully cancelled and no possibility of reinstatement existed, the consumer would have no right to the vehicle as the plaintiff is the lawful owner and the defendant had no right to retain it. According to Wallis J all the court needed to decide at this point was whether reinstatement is "a notionally feasible outcome of the defendant's reliance upon s 85".

Before further considering section 85, the court referred to sections 129(3) and 129(4)(c). Section 129(3) provides as follows:

> "Subject to subsection (4), a consumer may –
> (a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and
> (b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order."

The court interpreted the quoted section to refer to the "right of cancellation" by stating that it provides expressly for a consumer in arrears to prevent the credit provider from exercising the right of cancellation by paying arrears, default charges and reasonable costs of enforcing the agreement. However, the court then considered section 129(4)(c) and indicated that the consumer's right of reinstatement falls away once the agreement has been lawfully cancelled. Section 129(4) provides as follows:

> "A consumer may not re-instate a credit agreement after –
> (a) …
> (b) …
> (c) the termination thereof in accordance with section 123."

As it was common cause that the credit agreement was lawfully cancelled on 11 September 2008 the court found (76) that the consumer had lost the

right to reinstate the agreement by making payments as provided for in terms of section 129(3).

However, it was argued in defence that the *court* has the power to re-instate a cancelled agreement by utilizing the powers under section 85 (75) read together with the methods (or orders) of rearrangement contained in section 86(7)(c)(ii). It was accepted that the NCA does not expressly provide for reinstatement by a court, but the defendant argued that it is a possible consequence of the court's powers under the sections mentioned. It was submitted that it is possible for a court to make an order that will result in the agreement being reinstated, which in turn will result in the restoration of the defendant's right of possession. The defendant consequently argued that the plaintiff was not entitled to a final order for return of the vehicle as the possibility existed that the court might reinstate her right to possession, and until the court had determined the issues raised by virtue of section 85 she was entitled to possession of the vehicle. The court agreed that such a stance was permissible as *in casu* final relief was sought, but mentioned that the situation might have been different if the plaintiff had sought an interim order for possession of the vehicle pending the final outcome of the trial. The court then considered whether the defendant was correct in contending that reinstatement of a cancelled agreement was a possible outcome of her resort to section 85 (75-76).

The defendant focused on and quoted the court's powers under section 85(b) read together with section 86(7)(c) (77). The latter section states that if a consumer is found to be over-indebted the debt counsellor may make a proposal to the Magistrate's Court recommending that the court should make either or both of the orders set out in section 86(7)(c)(i), dealing with reckless credit specifically, and section 86(7)(c)(ii) which provides as follows:

> "One or more of the consumer's obligations [may] be re-arranged by –
> (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."

The defendant contended that the orders, or methods of rearrangement, mentioned under section 86(7) would only be feasible if the credit agreement stayed in force and that it is therefore necessarily implicit in the aforesaid provisions that if a credit agreement was cancelled, such agreement should be reinstated. Thus, if the contention as put forward by the defendant was correct, and circumstances as *in casu* were present, the consumer would be entitled to retain the goods, or if the credit provider had already repossessed the goods, the credit provider would be obliged to return same to the consumer. The court agreed that the only basis for a possible entitlement to retain the vehicle rested on the possibility that section 85 provides for the setting aside of the cancellation of the agreement, thereby allowing the re-instatement thereof (77).

The court recognized that the wording of section 86(7)(c)(ii) is particularly attuned to instalment sale agreements, leases of movable property or other agreements whereby the consumer commits himself to making regular payments. However, the implication of the defendant's contention is that only these situations or agreements are covered by the section. Wallis J therefore rejected the defendant's argument (77-78). The court held that the proposed construction was too narrow and that it would limit the debt-review process unduly contrary to the purposes thereof and the broader purposes of the NCA itself (the purposes of the NCA are set out in s 3).

The court further held that the NCA emphasizes the eventual satisfaction of debts at some point in time. If debt restructuring is limited, as suggested by the defendant, to circumstances where there are ongoing obligations, a great number of debts that could have attributed to the over-indebtedness could not be included in the debt rearrangement. The court mentioned overdrafts, overdue credit cards and clothing accounts as some of the obligations that do not necessarily involve payments at regular intervals. It indicated that if these debts were excluded it would render the whole debt-review process nugatory, which is contrary to the intention of the NCA (78).

The court found that once a consumer is over-indebted, all debts should be included in the debt-review process irrespective of whether the debt is due as a lump sum, as periodic obligations or within a reasonable period from demand (78-79). Wallis J also referred to section 79(1), defining the concept of over-indebtedness, which reinforces the court's view and provides that a consumer is over-indebted if on the available information it appears that the consumer is or will be unable to satisfy in a timely manner "all the obligations under all the credit agreements to which the consumer is a party". Wallis J remarked that the notion that debt review is limited to certain types of indebtedness alone is therefore dispelled and further pointed out that it is clear from regulation 24 and Form 16 that their purpose is to obtain a comprehensive view of the consumer's means and obligations (79).

Wallis J indicated that when considering a consumer's financial position, a debt counsellor or court should take into consideration the consumer's financial position at the time of the investigation (79). The investigation is therefore not concerned with past obligations. Thus, if an agreement was cancelled prior to the commencement of the debt-review procedure, the obligation existing at the time of the enquiry and not the one that existed whilst the agreement was still in force should be considered (80).

The court recognized the possibility that credit providers may cancel agreements and then seek possession of goods rather than allow the goods to be subject to the debt-review procedure, but stated that although the possibility of these consequences is inevitable in complex legislation, they may in practice be of less importance than they might appear at first glance. The court stated that one would expect that in many instances of debt rearrangement an underlying agreement would be terminated and goods restored to credit providers in return for payment of a diminished surrender value. Wallis J further remarked that debt rearrangement is not one-sided and that a credit provider is entitled to terminate the debt review under section 86(10) and may oppose a rearrangement by the court under section 87(1). The court found that the latter does not provide a basis for the

inference that debt review and rearrangement may involve the compulsory reinstatement of a cancelled agreement (80).

In conclusion, the court held that the argument that a credit agreement may be reinstated as a consequence of the court's powers under section 85 read together with section 86(7) cannot be sustained. The Act does not expressly provide for this possibility and all textual and contextual indications point in the opposite direction. The court therefore found that the defendant's right to possession was terminated by cancellation and that it cannot be restored through the mechanisms of the NCA. It consequently decided, in light of the third question before the court, that an order under section 85 cannot have the effect of reinstating a lawfully cancelled agreement under debt rearrangement and can only relate to damages and other claims pursuant to the repossession and sale of the goods (80).

The court confirmed the cancellation of the agreement between the parties, ordered the defendant to restore and deliver the vehicle to the plaintiff and made a cost order against the defendant (81).

3 Legal issues

From the facts it appears that a number of issues, not limited to the questions formulated by the parties, emerged in this case, namely:

(a) When does debt review in terms of section 86 of the Act commence?

(b) What is the scope of a section 129(1)(a) notice specifically with reference to the provision that a consumer may approach a debt counsellor?

(c) Does the bar contained in section 86(2) against an application for debt review come into effect once a section 129(1)(a) notice is delivered or at a later stage, namely when debt-enforcement proceedings are actually commenced?

(d) If the correct position is that the section 86(2) bar only comes into effect once debt enforcement commences, when exactly does debt enforcement commence for purposes of the Act?

(e) Given the prominence afforded to section 130(3)(c)(i) by Wallis J, what, if any, interaction exists between sections 86(2) and 130(3)(c)(i)?

(f) If a court exercises its discretion in terms of section 85 in favour of the consumer with the effect that the consumer is referred to debt review and eventually afforded debt relief in the form of debt restructuring, does such an order have the effect of reinstating the agreement for the purposes of a debt-restructuring order?

(g) Can a consumer ward off an order confirming cancellation of the agreement and return of the vehicle by reliance on section 85 of the Act?

The court's decision in the *Donkin* case is discussed with reference to the above issues and certain submissions are subsequently made.

4 Discussion

4 1 Commencement of debt review

The question as to when debt review commences is significant for a variety of reasons. Once a debt review is commenced, it creates a moratorium on the enforcement of the credit-agreement debt (s 88(3)).The over-indebted consumer is prohibited from incurring any further credit-agreement debt (s 88(1)). It is also necessary to determine the date on which an application for debt review is made for purposes of calculating the period after which such review may be terminated (s 86(10)). Significantly, where a debt-review application has already been made by the time that enforcement commences the provisions of section 86(2) will not apply.

From the perspective of both credit provider and consumer it is thus important to determine whether an "attempt" by a consumer to apply for debt review indeed meets the basic requirements set out in section 86 read together with regulation 24 in order for it to be viewed as an effective application for debt review that would trigger the consequences referred to above. Being able to establish whether a proper application for debt review indeed exists will contribute to legal certainty as a consumer will know the exact moment that the moratorium against enforcement will come into operation (which is the moment that the application for debt review is made).

It is thus agreed with Wallis J that at least the minimum information and documentation as indicated by him should be present to constitute an effective application for debt review for purposes of section 86.

However, it may be asked how a credit provider will be able to discover that a consumer has brought an abortive application for debt-review. In practice the credit provider will usually only become aware of the debt review application once he receives a Form 17.1 from the debt counsellor, which is supposed to be delivered within five business days after the application for debt review was made (reg 24(2)). It will thus generally only be on receipt of the Form 17.1 that a credit provider will be in a position to make enquiries to ascertain whether the consumer submitted the necessary information and documentation to the debt counsellor for purposes of applying for debt review. Should the minimum required information and documentation then be absent, it appears that the matter may be treated as if no application for debt review was made and it is submitted that a credit provider may then proceed with enforcement steps without first having to terminate the "debt review" in accordance with section 86(10).

4 2 Interpretation of section 86(2)

Wallis J's restrictive interpretation of the scope of the mandatory preliminary section 129(1)(a) notice as only allowing the consumer to consult with a debt counsellor for the purposes expressly stated in section 129(1)(a) and not as a " ticket" to debt review is in line with the *dicta* in various other cases (*Nedbank Ltd v Motaung,* unreported case no 2245/07; and *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D)). It should, however, be noted that the *Donkin* case was the first matter where the scope of

section 129(1)(a) was addressed at length. However, this view of section 129(1)(a), although it makes perfect sense when having regard to the express wording of the section, leaves one with a slight feeling of unease. Despite wide efforts at consumer education it is quite probable that there are still consumers who are unaware of the debt-review provisions of the NCA or specifically of their right to approach a debt counsellor voluntarily for debt review in terms of section 86 prior to delivery of a section 129(1)(a) notice. Consequently it will often be the delivery of the latter notice that will alert them to the possibility of approaching a debt counsellor. Where it then appears to the debt counsellor that the consumer is so seriously over-indebted that a comprehensive debt review is required and an individual debt-repayment proposal is not feasible, it may be asked what the position should be. Must the debt counsellor then inform the consumer that because a section 129(1)(a) notice has been delivered, debt-review is no longer competent but that if the consumer waits until legal proceedings are instituted, he or she will be able to access the debt review process again by alleging that he or she is over-indebted and requiring the court to exercise its discretion in terms of section 85 favourably by referring him or her to debt review? (See s 85(a) and (b).) Apart from being a costly procedure, it is submitted that it is most likely that the consumer's debt situation may have deteriorated even further by the time he or she is able to raise such over-indebtedness in court.

It may also be asked what procedure should be followed where a consumer consults a debt counsellor after receipt of a section 129(1)(a) notice. Section 130(1) only refers to the situation where the consumer does not respond to the section 129(1)(a) notice or responds by rejecting the proposals contained in it. Furthermore, the only section that sets out the procedural competencies of a debt counsellor is section 86 which provides for debt review – a process that is apparently not facilitated by receipt of a section 129(1)(a) notice.

It is crucial to obtain clarity on the interaction between section 129(1)(a) and section 86(2), if any, to determine whether delivery of a section 129(1)(a) notice indeed triggers the bar against debt review contained in section 86(2). It is clear that the interpretation of section 86(2) hinges on the interpretation of the words "steps contemplated in section 129 to enforce that agreement". If these words are interpreted to refer to the section 129(1)(a) notice and the narrow interpretation of such notice is favoured, it will have the effect that the section 129(1)(a) notice, apart from not *per se* facilitating debt review in terms of section 86, will in fact actively bar such review. If the broad interpretation of the section 129(1)(a) notice is favoured it will create the anomalous situation that such notice will effectively facilitate and bar an application for debt review.

However, the question is whether section 86(2) actually refers to section 129(1)(a) at all given that the words "section 129(1)(a)" are not specifically mentioned. Section 129 is entitled "Required procedures *before* debt enforcement" (authors' own emphasis). Section 129(1)(b) read together with section 130(1) actually makes it clear that a credit provider may only proceed with enforcement *inter alia* after delivery of a section 129(1)(a) notice to the consumer. This justifies the inference that section 86(2) most

likely refers to the enforcement steps mentioned in section 130. It is further submitted that the section 129(1)(a) notice, by allowing the consumer to approach a debt counsellor for resolving a dispute or developing and agreeing on a plan for debt repayment, actually serves to prevent enforcement should the consumer take up the proposals made in it.

An interpretation that section 86(2) refers to section 129(1)(a) has the further absurd result that it would preclude a specific credit agreement from inclusion in the debt-review process which is a comprehensive process intended to relate to all the consumer's credit-agreement debt (Coetzee *The Impact of the National Credit Act on Civil Procedural Aspects Relating to Debt Enforcement* (2010) LLM Dissertation at the University of Pretoria 86; and Van Loggerenberg, Dicker and Malan "Aspects of Debt Enforcement under the National Credit Act" 2008 *De Rebus* 40).

If the premises is accepted that the section 86(2) bar is triggered by the taking of steps to enforce the agreement, the next significant question is when these steps actually commence – is it on issuing of a summons or service thereof? It is submitted that a distinction should be made between "institution" of legal proceedings and "commencement" thereof, the latter being the term used in the NCA (s 129(1)(b)). It is submitted that although legal proceedings may be "instituted" by the issuing of summons, such proceedings for all practical purposes only "commence" once the summons is served on the consumer and the latter becomes aware of the proceedings instituted against him or her. Service of summons, as opposed to mere issuing of summons, has various significant effects, *inter alia*, that it crystallizes jurisdiction and interrupts the running of prescription. It also creates legal certainty, while it is possible that if commencement is equated to the issuing of a summons it may have the undesirable effect that a consumer, unaware that summons has been issued against him, may apply for debt review; the debt-review application will later be regarded as having been incompetent and thus be a waste of time and money for the already overburdened consumer.

It is thus submitted that an interpretation of section 86(2) in terms of which a consumer may still apply for debt review after delivery of a section 129(1)(a) notice but before service of summons is to be preferred.

It is submitted that in the unlikely event that the application for debt review coincides with the exact same moment as service of summons, the application for debt review should take precedence. However, where one of these events has apparently occurred before the other, although on the same day, it may be difficult to prove which procedure was the earlier. It may thus be more prudent to deal with such a situation on the basis that an application for debt review takes precedence if applied for on the same day as service of a summons to enforce the obligations under a specific credit agreement. Although it is acknowledged that the Act seeks to balance the interests of credit providers and consumers it is submitted that this approach, in terms of which the consumer is given the benefit of proceedings that coincide, is analogous to the position in civil proceedings where an appearance to defend and a request for default judgment is filed at court on the same day (Magistrate's Court rule 12). It will also promote legal certainty.

4 3 The significance of section 130(3)(c)(i)

According to Wallis J, the legislature sought to exclude the danger in the different outcomes that approaching a debt counsellor in terms of section 129(1)(a) and section 86(1) may have by means of the reciprocal provisions of sections 86(2) and 130(3)(c)(i).

Wallis J stated specifically that once the credit provider has taken steps under section 129(1)(a) to enforce an agreement, the consumer can no longer apply for debt review. As indicated, he then referred to section 130(3)(c)(i) which provides that a court may not determine a matter while the matter is before a debt counsellor and concluded that the latter section should be construed broadly, and that section 130(3)(c)(i) encompasses both the instance where a matter is before a debt counsellor pursuant to a notice in terms of section 129(1)(a) as well as pursuant to a section 86(1) application for debt review. In his opinion, a narrower construction would create an awkward situation where the debt-review process was "under way" and a credit provider proceeded to enforce the agreement.

However, it is submitted that section 129(1)(a) should be construed to refer only to the situation where a matter is before a debt counsellor pursuant to a section 129(1)(a) notice (which according to the interpretation of Wallis J in the *Donkin* case does not facilitate debt review). The reason for this submission is that the powers of the court when it is approached pursuant to a section 129(1)(a) notice differ markedly from its powers when it is approached during a pending debt review, as is evident from sections 130(4)(b) and (c) (Scholtz, Otto, Van Zyl, Van Heerden and Campbell *Guide to the National Credit Act* (2008) par 12.9.4.).

When a court is approached during proceedings pursuant to section 129(1)(a), that is, before the 10 business days after delivery of the notice have lapsed, it has no discretion: it must adjourn the matter and make an order setting out the steps to be completed by the credit provider before the matter may be resumed. It should further be noted that the other role players mentioned in section 129(1)(a), namely an alternative dispute resolution agent, consumer court or ombud with jurisdiction, is also mentioned in section 130(1)(a), which indicates that the legislature had a section 129(1)(a) situation in mind and not debt review.

However, when a court is approached during a pending debt review, it has a discretion in terms of section 130(4)(c) to adjourn the matter, pending a final determination of the debt-review proceedings, and to order the debt counsellor to report to the court and thereafter to make an order contemplated in section 85(b) (if the consumer is found to be over-indebted). Alternatively, where the credit agreement is the only agreement to which the consumer is a party, the court can order the debt counsellor to discontinue the debt-review proceedings and make an order contemplated in section 85(b). It should further be noted that section 88(3) specifically prevents enforcement of a credit agreement by litigation or other judicial process whilst a debt review is pending. It appears that the relevance of this section to prevent the situation Wallis J deemed section 130(3)(c) to deal with, namely enforcement during a pending debt review, was not considered in the *Donkin* case. In view of the aforementioned it is submitted that the

provisions of sections 86(2) and 130(3)(c)(i) are not reciprocal as indicated by Wallis J.

4 4 Reinstatement and cancellation in terms of the NCA and the question whether section 85 facilitates reinstatement of a duly-cancelled agreement

This decision also raises questions regarding the ambit of cancellation and reinstatement of credit agreements under the NCA. Before the possibility of re-instatement can be considered, it has to be determined whether the NCA has altered the common law as far as cancellation of agreements is concerned. Section 123, which is headed "Termination of agreement by credit provider" is the most prevalent section dealing with cancellation. Subsections 123(1) and 123(2) are relevant in this regard and provide as follows:

> "(1) A credit provider may terminate a credit agreement before the time provided in that agreement only in accordance with this section.
> (2) If a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6 to enforce and terminate that agreement."

At first glance, section 123(2) creates some uncertainty as it is not clear how an agreement can be enforced and terminated at the same time (Otto *The National Credit Act Explained* (2006) 87; and Scholtz *et al* 12-1). The undefined term "enforce" is a novel concept introduced by the NCA (Otto 87-88; Scholtz *et al* 12-2; and Van Heerden and Otto "Debt Enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655) which seems to refer, in the context of the NCA, to the creditor making use of *any* of his or her remedies to address the consumer debtor's default (Otto 87-88; Scholtz *et al* 12-2; Van Loggerenberg *et al* 2008 *De Rebus* 40; and Boraine and Renke "Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005" 2008 *De Jure* 1 2).

Support for the statement that the word "enforce" is used in a very wide sense can be found in section 129(3) (Otto 87-88). This section forms part of the enforcement procedures of the NCA and provides that a consumer may "at any time before the credit provider has cancelled the agreement reinstate a credit agreement". It is further nonsensical that a credit provider must provide a notice in terms of section 129(1)(a) when enforcing payment, but not when the more serious remedies of cancellation and restitution are utilized (Otto 88; and Boraine and Renke 2008 *De Jure* 2).

It is therefore submitted that the word "enforce" is used in a very wide sense to include a credit provider making use of *any* of his or her remedies in legal proceedings (Otto 87; Van Heerden and Otto 2007 *TSAR* 655; and Boraine and Renke 2008 *De Jure* 2 fn 5). Chapter 6 Part C will thus apply regardless of the remedy that the credit provider attempts to utilize. However, in the event that a credit provider chooses to cancel the agreement, a distinction must be drawn between the situation where the credit provider him- or herself has cancelled the agreement prior to approaching

the court and the situation where an order for cancellation is sought from the court. It is submitted that in the former instance cancellation need not be requested or prayed for as such in subsequent court proceedings or, at most, the prayers may include a request for confirmation of the prior cancellation. In other instances the summons or particulars of claim must specifically include a prayer for cancellation (see also Christie *The Law of Contract in South Africa* (2006) 538-539).

In *ABSA Bank Ltd v De Villiers* (2009 5 SA 40 (C)), the court held that the NCA did not alter the common-law principle of cancellation of a credit agreement to which the NCA applies prior to repossession of goods. The court remarked that if that was the legislature's intention it would have "been conveyed in clear and certain terms" (*ABSA Bank Ltd v De Villiers supra* 49; and see also Otto "Attachment of Goods Sold in Terms of Instalment Agreement without Cancellation of Contract – Sanctioned by National Credit Act? – *Absa Bank Ltd v De Villiers*" 2009 *THRHR* 473).

Even thought the common law was not changed as far as cancellation is concerned, cancellation is now incorporated under the term "enforce" used by the legislature and therefore certain pre-enforcement requirements should be adhered to prior to cancellation of an agreement. These requirements are, *inter alia*, the provision of a section 129(1) notice as well as those prescribed by section 130(1). This should be the case irrespective of whether the *credit provider* cancels the agreement or whether the *court* is requested to make such an order. Therefore, even if a credit provider may rely on a *lex commissoria* to cancel an agreement, the actual cancellation cannot be lawfully carried out without first complying with the pre-enforcement requirements of the NCA set out in section 129(1) read together with section 130(1). It is not clear from the facts of the *Donkin* matter whether the credit provider cancelled the credit agreement based on a *lex commissoria* (although it would be highly unlikely that the agreement would not have contained such a clause). However, there was proper compliance with the prescribed pre-enforcement provisions prior to the actual cancellation of the agreement on 11 September 2008.

If a credit agreement was indeed lawfully cancelled the next matter for consideration in light of the *Donkin* decision would be whether such agreement may be reinstated through the machinery of the NCA.

The court's reasoning and subsequent decision that section 85 does not have the effect of reinstating a lawfully cancelled agreement for purposes of debt review are supported (see *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D), where the court's discretion under s 85 was considered). It is submitted that where an agreement has been cancelled "the matter" which the court may refer to a debt counsellor under section 85(a) is the shortfall or remaining obligations after such cancellation. If the credit provider has not cancelled the agreement by the time the consumer seeks to invoke the court's powers in terms of section 85, it is the credit agreement that is referred to the debt counsellor and under these circumstances the issue of reinstatement is irrelevant as the agreement is still in force. Section 85 therefore provides the court with the power to countermand debt-enforcement proceedings in the sense that such agreements may be referred to a debt counsellor irrespective of section 86(2). However, it does

not provide the court with the authority to reverse the cancellation of the agreement. Corroboration for the above can also be found in the orders listed under section 86(7)(c). None of the potential orders allows the court to reinstate a duly-cancelled agreement. It is submitted that if the legislature intended that the courts may grant such extraordinary orders, which would have the effect of altering the common law, it would have expressly stated it as such, especially since orders of lesser consequence are included under section 87(7)(c).

If the court does not possess the power to reinstate a cancelled agreement under section 85, the final question would be whether re-instatement is possible under any other provision of the NCA. Stated differently, does the NCA provide the *consumer* with a right to reinstate a cancelled agreement? Wallis J briefly considered sections 129(3) and 129(4).

Section 129(3) provides that

> "[s]ubject to subsection (4), a consumer may –
> (a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and –
> (b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order."

In terms of section 129(3) a defaulting consumer may utilize the right of reinstating a credit agreement, thereby preventing a credit provider from commencing or continuing with debt-enforcement procedures, provided that the agreement was not cancelled by the credit provider. The consumer may reinstate the agreement by paying to the credit provider overdue amounts coupled with permitted default charges and reasonable costs of enforcement up to the date of reinstatement.

The term "reinstate" may commonly be interpreted as reinstatement of a cancelled agreement, thereby affording the consumer a right to "revive" an already cancelled agreement. However, such a construction is not sensible under the wording of section 129(3), since the first part of the section clearly states that the right may be exercised "at any time *before* the credit provider has cancelled the agreement" (authors' own emphasis).

It is submitted that a possible interpretation of section 129(3)(a) is that it refers to those instances in which the credit provider has already acquired the right to cancel the agreement, but has not yet exercised it. Under the proposed circumstances the consumer will effectively prohibit the credit provider from exercising the right to cancel the agreement by making the prescribed payments (Coetzee LLM Dissertation 141). Wallis J also attributed this particular meaning to reinstatement as contemplated in section 129(3)(a), namely that it refers to the "right of cancellation" (76). However, the proposed construction is clouded by the wording of section 129(3)(b) that seems to make provision for circumstances where property has been repossessed pursuant to an attachment order which presupposes cancellation. Section 129(3)(b) states unambiguously that it is subject to

section 129(3)(a) and therefore the requirements mentioned therein – one being that the right should be exercised prior to cancellation. In general civil enforcement procedures, a final attachment order without prior cancellation, seem impossible (Coetzee LLM Dissertation 141).

Further interpretational difficulty arises when considering the fact that section 129(3) renders itself subject to section 129(4) which provides as follows:

> "A consumer may not re-instate a credit agreement after –
> (a) the sale of any property pursuant to –
> (i) an attachment order; or
> (ii) surrender of property in terms of section 127;
> (b) the execution of any other court order enforcing that agreement; or
> (c) the termination thereof in accordance with section 123."

Section 129(4)(a) prohibits reinstatement of the agreement only after the sale of property, irrespective of whether such property was repossessed pursuant to an attachment order or voluntarily surrendered under section 127. Reinstatement is also prohibited after a court order enforcing an agreement has been executed or an agreement has been terminated by a credit provider in accordance with section 123. It can be argued that, under section 129(4)(a), the legislature intended to place the consumer in the most favourable position as a consumer will only be prohibited from bringing payments up to date and thereby remedying the default once the goods have been sold. It is therefore the sale of property that marks the final point of no return, after which the consumer may not reinstate the agreement and resume possession of property by using the mechanisms contained in section 129(4) (Coetzee LLM Dissertation 145). However, section 129(4)(c) states that a consumer may not reinstate an agreement after termination in accordance with section 123. It is difficult to comprehend how an attachment order and the sale of property can occur without prior termination in accordance with section 123. As termination is specifically listed as an event after which reinstatement would be impossible it is submitted that on the facts as stated in the *Donkin* matter, the defendant was prohibited from re-instating the agreement once it had been cancelled in accordance with section 123 on 11 September 2008. The *consumer* is therefore also not entitled to reinstate a cancelled agreement by making use of section 129(3) read together with section 129(4). It is proposed that section 129(4) be redrafted to clarify the apparent contradiction between the circumstances provided for in section 129(4)(a) and 129(4)(b), and the circumstances as set out in section 129(4)(c).

It is finally submitted that neither the court under section 85 nor a consumer under section 129(4) has the right to reinstate an agreement cancelled by a credit provider.

Van Heerden is also mindful of the unclear and contradictory wording used in sections 129(3) and 129(4) and submits that section 129(3) may be construed to refer to interim attachment orders (Van Heerden "Chapter 12: Enforcement of Credit Agreement" in Scholtz, Otto, Van Zyl, Van Heerden and Campbell *Guide to the National Credit Act* (2008) 12-30; and see also Otto 95). The author further comments that section 129(4)(a) in contrast

seems to refer to a final attachment order (Van Heerden 12-30). It is submitted that Van Heerden's interpretation is the only sensible approach. However, section 129(3) specifically renders itself subject to section 129(4) and the subsections can therefore not be read in isolation. It is thus submitted that section 129(3) should also be redrafted in order to provide clearly for interim attachment orders with the object of safekeeping pending a final attachment order (see also Boraine and Renke 2008 *De Jure* 14).

5 Conclusion

The *Donkin* case provides clarity on the minimum amount of information and documentation that needs to be supplied to constitute effectively an application for debt review for purposes of section 86. Given the significant consequences of debt review, highlighted in paragraph 4 1, establishing whether an application for debt review was procedurally properly made for purposes of section 86 read together with regulation 24 is thus vitally important from the perspective of both the consumer and the credit provider.

Owing to Wallis J's acceptance of the contention on behalf of the defendant that an application for debt review is only barred once there has been both delivery of a section 129(1)(a) notice and commencement of proceedings, the judgment has the effect that a mere delivery of a section 129(1)(a) notice, although it has been construed by Wallis J as *per se* not allowing or facilitating debt review, will, however, not trigger the bar in section 86(2). It appears from the *Donkin* case that Wallis J regarded the issuing of summons as the moment of commencement of proceedings. Although this approach allows the consumer a certain window of opportunity within which to apply for debt review after delivery of a section 129(1)(a) notice, it is submitted that the better approach for purposes of legal certainty would be to regard the moment of service of summons as "commencement" of enforcement proceedings for purposes of determining whether section 86(2) applies in a given situation.

It is further submitted that Wallis J's reliance on section 130(3)(c)(i) is misconstrued as the position that he had in mind, namely protecting a consumer against debt enforcement during a pending debt review, is adequately catered for by the provisions of section 88(3) read together with section 130(4)(c).

"Enforce" is a novel term employed by the NCA. It has been established that the legislature attributes a wide meaning to it and that it therefore refers to the credit provider making use of *any* of his or her remedies, including cancellation of the agreement. Although it has been established, with reference to *ABSA Bank v De Villiers,* that the NCA did not alter the common law principles as far as cancellation of an agreement prior to repossession of goods is concerned, it has, however, prescribed certain pre-enforcement requirements, contained in section 129(1) read together with section 130(1), to which the credit provider must adhere prior to enforcing a credit agreement.

The question as to whether section 85 by implication provides for the re-instatement of a duly-cancelled agreement was considered by Wallis J and decided in the negative. The court held that the section does not have the

effect of reinstating a lawfully cancelled agreement for purposes of debt review. This decision is supported. Section 85 affords the court the discretion to revoke the effect of section 86(2), thereby including agreements previously excluded from potential debt-review proceedings. It is submitted that the "matter" that the court refers after the agreement has been duly cancelled is the shortfall or remaining obligations. In the event that the agreement has not been cancelled the agreement, as is, is referred for debt review.

In conclusion it was submitted that section 129(3) read together with section 129(4), or any other section for that matter, does also not afford the consumer with a right to reinstate a lawfully cancelled credit agreement. Sections 129(3) and 129(4) are not without interpretational difficulty and it is suggested that the legislature redraft these sections in order to clarify its intention in terms thereof.

Corlia van Heerden and Hermie Coetzee
University of Pretoria