



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A100/2016

In the appeal between:

BELINDA LOUIZA DRISKEL
(on behalf of Help-U Debt Counsellors)

Appellant

and

MOSHIDI YVONNE MASEKO

1st Respondent

STANDARD BANK OF SOUTH AFRICA LTD

2nd Respondent

NEDBANK LTD

3rd Respondent

**SAM DALE TRADING (PTY) LTD t/a
CONSUMER FRIEND**

4th Respondent

CORAM:

RAMPAI, J *et* VAN ZYL, J

JUDGMENT BY:

VAN ZYL, J

DELIVERED ON: 24 AUGUST 2017

- [1] This is an appeal against a judgment delivered in the Bloemfontein Magistrate's Court on 31 July 2015, read with the written reasons provided by the magistrate in terms of Magistrate's Court Rule 51(1)(a) and (b), dated 22 September 2015.
- [2] In terms of the heading of the founding affidavit the appellant, a debt counsellor, approached the court *a quo* with an application "for debt review in terms of section 86(7), read with sections 86(8)(b), 87 and 79 of the National Credit Act, 34 of 2005. In terms of the Notice of Motion the following relief was sought:
- "(a) That the applicant is granted leave in terms of section 86 of the National Credit Act 34 of 2005 to bring this application;
 - (b) That the first respondent is declared over- indebted as set out in section 85(b) of the National Credit Act 34 of 2005;
 - (c) That the first respondent's debt obligations be re-arranged in terms of section 87(1)(b)(ii) read with section 86(7)(c)(ii) of the National Credit Act 34 of 2005;
 - (d) Payment of R4900.00 will be made on a monthly basis as from 15th day of February 2015 due to DC Fee and Legal Fee that will be paid to the appointed Payment Distribution Agency.
 - (e) That each party bears its own costs, unless otherwise ordered."
- [3] The second respondent opposed the application. After the hearing of the application, it was dismissed with costs.

[4] I have to point out that in its initial judgment dated 31 July 2015, reflected on p.112 - p.113 of the record, the court *a quo* made the following order:

“1. That the application is hereby dismissed with costs.”

However, when the court *a quo* on 22 September 2015 provided its reasons for the judgment in terms of Magistrate`s Court Rule 51(1)(a) and (b), as reflected on p.113 – p.119 of the record, the said reasons concluded with the following order:

“1. That the application is hereby dismissed with costs;
2. The Debt Review is subject to review after a period of 12 months from the date of this order.”

No explanation for the aforesaid difference between the two orders is evident from the papers before us. Both parties, however, approached the appeal on the basis that the last mentioned order of 22 September 2015, is the order that is being appealed against. This judgment is consequently based on the same approach.

Background:

[4] The appellant is a registered debt counsellor as envisaged in the National Credit Act, 34 of 2005 (“the Act”) and was approached by the first respondent (“the consumer”) on 21 October 2014 to have her declared over-indebted and for debt review in terms of section 86 of the Act. For the purposes of the said application the consumer completed Form 16, as prescribed by regulation 24, read with regulation 74 and Schedule 1 to the Regulations in terms the

Act (“the NCA Regulations”). Subsequent to her assessment, the appellant concluded that the consumer was over-indebted and applied to the Bloemfontein Magistrate’s Court to have the consumer’s obligations re-arranged in accordance with the proposed restructured payment plan attached to the application, annexure H6 - H8, p.61- p.63 of the record.

[5] The aforesaid restructured payment plan included the re-arrangement of the following credit agreements between the consumer and the second respondent:

1. Personal loan account [4...];
2. Credit card account [5...];
3. Home loan account [3...]; and
4. Current account [0...].

[6] The appellant and the second respondent were apparently unable to agree on a plan of debt re-arrangement and the second respondent consequently filed its answering affidavit in opposition of the debt review application. In its answering affidavit the second respondent, *inter alia*, raised the following points of contention against the application:

1. As a point *in limine*, that the appellant unilaterally amended the interest rates contractually agreed upon between the consumer and the second respondent in the proposed restructured payment plan, which relief cannot be granted as it is not provided for in section 86(7)(c)(ii) of the Act.

2. The appellant failed to provide sufficient evidence to substantiate the consumer's alleged over-indebtedness, considering that the onus rested upon the appellant.
3. In the alternative, should the Court find that the consumer is proven to be over-indebted, the appellant's proposed restructured payment plan, according to the second respondent's calculations, does not service the required interest and the full outstanding amounts, together with interest thereon, and will subsequently not be paid off in the periods proposed by the appellant.
4. The proposed payment plan is not fair, just and equitable and, therefore, does not comply with the purpose of the Act.

[7] Pursuant to the filing of the second respondent's answering affidavit, the appellant filed her replying affidavit. The main issues that were addressed in the replying affidavit are the following:

1. The appellant denied that she unilaterally amended the interest rates. She specifically referred to the home loan account, the credit card account and the personal loan account and averred that the amended interest rates were accepted by the second respondent, referring to Annexures L1, L2 and L3 attached to her supplementary affidavit, p. 78 – 80 of the record.

2. The appellant alleged that the financial means of the consumer had been evaluated by her, which, according to the appellant, is evident from Annexures C1, C2, C3, C4, C5, D1, D2, D3 and G1 (proof of income) attached to the founding affidavit. The appellant, therefore, contended that there is sufficient evidence before the court to enable it to properly determine and adjudicate whether the consumer is in fact over-indebted.
3. Regarding the criticism by the second respondent on the proposed restructured payment plan, the appellant denied same and averred the following:

“The proposal and the attached cascades do solve (*sic*), the payments are in line with the guidelines published. I attach hereto the latest proposal, as Annexure A.”

- [8] For the sake of clarity, I will hereinafter refer to the last mentioned proposal as “the updated restructured payment plan”. A draft order was also attached to the replying affidavit (p.103 – p.104 of the record).

Findings by the court *a quo* and the grounds of appeal:

- [9] The court *a quo*, *inter alia*, made the following findings in its reasons in terms of Magistrate`s Court Rule 51(1)(a) and (b):

“[8] Interest may be changed by agreement between the parties. Had the second respondent been in disagreement with regard to the change of interest, they could not have communicated

acceptance to the applicant as per L1, L2 and L3 of the founding affidavit.

[9] In (*sic*) page 29 of the founding affidavit proof of income is attached as annexure G1 in a form of a salary advice they did (*sic*) October 2014.

[10] The matter was set down for hearing on 17 July 2015.

[11] In terms of the founding affidavit paragraph 13 and as per submission by the applicant the court was informed that the first respondent earns an amount (*sic*) R14 183.29 per month, while the salary advice refers to total earnings as R18 367.75 for the month of October 2014, no explanation was provided to the court for the difference.

CONCLUSION

[12] No recent proof of income was submitted before the court on 17 July 2015 and no reason advanced for such a failure.

[13] Having considered the papers filed of record and submissions made by both parties, I am not satisfied that the applicant made a case on a balance of probabilities for the first respondent to be declared over- indebted as set out in terms of section 85(b) of the NCA.”

[10] For reasons that will become evident from the judgment, I deem it prudent to repeat the grounds of appeal, as set out in the notice of appeal, herein:

“1. The Learned Magistrate erred in concluding that applicant did not make out a case on a balance of probabilities that the first respondent is over-

indebted as set out in terms of the National Credit Act, Act 34/2005 (as amended).

2. The Learned Magistrate erred in applying the principles and requirements pertaining to the consideration of the appellant's recommendation and proposal that the first respondent be found to be over-indebted.
3. The Learned Magistrate erred in finding that no explanation was provided to court for the difference in the income of the first respondent as set out in annexure 'G1' to the founding affidavit, in that it is recorded on such attachment that the total earnings of the first respondent is R18 367.75, and the submission made to court that the total of the first respondent's earnings are R14 183.29.
4. The Learned Magistrate erred in considering that on annexure 'G1' annexed to the founding affidavit, in which it is recorded that salary code 0359* (A) DEPRIVATION ALL: R4 184.46 read with number 3 under 'notes', indicates that such an amount is an arrear payment that was made to the first respondent in that particular month, and does not form part of his (*sic*) continuous monthly salary.
5. That the Learned Magistrate erred in finding that no sufficient explanation was provided to the court for the difference, as the difference in amount appears fully from the papers that were before court.
6. The Learned Magistrate erred in finding that no reason was advanced for the failure to attach a recent proof of income before court on 17 July 2015.
7. The Learned Magistrate erred in finding, that although the interest had been changed by agreement between the parties, and that the interest rate applicable to a credit agreement may be changed by agreement between the parties, and that in fact the interest rate applicable to this

specific credit agreement between the first respondent and the second respondent, had indeed been changed by agreement, that on the papers before the court, the applicant did not make out a case on a balance of probabilities for the first respondent to be declared over-indebted as set out in terms of section 85(b) of the ... Act.

- [8] The Learned Magistrate erred in making the order in terms of which the application for debt review is dismissed with costs, with reference to section 85(b) of the ... Act.

8.1 The above-mentioned section provides the court and the magistrate hearing the matter to declare that the consumer is over-indebted, as determined in accordance with this part, and may such Learned Magistrate make any order as contemplated in section 87 of the ... Act, to relieve the consumer's over-indebtedness.

- [9] The Learned Magistrate erred in not applying section 85(a) of the ... Act in that the matter should have been referred to a debt counsellor with the request that the consumer's circumstances be re-evaluated and that the appellant should have made a revised recommendation to the court in terms of section 86.

- [10]. The Learned Magistrate erred and acted *ultra vires* in dismissing the application for debt review with costs and in addition thereto, made the debt review subject to review after a period of 12 months from the date of the order, being 22 September 2015.

- [11] The Learned Magistrate erred in finding that the debt review of the first respondent can be made subject to review after a certain period, subsequent to the application for debt review being dismissed with costs. The Learned Magistrate thus erred in finding that the process of debt review did not come to an end by the dismissal of such application.

[12] The Learned Magistrate erred in finding that the first respondent is not over-indebted on a balance of probabilities as on the date upon which the appellant made the assessments in accordance with section 86(6)(a) in the determination of the first respondent's over- indebtedness, and the appellant's reference to section 79 of the ... Act.

[13] The Learned Magistrate erred in applying the principles as laid down in section 86(7)(b) of the ... Act, in that each relevant credit provider and the first respondent had accepted the proposal, and the variation of the initial interest rates applicable to the credit agreements, and after having accepted same, did not make the recorded proposal an order of the court. That the Learned Magistrate had erred in not finding that if it had been consented to by the first respondent and each relevant credit provider, the order should have been filed and ordered as in terms of section 138 of the ... Act, in the alternative."

Condonation:

[11] The appellant filed an application for condonation for the non-compliance with Rule 50(1) of the Uniform Rules, read with Magistrate`s Court Rule 51, in that both the noting of the appeal and the prosecution of the appeal were done outside the relevant prescribed time periods. The second respondent did not file any opposition to the condonation application. Mr Tshangarakis, who appeared on behalf of the second respondent, indicated that the second respondent is not opposing the granting of condonation, subject to the qualification that the second respondent`s stance in this regard is not to be understood to be a concession on the prospects of success of the appeal.

[12] In view of the numerous issues I intend addressing in this judgment, I am of the view that it is of great importance to actually deal with the merits of this appeal, as this matter is not only important to the parties hereto, but also to debt counsellors, Magistrates and the public at large who may consider to apply for debt review. I will therefore grant the condonation application, with the appellant to pay the costs thereof.

Merits of the appeal:

[13] I will start off by dealing with the two main findings made by the court *a quo*:

A: Dispute concerning agreement on the amendment of the interest rates:

[14] The finding the court *a quo* made in this regard is a finding in favour of the appellant, although the eventual order made by the court *a quo* was not in favour of the appellant. The order of the court *a quo* was based on a different finding, being on the issue of over-indebtedness. The finding pertaining to the amendment of the interest rates did, therefore, not constitute the basis of the court *a quo*'s order. This raises the question whether we, as a court of appeal, ought to and/or need to deal with this finding at all.

[15] As correctly pointed out by Mr Tsangarakis, an appeal is directed against the judgment itself, i.e. the substantive order, not the reasons for the judgment. This was stated in **Western**

Johannesburg Rent Board And Another v Ursula Mansions (Pty) Ltd 1948 (3) SA 353 (A) at 355:

“... it is clear that an appeal can be noted not against the reasons for judgment but against the substantive order made by a court. For instance, it is open to a respondent on appeal to contend that the order appealed against should be supported on grounds which were rejected by the trial judge: he cannot note a cross-appeal under Rule 6 (4) unless he desires a variation of the order. See *Municipal Council of Bulawayo v Bulawayo Waterworks, Ltd.* (1915 AD 611 at pp. 625, 631, 632).”

The aforesaid principle has since been confirmed and applied in numerous judgments, one of which was in the matter of **Cape Empowerment Trust Ltd v Fisher Hoffman Sithole** 2013 (5) SA 183 (SCA) at 198, paragraph [39]:

“[39] In the result I agree with the ultimate conclusion arrived at by Davis J, albeit for different reasons. This renders it unnecessary to decide on the correctness of his reasoning, since an appeal does not lie against the reasons for judgment but against the substantive order made by the court *a quo* (see eg *Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355).”

- [16] However, in my view and in the circumstances of this appeal, we are obligated to deal with the finding of the court *a quo* regarding the amendment of the interest rates. In the **Ursula Mansions**-judgment, *supra*, it was specifically found that “it is open to a respondent on appeal to contend that the order appealed against should be supported on grounds which were rejected by the trial judge: he cannot note a cross-appeal...”. In the present appeal it is the very submission of Mr Tsangarakis that the court *a quo* erred in finding that the second

respondent agreed to the proposed amendment of the interest rates and that, therefore, the point *in limine* regarding the absence of such an agreement should, in itself, already have resulted in the dismissal of the application and consequently the dismissal of the present appeal. The further reason why I deem it necessary that we have to deal with this finding, is in view of the ground of appeal recorded in paragraph 13 of the appellant's notice of appeal, which is based on this very finding in favour of the appellant. I will therefore now deal with the merits of this finding.

[17] Section 87 of the Act determines as follows:

“87. Magistrate's Court may re-arrange consumer's obligations.

(1) If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86(8)(b), or the consumer applies to the Magistrate's Court in terms of section 86(9), the Magistrate's Court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means, prospects and obligations, may

—

(a) reject the recommendation or application as the case may be; or

(b) make —

(i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) or (3), if the Magistrate's Court concludes that the agreement is reckless;

(ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii); or

(iii) both orders contemplated in subparagraph (i) and (ii).

(2) ...”

[18] The court only has the debt re-arrangement powers awarded to it by the Act. Section 86(7)(c)(ii) provides that the court can re-arrange one or more of the consumer's obligations 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.”

[19] A court is not permitted to reduce the interest rate applicable to an agreement in order to provide debt relief. In **SA Taxi Securitisation (Pty) Ltd v Dick Lennard** 2012 (2) SA 456 (ECG) the following findings in this regard were made in paragraphs [9] to [11] of the judgment:

“[9] On a reading of s 87(1) it is clear that the magistrates' court does not have the power to make any order other than those listed in paras (a) and (b) thereof. If it is found that a consumer is over-indebted as determined by the debt counsellor and a recommendation that the consumer's obligations be rearranged is appropriate in the circumstances, then the said court is empowered to make one or more of the orders contemplated in s 86(7)(c)(ii). In the present matter Strydom's recommendation was that the respondent's obligations arising from the credit agreement concluded with the appellant were to be rearranged by 'extending the period of the agreement and reducing the amount of each payment due' as envisaged in subpara (aa) of s 86(7)(c). It is, however, clear from Strydom's proposal and the calculations that,

instead of reducing the amount of each payment due each month by spreading the payment thereof over an extended period as envisaged in subpara (aa), he achieved a reduction in the payments by reducing the interest rate agreed to in the agreement. Consequently, by ordering that the respondent's obligations be rearranged 'as per annexure A to the application, by extending the periods of the agreements and reducing the amount of each payment due accordingly', the magistrate effectively ordered not only that the monthly payments be reduced, but also that the interest rate be reduced to 15,5%.

[10] I agree with the appellant's submission that in doing so the magistrate acted outside his powers. An order envisaged by s 86(7)(c)(ii) constitutes a variation of the terms of the credit agreement. Subparagraph (aa) of the said section in terms of which both the recommendation and the order were clearly made authorises the court to extend the period of payment and reduce the amounts of each payment due 'accordingly'. It makes no reference to any other terms of the credit agreement. What subpara (aa) provides for is debt relief to an over-indebted consumer by extending the period of payment, thereby resulting in a reduction of the payments without reducing the actual amount owing by him or her in terms of the relevant agreement. The wording thereof is clear and unambiguous and is in my view not capable of any other interpretation. It accordingly does not permit the magistrates' court to reduce the interest rate applicable to an agreement in order to provide debt relief to a consumer (see Van Heerden *Guide to the National Credit Act* (LexisNexis) para 11.3.3.2). It also follows that as the debt counsellor's scope for making a proposal as envisaged in s 86(6)(c) is inextricably linked to the powers of the magistrates' court in s 87 of the Act, he or she cannot recommend what the said court is not empowered to order. (Own emphasis)

[11] Accordingly the magistrate in the present matter acted ultra vires and the order must be set aside..."

[20] The said principle has since been confirmed in a number of judgments, *inter alia*, in the matter of **Nedbank Ltd v Norris and Others** 2016 (3) SA 568 (ECP) at paras [43] to [45]:

“[43] Apart from this, the magistrate also ordered that the first respondent's contractual obligations to pay interest on the outstanding balance of the loan be reduced from the fixed 17,5% to 0%.

[44] Section 86(7)(c)(ii) confers no such power upon the magistrates' court. A debt-rearrangement order has as its purpose the rescheduling or rearrangement of the obligations of the consumer in such a manner as to enable the consumer to meet his/her/its obligations to the credit provider. It serves to mitigate the effect of over-indebtedness by making provision for payments within the existing means of the consumer and over an extended period. A rearrangement order does not, and cannot, extinguish the underlying contractual obligations. This much is plain from the wording of s 86(7). The order reducing the first respondent's contractual obligation to pay interest on the outstanding balance of the loan is therefore ultra vires the NCA (*FirstRand Bank v Adams* supra para 28; *SA Taxi Securitisation (Pty) Ltd v Lennard* 2012 (2) SA 456 (ECG) para 10). (Own emphasis)

[45] A magistrates' court is a creature of statute. It only has the jurisdiction which is conferred upon it by statute. It exercises no inherent jurisdiction and can accordingly not adjudicate matters which fall outside of its expressly conferred jurisdiction and cannot grant orders other than those it is expressly authorised to grant (*Ndamase v Functions 4 All* 2004 (5) SA 602 (SCA)).

[46] In purporting to make the order the magistrate acted without jurisdiction....”

In **Nedbank Ltd v Jones and Others** 2017 (2) SA 473 (WCC) the Court adopted the reasoning in the **Norris**-judgment, *supra*, and, *inter alia*, made the following declaratory order:

“A magistrate’s court hearing a matter in terms of s 87(1) of the National Credit Act 34 of 2005, does not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement, and any order containing such a provision is null and void.”

- [21] The interest rates applicable to the credit agreements entered into between the consumer and the second respondent in the present matter are indicated hereunder, as opposed to the amended interest rates initially proposed by the appellant in the restructured payment plan:

ACCOUNT	ORIGINAL INTEREST RATE	INTEREST PROPOSED BY THE APPLICANT
[4...]	22,35%	0,00%
[5...]	22,35%	0,00%
[3...]	11,05%	0,00%
[0...]	21,750%	0,00%

In the updated restructured payment plan attached to the replying affidavit, three of the four proposed interest rates remained at 0,00%, whilst the proposed interest rate pertaining to the home loan account, [3...], was amended to reflect a proposal of 7,75%.

- [22] As indicated earlier, the appellant denied in her replying affidavit that the relevant interest rates were changed unilaterally and

averred that the proposed changed interest rates were accepted by the second respondent, relying on annexures “L1”, “L2” and “L3”.

- [23] From a perusal of the papers it seems that the appellant had sent an e-mail to the consumer’s creditors, including the second respondent, on 3 November 2014, advising them as follows (annexure “A2”, p.66 of the record):

“This notice serves to advise you of the attached restructured proposal and cascading of the above mentioned consumer.

Inform our company of any changes or errors which require re-work before the Final Proposal are (*sic*) issued. Kindly respond to this Proposal in the form of a (*sic*) acceptance letter or counter proposal within five (5) business days. If we do not receive response within five (5) business days we will deem the attached Proposal to be acceptable.”

In the founding affidavit, dated 4 November 2014, the appellant, *inter alia*, made the following averments:

“17. The following respondents accepted the proposal:

None

17.1 The following respondents rejected the proposal:

None

17.2 The following respondents sent a counter proposal which was accepted by me:

None

17.3 The following respondents sent a counter proposal which was not accepted by me:

None

17.4 ...

17.5 No response was received from the following respondents:

None”

The appellant subsequently filed a supplementary affidavit, dated 10 November 2014 (p.76 – p.77 of the record), in which she made the following relevant averments:

“2. After the application was served on all the respondents some creditors responded in the following manner:

2.1 The following creditors accepted the proposal attached to the application.

Second respondent ‘L2’ and ‘L3’.

2.2 The following respondents rejected the proposal attached to the application.

None

2.3 The following respondents provided us with counter offer attached to the application.

Second respondent ‘L1’.”

[24] Annexure “L1” reflected on p.78 of the record, dated 7 November 2014, pertains to the home loan account [3...] and from a reading thereof it is clear that it indeed constituted a counter proposal in the following terms:

“The debt re-arrangement proposal has not been accepted due to the following reason/s:

- a. The re-arrangement proposal does not solve the matter and/or does not lead to the eventual satisfaction by the customer of all financial obligations.

Please find attached our counter proposal, which is an indication of a re-arrangement that would be acceptable to us.

Outstanding balance as a date of this letter	R41 0166.49
Proposed instalment	R3 098.11
Interest rate	7,75% per annum, with effect from 2014/11/30, worked out daily and compounded monthly, which will be fixed for as long as she remain in debt review.
Monthly fees	R57.00
Concession term	300 months or until repayment of the debt or until you can meet your original contractual obligations, whichever occurs earlier.

The attached counter proposal is only valid for a period of ten (10) business days from date of this letter.”

- [25] Annexure “L2” which is reflected on p.79 of the record and also dated 7 November 2014, pertains to the credit card account [5...]. Annexure “L3”, also dated 7 November 2014, is reflected on p.80 of the record and it pertains to the personal loan account [4...]. Each of these letters indicates in the heading thereof that it is a

provisional acceptance of the re-arrangement proposal and then the following is stated:

“We confirm our provisional acceptance of the terms of the re-arrangement proposal for the above account.

This re-arrangement is accepted on a provisional basis on specific terms and conditions which will be confirmed at final acceptance or as ordered by court.”

[26] Mr Tsangarakis made the following statements and submissions in paragraphs 1.3 to 1.7 of his heads of argument filed in the appeal:

“1.3 The appellant had submitted in both her replying affidavit to the debt review application (par 2) as well as her Heads of Argument filed for purposes of argument of the debt review application, that she had ostensibly ‘accepted’ the second respondent’s counter proposals which were sent on 5 March 2015 and then proceeds to attach said counter proposals to her heads of argument (which is in itself disallowed).

1.4

1.5 That being said, it should be noted that the appellant’s revised proposal (Annexure ‘A’) to both her replying affidavit and Heads of Argument does not correspond with the second respondent’s counter proposal and as such no settlement had been reached.

1.6 As such there was never a so-called ‘meeting of the minds’ between the parties which could have led to this matter becoming settled.

1.7 Accordingly, and in the absence of any settlement, the bank’s counter proposal has lapsed and the contractual interest rates remain applicable.”

[27] The heads of argument filed for purposes of the hearing of the debt review application in the court a quo do not form part of the appeal

record before us. The second respondent's counter proposal(s) "which was sent on 5 March 2015" are, therefore, not before us and we have no knowledge of the contents thereof. If the appellant wanted to rely, or attempt to rely, on those counter proposals, it was, at the very least, the duty of the appellant (or the appellant's attorney) to have ensured that those heads of argument be included in the appeal record. Having said that, it is also to be recorded that the inclusion thereof in the appeal record would, in any event, not necessarily have guaranteed that we, as a court of appeal, would have attached any evidential value to it. Those counter proposals and the appellant's alleged acceptance thereof, should have been contained in the replying affidavit in order for them to have properly served before the court a quo as part of the evidence. It was possible for the appellant to have done this, considering that the replying affidavit was only attested to on 19 June 2015 and the said counter proposals were apparently sent to the appellant (probably via e-mail) on 5 March 2015 already.

[28] We can thus only deal with this appeal based on the papers before us which form part of the appeal record. It, in any event, seems that the court a quo's aforesaid finding that the interest rates had been changed by agreement between the parties, is based on Annexures "L1", "L2" and "L3" to the supplementary affidavit and not on any counter proposal(s) attached to the appellant's heads of argument at the time.

[29] I will now deal with the respective accounts the consumer holds with the second respondent:

Current Account [0...]:

- [30] It seems to be common cause between the parties that the applicable interest rate in terms of the credit agreement is 21.75%. The revised interest rate proposed by the appellant, both in the initial restructured payment plan and in the updated restructured payment plan, is 0%. However, Annexures “L1”, “L2” and “L3” do not pertain to this account. There was therefore no proper evidence before the court *a quo* as to whether the second respondent had accepted the amended interest rate, rejected it or made a counter offer regarding thereto to the appellant.
- [31] There is consequently, in my view, no basis upon which the court *a quo* could have found that the amendment of the interest rate pertaining to this account followed from an agreement between the parties.

Home Loan Account [3...]:

- [32] Annexure “L1” is applicable to this account. As indicated by the appellant in her supplementary affidavit referred to earlier, Annexure “L1” constituted a counter-offer. As recorded earlier, the said counter-offer was only valid for a period of ten (10) business days from the date of the letter, hence from 7 November 2014.
- [33] The trite general principles regarding the acceptance of an offer (or a counter-offer) are summarised in **Wille’s Principles Of South African Law**, F Du Bois *et al*, 9th Edition, at p. 742 to 743:

“An acceptance is an assent by the person to whom the offer is made to be bound by the terms contained in the offer. In order for the acceptance to constitute a contract it is necessary that the acceptance be definite and unconditional....

The person to whom the offer is made can convert it into a contract only by accepting, as they stand, the terms offered; he cannot vary them by omitting or altering any of the terms or by adding proposals of his own. It follows that if the acceptance is not unconditional but is coupled with some variation or modification of the terms offered, no contract is constituted...

The acceptance itself must be communicated to the offeror, and until it has been so communicated no contract is constituted...”

Where an offer (or counter-offer) stipulates a period for acceptance, it lapses if acceptance does not take place within that period. See **Contract General Principles**, SWJ Van der Merwe *et al*, 4th Edition, at p. 52.

[34] Not a single averment was made by the appellant in any of the papers before us that she accepted the counter proposal contained in Annexure “L1”. The averment she made in the replying affidavit is that the changed interest rate “was accepted by the second respondent” (not by the appellant), in support of which averment the appellant relied on annexure “L1”, the counter proposal, which reliance is clearly ill-founded.

[35] It is important to be mindful of the fact that the counter proposal contained in Annexure “L1”, did not only propose an interest rate of 7.75% as opposed to the appellant’s proposal of 0%. It also proposed a different monthly payment, R3 098-11, as opposed to

the appellant's proposed monthly payment of R2 290-76. In addition the counter proposal proposed a revised payment term of 300 months as opposed to the 111 months proposed by the appellant. A monthly fee of R57-00 was also proposed in the counter proposal, as opposed to no fee proposed by the appellant. It is therefore, in my view, clear that the counter proposal pertaining to the interest rate of 7.75% was based upon the "package deal" proposed by the second respondent. Any alleged acceptance by the appellant of the counter proposal should, therefore, have been an acceptance of the complete counter offer as set out in the letter. Again no such acceptance appears from the record before us.

- [36] The Court *a quo* consequently erred in finding that an agreement was concluded regarding the amendment of the interest rate from 11.05% to 7.75% as proposed in the updated restructured payment plan.
- [37] For the sake of completeness I need to point out that I agree with the submission by Mr Tsangarakis that the updated restructured payment plan does, in any event, not correspond with the second respondent's counter-proposal in its totality as set out in annexure "L1".

Credit Card Account [5...] and Personal Loan Account [4...]:

- [38] In both annexures "L2" and "L3" it is stated that it is a "provisional acceptance" which will be "confirmed at final acceptance or as ordered by court". I am not convinced that these two letters constitute an unconditional acceptance of the proposal pertaining to the two accounts, especially in view of the intimation that it is still to be

confirmed. The words “without prejudice” which appear at the top of both these letters also tend to favour an interpretation that the acceptance was not unconditional. I, however, deem it unnecessary for purposes of this appeal to make a finding regarding the interpretation of these two letters, as it will have no effect on the outcome of the appeal considering the findings I have already made pertaining to the other two accounts and the further findings still to come in this judgment. I do pause to mention that I would have expected the applicant to have dealt with the interpretation of these two letters in her supplementary founding affidavit in order for her to be able to rely upon them as the basis for alleged agreements on the amended interest rates pertaining to these two accounts.

Conclusion:

- [39] In the premises I am convinced that the court *a quo* erred in its finding that the second respondent agreed to the amended interest rates. The evidence before court does not support or substantiate such a finding. That should have been the end of the application. The court *a quo* therefore could and should have dismissed the application (also) on this ground.
- [40] The appellant can, therefore, not be successful with the appeal on the basis of the ground of appeal contained in paragraph 13 of the Notice of Appeal.

B: Discrepancies regarding the monthly income of the consumer and the absence of recent proof of income:

[41] The aforesaid findings are to be considered against the backdrop of an exposition of the procedural requirements and substantive law relating to debt review applications.

[42] Procedural clarity was brought by the judgment in **National Credit Regulator v Nedbank Ltd** 2009 (6) SA 295 (GNP). The findings made in the said judgment are duly summarised in **Guide to the National Credit Act**, JW Scholtz *et al*, at p. 11-52 to p. 11-53, par 11.3.3.2. Relevant to the present matter are the following:

- “(a) In discharging his duties under section 87 of the National Credit Act, the magistrate fulfils a judicial role.
- (b) The power of a magistrate’s court to conduct a hearing in terms of section 87 of the Act and to make appropriate orders in consequence thereof is derived from section 87 read with section 86. The Magistrates’ Courts Act and Magistrates’ Courts Rules govern the procedure by which the magistrate’s court may conduct itself in so doing.
- (c) A referral by a debt counsellor to a magistrate’s court under section 86(8)(b) and 86(7)(c) of the National Credit Act is an application within the meaning of the Magistrates’ Courts Act and rules and falls to be treated as such in terms of magistrate’s court rule 55
- (d) ...

- (e) A debt counsellor who refers a matter to a magistrate's court in terms of section 86(7)(c) and 86(8)(b) of the National Credit Act has a duty to assist the court and should be available and able to render such assistance by furnishing evidence, making submissions regarding his proposal or by answering queries raised by the court.
- (f) The debt counsellor is the applicant in debt review proceedings under sections 86(7)(c), 86(8)(b) and 87; the consumer and his credit providers are the respondents.
- (g) The appropriate magistrate's court to approach for the purposes of sections 86(7)(c), 86(8)(b) and 87 of the National Credit Act is the magistrate's court having jurisdiction in respect of the person of the consumer.
- (h) ...”

[43] The aforesaid judgment was confirmed on appeal in **Nedbank Ltd v The National Credit Regulator** 2011 (3) SA 581 (SCA). In addition the SCA also dealt with the omission in section 86(8) to refer to section 86(7)(c). The court referred to the principle that a court is empowered to modify the wording of a statute where it is necessary to give effect to what was the true intention of the legislature. It then concluded that by reading in the words “and section 86(7)(c)” in declaratory 4 of the order by the court *a quo* proper effect will be given to the intention of the legislature.

[44] On 10 May 2012 the Debt Counselling Regulations (‘the Debt Counselling Regulations’), published in Government Gazette 35327 of 10 May 2012, GN R362, came into operation which, in

regulation 2 thereof, contains procedural provisions pertaining to applications for debt restructuring orders as contemplated in section 86(7)(c). The part of the said regulation relevant to the current appeal reads as follows:

- “(1) An application by a debt counsellor for an order contemplated in section 86(7)(c) of the Act must be lodged in a manner and form prescribed by Rule 55 of the Magistrates’ Court’s Rules, unless the court directs otherwise.
- (2) The application referred to in Regulation 2(1) above must be substantiated by an affidavit deposed to by the debt counsellor in which the following is set out –
 - (a) An exposition of the debt counsellor’s assessment conducted in terms of section 86(6) of the Act, read with sections 78(3), 79, 80 of the Act and Regulation 24 of the Regulations;
 - (b) The relief claimed in terms of section 86(7)(c);
 - (c) Full particulars of each credit provider;
 - (d) Full particulars of the consumer and the debt counsellor; and
 - (e) Confirmatory affidavit from the affected consumer.”

[45] Regulation 24 of the NCA Regulations contains the following requirements relevant to this appeal:

Application for debt review - (1) A consumer who wishes to apply to a debt counsellor to be declared over-indebted must:

- (a) Submit to the debt counsellor a completed Form 16; or
- (b) ...
- (c) Submit to the debt counsellor the documents specified in Form 16.
- (d) ...
- (2) ...
- (3) The debt counsellor must verify the information provided in terms of subsection (1) above by requesting documentary proof from the consumer, contacting the relevant credit provider or employer or any other method of verification.
- (4) ...
- (5) ...
- (6) ...
- (7) When assessing the consumer's application in terms of section 86(6)(a) of the Act, the debt counsellor must refer to section 79 and further consider the following:
 - (a) A consumer is over-indebted if his/her total monthly debt payments exceed the balance derived by deducting his/her minimum living expenses from his/her net income;
 - (b) Net income is calculated by deducting from the gross income, statutory deductions and other deductions that are made as a condition of employment;
 - (c) Minimum living expenses are based upon a budget provided by the consumer, adjusted by the debt counsellor with reference to guidelines issued by the National Credit Regulator."

[46] Section 79 of the Act deals with "over-indebtedness" and, *inter alia*, determines as follows:

"79. Over-indebtedness.—(1) A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular 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, having regard to that consumer's—

- (a) financial means, prospects and obligations; and
- (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.

(2) When a determination is to be made whether a consumer is over-indebted or not, the person making that determination must apply the criteria set out in subsection (1) as they exist at the time the determination is being made.

(3) ...”

[47] In terms of section 78(3) of the Act the aforesaid “financial means, prospects and obligations” includes:

- “(a) income, or any right to receive income, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective consumer receives, has a right to receive, or holds in trust for another person;
- (b) the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily—
 - (i) share their respective financial means; and
 - (ii) mutually bear their respective financial obligations; and
- (c) ...”

[48] In **Standard Bank Of South Africa Ltd v Panayiotts** 2009 (3) SA 363 (WLD) the court dealt with a summary judgment application wherein the respondent raised his over-indebtedness as a

defence. It held as follows in paragraphs [8], [9] and [52] of the judgment:

“[8] A party (the consumer) who raises a defence of over-indebtedness must plead and prove the defence, which includes proving that he is over-indebted as envisaged in s 79 of the NCA.

[9] Having regard to the wording of s 79, such proof must inevitably involve details of, Inter alia, the consumer's financial means, prospects and obligations. Financial means would include not only income and expenses, but also assets and liabilities. Prospects would include prospects of improving the consumer's financial position, such as increases, and, even, liquidating assets.

...

[52] It is so that the NCA is for the benefit of every consumer who can prove that he is over-indebted as contemplated in s 79 of the NCA.”

There is no reason why the same principles are not to be *mutatis mutandis* applied to a debt review application. Therefore, the onus was on the appellant to prove to the court that the consumer is over-indebted.

[49] In order for an applicant in an application for debt review to discharge the aforesaid onus, the founding affidavit should set out sufficient evidence to disclose and support the cause of action. The applicant's obligations in this regard were determined and dealt with in **Motor Finance Corporation (Pty) Ltd v Joubert** 2013 JDR 1912 (GNP), paragraphs [7] to [13]:

- [7] ... While the NCA does not specify the procedure to be followed in applications for debt relief, it is now accepted that in the Magistrate's Court the procedure in accordance with Rule 55 of the Magistrate's Courts Act must be followed. See *Nedbank v National Credit Regulator* 2011 (3) SA 581 (SCA) at para [28] ...
- [8] Accordingly, an applicant should set out sufficient facts to disclose a cause of action, and whereas in pleadings a party is not permitted to plead evidence, the nature of applications is that the affidavits constitute not only the pleadings but all of the evidence on which the applicant relies. See *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D); *Louw and others v Nel* 2011] 2 All SA 495 (SCA) at para [17]. It follows therefore that an applicant has to make out a case in his or her founding affidavit. See *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A); *Pat Hinde & Sons (Brakpan) (Pty) Ltd v Carrim* 1976 (4) SA 58 (T). (Own emphasis)
- [9] ... However, the court retains a discretion, in terms of section 87, to consider whether to accept a proposal. In this instance, before a court can decide to issue an order declaring the debtors affairs to be re-arranged or the credit agreement to be reckless, it is obliged to have regard to the proposal and information before it. That burden can only be discharged where the applicant under section 86 places full documentary evidence before the court, and not, as contended by the appellant, when the debt counsellor merely pays lip service to the regulations and the Act. In terms of section 79 over-indebtedness can only be determined if the consumer discloses his or her *"financial means, prospects and obligations; and the probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party"*. In *Standard Bank of South Africa Ltd v Panayiotts* (2009) (3) SA 363 at para [9], Masipa J noted the following:... (Own emphasis)

[10] In the present case, the consumers did not set out in their founding affidavit proof of income; bank statements from which their monthly and fixed expenses could be easily ascertained and importantly; what prospects existed for the improvement of their financial predicament. Only once there has been this level of disclosure, can the debtor's affairs be fully interrogated. On that basis, the appellant contends that the application should have been dismissed due to insufficient evidence. The observations of Masipa J in *Standard Bank of South Africa v Pannayiotts* (*supra*) are apposite. ...

[11] In light of the consumer's application being subjected to intense scrutiny from the appellant (the sixth respondent in the court *a quo*), a number of critical deficiencies in the founding affidavit were extrapolated. For example, the second respondent (the husband) failed to attach his proof of income from which his precise earnings could be ascertained as well as the nature and amount of his monthly deductions. ... All of these factors would affect the amount available for the distribution to creditors.

[12] ...

[13] On the basis of the arguments advanced I am satisfied that the respondent (on the basis of the contents of the founding affidavit) had not met the standard of disclosure required of an applicant seeking debt relief or debt re-arrangement...."

[50] In the **Norris**-judgment, *supra*, the aforesaid principles were again confirmed and applied in paragraphs [38] to [40] of the judgment.

[51] The debt counsellor in the aforesaid **Joubert**-judgment subsequently filed a supplementary affidavit in the court *a quo*, which was accepted by the said court and taken into consideration in its adjudication of the application. With regard to the filing of the

said supplementary affidavit, the court of appeal made the following findings in paragraph [13] and further of the judgment:

[13] ...However, the first respondent filed a 'supplementary affidavit' seeking to address many of the pitfalls in his founding affidavit. The first respondent this time gave a comprehensive breakdown of the consumers' income and expenditure, supported by documentary evidence including the second respondent's salary advice. In addition, details are provided ...

[14] The appellant submitted that the court *a quo* erred in accepting the first respondent's affidavit into evidence. It was contended that no provision exists in Magistrate's Court Rules for a supplementary affidavit in application proceedings. That is so but that omission is regularly ignored and replying affidavits are accepted. More particularly, the appellant contends that the first respondent sought to make out a case for debt relief and re-arrangement based on the contents of his supplementary affidavit. In this regard, the authorities are clear that an applicant must normally stand or fall by his founding affidavit. Thus, an applicant will not be allowed to introduce new material in reply except within a very narrow ambit. However, Harms in Civil Procedure in the Superior Courts (B-53) pointed out that the present tendency seems to permit a greater flexibility, and rightly so, in the absence of prejudice to the other party. See Nick's Fishmonger Holdings (Pty) Ltd and Another v Fish Diner in Bryanston CC and Others 2009 (5) SA 629 (W).

[15] Counsel for the appellant elevated the supplementary affidavit filed by the first respondent as evidence of a "trial by ambush". I do not agree, particularly as nothing stopped the appellant from raising the same arguments which it presently does to show why the consumers should not be granted the relief they seek. I am of the view that unless the applicant intends to supplant a cause of action

set out in the founding affidavit, parties should be entitled to have their case adjudicated on the fullest facts available, even if through omission these facts did not appear in the founding affidavit. In the present case, the first respondent's founding affidavit was significantly bereft of the details that ought to have been set out. The essential ingredients for an application for debt relief were however foreshadowed in the founding affidavit – the consumers' contended that they were over indebted and gave some indication (albeit incomplete) of their income and expenses.

[16] In all probability, the first respondent, who was entrusted with bringing the application, assumed that the application would be a mere formality and the application would not be met with such resistance. As matters turned out, a number of creditors did not oppose the application for debt relief and were content to abide the decision of the court. The first respondent's tardiness should not however prejudice the consumers in having their application for debt relief being properly considered. In any event, as a result of the further information placed before the court, the credit providers now had a better, more informed picture of the consumers' financial circumstances as all (or most) of the deficiencies were addressed in the supplementary affidavit. Whilst counsel for the appellant argued that the appellant was prejudiced in that no provision existed for it to file an affidavit in reply, (he always could apply for such leave) this did not prevent the appellant from using the information disclosed to properly argue its case. Ultimately, the court has discretion to decide whether to allow the introduction of additional affidavits. ...I accordingly find that the appellants were not prejudiced in the court *a quo*, and I find no grounds to interfere with the court's decision to allow the introduction of the supplementary affidavit."

[52] With the aforesaid principles in mind I will now consider the application *in casu* and the findings of the court *a quo* pertaining to the alleged income of the consumer and her alleged over-indebtedness.

[53] It is evident that the consumer's income is fundamental to the consideration by a debt counsellor as to whether a consumer is over-indebted or not and *mutatis mutandis* of fundamental importance to a court considering a debt review application.

[54] In the founding affidavit the applicant alleged the following in paragraph 13 thereof:

“The first respondent's monthly income is R14 183.29. A copy of the first respondent's salary advice is attached hereto as Annexure ‘G1’.”

From a perusal of the said salary advice, dated October 2014, the “earnings” of the consumer are indicated as follows:

<u>Salary Code</u>	<u>Description</u>	<u>Amount</u>
0020*	(C) Pay	R11 982-75
0359*	(A) Deprivation All -	R 4 184-46
1533*	(C) Housing All–Other	R 900-00
1276	(A) S&T per W/Voucher	R 1 300-54

The “total earnings” is then indicated as R18 367-75.

A number of deductions are indicated, most of which do not seem to be in dispute. I do, however, deem it necessary to record the following three deductions:

<u>Salary Code</u>	<u>Description</u>	<u>Amount</u>
7275 (A)	Pre-paid W/V	R1 300-54
7910 * (C)	PAYE RSA	R1 158-20
7910 * (A)	PAYE RSA	R 509-04

The “total deductions” is reflected as R5 278-50 and then there is an amount reflected as “due to you”, being R13 089-25. From a calculation it is evident that the last mentioned total constitutes the result when the total of the deductions is subtracted from the total of the earnings. The amount of R14 183-29 alleged in the founding affidavit, is not reflected on the salary advice.

- [55] From the details completed on Form 16 attached to the founding affidavit as annexures “C1” to “C5”, it is evident on p. 38 of the record that the appellant calculated the “total income” of the consumer on the basis of a “basic salary” of R11 982-75, “income” of R900-00 and a further “income” of R1 300-54, totalling R14 183-29; hence, excluding the “deprivation all” amount of R 4 184-46.

On the same page of the record the deductions were reflected in the same amounts as reflected on the salary advice, totalling R5 278-50, also similar to the salary advice. Based on the aforesaid calculations reflected on p. 38 of the record, the “net pay” of the consumer was reflected as R8 904-79 on annexure “C3”, p. 39 of

the record, as opposed to the amount of R13 089-25 on the salary advice.

[56] On the papers which served before the court *a quo* there, therefore, clearly existed a discrepancy between the allegation in the founding affidavit pertaining to the consumer's income as opposed to what is reflected on the salary advice.

[57] In its answering affidavit the second respondent stated that annexures "C1" to "C5", "D1" to "D3", "E1", "F1" to "F9", "G1" and "I1" to "I2" had not been attached to the application papers served on the second respondent. The second respondent specifically pointed out that the appellant failed to attach any form of proof of income to the founding affidavit and that this failure, as well as the failure to put proper evidence before court pertaining to the alleged over-indebtedness of the consumer, have the result that the appellant failed to prove the alleged over-indebtedness of the consumer.

[58] In the replying affidavit the appellant merely persisted with the allegation that the relevant annexures had in fact been attached to the founding affidavit, including annexure "G1", the salary advice, but still without any attempt to explain the discrepancy between the figure alleged in the founding affidavit, read with the figures reflected on annexures "C2" and "C3", and the figures reflected on the salary advice. The appellant also never attempted to file a supplementary affidavit in order to explain the discrepancy.

[59] The following “notes” appear at the bottom of the salary advice, annexure “G1”:

- “1. Any enquiry iro the information on this pay advice must be referred to your duty room/ships office.
2. * = Is used for your pay calculation and/or IRP 5 detail.
3. (C) = Current (A)= Arrears”

In addition the following “salary info” appears on the salary advice:

“Subsistence and travel (S&T) is not an allowance or a measure to supplement salary.”

[60] In the absence of an explanation under oath by the appellant, duly confirmed under oath by the consumer, there is no basis upon which the court *a quo* could have found that the aforesaid information on the salary advice provides an explanation as to why the “deprivation all” amount of R4 184-46 was not to be taken into consideration for purposes of calculating the consumer’s net income.

[61] The first attempt the appellant made to explain the discrepancy, as correctly pointed out by Mr Tsangarakis, was only in her founding affidavit in support of the application for condonation, paragraph 19 thereof, at p. 17 of the record. This affidavit did not exist at the time of the hearing of the debt review application by the court *a quo* and did consequently not serve before the said court.

[62] The finding by the court *a quo* that no explanation was provided to the court for the discrepancy, can, therefore, not be faulted in my view.

[63] As mentioned earlier, the court *a quo* also concluded in its judgment that:

“No recent proof of income was submitted before the court on 17 July 2015 and no reason advanced for such a failure.”

[64] I deem it apposite to repeat section 79(2) of the Act:

“When a determination is to be made whether a consumer is over-indebted or not, the person making that determination must apply the criteria set out in subsection (1) as they exist at the time the determination is being made.” (Own emphasis)

My interpretation of this subsection is that when a court considers an application for debt review and consequently firstly has to determine whether the consumer is over-indebted, such a determination by the court is to be based upon facts and figures as they exist at the time of the hearing, or at least relatively close to that time. In my view logic dictates that this is the correct interpretation, because had a determination regarding over-indebtedness been made by a debt counsellor, for example, a year before the date of the hearing, the circumstances could have changed since then, even to the extent that the consumer might not even be over-indebted anymore. Surely it cannot have been the intention of the Legislature that the court should then still declare the consumer to be over-indebted just because that was

the situation at the time the debt counsellor made his/her determination.

[65] The court seems to have followed a similar interpretation in **Firststrand Bank Ltd v Barnard** 2015 JDR 1614 (GP) when it dealt with the necessity of placing additional evidence before the court in certain circumstances, as well as the manner in which it is to be done, in paragraphs [22] to [24] of the judgment:

“[22] The second procedural aspect arises from the fact that the appellants adduced facts in their answering affidavits which gave rise to disputes. The debt counsellor responded to those disputes not, as she should have, by the delivery of a replying affidavit, but by the delivery of heads of argument in which certain factual assertions were made. The appellants justifiably objected in the court below to this procedure. The general rule is that facts are placed before courts in applications through affidavits sworn by deponents with personal knowledge of that to which they depose.

[23] It was submitted on behalf of the debt counsellor that it was not competent for the consumer, being a respondent in the application, to respond to the issues raised by the other creditor respondents. That is wrong because it puts form above substance. The application, in substance although not in form, is the application of the consumer. He is required by law to confirm on oath, as he did in this case, the allegations made by the debt counsellor in her founding affidavit. He may go further, as he did in this case, and put before the court in his affidavit any factual material which he considers or is advised is material to the decision of the case.

[24] While the provisions of rule 55 are applicable to proposals made by debt counsellors to the court under s 87(1), this does not mean that

they must rigidly apply as if this were, for example, a claim for payment of a specified amount on a cause of action which accrued before the application was launched. The power of the court approached under s 87(1) derives, as I have said, from the NCA and the procedure provided by magistrates' courts rule 55 should not be applied so as to defeat the purposes of the NCA. The position of a debtor such as the consumer is dynamic and may, in the time between when the application to court is launched and when it is heard, improve or deteriorate with the vicissitudes of life. The purposes of s 87 of the NCA, viewed through the prism of the measure as a whole, require that the court conducting the hearing be appraised of such relevant material as the parties may wish to put before it. For this purpose, it is a necessary implication of the provision that the court conducting a hearing under s 87 is empowered right up to the time it delivers its judgment to receive information additional to that provided by the founding, answering and replying affidavits conventionally encountered in an opposed application. Such power should of course be exercised in accordance with a judicial discretion, which will usually involve a consideration of the reasons for the late provision of the new material and any prejudice to other parties affected by the hearing and the relief sought." (Own emphasis)

- [66] The appellant completely failed to provide the court *a quo* with any updated information, despite the fact that Form 16 attached to the founding affidavit is dated 21 October 2014, the initial restructured payment plan is dated 31 October 2014 and the founding affidavit is dated 4 November 2014, whilst the application only served before the court *a quo* on 17 July 2015. Although the appellant apparently did provide the court with an updated restructured payment plan, dated 4 May 2015, none of the information reflected therein, was properly placed before the court *a quo* under oath.

The appellant in any event reflected the earnings and deductions of the consumer to be exactly the same as during October 2014, which is most improbable considering the following:

1. The date of the hearing fell within a new financial year - the salary advice still emanated from the previous financial year. The possibility, or even probability, of a salary increase can therefore not be excluded.
2. The mere fact that the salary advice of October 2014 reflected an arrear earning, begs the question whether this was a once-off payment or whether similar earnings continued after October 2014.
3. Considering the nature of the different deductions reflected on the salary advice, it is most probable that those amounts would have increased either at the beginning of the new year, 2015, or at the beginning of the 2015 financial year, especially the policy premiums and the medical fund premium.

[67] In the circumstances it was fatal for the appellant's case not to have provided the Court *a quo* with a recent payslip or even better, the three latest payslips available at the time, in case of payment fluctuations.

[68] Due to the unexplained discrepancy regarding the monthly income of the consumer and the appellant's failure to submit a recent salary advice(s), there was no proper prove of the consumer's monthly income at the time of the hearing of the application before the court *a quo*. The court *a quo*, therefore, correctly found that the

appellant failed to proof the alleged over-indebtedness of the consumer.

[69] The appeal can, therefore, not succeed on this ground either.

Remarks regarding additional shortcomings in the application:

[70] I unfortunately deem it necessary to highlight further shortcomings in the application which, in my view, in any event would have entitled the court *a quo* to dismiss the application.

Calculation of net income:

[71] To demonstrate the appellant's complete failure to properly apply her mind when she calculated the monthly income of the consumer, even after judgment by the court *a quo* had been handed down, I wish to refer to the attempted explanation for the discrepancy as contained in paragraph 19 of the founding affidavit in support of the condonation application, at p. 17 of the record:

"From paragraph 11 of the reasons provided for the Magistrate's judgment, the Learned Magistrate sets out that in terms of the founding affidavit, paragraph 13 thereof and per submission by the applicant, the Court was informed that the First Respondent earns an amount of R14 183-29 per month, whilst the salary advice referred to a total earning of R18 367-75 for the month of October 2014. The Magistrate went further and said that no explanation was provided to the Court for the difference. From annexure "G1" annexed to the founding affidavit of the debt review application, being the salary advice, it is recorded that salary code 0359* (K) (*sic*) DEPRIVATION ALL: R4 184-46 (I accept that the '(K)' should read '(A)'), indicates an amount specifically that amount to

be an arrear payment that was made to the First Respondent during that particular month. This does not form part of the First Respondent's continuous monthly salary. As such the Learned-Magistrate could not have found that no sufficient explanation from the papers before the Court were provided for the difference in the submission that the First Respondent's salary amounts to R14 183-29, and not on a monthly basis R18 367-75."

[72] Even if the aforesaid explanation is to be accepted, the basis of the calculations reflected on Form 16 can, in my view, still not be accepted as correct, due to the following scenarios:

1. The "S&T per W/Voucher" in the amount of R1 300-54 is also reflected as an "arrears" amount and should therefore *mutatis mutandis*, on the appellant's reasoning, not have been taken into consideration "as part of the first respondent's continuous monthly salary" either. In addition the said payment is specifically described not to be an allowance or a measure to supplement salary. This amount should, therefore, not have been reflected as part of the consumer's monthly income. Luckily for the appellant, this mistake is negated by the fact that the very same amount is also reflected under the deductions, both on the salary advice and on Form 16. Therefore this amount does not have an impact on the result of the calculation of the net monthly income.
2. The deduction reflected as "7910 * (A) PAYE RSA", in the amount of R509-04, *prima facie* seems to be an arrear tax payment on the arrear income amount of R4 184-46. The appellant took the deduction of R509-04 into consideration for

purposes of calculating the net income of the consumer. On the appellant's reasoning, she clearly erred in doing so, because if the arrear earning was not to be taken into consideration, the arrear tax deduction should not have been taken into consideration either. This would mean that, at least for the month of October 2014, the net income would have been R509-04 more than the amount which was used for purposes of determining whether the consumer is over-indebted and calculating the proposed restructured payment plans.

3. Both the arrears "Deprivation All" amount of R 4 184-46 reflected under the earnings on the salary advice and the arrears "PAYE RSA" amount of R509-04 reflected under the deductions on the salary advice, are marked with an asterisk. As I have already pointed out, one of the notes on the salary advice indicates that amounts marked with an asterisk, are used for purposes of "pay calculation and/or IRP 5 detail". It therefore *prima facie* seems to me that the appellant should have included both the said amounts in her calculation of the consumer's net income for the month of October 2014, the one as an earning and the other as a deduction. This would also have resulted in a different net income figure than the one the appellant used for purposes of determining whether the consumer is over-indebted and for calculating the proposed restructured payment plans.

[73] It therefore appears that the appellant failed to ensure that she has a correct understanding of the payment system of the consumer's

employer and hence the nonsensical explanation for the basis of her calculation of the consumer's monthly net income. *Prima facie* the appellant's calculation appears to be incorrect and hence it could not have been expected from the court *a quo* to make a determination regarding the consumer's alleged over-indebtedness based on those figures.

Required contents of the founding affidavit:

[74] I have already extensively dealt with the principles regarding the procedural requirements and substantive law relating to debt review applications. Without dwelling too much on the point, the following is evident:

1. Although Form 16 indicated that the consumer is single, no allegation was made pertaining to the applicability of section 78(3)(b) which determines that the financial means, prospects and obligations of a consumer include the following:

“(b) the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily—

- (i) share their respective financial means; and
- (ii) mutually bear their respective financial obligations; ...”

2. The **Panayiotts**-judgment interpreted “financial means” and “prospects” as follows:

“Financial means would include not only income and expenses, but also assets and liabilities. Prospects would include prospects of improving the consumer's financial position, such as increases, and, even, liquidating assets.”

As indicated earlier, the aforesaid interpretation has since been approved and followed in other judgments. Despite this, the application does not contain any allegation regarding the assets of the consumer, nor does it contain any averment pertaining to the consumer's prospects of improving her financial predicament.

3. The founding affidavit appears to be a form of pro-forma- or standard document which is probably being used by the appellant in all debt review applications, with only the details being changed in accordance with the particulars of the different applicants. That is probably the reason why paragraph 15. 2 thereof incorrectly refers to the consumer as “he”. The affidavit contains the bare minimum of averments. This is a very far cry from what is required in order to make out a proper case in the founding affidavit, considering that the said affidavit should not only constitute the pleadings, but all of the evidence on which the appellant wished to rely, as determined in the **Joubert**-judgment, *supra*.
4. The appellant therefore completely failed to set out sufficient evidence to disclose and support the cause of action.

Relief sought in terms of Section 85 of the Act:

[75] As previously indicated the relief sought by the appellant in her Notice of Motion *inter alia* entails that the consumer be declared over-indebted “as set out in section 85(b)”. Similar relief was requested in the subsequent draft order to which I referred earlier. In its reasons for judgment the court *a quo* found that the appellant did not make out a case for the consumer to be declared over-indebted “as set out in terms of section 85(b) of the NCA”. Even in the notice of appeal reliance is again placed on section 85 by *inter alia* stating that the court *a quo* erred in not applying section 85(a) of the Act and further persisting with the submission that the Court *a quo* ought to have declared the consumer over-indebted in terms of section 85(b) of the Act.

[76] Section 85 of the Act reads as follows:

“85. Court may declare and relieve over-indebtedness.- 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."

Section 86(2) contains the following proviso subsequent to an amendment thereto by Act No. 19 of 2014:

"(2) 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 130 to enforce that agreement."

[77] In the unreported judgment of **Standard Bank of South Africa Ltd v Kallides** (1061/2012) [2012] ZAWCHC 38 (2 May 2012), at paras [6] to [8], the court drew a clear distinction between sections 85 and section 86. For purposes of this judgment I only quote the following parts thereof:

"[6] There is nothing in the wording of s 85 of the NCA that contemplates the making of an application in order to invoke its operation. On the contrary, the trigger to the operation of s 85 is the allegation in the context of any court proceedings in which a credit agreement is being considered that the consumer in terms the agreement is over-indebted. The allegation in question would be one made integrally in the context of pending proceedings in which the terms or existence of a credit agreement is relevant. It might be made either in a pleading, or an affidavit, or even in the course of *viva voce* evidence. ... (Own emphasis)

[7] The process under s 85 of the NCA falls to be contrasted with that in terms of s 86 of the Act, in which the over-indebted consumer has the right, subject to the Act, to initiate debt review proceedings,

and ultimately to apply, in the manner expressly provided, for a debt rearrangement order. ...

- [8] Sections 85 and 86 of the NCA are both to be found in Part D of chapter 4 of the Act. The process contemplated in terms of both provisions is directed at obtaining the consideration of a recommendation by a debt counsellor in terms of s 86(7) and/or the making of an order of the nature provided for in terms of s 87(1) of the Act. Notwithstanding the breadth of the opening words to s 85 of the NCA, reference to the broader context of the statute impels the conclusion that the section was not intended to provide a basis for a repetition of the process already provided for in terms of s 86, or to draw back within the ambit of debt review debts already excluded therefrom by the operation of other provisions of the Act, such as s 86(2), s 86(10) or s 88(3). To construe s 85 otherwise would be conducive to the most unwholesome circularity, at odds with basic principle - *interest rei publicae ut sit finis litium*.

See also **Collett v Firstrand Bank Ltd** 2011 (4) SA 508 (SCA) at par [11].

- [78] From the wording of the respective sections, as well as from a reading of the relevant case law, it is in my view evident that section 85 bears no relevance to an application for debt review in terms of section 86. Section 86 provides for a procedure whereby the consumer may *mero motu* approach a debt counsellor before a credit provider approaches court for an order to enforce a credit agreement. Those are the circumstances which prevailed in the current instance at the stage when the consumer approached the appellant. Section 85, on the other hand, is only applicable once a

credit provider has in fact instituted court proceedings pertaining to a credit agreement and it is then alleged that the consumer is over-indebted.

- [79] The appellant's reliance upon section 85 is, in my view, therefore completely misplaced. The court *a quo* could consequently not have granted any relief in terms of section 85(b) of the Act as requested in the Notice of Motion, nor can the appeal succeed on this basis.

The updated restructured payment plan:

- [80] In her replying affidavit the appellant referred to an updated proposed restructured payment plan, attached to the replying affidavit as annexure "A", apparently dated 4 May 2015. From a perusal of the said document, especially at p. 105 of the record, it is evident that the appellant still based her calculations on a monthly net income of R8 904-79, which, as already indicated, cannot be correct. More importantly however, where the consumer's monthly commitments/expenses were indicated as being R4 004-79 on the initial proposed restructured payment plan attached to the founding affidavit as annexures "H6" to "H8", (more specifically at p. 62 of the record), leaving an amount of R4 900-00 per month for distribution, the updated proposal reflects the monthly expenses to only be R3 204-79, leaving an amount of R5 700-00 per month available for distribution (at p. 105 of the record). Likewise, the Notice of Motion contains a prayer to the effect that it be ordered that an amount of R4 900-00 be paid on a monthly basis, the request for which relief was confirmed by the

consumer in a confirmatory affidavit, but the draft order attached to the replying affidavit (at p. 103 of the record) provides for the payment of a higher monthly amount, namely R5 700-00. No explanation was provided as to why the updated expenses of the consumer had in the meantime decreased from R4 004-79 to R3 204-79. The further fatal deficiency is that not only was no confirmatory affidavit of the consumer attached to the replying affidavit, but the updated proposal was also not signed and thus confirmed as being true and correct by the consumer, despite the fact that the document specifically makes provision for such signature and confirmation.

- [81] The result is that the amended updated figures, both pertaining to the consumer`s monthly commitments/expenses and the consequent amount allegedly available for distribution, constitute inadmissible and unreliable hearsay evidence. It could not have been expected from the court *a quo* to make a determination of over-indebtedness based on figures presented in this unacceptable manner.

Attestation of founding papers:

- [82] The founding affidavit, the confirmatory affidavit by the consumer attached thereto (at p.67 – 68 of the record), the affidavit of the appellant pertaining to service (at p. 69 – 70 of the record), as well as the supplementary affidavit of the appellant (at p.76 – 77 of the record), were all attested to by one Mr De Wet from Jordaans Rijkheer Attorneys of 46 Kellner Street, Bloemfontein. The

attorney of record of the appellant is one Mr Du Plessis of the very same firm of attorneys, Jordaans Rijkheer.

[83] The Regulations issued in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963, determine in regulation 7 thereof as follows:

“(1) A commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest.

(2) Sub-regulation (1) shall not apply to an affidavit or a declaration mentioned in the Schedule.”

The abovementioned affidavits do not fall within the ambit of the exclusions mentioned in the Schedule. In **Erasmus Superior Court Practice**, Electronic Version, at RS 3, 2016, D3-3 to D3-4 the following principles are summarised:

“In regard to the question whether regulation 7(1) is peremptory, it has been held that both precedent and principle point to an affirmative answer. The reason for the regulation is that the person attesting an affidavit is required to be unbiased and impartial in relation to the subject matter of the affidavit. If his position is such that this qualification is *prima facie* absent, there is danger that he may have influenced the deponent in regard to the subject matter of the affidavit. It is therefore necessary that in civil matters an affidavit be attested by a commissioner who is entirely independent of the office of the attorneys where the affidavit was drawn. A failure to observe this requirement can in certain cases be condoned, however.”

In **Louw v Riekert** 1957 (3) SA 106 (T) the court extended the rule to include also clerks and partners of the attorney acting for the

litigant as well as attorneys employed by such an attorney as professional assistants.

In Radue Weir Holdings Ltd t/a Weirs Cash & Carry v Galleus Investments CC t/a Bargain Wholesalers 1998 (3) SA 677 (E) the court dealt thoroughly with the relevant case law and principles and concluded as follows at 681 G:

“What emerges clearly from the above cited cases is that the commissioner of oaths who attests an affidavit is required to be impartial, unbiased and entirely independent of the office where the affidavit is drawn.”

In the said judgment the court concluded that the attestation in that matter did not comply with the aforesaid requirement. The court then dealt with the matter as follows at 682 H - J:

“Despite Mr *Cole*'s submissions to the contrary, I am satisfied that it would not be the proper course to proceed with the case as if no affidavit had been filed...

Defendant must be afforded an opportunity of putting its defence before the court in a regular manner by having the affidavit which was filed on its behalf re-attested before a competent commissioner of oaths. (See for instance *Abromowitz v Jacquet (supra)*; *Louw v Riekert (supra)*.)”

[84] As the point pertaining to the irregular attestation was not raised in the court *a quo*, I cannot speculate as to how the court *a quo* would have exercised its discretion in response thereto and we need not make a finding in this regard. The reason why I deemed it necessary to *mero motu* raise this issue, is firstly to emphasize the

numerous defects in the application, but also with the hope that by pointing it out, the appellant and other debt counsellors will be alerted to this requirement relating to attestation and properly comply with it in future.

The second order of the court *a quo*:

[85] Like I have already indicated at the outset of this judgment, the court *a quo* also made a second order which reads as follows:

“The Debt Review is subject to review after a period of 12 months from the date of this order.”

[86] In view of the fact that the application was dismissed, it is evident that this order was incorrectly made as it is neither a competent nor enforceable order. Both counsel are also in agreement that this order is to be deleted.

Costs:

The appellant:

[87] The Court *a quo* dismissed the application, with costs; hence, the appellant, who is a debt counsellor, is to pay the costs of the application. Mrs Collins, who appeared on behalf of the appellant, submitted that the Court erred in this regard and relied on the judgment in **National Credit Regulator v Nedbank Ltd** 2009 (6) SA 295 (GNP) for her submission in this regard, wherein the court held that, given that a debt counsellor fulfils a statutory obligation,

Magistrate's Court rule 33 is applicable to applications under sections 86 and 87 of the National Credit Act. The implication of this finding is that a statutory functionary who, in the process of fulfilling his statutory function, is involved in court proceedings is not ordinarily ordered to pay the costs of any other party. An adverse costs order against such functionaries is ordinarily made only when they acted improperly or *mala fides*.

[88] In **Absa Bank Ltd v Robb** 2013 (3) SA 619 (GSJ) the circumstances were very similar to those in the present matter. The court specifically dealt with the principles to be considered in deciding whether costs should be awarded against a debt counsellor and came to the following findings:

“[20] In opposing the application the appellants rightly pointed out that the respondent had not properly fulfilled her statutory obligations in assessing whether the Cassims were over-indebted. The respondent had adduced no documentary evidence of the Cassims' monthly and living expenses, as required in reg 24(1). The determination of Mr Cassim's employment income was outdated. It was based on a payslip dated 30 November 2010, when the application was made more than eight months later, in July 2011....

[21] The reasons given by the magistrate in the ruling delivered on 26 January 2012 for disallowing costs are wholly untenable. A debt counsellor is required to have a thorough knowledge of the debt-counselling process....

[23] The application for debt review was not based on a proper application of the statutory standards for assessing over-indebtedness. The respondent's determination that the Cassims

were over-indebted was based on an erroneous application of the Act and Regulations, as also the Guidelines published by the National Credit Regulator for assessing over-indebtedness. All of this was clearly spelt out in the appellants' answering affidavit which was filed on 10 November 2011. However, rather than responding responsibly to the affidavit and immediately withdrawing the application so as to avoid the incurring of unnecessary costs, the respondent delayed for more than three months and only withdrew the application on the eve of the hearing. By that stage, the appellants had already incurred additional costs in briefing counsel to prepare for the hearing.

[24] Having withdrawn the application in these circumstances, there is no reason why the magistrate should not have followed the general rule as to costs pursuant to the withdrawal of an application in the magistrates' court. I am unaware of any case in which a court has refused to grant costs against a public official or statutory functionary who institutes and then withdraws legal proceedings simply on the basis of the statutory character of the official's functions. The obvious reason for this is that there is no public interest in encouraging public officials, or those who wield statutory power, to bring wholly unmeritorious applications to court. Dissuading such officials from doing so by costs orders in appropriate cases in fact enhances the public interest. To clog the court roll with cases which are instituted and then later withdrawn is contrary to the public interest and the efficient administration of justice.

[25] If a costs order were granted in this case it would serve the important purpose of cautioning debt counsellors to properly apply the provisions of the Act, the Regulations and the National Credit Regulator's guidelines before bringing applications to court for debt review.

[26] The above caution would serve not only the interests of the courts in maintaining the efficient administration of justice, but also the interests of both consumers and credit providers under the Act. The interests of consumers are protected because they will be assured that an application for debt review will be made on their behalf only when there are reasonable grounds for concluding that they are over-indebted. And the interests of credit providers are protected because only reasonably meritorious applications for debt review would be pursued.

[27] It needs to be emphasised that the discretion to award costs against a debt counsellor is not limited to instances where the application for debt review is withdrawn, as occurred in the present case. The court has a discretion to award costs against a debt counsellor who in any way acts improperly or with mala fides in the discharge of his or her statutory obligations.”

The aforesaid principles were also applied in **Joubert**-judgment, *supra*.

[89] In the **Barnard**-judgment, *supra*, the following findings and factual matrix were recorded in paragraphs 29 to 32 of the judgment:

“[29] There are in my view three insuperable problems with this proposal. The first is that while the court below had jurisdiction to extend the term, it had no power to reduce the interest rate applicable to the debt. ...

[31] The final difficulty with the proposal was the provision for payment of the costs of para 3 of the order as proposed by the debt counsellor and as made by the court below, which reads:

‘That in terms of Section 86(7)(c)(ii)(bb) the date upon which payments to the [creditor respondents] become due be postponed until after all Debt Counselling Fees and Legal Fees [in] relation to this application are paid in full.’

- [32] What the debt counsellor sought to achieve by this remarkable paragraph was the subordination of the payment scheme in the order in favour of her own fees and those of her attorney in relation to the application. Section 86(7)(c)(ii)(bb) simply does not permit of such a subordination. But a far greater problem is that these unspecified amounts may never be paid at all. In such a case, the due dates for settlement of the claims of the creditor respondents would be postponed indefinitely. This irrationality was imported uncritically into the order of the court below and is fatal to the order itself.” (Own emphasis)

The Court subsequently dealt with the issue of costs in the following manner, as set out in paragraph 39 and further of the judgment:

- [39] The debt counsellor is a *pro forma* applicant who has only a professional, as opposed to a personal, interest in the outcome of the proceedings. She should not take sides with one or other of the litigants. She should not in an untoward manner advance her own interests to the detriment of those of the litigants proper. ...

- [41] A debt counsellor may not seek to have her own fees and expenses preferred to those of the creditors and the consumer. A debt counsellor may however make provision for her own fees and expenses in specified amounts to be paid by instalments ranking equally with the consumer's other creditors.

[42] With this in mind, I think that a debt counsellor who does no more than I have outlined should not in general be mulcted in costs if the proposal is not accepted by the court hearing the matter under s 87(1). ...

[43] ...A court should bear in mind, however, that imposing a costs obligation on a consumer whose obligations are re-arranged under s 87(1) would often defeat the purpose of the order by imposing an obligation not subject to the order on an already financially burdened consumer.

[44] To return to the present case: the debt counsellor entered the dispute between the parties when she sought the order which would give her fees and expenses preference over the claims of the creditor respondents. She perpetuated her personal involvement in the dispute in the manner in which she made the case of the consumer her own. ...

[45] In addition, the proposal made by the debt counsellor was fatally irrational. ...

[47] But in my view, in the case before us exceptional circumstances are present. Not only did the debt counsellor advance a proposal which was irrational in several material respects but she defended it in a partisan manner. In these circumstances, she should pay the costs both in the court below and on appeal as well as the costs of the abortive application to lead further evidence on appeal. ...

[50] ...However, different considerations apply in relation to the costs in the court below. We have a transcript of the proceedings in that court. It appears from the transcript that only the debt counsellor, FNB and Nedbank were represented in those proceedings and that the consumer played no part in them. There is thus no good reason to make the consumer pay the costs incurred in the court below."

[90] The circumstances in the present matter are *on par* with the factual situation referred to in aforesaid judgment. Annexure “H2” on p. 85 of the record, is a document titled “NOTIFICATION TO ALL CREDIT PROVIDERS AND REGISTERED CREDIT BUREAUS IN TERMS OF SUBSECTION 24(10) OF THE REGULATIONS OF THE NATIONAL CREDIT ACT, 34 of 2005”, signed by the appellant. It contains the following statement:

“Please note: Payments to all credit providers will only start once all fees (legal & restructuring) have been paid in full.”

In addition thereto, both the Notice of Motion and the draft order contains the following similar prayer, albeit with different figures and dates (the prayer in the draft order is quoted):

“Payment of R5 700.00 will be made on a monthly basis as from 15th day of May 2015 due to DC Fee and Legal Fee that will be paid to the appointed Payment Distribution Agency”

The said prayer is apparently directed at ensuring that the appellant’s fees and legal fees indeed receive preference over the claims of the other creditors, considering that the figure mentioned in the said prayer is the **total** amount allegedly available for monthly distribution amongst the consumer’s creditors. The date reflected in the said prayer is the requested inception date of the updated restructured payment plan. Had the requested prayer been granted by the court *a quo*, it would have had the deplorable result referred to in paragraph [32] of the **Barnard**-judgment, *supra*,

- [91] It is consequently evident from the Barnard-judgment that the said arrangement and prayer are an exact manifestation of the unacceptable personal involvement of a debt counsellor which the court warned against and which conduct was penalised with an appropriate order of costs.
- [92] To add injury to insult, in the present matter the appellant also indemnified, or at least attempted to indemnify, herself against all loss or damage which she may sustain as a result of the debt review application. I wish to elaborate on this issue.
- [93] Part 6 of Form 16 of the NCA Regulations makes provision for a declaration by the consumer in the wording as contained in the pro-forma form. Such a declaration was indeed signed by the consumer, as is evident from annexure “C5” on p. 41 of the record. However, a similar declaration appears on p. 40 of the record, but which declaration contains the following proviso:

“6. I/we the undersigned consumer/s hereby agree and undertake to keep the Debt Counsellor indemnified against all loss or damage from any cause arising which I/we may sustain as a result of the application in terms of Section 86 of the National Credit Act, 34 of 2005.”

Neither the Regulations, nor the pro-forma forms thereto, make provision for such an indemnification. Although the said declaration was not signed by the consumer, probably also as a result of a lack of diligence by the appellant, the attempt to obtain such indemnification, especially as though it forms part of Form 16, is reprehensible. Furthermore, although provision was made in the

initial restructured payment plan for the payment of certain fees, no such provision was made in the updated restructured payment plan. In fact, on p. 111 of the record it is reflected that no legal costs are due and payable. Therefore, if the indemnification was to be enforced upon the consumer, it will obviously result in her not being able to comply with the suggested updated restructured payment plan.

[94] In view of the appellant's unconscionable arrangement and conduct pertaining to her fees and the legal fees, as well as her failure to have complied with the relevant applicable legislation, regulations and enunciated principles, which resulted in the flagrant fatal shortcomings in the application, both in substance and in form, the costs order made by the Court *a quo* is wholly justified, albeit, probably, for different reasons.

[95] Even despite the mentioned fatal deficiencies in the application, the appellant persisted with the application by taking the matter on appeal. In addition there is no indication whatsoever from the record that the consumer even has knowledge of the appeal – she played no part in it. In the circumstances, I cannot but find that the appellant acted improperly by the institution of the appeal and hence she should also bear the costs of the appeal.

[96] For the sake of completeness and clarity, it is recorded that the aforesaid costs orders are meant to be and should be considered to be orders *de bonis propriis* against the appellant. The appellant is not entitled to claim any of the legal fees or legal costs from the consumer, neither of the proceedings in the court *a quo* nor of the

appeal. As a result I deem it essential that the consumer be properly informed about the contents of this judgment and order, wherefore I intend making provision for the service of this judgment and order on the first respondent.

Condition of the appeal record:

- [97] Uniform Rule 50(7)(c), which deals with the compiling of the record for purposes of civil appeals from Magistrates' Courts, states the following:

"The record shall contain a correct and complete copy of the pleadings, evidence and all documents necessary for the hearing of the appeal, together with an index thereof, and the copies lodged with the Registrar shall be certified as correct by the attorney or party lodging the same or the person who prepared the record."

- [98] In **Erasmus Superior Court Practice** , *supra*, the following is stated at OS, 2015, D2-690, with reference to applicable case law:

"If in a civil appeal a record is not in order, the court may, according to the circumstances, either strike the appeal off the roll with costs, or postpone the appeal for the record to be put in order, making a suitable order as to costs, or hear the appeal and disallow portion of the costs of the party responsible for the omission."

- [99] In **Rennie N.O. v Gordon and Another NNO** 1988 (1) SA 1 (A) at 20 D the duty of an attorney in this regard was again confirmed:

"As appears from the remarks of my Brother Viljoen in the case of Senator Versekeringsmaatskappy Bpk v Lawrence 1982 (3) SA 136 (A) at 144 G to 145

B, it is the duty of an attorney charged with prosecuting an appeal on behalf of a client to see that a proper record of appeal is placed before this Court and in order to discharge this duty (and incidentally to earn his perusal fee) he must peruse the record and satisfy himself that it is complete and in compliance with the Rules as to form, etc. ...I might just add that even the additional volume lodged out of time ... was not in proper form in that it lacked an index, an annoying and inconvenient defect.”

[100] In the present instance the record has not been certified as correct by the attorney as required by Rule 59(7)(c). No explanation for such a failure was placed before us. The contents of many pages of the record are skew, some to the extent that not the whole of the contents are legible. I do not know whether this is due to the fact that the original record was in the same condition or whether this happened during the copying of the record. Either which way, it speaks of a lack of diligence and care by the attorney. This slovenliness continued in the marking of the annexures. Some of the annexures have not been marked at all, whilst the ones which have been marked, reflect markings which are eligible or almost eligible.

[101] In addition to the aforesaid, the record was prepared and compiled in a manner whereby the whole of the application which served before the Court *a quo* is attached to the application for condonation. This is not in compliance with the practice in our Court. The record of the proceedings which served before the Court *a quo* ought to be separate from the application for condonation, although it may be binded in the same volume. Reference could and should have been made in the condonation application to the record without the necessity of attaching the

record to the application for condonation. As a consequence of this nonsensical manner of compiling the record, the index merely reflects the whole of the application which served before the Court *a quo* as “annexure ‘BL2’”, with the pages indicated as “24 - 111”. The index does not differentiate between the respective affidavits and annexures which form part of the application, neither by descriptions thereof, nor by page numbers. This added to the frustration of having to deal with a record of which the annexures have not been clearly marked.

[102] As long back as in **Van Der Merwe v Kgalokwane** 1977 (3) SA 106 (O) this Court expressed its strong disapproval and rejection of a record with similar defects, at 107 E - 108 G:

“Dit is vir my duidelik dat die betrokke prokureur hom geensins aan die vereistes van voormelde Hofreël gesteur het nie. Wat hy toe gedoen het was eenvoudig net om fotostatiese afdrukke van die pleitstukke, die landdros se redes vir uitspraak, kennisgewing van appèl en al die ander dokumente, ter saaklik of nie, wat in die oorspronklike omslag is, te maak. Hierdie is toe voor die getuienis in die oorkonde gebind en gepagineer 1 tot 43. Slegs hiervan is 'n inhoudsopgawe gemaak. Die getuienis word net aangedui as beginnende op bl. 44 en geen poging is aangewend om 'n in-houdsopgawe daarvan te maak nie.

Wanneer daar verder na die oorkonde gekyk word dan blyk dit duidelik dat dit nie deur die prokureur as juis ingevolge Hofreël 50 (7) (c) gesertifiseer is nie. In al die fotostatiese afskrifte is die 10de reël ook nie genommer nie. Die landdros se redes is ook nie oorgetik nie, dit is eenvoudig met al die deurhalings en verbeterings, wat die landdros in sy handskrif aangebring het, gefotostateer. Die stuk is onooglik en onnet en is nie die verrigtinge van 'n Hooggeregshof waardig nie. Dit is egter

nie al nie. Sommige van die gefotostateerde stukke is òf onleesbaar òf moeilik leesbaar. Dit het blykbaar die betrokke prokureur ook nie gehinder om sulke stukke voor ons te lê nie, of hy was onverskillig daaromtrent, want selfs die Appèlhof het alreeds 'n ernstige waarskuwing geuiter ten opsigte van hierdie soort van fotostatiese afskrifte.

In die saak van *Estate Woolf v Johns*, 1968 (4) SA 492 (AA), laat OGILVIE THOMPSON, A.R., soos hy toe was, hom op bl. 493 die volgende ontval, nl.:

'I pause here to remark that, while the Registrar was, of course, entirely correct in refusing to accept the record because it was out of time, in terms of Rule 5 (4) (b), he would, in the exercise of his powers under Rule 5 (14), also have been fully entitled to refuse to accept the record because of the state of the exhibits. These, comprising some 200 pages of the record, contained a large number of photostats, most of which were badly and untidily reproduced, and many of which were illegible. I may also add that some of the photostat copies of the letters annexed to the application for condonation presented by the defendant's attorneys were smudgy to a degree for which counsel for the estate could offer no explanation and but apologise.

Photostatic reproduction, when neatly and clearly done, can no doubt be very useful; but there has, in recent years, been a noticeably increasing tendency to include poor photostats in the records and documents presented to this Court. This must cease. In this connection, it is necessary to repeat what was said by RUMPFF, J.A., delivering the judgment of the Full Court in *Lafrenz (Pty.) Ltd. v Dempers*, 1962 (3) SA 492 (AD) at p. 497H, viz:

'There has been a tendency lately, as far as the condition of records is concerned, not to comply properly with the requirements as are laid down in the Rules of this Court, and I think a note of warning should be sounded.

Slackness on the part of those who are responsible for the state of the records may no longer be condoned.'

Practitioners and litigants would do well to take note that records and other documents, and in particular photostats, which do not conform to the required, and generally well recognised, standards are not to be tolerated.'

Selfs in die saak van *S. v Haarmeyer*, 1971 (3) SA 43 (AA), het Appèlregter JANSEN op bl. 45 die volgende gesê:

'Alvorens die aansoek te behandel is, is dit egter nodig om te verwys na die aard van die afskrifte van die stukke vir ons gebruik ingedien. Elkeen van die bundels bestaan uit faksimilees van 100 bladyse tikskrif, deur 'n fotografiese proses verkry. Plek-plek is die reproduksie onduidelik en word die lees daarvan bemoeilik; 'n onegalige, vlekkerige verdonkering aan die onderpunt van menige blaaie dra daartoe by en is boonop onooglik. In *Estate Woolf v Johns*, 1968 (4) SA 492 op bl. 493, is reeds gese:....'

Dan haal die geleerde Regter die aanhaling aan wat ek reeds aangehaal het. Hy gaan dan verder op bl. 46 om te sê:

'Desondanks was daar sedertdien verskeie kere aanleiding daartoe in hierdie Hof om misnoeë oor die toestand van afskrifte uit te spreek. ...Voortgesette verontagsaming van die Reëls en vermanings in hierdie verband kan lei tot 'n strenger benadering deur hierdie Hof in die toekoms.'

...

In die lig van al hierdie gebreke in die oorkonde ... is ons nie bereid om die appèl vandag aan te hoor nie en sal die appèl van die rol verwyder word."

[103] Although we opted to hear the appeal instead of striking it from the roll, we cannot condone or accept terribly bad condition of the record. Our disapproval of the attorney's failure to have complied

with his duties regarding the compilation and perusal of the record, will therefore be embodied in an appropriate order as to costs in this regard.

Order:

[104] In the circumstances the following order is made:

1. The appellant's application for condonation is granted, the appellant to pay the costs thereof.
2. The appeal against the first order made by the Court *a quo*, is dismissed.
3. The appeal against the second order made by the Court *a quo*, is upheld and this order is set aside.
4. The order of the Court *a quo* is consequently amended to read as follows:

"The application is dismissed, with costs."

5. The appellant is ordered to pay the costs of the appeal.
6. All of the aforesaid costs orders against the appellant are to be paid by the appellant *de bonis propriis*.
7. The appellant is not entitled to claim any of the legal fees or legal costs from the first respondent, neither of the proceedings in the court *a quo*, nor of the appeal.

8. The appellant's attorney of record is not entitled to charge the appellant any fees or costs for the compilation and the perusal of the record.
9. The appellant's attorney of record is requested and ordered to serve a copy of this judgment and order on the first respondent in terms of the Court Rules and to file the sheriff's return of service as proof thereof in the court file within three weeks from the date of this order. The costs of the said service are to be costs in the appeal.

C. VAN ZYL, J

I concur:

M.H. RAMPAL, J

On behalf of Appellant: Adv L Collins
On instructions of:
Jordaans Rijkheer Attorneys

BLOEMFONTEIN

On behalf of Respondent: Adv S Tsangarakis
On instructions of:
Hill, McHardy & Herbst Ing.
BLOEMFONTEIN