# TERMINATION OF DEBT REVIEW IN TERMS OF SECTION 86(10) OF THE NATIONAL CREDIT ACT AND THE RIGHT OF A CREDIT PROVIDER TO ENFORCE ITS CLAIM

## Standard Bank of South Africa Ltd v Kruger (unreported case number 45438/09 (GSJ)) and Standard Bank of South Africa Ltd v Pretorius (unreported case number 39057/09 (GSJ))

## 1 Introduction

One of the purposes of the National Credit Act 34 of 2005 (NCA) is to protect consumers by *inter alia* providing mechanisms for resolving over-indebtedness (see s 3(g)). Section 86 of the NCA provides for such measure in that it allows a consumer to apply to a debt counsellor to conduct a debt review of the credit agreements to which he is a party and to be declared over-indebted (s 86(1)). One of the first steps in the debt review process is therefore, a determination by the debt counsellor whether the consumer is over-indebted, likely to become over-indebted, or not over-indebted at all (s 86(6) and (7)). Where the debt counsellor concludes that the consumer is indeed over-indebted, section 86(7)(c) requires of the debt counsellor to issue a proposal recommending that the Magistrate's Court make an appropriate order to declare one or more of the consumer's credit agreements to be reckless credit (if applicable) and/or to re-arrange or restructure the consumer's obligations. In terms of section 86(8)(b) the debt counsellor is also obliged to refer the recommendation to the Magistrate's Court for a hearing under section 87 (see the interpretation of the relevant sections in *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) 303 and 304).

In *Standard Bank of South Africa Ltd v Kruger* (unreported case number 45438/09 (GSJ)) and *Standard Bank of South Africa Ltd v Pretorius* (unreported case number 39057/09 (GSJ)) the court (Kathree-Setiloane AJ) had to interpret section 86(10) of the Act which provides as follows:

> "If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to –
>
> (a) the consumer;
>
> (b) the debt counsellor; and
>
> (c) the National Credit Regulator,
>
> at any time at least 60 business days after the date on which the consumer applied for debt review."

The court had to determine whether the credit provider *in casu* was entitled to terminate the debt review in terms of section 86(10) and thereafter to proceed with the enforcement of the credit agreements in circumstances where the debt counsellor had referred the debt review matter to the Magistrate's Court for a hearing in terms of section 87 of the Act.

In what follows, the facts and decision in *Kruger* and *Pretorius* will be analysed and commented on. In addition, relevant provisions of the Act pertaining to the termination of debt review proceedings and the credit provider's right to enforce its claim will also be interpreted and commented on. Regarding the credit provider's right to enforce its claim the position where the debt review process is still pending whilst the matter has not been referred to the Magistrate's Court for determination yet, will be distinguished from the position where the matter has indeed been referred to the Magistrate's Court.

## 2 The facts

The judgment in *Kruger* and *Pretorius* concerned two applications for summary judgment against the respondents for the outstanding amount of two loans granted to the respondents and which were secured by two mortgage bonds over certain immovable properties (par 1).

It was not in dispute that the NCA applied to the loan agreements or that the respondents were consumers or that the applicant was a credit provider in terms of the Act (par 6). It was furthermore common cause that the respondents applied for debt review in terms of section 86(1) of the Act before institution of the respective actions against them by the applicant (par 4).

The applications for summary judgment were brought on the basis that the applicant had terminated the respondents' respective debt reviews in terms of section 86(10) of the Act (par 3). According to the applicant, it gave notice in accordance with the provisions of section 86(10) more than 60 days after the date on which each of the respondents applied for debt review (par 5). The respondents, however, denied that their respective debt review applications were terminated lawfully. In resisting summary judgment the respondents alleged *inter alia* that the termination and subsequent summons were premature and in violation of section 130 of the Act as their debt review applications to court were brought within the 60 business days' time period provided for in section 86(10). According to the respondents the matters were therefore *sub-judice*, as the proceedings before the relevant Magistrate's Courts have not been finalized yet (par 7-8).

## 3 The issues

The court hade to interpret section 86(10) of the Act, and the two issues to be determined were (par 9):

(a) Whether section 86(10) of the Act allows a credit provider to terminate the debt review process where a debt counsellor has already referred a debt review matter to a Magistrate's Court for consideration, and

(b) whether section 130(4)(b) of the Act is applicable where the credit provider has failed to comply with section 86(10) of the Act.

# 4 The decision

## *4 1 The purpose of the Act*

According to the court, the interpretation of section 86(10) should be viewed against the purpose and objectives of section 86 and the Act as a whole. In this regard the court quoted section 2(1) which provides that the Act must be interpreted in a manner that gives effect to the purposes of the Act set out in section 3 (par 10). After quoting relevant parts of section 3, the court concluded (par 11):

> "The purpose of the Act is clearly to promote and to protect consumers. The Act must accordingly be interpreted to give effect to this core purpose."

## *4 2 Section 86 proceedings versus section 87 proceedings*

The court pointed out that the termination of debt review proceedings in terms of section 86(10) is explicitly limited to a credit agreement "that is being reviewed in terms of this section". Consequently, a credit provider's right to terminate in terms of section 86(10) would only pertain to a debt review to which section 86 applies. Once a debt review has been referred to the Magistrate's Court in terms of section 86(8)(b), section 87, providing for the hearing and possible order re-arranging the consumer's obligations, applies and any termination of the debt review will then be unlawful. In such a case, the debt review process, as conducted in terms of section 86 ends and becomes a review before the Magistrate's Court (par 13-15).

Therefore, according to the court, the only review process that may be terminated in terms of section 86(10), is the one undertaken by the debt counsellor, that is, the steps taken by the debt counsellor in terms of section 86(6) to 86(8)(a) of the Act, prior to the referral to the Magistrate's Court. The court explained its viewpoint as follows (par 16):

> "I am of the view that any contrary interpretation in terms of which a credit provider would be entitled to terminate the debt review process after a period of 60 days, despite it having been referred to a Magistrate's Court, would lead to an absurdity in that any delay by any party to such application, any delay occasioned at the instance of the court or even any delay due to unforeseen circumstances would deprive the consumer of the opportunity to have the matter properly determined by that court."

Furthermore, having regard to the lengthy delays when attempting to obtain a date for a hearing in the Magistrate's Court and the likelihood of multiple postponements in a review, the court was of the opinion (par 17):

> "that an unqualified entitlement to terminate proceedings, where a court has been seized with the review therein, without reference to that court is clearly not consistent with a core objective of the Act, which is the promotion and protection of consumers."

The applicant relied on the procedural inability of the Magistrate's Court to deal with section 87 proceedings within 60 business days form the date on which it was referred to it for its contention that section 86(10) should be

interpreted to allow a credit provider to terminate a debt review once it has been referred to the Magistrate's Court for consideration (par 21). The court referred to the decision in *S v Tom and S v Bruce* (1990 2 SA 802 (A) 807-809), where the Appellate Division held as follows:

> "The primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. One does so by attributing to the words of a statute their ordinary, literal, grammatical meaning. Where the language of a statute, so viewed, is clear and unambiguous effect must be give thereto, unless to do so 'would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account ... (per Innes CJ in *R v Venter* 1907 TS 910 at 915). See also *Shenker v The Master and Another* 1936 (AD) 136 at 142'"

The court accordingly rejected the applicant's argument as follows (par 21):

> "I am of the view that such an interpretation will lead to an absurdity, in that the whole purpose of the Act would be circumvented, due to the Magistrate's Court's inability to process section 87 applications within 60 business days from the referral date, being the referral to the credit provider, and not the referral to the Magistrate's Court. Such interpretation would be contrary to the intention of the legislature as set out in section 2(1) read with section 3 of the National Credit Act."

The court furthermore confirmed that the 60 days' period referred to in section 86(10) runs at least 60 days from the date on which the consumer first applied to a debt counsellor for a debt review and not from the date of referral to the Magistrate's Court (par 22). Moreover, it is, according to the court, not the magistrate that is required to make a determination at least 60 days from the date of the debt review application, but rather the debt counsellor, who must complete the debt review process in terms of section 86 within 60 days. If the debt counsellor fails to complete the process within 60 days, the credit provider would be entitled to terminate the review in terms of section 86(10). According to the court, any contrary interpretation would not have been contemplated by the legislature as it would be to the detriment of the consumer (par 23). The court summarized its viewpoint as follows (par 24):

> "I am of the view that notice in terms of section 86(10) of the Act is not competent where a debt counsellor has already referred the debt review to the Magistrate's Court. Any contrary interpretation would render the entire debt review process ineffectual, as all credit providers will simply wait for 60 working days, knowing that no Magistrate's Court will be able to adjudicate the debt review in terms of section 87 of the Act, to finality within 60 business days from referral to it. Such an interpretation would circumvent the protection afforded by the Act, and would be in conflict with the intention of the legislature. It is vital, in this regard, that the provisions of the Act, and, in particular, the provisions of section 86(10) be viewed in their proper context and not to the detriment of the consumer, which the Act so clearly seeks to protect."

It was also contended on behalf of one of the respondents that section 129 of the Act supports an interpretation that termination in terms of section 86(10) is disallowed once a debt review matter has been referred to the Magistrate's Court (par 25). The relevant provisions of section 129 read as follows:

> "(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.

(2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order."

According to the court it is clear that neither section 129(1)(a) nor section 129(1)(b) (and therefore also s 86(10) – see s 129(1)(b)(i)) applies to instances where a matter has been referred to the court for determination as the application of section 129(1) is, in terms of section 129(2), expressly excluded with regard to "a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order". The court pointed out that a referral of a debt review matter in terms of section 86(8) to a Magistrate's Court for determination in terms of section 87 may result in a debt-restructuring order as contemplated in section 129(2). Consequently, the court was of the view that in terms of section 129(2), a notice to terminate a debt review in terms of section 86(10) would be incompetent once the debt review has been referred to the Magistrate's Court (par 26).

In conclusion the court held that the applicant's termination of the debt reviews in the two applications was invalid and of no force and effect (par 27).

## *4 3 The right of the credit provider to enforce its claim*

The court also referred to the recent unreported judgment of *First Rand Bank v Smith* (unreported case number 24208/08 (WLD)), where Lamont J dealt with the consequences that may, in the court's view, occur where the debt counsellor failed to refer a debt review matter to the Magistrate's Court in terms of section 86(8)(b) (par 18).

The court in *Smith* found that the debt counsellor *in casu*, by not having taken the next step in terms of section 86(8)(b), has enabled the consumer to prevent the credit provider from ever instituting action against the consumer. This, according to the court in *Smith*, is because a credit provider who receives notice of a debt review application may not institute action until certain events in terms of section 88(3) have occurred (*Smith* case par 9-15).

Section 88(3) provides as follows:

"Subject to section 86(9) and (10), a credit provider who receives ... notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until –

(a) the consumer is in default under the credit agreement; and

(b) one of the following has occurred:

(i) An event contemplated in subsection (1)(a) through (c); or

(ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal."

The events referred to in subsection (b)(i) quoted above, are those mentioned in section 88(1)(a) through (c):

"(a) The debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) has expired without the consumer having so applied;

(b) the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application; or

(c) a court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreement as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement."

The court in *Smith* was, however, of the opinion that the events in terms of section 88(3) could not occur unless the next step, namely the referral of the matter to the Magistrate's Court, in terms of section 86(8), was taken. Accordingly, the court was of the opinion that there appears to be a *lacuna* in the Act and that the legislature could not have intended such an absurd result. The court therefore found that the notice of the debt review application would become ineffective to stay proceedings and that the process will lapse if it is not followed to its conclusion within a reasonable time, which is, according to the court, no more than three months (see *Smith* case par 15, 19, 22-24 and 27).

It is submitted that the court's decision in *Smith* is incorrect (see Roestoff "Enforcement of a Credit Agreement Where the Consumer has Applied for Debt Review in Terms of the National Credit Act 34 of 2005" 2009 *Obiter* 430 436 *et seq*). In the author's view, the reason for the credit provider in *Smith* not being able to institute action against the consumers, was the fact that the relevant credit provider did not proceed to terminate the debt review as provided for in section 86(10). In this regard it should be noted that the legislator has made the application of section 88(3) subject to section 86(10). Therefore, if a debt counsellor fails to proceed in terms of section 86(8), the credit provider may proceed to terminate the debt review process in terms of section 86(10) and continue to enforce its claim (*cf* Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 12-20(3)). Section 88(3) clearly does not apply in such an instance and any of the events set out in this section need not occur.

Although the court in *Kruger* and *Pretorius* shared Lamont J's concerns that there appears to be a *lacuna* in the Act, the court nevertheless distinguished the facts in *Smith* from the two applications in *Kruger* and *Pretorius*. The court in *Kruger* and *Pretorius* pointed out that that the debt review process in *Smith* was initiated in terms of section 86(1) read with section 86(4), but that no further steps were taken and the matter was never referred to the Magistrate's Court in terms of section 86(8)(b). The court therefore found that Lamont J's concerns were not relevant with regard to the two applications *in casu* as the debt counsellor in each of these two matters indeed referred the debt review with his recommendations to the Magistrate's Court for consideration (par 19).

The court therefore concluded that once a debt review has been referred to the Magistrate's Court (par 20) (author's own emphasis):

> "the credit provider is not entitled to institute court proceedings to enforce its claim, until the Magistrate's Court has made a *determination in terms of section 87 of the Act*."

It is submitted that the court here failed to apply the provisions of section 88(3) quoted above. Once the debt review has been referred to the Magistrate's Court, the credit provider will, in the author's view, only be entitled to proceed with enforcement once any one of the relevant events mentioned in section 88(3) has occurred (see the discussion in par 5 2 below).

## *4 4 Application of section 130(4)(b)*

An additional point *in limine* was raised on behalf of one of the respondents that the applicant has not complied with section 86(10) as the latter has failed to provide proof that the termination notice was transmitted to the National Credit Regulator (par 28). In reply to this, the applicant contended that the court must, in such an instance, make an order in terms of section 130(4)(b) of the Act (par 29). Section 130(4)(b) provides as follows:

> "In any proceedings contemplated in this section, if the court determines that –
> (a) ...
> (b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a), or has approached the court in circumstances contemplated in subsection (3)(c) the court must –
>  (i) adjourn the matter before it; and
>  (ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed."

Subsection (3)(a) which is relevant with regard to the applicant's argument, 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) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with."

The court referred to *ABSA Bank Limited v Prochaska t/a Bianca Cara Interiors* (2009 2 SA 512 D par 28-31), where Naidu AJ held as follows with regard to the notice in terms of section 86(10) of the Act:

> "The credit provider is also precluded, by the provisions of s 129(1)(b), from commencing any legal proceedings before first providing notice to the consumer, as contemplated by s 86(10), to terminate the review that has been commenced by the debt counsellor pursuant to the provisions of s 86 … The notice to the consumer to terminate the review, as envisaged in s 86(10), may only be given at least 60 days after the application made by the consumer to apply for review … The wording of s 86(11), in my view, renders it beyond any argument that the notice contemplated in s 86(10) is a necessary first step before the credit provider proceeds to commence litigation."

As the court was of the view that section 86(10) does not apply when a debt review has been referred to the Magistrate's Court for consideration, it found that it was not necessary for the court to make a decision on whether section 130(4)(b) finds application where the required notice in terms of section 86(10) has not been provided. Consequently the court also held that it was not necessary to make a decision on the respondent's further point, that the notice was not in compliance with section 96 of the Act which requires any legal notice to a party to be delivered at the address of the party as set out in the agreement, or the address most recently provided by the recipient (par 30).

The court finally held that the respondents in each of the summary judgment applications had a *bona fide* defence that was good in law and accordingly granted them leave to defend the respective actions against them (par 31).

## 5 Commentary, interpretation of relevant provisions of the Act and concluding remarks

### *5 1 Termination in terms of section 86(10)*

A research report by the Law Clinic of the University of Pretoria (Haupt, Roestoff and Erasmus *The Debt Counselling Process: Challenges to Consumers and the Credit Industry in General* – Report submitted by the UP Law Clinic to the National Credit Regulator in April 2009) indicated that credit providers have in the past indeed attempted to terminate debt review proceedings after the 60-day time period has expired notwithstanding the fact that a matter had already been referred to the Magistrate's Court and a date for a hearing had already been obtained (*cf* Haupt *et al* 206). The court's interpretation of section 86(10) that a notice to terminate in terms of section 86(10) is not competent where a debt review matter has already been referred to the Magistrate's Court for determination, is therefore to be welcomed. The court's point of departure, that section 86(10) should be interpreted with reference to the purpose of the Act, namely, to protect consumers, is in the author's view the correct approach. In this regard the following statement of Naidu AJ in the *Prochaska* case is also relevant (par 21):

> "It is abundantly clear, in my view, that the Act has introduced innovative mechanisms and concepts directed more at the protection and in the interests of credit consumers than that of credit providers."

The research report by the Law Clinic mentioned above also indicated that credit providers not co-operating in the debt review process and not complying with the Act and Regulations were important causes of the ineffectiveness and the non-functioning of the debt review process (*cf* Haupt *et al* 113 *et seq*, 230 *et seq* and 308). Delays in the process are also frequently caused by credit providers not responding to debt restructuring proposals of debt counsellors that were submitted to them for their consideration (*cf* Haupt *et al* 211 *et seq*). Furthermore, delays are also caused by credit providers failing to provide the required financial information (the so-called "Certificate of Balance") to the debt counsellor within the prescribed-time period (*ie*, 5 business days – see reg 24(4) of the Regulations

promulgated under the Act; and Haupt *et al* 262 *et seq*). The report concluded that the 60 business days' period provided for in section 86(10) is insufficient time to complete the debt review process. The research report has indicated that the average period it would take to receive a response on a debt counsellor's debt restructuring proposal is 82 business days (*cf* Haupt *et al* 278 *et seq*).

It would therefore appear that the Act needs to be amended to provide for a longer time period for the debt counsellor to complete the debt review process in terms of section 86 of the Act. Such time period should furthermore, in the author's view, only commence once the credit provider has supplied the debt counsellor with the required financial information.

### *5 2 Enforcement of a credit agreement before and after a debt review matter has been referred to the court for determination*

Where the consumer has applied for debt review in terms of section 86(1) of the Act and the matter has not been referred to the Magistrate's Court for determination yet, the following interpretation of relevant sections is suggested:

(a) In terms of section 86(10) the credit provider would be able to terminate the review 60 business days after the date on which the consumer applied for the debt review. The effect of this provision is thus that the debt counsellor is given 60 business days to complete the debt review proceedings in terms of section 86 of the Act. After termination the credit provider would be entitled to proceed with the enforcement of the specific credit agreement, provided that the relevant requirements of section 130 are complied with (see also s 129(1)(b) and the *Prochaska* case par 28-32). It is submitted that section 88(3) is not applicable in such an instance as it, in the author's view, does not apply in instances where the debt review proceedings had been terminated in terms of section 86(10) of the Act.

(b) In terms of section 88(3)(a) and (3)(b)(i), read with section 88(1)(a) a credit provider would furthermore be entitled to enforce his/her claim where the consumer is in default under the credit agreement and the debt counsellor has rejected the debt review application whilst the prescribed time period for direct filing by the consumer has expired without the consumer having so applied. However, the credit provider would, it is submitted, in such an instance only be able to proceed with enforcement proceedings after he/she has provided notice to the consumer in terms of section 129(1)(a) and after complying with the relevant requirements set out in section 130 of the Act (see s 129(1)(b)). It is submitted that section 129(2) would not apply in such an instance as the credit agreement would not in terms of this subsection "be subject to a debt-restructuring order, or to proceedings in a court that could result in such an order".

Where the consumer has applied for debt review in terms of section 86(1) of the Act and the matter has been referred to the Magistrate's Court for determination, the following interpretation of relevant sections is suggested:

(a) In terms of section 88(3)(a) read with section 88(3)(b)(i) and section 88(1)(b) a credit provider would be entitled to enforce his claim where the consumer is in default under the credit agreement and the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application. It is submitted that the credit provider in such a case would be entitled to proceed with enforcement proceedings after he has provided notice to the consumer in terms of section 129(1)(a) and after complying with the relevant requirements set out in section 130 of the Act (see s 129(1)(b)). Section 129(2) would not apply as the credit agreement would no longer in terms of this subsection be subject to proceedings in a court that could result in a debt-restructuring order.

(b) Where a re-arrangement of the consumer's obligations has been ordered by the court, enforcement is disallowed until all the consumer's obligations under the credit agreements as re-arranged are fulfilled (unless the consumer fulfilled the obligations by way of a consolidation agreement – see s 88(3)(a) and (3)(b)(i) read with s 88(1)(c)). It is submitted that these provisions read together merely confirm the legislator's intention that enforcement of a credit agreement is not permitted whilst a debt re-arrangement still subsists. Once the consumer has fulfilled all his obligations there will clearly be no need for the credit provider to proceed to enforce its claim.

(c) In terms of section 88(3)(a) read with section 88(3)(b)(ii) the credit provider would be entitled to enforce his/her claim where the consumer is in default under the credit agreement and has defaulted on any obligation in terms of a re-arrangement ordered by the court or the Tribunal. It would appear that a notice in terms of section 129(1)(a) is not required in such an instance as section 129(1) does not apply to credit agreements that are subject to debt-restructuring orders (see s 129(2) and *cf* Van Heerden 12-20(2) *et seq*).

The intention of the legislator in section 129(2) read together with section 88(3) of the Act is, in the author's view, clearly that debt enforcement of a credit agreement is disallowed whilst debt review proceedings in terms of section 86 or 87 are still pending. A credit provider will in such an instance only be entitled to enforce a credit agreement after he has terminated the debt review proceedings in terms of section 86 or when one of the relevant events set out in section 88(3) has occurred (*cf* Van Heerden 12-20(2) *et seq*).

## *5 3 Section 130(4)(b) and (c)*

It is submitted that the court correctly found that section 130(4)(b) was not applicable *in casu*. However, it is submitted that section 130(4)(c) is applicable as this subsection deals with credit agreements which are subject to a pending debt review in terms of Part D of Chapter 4 of the Act. This Part includes a section 86 debt review before a debt counsellor as well as a section 87 debt review before the Magistrate's Court. In terms of section 130(4)(c) the court, in any proceedings in respect of a credit agreement, if it determines that a credit agreement is subject to such debt review proceedings, may:

"(i) adjourn the matter, pending a final determination of the debt review proceedings;

(ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85(b); or

(iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85(b)."

Where a delay in debt proceedings before a debt counsellor in terms of section 86 is caused by the conduct of the consumer, it is submitted that a credit provider's remedy is contained in his right to terminate the debt review proceedings after 60 business days have lapsed. However, as has been pointed out above, the right to terminate in terms of section 86(10) ends once the debt review matter has been referred to court, and the credit provider may only proceed to enforce his/her claim once any of the relevant events set out in section 88(3) has occurred. It would therefore appear that credit providers will be left without any proper remedy in instances where a matter has indeed been referred to court and delays in the proceedings are caused due to the fact that the consumer has no real intention to ensure that the proceedings are followed to its conclusion. The credit provider's only remedy in such an instance would most likely be to rely on section 130(4)(c)(ii) in terms of which the court has the power to order the debt counsellor to report directly to court and then to make an order in terms of section 85(b), that is, to declare that the consumer is over-indebted and to make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

It is submitted that the Act contains a *lacuna* in this respect and it is suggested that the Act be amended to provide for the lapsing of debt review proceedings in terms of section 87 if it is not followed to its conclusion within a reasonable time period after referral to the Magistrate's Court.

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