Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Before: The Hon. Mr Justice Binns-Ward
Hearing: 9 January 2018
Judgment: 12 January 2018

Case No: 20480/2017

In the matter between:

KAMOGELO ISAAC PHALADI Applicant

and

ASIA LAMARA First Respondent
AFRICAN BANK LTD Second Respondent

Case No. 20481/2017

And in the matter between:

NEO GLORIA MOSHESHA Applicant

and

ASIA LAMARA First Respondent
FOSHINI (PTY) LTD Second Respondent
OLD MUTUAL (PTY) LTD Third Respondent

JUDGMENT

BINNS-WARD J:

[1] Application was made in two matters[1] enlisted on Tuesday's unopposed motion roll for orders:

(a) Declaring that the applicant is no longer over-indebted and that the records be expunged; and

(b) Directing that the debt counsellor (the first respondent) update the status of the applicant with its creditors, the credit bureaux and the National Credit Regulator within one month hereof by forwarding the relevant Form 17.W.[2]

[2] The factual bases of both applications were essentially identical. In each case the applicant had applied to the debt counsellor in terms of s 86 of the National Credit Act 34 of 2005 ('the NCA') to be declared to be over-indebted. Having assessed their applications, and given notice to the applicants' creditors and all the registered credit bureaux as required in terms of s 86(4), the debt counsellor accepted their applications. An application to the magistrates' court for a debt-rearrangement order did not follow, however. This was because in each case a voluntary rearrangement was agreed with the creditors pursuant to a recommendation by the debt counsellor in terms of s 86(7)(b). These arrangements were apparently satisfactorily adhered to under the auspices of the debt counsellor. Matters have reportedly proceeded so satisfactorily in fact that the applicants claim that they are now 'financially sound', and in a position to demonstrate that they are able to punctiliously fulfil their outstanding obligations. They contend that it would be reasonable in the circumstances for their records at the credit bureaux to be expunged so that they would be enabled to responsibly incur additional obligations by entering into fresh credit agreements in the ordinary course. In one of the matters it is alleged, without any substantiating particularity, that the applicant's 'negative credit rating' also 'potentially affect[s] [her] job applications to further [her] career'. They submit that the only manner in which their objects can be achieved is with the aid of a court order.

[1] It would seem that four such applications were intended to be brought, but in the other two matters there were no papers in the court files when they were called, and they were struck from the roll.

[2] Form 17W is a form that has been brought into use in terms of the 'Guidelines for the Withdrawal from Debt Review' issued by the National Credit Regulator, discussed in para. [18]-[19] and [23]-[27], below.

[3] The question that arises is whether it is at all within the power of the court to grant them the relief they seek.

[4] A similar application was recently refused in this Division by Thulare AJ in *Du Toit v Benay Sager t/a Debt Busters and Others* [2017] ZAWCHC 141 (17 November 2017). The essence of the reasoning of the court in *Du Toit* was that the relief sought was inconsistent with the scheme of the NCA. It was held in particular that it had been inappropriate for the applicant to have brought the application to the High Court.

[5] In the Gauteng Division, however, there have been at least three judgments handed down in which relief of the nature sought in the current application has been granted. In *Magadze v ADCAP*, *Ndlovu v Koekemoer* [2016] ZAGPPHC 1115 (2 November 2016), Neukircher AJ granted the applicants precisely the same relief as that sought by the applicants in the matters before me, and Mbongwe AJ followed suit in *Mokubung v Mamela Consulting and Others* [2017] ZAGPPHC 462 (14 June 2017) and *Manamela v Du Plessis t/a Debt Safe and Others* [2017] ZAGPPHC 289 (21 June 2017).

[6] Neukircher AJ noted that debt counsellors enjoyed no power under the NCA to release a debtor from debt review proceedings[3] and, correctly, with respect, held held that s 71 of the NCA did not afford an adequate remedy in the circumstances to expunge the record that the applicants were in debt review. She considered that the High Court nevertheless enjoyed 'wide powers' to grant the relief sought by the applicants. The learned acting judge expressed the opinion that it would be 'untenable' were s 71 of the Act to 'carry more weight than an order issued out by the High Court'.[4] The judgment does not identity the source of the wide powers that were purportedly invoked to grant the orders that were made, effectively overriding the statutory provision.

[7] In the other two judgments, Mbongwe AJ, citing *Universal City Studios Inc v Network Video (Pty) Ltd* [1986] ZASCA 3; 1986 (2) All SA 192; 1986 (2) SA 734 (at 754 SALR), explained that the orders made were granted 'using [the court's] inherent

[3] In this regard the learned acting judge agreed with the (uncontroversial) finding to that effect previously made by Nobanda AJ in *Rougier v Nedbank Ltd* [2013] ZAGPJHC 119.

[4] At para. 21 of the judgment.

reservoir of power to regulate procedures in the interest of the proper administration of justice'.

[8] The High Court does indeed have an inherent jurisdiction, and in appropriate circumstances even a duty, to develop the common law taking into account the interests of justice.[5] It also has an inherent jurisdiction to regulate its own procedures and processes – it was only of *that* aspect of its powers that Corbett JA was treating in *Universal City Studios* supra loc cit.[6] In the area of law regulated or determined by statute, it is under a duty to interpret and apply legislative enactments in a manner that promotes the spirit, purport and objects of the Bill of Rights,[7] but in striving to do so it cannot by procrustean construction do violence to the language used by the legislature Its powers do not extend to improving legislation by providing measures or remedies that the statutory enactments do not afford, merely because the court considers it would just or equitable that they should be afforded. To purport to do so would be in effect to assume a legislative function and thereby trench impermissibly on the domain of the legislative branch of government. The powers exercisable in terms of s 172 of the Constitution to read down or read in provisions to render legislation constitutionally compatible, or to provide just and equitable interim relief following on a declaration of constitutional incompatibility are quite distinguishable; as is the approach of the courts to strictly or narrowly interpret legislation that limits or curbs common law rights. Any contemplation of the width of the superior courts' powers that fails to acknowledge and respect these limitations of their bounds is likely to lead to a fundamentally misconceived conception of their actual extent, and, if by judges, can result in their being exceeded.

[9] The concepts of 'over-indebtedness' (including that of financial difficulty falling short of 'over-indebtedness' contemplated by s 86(7)(b)) and the attendant remedy of 'debt review' within the meaning of the NCA have no foundation in the common law. They are statutory creations. How they work is governed entirely by the

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[5] Sections 39(2) and 173 of the Constitution.

[6] Section 173 of the Constitution. In *Universal City Studios* supra, at p.754G, Corbett JA said 'There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate *its* procedures in the interests of the proper administration of justice'. (Italicisation supplied for emphasis. The italicised word was omitted from the quotation in the form in which it was borrowed by Mbongwe AJ for the purposes of the judgments in *Mokubung* and *Manamela* supra, with a resultant critical distortion of its actual import.)

[7] Section 39(2) of the Constitution.

NCA and, in the absence of a challenge to their constitutionality, the courts' powers in respect of them are delineated by the provisions of the enactment.

[10] It is plain, if regard is had to the Act, that the debt review process under the NCA is provided as a remedy whereby the over-indebted can obtain an opportunity to settle their credit agreement related debt in a responsible, dignified and ordered manner. In many cases it affords an alternative to voluntary sequestration that is mutually beneficial to debtor and creditor.[8] In all cases in which a rearrangement order or agreement is made, the over-indebted (or financially challenged) consumer is thereupon provided with conditional protection from harrying and distressing litigation. A support system for the debtor is afforded through the assistance provided by debt counsellors and payment distribution agents. The responsibilities of the debt counsellor include investigating whether any of the consumer's debt has been incurred as a result of reckless credit extension and, if it has, assisting the debtor to obtain the special relief provided for such cases by the NCA. The role given to the magistrates' court in the debt review procedure is to enable orders of a binding character to be made in respect of debt rearrangement in matters in which the creditors fail to enter into a voluntary debt rearrangement that can be made an order by consent by the National Consumer Tribunal in terms of s 138. In the nature of judicial proceedings, a court is, of course, not bound to rubber-stamp whatever is put before it. The Act acknowledges this by its express provision for the rejection of applications to the magistrate, and for the consequences that follow upon any such dismissal of the applications.[9]

[11] An important object of debt review-related relief in terms of the Act is to ensure that persons in debt review do not incur further debt until they have recovered from their predicament. This is sought to be achieved, in part, by prohibiting persons who have applied for debt review from entering into fresh credit agreements.[10] A person who has applied for debt review who incurs debt in contravention of the prohibition is deprived of the benefits and protection of Part B of Chapter 4 of the NCA in respect of the additional debt so incurred.[11] Any credit extended to a person subject to the

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[8] Cf. *Ex parte Ford and Two Similar Cases* 2009 (3) SA 376 (WCC) and *Ex Parte Concato and Similar Cases* 2016 (3) SA 549 (WCC).

[9] See s 86(7)(c) read with ss 87(1)(a) and 88(1)(b) of the NCA.

[10] Section 88(1) and (2) of the NCA (quoted in para. [12], below).

[11] Section 88(5) of the NCA.

prohibition is treated by the Act as reckless credit, with the attendant adverse potential consequences to the creditor's rights of recovery.[12] Potential creditors are afforded a means of protection against finding themselves considered to have extended credit recklessly by being able to refer to the information made available by the credit bureaux. That is the reason for the obligation on debt counsellors in terms of s 86(4) to inform the credit bureaux when they receive an application for debt review. The activities of the credit bureaux are also regulated in terms of the NCA. All of these provisions are directed at giving effect to various of the purposes of the Act listed in s 3.[13]

[12] The disabilities that follow for an allegedly over-indebted consumer after he or she has applied to a debt counsellor for debt review are regulated in the first instance by s 88(1) and (2) of NCA, which provide:

> **Effect of debt review or rearrangement order or agreement**
>
> (1) A consumer who has filed an application in terms of section 86 (1), or who has alleged in court that the consumer is over-indebted, must not incur any further charges under a credit facility or enter into any further credit agreement, other than a consolidation agreement, with any credit provider until one of the following events has occurred:
>
> (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 agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.
>
> (2) If a consumer fulfils obligations by way of a consolidation agreement as contemplated in subsection (1) (c), or this subsection, the effect of subsection (1) continues until the consumer fulfils all the obligations under the consolidation agreement, unless the consumer again fulfilled the obligations by way of a consolidation agreement.

(The reference in s 88(1)(a) to s 86(9) is plainly erroneous, and falls to be construed as referring to s 86(10). It is regrettable that the legislature has not taken the opportunity on either of the occasions on which the NCA has been amended to correct this error, despite it having been pointed out in several judgments of the courts.)

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[12] Section 88(4) of the NCA.

[13] See in particular s3(c) ,(d) ,(f), (g) and (i).

[13] The effect of s 88 in matters like the present would therefore appear to be that the applicants are prohibited from entering into any fresh credit agreements, apart from a consolidation agreement, until they have fulfilled all their obligations under the existing credit agreements as rearranged. That effect is ameliorated by the provisions of s 71 (as amended), which reads as follows:

> **Removal of record of debt adjustment or judgment**
>
> (1) A consumer whose debts have been re-arranged in terms of Part D of this Chapter, must be issued with a clearance certificate by a debt counsellor within seven days after the consumer has-
>
> (a) satisfied all the obligations under every credit agreement that was subject to that debt rearrangement order or agreement, in accordance with that order or agreement; or
>
> (b) demonstrated-
>
> (i) financial ability to satisfy the future obligations in terms of the rearrangement order or agreement under-
>
> (aa) a mortgage agreement which secures a credit agreement for the purchase or improvement of immovable property; or
>
> (bb) any other long term agreement as may be prescribed;
>
> (ii) that there are no arrears on the re-arranged agreements contemplated in subparagraph (i); and
>
> (iii) that all obligations under every credit agreement included in the rearrangement order or agreement, other than those contemplated in subparagraph (i), have been settled in full.
>
> [Sub-s. (1) substituted by s. 21 of Act 19 of 2014 (with effect from 13 March 2015).]
>
> (2) A debt counsellor must for the purposes of the demonstration envisaged in subsection (1) (b), apply such measures as may be prescribed.
>
> [Sub-s. (2) substituted by s. 21 of Act 19 of 2014 (with effect from 13 March 2015).]
>
> (3) If a debt counsellor decides not to issue or fails to issue a clearance certificate as contemplated in subsection (1), the consumer may apply to the Tribunal to review that decision, and if the Tribunal is satisfied that the consumer is entitled to the certificate in terms of subsection (1), the Tribunal may order the debt counsellor to issue a clearance certificate to the consumer.
>
> [Sub-s. (3) substituted by s. 21 of Act 19 of 2014 ((with effect from 13 March 2015).]
>
> (4) (a) A debt counsellor must within seven days after the issuance of the clearance certificate, file a certified copy of that certificate, with the national register established in terms of section 69 of this Act and all registered credit bureaux.
>
> (b) If the debt counsellor fails to file a certified copy of a clearance certificate as contemplated in subsection (1), a consumer may file a certified copy of such certificate

> with the National Credit Regulator and lodge a complaint against such debt counsellor with the National Credit Regulator.
>
> [Sub-s. (4) substituted by s. 21 of Act 19 of 2014 ((with effect from 13 March 2015).]
>
> (5) Upon receiving a copy of a clearance certificate, a credit bureau, or the national credit register (sic), must expunge from its records-
>
> (a) the fact that the consumer was subject to the relevant debt rearrangement order or agreement;
>
> (b) any information relating to any default by the consumer that may have-
>
> (i) precipitated the debt rearrangement; or
>
> (ii) been considered in making the debt rearrangement order or agreement; and
>
> (c) any record that a particular credit agreement was subject to the relevant debt rearrangement order or agreement.
>
> (6) Upon receiving a copy of a court order rescinding any judgment, a credit bureau must expunge from its records all information relating to that judgment.
>
> (7) Failure by a credit bureau to comply with a notice issued in terms of section 55, in relation to this section, is an offence.

[14] Prior to its substitution in terms of the National Credit Amendment Act 19 of 2014, s 71(2) had provided:

> A debt counsellor who receives an application in terms of subsection (1), must-
>
> (a) investigate the circumstances of the debt rearrangement; and
>
> (b) either-
>
> (i) issue a clearance certificate in the prescribed form if the consumer has fully satisfied all the obligations under every credit agreement that was subject to the debt rearrangement order or agreement, in accordance with that order or agreement; or
>
> (ii) refuse to issue a clearance certificate, in any other case.

[15] It is clear that s 71(2) in its original form was entirely congruent with ss 88(1)(c) and 88(2). The evident intention in substituting the subsection with the current provision was to enable credit receivers who had made debt review applications to achieve the expungement of the record of their debt rearrangement orders or agreements once they had fulfilled all their obligations in respect of those credit agreements that were not mortgage agreements or any other so-called 'long term agreements' as might be prescribed.[14]

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[14] The expression 'long term agreements' is not defined, but it would appear from the context that it refers to credit agreements of the sort in which the originally agreed period for the redemption of the debt extends over several years. They fall to be identified ('prescribed') in regulations, which, to the best of my knowledge, have yet to be made.

[16] It is implicit that upon the expungement of the record of the debt rearrangement in terms of s 71 the credit receiver may enter into fresh credit agreements. This must be so, because if potential credit providers are to be deprived of access to information at the credit bureaux that the consumer to whom they are considering proving credit is the subject of an extant debt rearrangement, the provision in s 88(4) that a credit provider who enters into a credit agreement with a consumer who is subject to a subsisting debt rearrangement is exposed to having all or part of that new credit agreement declared to be reckless credit[15] could not otherwise be applied consistently with the stated purposes of the Act[16]. The legislature might have made matters clearer had it also amended s 88 when it wrought changes to s 71. Its failure to do that has given rise to a tension between the two provisions. That tension falls to be resolved in the manner that I have described by applying the enjoinder in s 2(1) that the Act 'be interpreted in a manner that gives effect to the purposes set out in section 3'.

[17] The upshot is that if the applicants have fulfilled all their obligations under the credit agreements that are subject to the debt rearrangement that are not mortgage agreements or long term agreements identified in regulations made under the Act,[17] they are entitled to obtain a clearance certificate in terms of s 71 of the Act. If they succeed in obtaining such a certificate, the record of the debt rearrangement will be expunged from the records in the credit bureaux. If they encounter problems in obtaining the relief to which they might contend they are entitled under s 71, their remedy lies in an approach to the National Consumer Tribunal.[18] It is only the Tribunal that is empowered to assist them at first instance. The process is an administrative one. As pointed out by Thulare AJ in *Du Toit* supra, the role of the High Court in the

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[15] Section 80(1) of the NCA provides:

A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)—

(a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or

(b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that—

(i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

(ii) entering into that credit agreement would make the consumer over-indebted.

[16] See in particular those stated in s 3(c), (d) and (f) of the NCA.

[17] I am not aware that any such regulations have yet been made.

[18] Sub-secs 71(4) and(7) of the NCA

legislative scheme is limited to dealing with judicial reviews of, or appeals from the decisions of the Tribunal; see s 148(2) of the NCA. The NCA does not afford the High Court jurisdiction to deal at first instance with matters falling within the province of the Tribunal.

[18] Mr *Bruinders*, counsel for the applicant in case no. 20480/2017, sought to rely on s 88(1)(b) of the NCA[19] and Paragraph 4.2 of the 'Explanatory Note to the Withdrawal Guidelines' issued by the National Credit Regulator.[20] (The National Credit Regulator is empowered in terms of s 16(1)(a) and (b) of the Act to issue guidelines and explanatory notes. The Regulator is obviously bound by the Act and its published opinions bearing on the interpretation of the Act are expressly acknowledged, in s 16(1)(b), to be 'non-binding'.)

[19] Paragraph 4.2 of the 'Explanatory Note to the Withdrawal Guidelines' reads as follows:

> ***Post declaration of over-indebtedness***
>
> *• The debt counsellor has the statutory power to recommend that the consumer be declared over-indebted, however, the Magistrates Court in terms of Section 85(b), Section 87(1) and/or Section 88(1)(b) of the Act has powers to declare the consumer over-indebted or not over-indebted.*

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[19] See para. [12] above for the text of s 88(1).

[20] The Explanatory Note is undated, but it would appear from the information published on the National Credit Regulator's website that it was issued in March 2016. The introduction to the Explanatory Note records that '*On 19 February 2015, the National Credit Regulator ("the NCR") issued Guidelines 002/2015 for the Withdrawal from Debt Review. Subsequently, challenges were experienced by the industry regarding the implementation of certain aspects of the guidelines. As a result, the sub-committee that dealt with the matter reconvened to find ways to address the identified implementation challenges.*' It follows that the Explanatory Note falls to be read with the issued Guidelines 002/2015. The introduction to those Guidelines is instructive: '*The National Credit Act ("the Act") introduced debt review as a debt relief measure for over-indebted consumers. This is a statutory process which is only conducted by registered debt counsellors. The process to withdraw or terminate debt review by the consumer or debt counsellor is not specified in the Act; however the credit industry has in the past years developed a voluntary withdrawal process and a Form 17.4 to facilitate the withdrawal process either by a consumer or DC. The application of this voluntary withdrawal process was overturned by the judgment granted in the case of Rougier v Nedbank which provided clarity on whether a debt counsellor has the statutory power to withdraw or terminate debt review. In terms of this judgment any act by a debt counsellor to terminate or withdraw debt review is beyond the statutory powers of a debt counsellor as espoused in the Act, therefore the conduct is prohibited. Following an intensive review process of this judgment and its impact by the Credit Industry Forum(CIF), the NCR is pleased to announce that the paper developed by the CIF has been signed off and is issued as guidelines to be applied by all industry participants effective immediately. These guidelines replace the use of Form 17.4. Please take note that amendments to the Act, its regulations or case law supersede provisions made in these guidelines and will when necessary be amended.'*

• If the debt counsellor has recommended that the consumer be declared over-indebted and the Form 17.2 has been issued to credit providers, the consumer must approach the Magistrates Court with the relevant jurisdiction to be declared not over-indebted and no longer under debt review.

• A court application in terms of Section 87(1)(a) of the Act must be made to the Magistrates Court with relevant jurisdiction requesting the Court to reject the debt counsellor's recommendation that the consumer be found over-indebted; and declare the consumer no longer over-indebted.

• The application must advise the Court that the consumer had been found over-indebted by the debt counsellor and a copy of the Form 17.2 is to be attached as an annexure.

• The application must advise the relevant Magistrates Court that the consumer is no longer over-indebted and must include the consumer's financial circumstances at that time in motivation of the aforesaid.

• The application must further advise the relevant Magistrates Court that the consumer no longer needs to be under debt review.

[20] It is convenient first to consider counsel's reliance on s 88(1)(b). It is clear, if the provision is read contextually, that it does *not* contemplate an application to the magistrates' court for the purposes of declaring an already established state of over-indebtedness to have come to an end, nor does it contemplate an application to bring an end to debt review pursuant to an agreed debt rearrangement pursuant to a recommendation in terms of s 86(7(b). Indeed, having regard to the provisions of s 71 of the NCA, discussed above, such a procedure would be superfluous. As mentioned, the legislative scheme is that the lifting of the consumer's disabilities attendant on debt review occurs by way of an administrative, not a judicial, process. Having regard to what is entailed that seems to me in any event to be entirely fitting. Whilst acknowledging that the separation of powers does not give rise to a hermetic compartmentalisation, it would, in my view, have been an inappropriate allocation of constitutional functions to give the courts a surrogate role in the administrative framework of national credit regulation structures. The appeal/review role accorded to

the High Court in terms of s 148 is, by contrast, constitutionally appropriate. (I have already dealt with the basis for the role given by the statute to the magistrates' court.[21])

[21] For the interpretation of s 88(1)(b) contended for by Mr *Bruinders* to be able to apply, the phrase 'the court has determined that the consumer is not over-indebted' would require to be read as 'the court has determined that the consumer is *no longer* over-indebted', thereby necessitating the deletion of the word 'not' and its replacement with 'no longer'. To deal with debt review following on an agreed debt rearrangement in terms of s 86(7)(b), it would have to containing wording 'has determined that the consumer is no longer subject to the effects of debt review' or other words to that effect. It is well established that in this context words cannot be read into a statute unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands.[22] Mr *Bruinders*' argument did not fulfil the requirements of that test. The unambiguous effect of the statute is that an over-indebted or financially challenged consumer under debt review who enters into a debt rearrangement agreement can only terminate the debt review by settling his or her obligations to the extent required in terms of s 71 and demonstrating that he or she has satisfied the other requirements of s 71(1)(b).

[22] The determination that a consumer is not over-indebted referred to in s 88(1)(b) is a determination that a magistrate might make when deciding an application in terms of s 86(8)(b) or 86(9). A determination that the applicant was not over-indebted would be a ground for rejecting a proposal by the debt counsellor or an application for relief by the consumer directly in terms of s 86(9). It makes sense if the consumer is found not to be over-indebted and denied debt review that the consequences of having applied for debt review should thereupon fall away. The only purpose of s 88(1)(b) is to make that clear. (It would seem that if that were indeed the basis for rejecting the proposal or refusing the application, the magistrate would be enjoined to expressly make the determination; preferably as part of the court's order. Like many other things in the NCA, the matter might have been more clearly expressed.) As it is, the applicants' debt

[21] In para. [10].

[22] See e.g. *Rennie NO v Gordon and Another NNO* 1988 (1) SA 1 (A), at 22E-F and *Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34 (CC), at para. 20. Reading in the context of determining constitutional compatibility is an entirely different issue.

reviews have been confirmed in terms of s 86(7)(b); sub-secs 86(8)(b) and/or 86(9) have played no role.

[23] Turning now to the National Credit Regulator's explanatory note. It postulates an application being made in terms of s 87(1)(a).[23] Section 87(1)(a) of the NCA does not make provision for an application. As already explained, s 87(1) sets forth what the magistrate may do in regard to an application made to the court by a debt counsellor in terms of s 86(7)(c) read with s 86(8)(b), or a consumer in terms of s 86(9). The relief sought in such an application would be that provided for in s 86(7)(c).[24] Section 87(1)(a) merely acknowledges the magistrate's power to refuse – or as the statute puts it, 'reject' - such an application.

[24] Notionally, there would be nothing to prevent a person who has applied for debt review adducing evidence in an application brought by his debt counsellor in terms of s 86(8)(b) that he or she is in fact not over-indebted. And if the magistrate were convinced by such evidence, it would afford a basis for the court to determine that the consumer was not over-indebted and reject the application. That would bring an end to the effects of debt review by reason of s 88(1)(b).

[25] An application by the consumer in terms of s 86(9) occurs only if the consumer's application to the debt counsellor has been rejected. Unless such application is brought within the prescribed time the consumer is automatically excluded from the effects of debt review by reason of s 88(1)(a). An application can be brought in terms of s 86(9) only with the leave of the court. To obtain such leave the consumer would have to satisfy the magistrate prima facie that, notwithstanding a

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[23] Refer to the third bullet point of paragraph 4.2 quoted in para. [19] above.

[24] Ordering-

> *(i)* *that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and*
>
> *(ii)* *that one or more of the consumer's obligations 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.*

debt counsellor's determination to the contrary, he was in fact over-indebted. Despite granting the consumer leave to bring the application, the magistrate might nonetheless eventually reject it, in which event s 88(1)(b) would be triggered and the effects of debt review terminated.

[26] Section 87(1)(a) provides for a *negative* response by the court to the application brought before it. It is to that provision that s 88(1)(b) effectively cross-references. The Act most certainly does not contemplate an application to the magistrates' court for a declaration that the consumer is not over-indebted. Any such declaration would require a *positive* response to an application for which the Act makes no provision. Once a debt review has been confirmed, whether by way of court order in terms of s 87(1)(b) or by voluntary debt rearrangement in terms of s 86(8)(a), the only way to end its effect is in terms of s 71 read with s 88(1)(c). There is no halfway house.

[27] In short, the NCA just does not make provision for the sort of application conjured in paragraph 4.2 of the Explanatory Note.

[28] Mr *Bruinders*' last ditch submission was to ask only for declaratory relief in the form of the first of the two heads of relief sought in the application, and described in paragraph [1] above, shorn of any direction as to the expungement of the records by the credit bureaux. In this regard he argued that the court should come to the applicants' assistance exercising its power in terms of s 21(1)(c) of the Superior Courts Act 10 of 2013. The simple answer to that argument is that it would be inappropriate to make such a declaration in the environment regulated by the NCA while the applicants are still properly recorded in terms of the Act as being subject of debt reviews. What could be the purpose of such a declaration while the applicants are still in debt review? Any such declaration would tend to undermine the scheme of the Act and its objects. The applicants have declared that they have brought the applications so as to be enabled to incur fresh credit. As explained earlier in this judgment, the Act precludes that until they have obtained clearance in terms of s 71.

[29] The applicants' resort to this court was therefore misconceived. They are limited to the relief provided for in terms of s 71 of the NCA, and can seek it only in the manner therein set out. To the extent that they do not qualify for relief under that provision, they are remediless. The courts are not empowered to craft a remedy that

the statute does not allow for. In my view therefore the orders made in the Gauteng Division judgments mentioned earlier should not have been granted.

[30] In the result the following orders are made:

1. In case no. 20480/2017:

   The application is dismissed.

2. In case no. 20481/20:

   The application is dismissed.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

In case no. 20480/2017

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Applicant's attorneys:	**MTO Attorneys**
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In case no. 20481/2017

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