IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A801/2014

In the matter between:

FIRSTRAND BANK LIMITED First Appellant

NEDBANK LIMITED Second Appellant

and

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

06/08/15
DATE

SIGNATURE

MICHELLE BARNARD First Respondent

BAREND HENDRIK COETZEE Second Respondent

JUDGMENT

Tuchten J:

1 This is an appeal against an order made in a magistrate's court under s 87(1)(b)(ii) of the National Credit Act, 34 of 2005 (the NCA),[1] re-arranging the debts of a consumer as defined in s 1. The order was

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[1] In what follows, references to statutory material will be to the NCA unless otherwise stated.

triggered by a proposal made by the first respondent a debt counsellor, registered as such under s 44.

2 On 31 January 2014, the second respondent (the consumer)[2] applied to the first respondent (the debt counsellor) to have himself declared over-indebted as contemplated in s 86(1).

3 Among the purposes of the NCA[3] is to address over-indebtedness by providing mechanisms to resolve over-indebtedness on the principle of satisfaction by the consumer of all responsible financial obligations and by providing for a system of debt restructuring enforcement and judgment which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

4 The consumer disclosed to the debt counsellor in his application to her that he was indebted to a number of credit providers,[4] in the total sum (re-calculated as at 9 July 2014) of some R1 360 973. This amount included balances, all of which were due, of R919 122 owed to the first appellant (FNB) under a home loan secured by a mortgage bond over a property in Lydenburg, and R128 318 owed to the second

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2 Persons in the position of the second respondent, amongst others, are described in the NCA as consumers and for that reason I shall call the second respondent the consumer in what follows.

3 Section 3

4 "Credit provider" is defined in s 1.

appellant (Nedbank) which traded for this purpose as Motor Finance Corporation (MFC) in relation to a Kia Cerato motor vehicle.

5 The debt counsellor accepted the application made to her by the consumer and proceeded to notify the credit providers listed in the consumer's application (who included both FNB and Nedbank) of the fact of the application. The debt counsellor then went on to evaluate the application as required of her under s 86(6) and came to the conclusion that the consumer appeared to be over-indebted as contemplated in the NCA. Section 79(1) describes the content of the concept of 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) When making a determination in terms of this section, the value of-

(a) any credit facility is the settlement value at that time under that credit facility; and

(b) any credit guarantee is-

(i) the settlement value of the credit agreement that it guarantees, if the guarantor has been called upon to honour that guarantee; or

(ii) the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor.

6 Some considerable time in argument before us was taken up by a debate about what a debt counsellor must establish before coming to the conclusion that a consumer is over-indebted. I do not think it is necessary or even possible exhaustively to identify what a debt counsellor must determine in this regard. I think each case will turn on its own facts. But for this purpose, I think a debt counsellor is entitled to accept the say so of the consumer where what the counsellor is told is supported by vouchers which appear regular and genuine. Whether the information supplied by the consumer will be sufficient for this purpose and whether the debt counsellor must go further than merely consulting with the consumer and examining the vouchers he produces and how much further she should in any given case go, will depend on the facts of the case.

7 In the present case there does not appear to be anything that ought at this stage of the evaluation by the debt counsellor to have given rise to suspicion or to have warranted further investigation. The tale told by the consumer, as ultimately embodied in a restructuring summary compiled by the debt counsellor, is the sadly familiar one often encountered in the motion court of this Division of a debtor who owes, beyond his means to repay, on a home loan, bank loans both on overdraft and on credit cards, for clothing and household goods and for motor vehicles.

8 The consumer told the debt counsellor that he was a mineworker. As at 19 March 2014, the consumer was employed by San Contracting Services of Lydenburg. He gave the debt counsellor a salary slip on the face of it issued by San with payment date 25 January 2014. The salary slip reflected a total earnings package of R29 680 for that month and that after deductions the consumer had received R20 867 in cash.

9 The material provided by the consumer to the debt counsellor reflected a monthly payment obligation of R33 375. He disclosed no means other than his salary from which immediately to pay his debts. Clearly, the consumer could not repay his creditors the full amount he had undertaken under his credit agreements with them from his salary. He told the debt counsellor that he was the sole provider to his

family. This is relevant because for these purposes the financial means, prospects and obligations of a consumer include[5] those of any other adult person within the consumer's immediate family, to the extent that they share their respective financial means and mutually bear their respective financial obligations.

10 On these facts, the debt counsellor determined that the consumer appeared to be over-indebted. Section 86(7)(c) regulates what a debt counsellor who has accepted an application made to her under s 86(1) may do when she determines that a consumer appears to be over-indebted.[6] Section 86 provides in part relevant to the present enquiry as follows:

> (1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.
>
> (2) ...
>
> (3) A debt counsellor-
>
> (a) may require the consumer to pay an application fee, not exceeding the prescribed amount, before accepting an application in terms of subsection (1); and

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5 Section 78(3)(b)

6 There is a change of language from s 86(6)(a) ("... appears to be indebted ...") to s 86(7)(c) ("... *is* over-indebted ..."). I do not think the change in language is significant. See *Nedbank Limited and Others v National Credit Regulator and Another* [2011] 4 All SA 131 SCA para 2.

(b) may not require or accept a fee from a credit provider in respect of an application in terms of this section.

(4) On receipt of an application in terms of subsection (1), a debt counsellor must-

(a) provide the consumer with proof of receipt of the application;

(b) notify, in the prescribed manner and form-

(i) all credit providers that are listed in the application; and

(ii) every registered credit bureau.

(5) A consumer who applies to a debt counsellor, and each credit provider contemplated in subsection (4) (b), must-

(a) comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement; and

(b) participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.

(6) A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time-

(a) whether the consumer appears to be over-indebted; and

(b) if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.

(7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that-

(a) the consumer is not over-indebted, the debt counsellor must reject the application, even if the debt counsellor has concluded that a particular credit

agreement was reckless at the time it was entered into;

(b) the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement; or

(c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders-

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

(ii) that one or more of the consumer's obligations be re-arranged by-

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

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

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

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

(8) If a debt counsellor makes a recommendation in terms of subsection (7) (b) and-

(a) the consumer and each credit provider concerned accept that proposal, the debt counsellor must record the proposal in the form of an order, and if it is

consented to by the consumer and each credit provider concerned, file it as a consent order in terms of section 138; or

(b) if paragraph (a) does not apply, the debt counsellor must refer the matter to the Magistrate's Court with the recommendation.

(9) If a debt counsellor rejects an application as contemplated in subsection (7) (a), the consumer, with leave of the Magistrate's Court, may apply directly to the Magistrate's Court, in the prescribed manner and form, for an order contemplated in subsection (7) (c).

(10) ...

(11) ...

11 A debt counsellor who has formed the opinion (*determined*, in the language of the NCA) that a consumer is over-indebted is not obliged in all circumstances to take the matter further. But she "may" issue a proposal under s 86(7)(c) recommending that the magistrate's court make one or more of the orders specified in s 86(7)(c). No doubt she will decline to do so if she is unable to formulate a proposal which, having record to the objects and the provisions of the NCA, she considers makes business sense. It is unnecessary for present purposes to try to identify all the circumstances under which a debt counsellor who has made the requisite determination may decline to take the matter further and formulate a recommendation that the magistrate's court make orders. In the present case, the debt counsellor did indeed issue such a proposal.

12 The proposal of the debt counsellor contemplated that the home loan debt owed to FNB be restructured by reducing the monthly minimum instalment due from R9 310 down to R5 551 (including an insurance premium) and maintaining the interest rate applicable at 7,4% per annum. The relevant proposal in relation to Nedbank[7] was that the monthly instalment of R5 695 be reduced to R1 500 and that the interest rate, agreed at 15,75%, be reduced to 10%. Similar re-arrangements were proposed for the consumer's other obligations to creditors identified in the proposal.

13 The proposal was submitted to all the consumer's creditors. All accepted the proposal except FNB in relation to the home loan and Nedbank in relation to the relevant motor vehicle agreement. The debt counsellor was then obliged under s 86 (8)(b) to refer (*must refer*) the matter to the magistrate's court "with the recommendation". In the present case the debt counsellor's recommendation was that the court approve the proposal. In the notice of motion, the debt counsellor cited the consumer and the several creditors, including those who had accepted the proposal, as respondents. She asked for orders, *inter alia*, declaring the consumer to be over-indebted and restructuring the consumer's debt obligations in accordance with the proposal. Significantly, for present purposes, the debt counsellor as applicant

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7 Nedbank was reflected as having more than one claim against the consumer.

sought an order for costs against any respondent who opposed the application.

14 What is to happen when a debt counsellor refers a proposal to a magistrate's court under s 86(8)(b) is provided for in s 87:

> (1) If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86 (8) (b), or a 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-
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> (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;
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> (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).

15 A magistrate presiding in a court to which a re-arrangement proposal has been referred fulfils a judicial and not an administrative role. The magistrate's court derives its power in this regard from the NCA. The procedure such a court must follow is that found in rule 55 of the rules

applicable to proceedings in magistrates' courts.[8] The magistrate must therefore apply the law of procedure and of evidence as applicable to judicial proceedings.

16 The re-arrangement proposed by the debt counsellor provided for a reduction in the monthly amounts which the consumer would be required to pay each of his creditors. It was based on an amount of R11 608 a month to be made available by the consumer towards his debts and a recommendation that the terms of such repayments be extended to terms of between 18 months and 105 months. Built into the scheme was provision for increased payments to the longer proposed term creditors as the shorter term creditors become repaid in full.

17 The conclusion in *National Credit Regulator v Nedbank and Others, supra,* that an application such as this must be brought by the debt counsellor in accordance with Rule 55 of the magistrates' courts rules was affirmed in the Supreme Court of Appeal.[9] This could therefore lead to the court's being confronted with disputes of fact which would then bring into operation, in an appropriate case, the procedural rule

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8 *National Credit Regulator v Nedbank Limited and Others* 2009 6 SA 295 GNP 306H, 308B and 310C

9 *Nedbank and Others v National Credit Regulator and Another, supra*, para 26

in *Plascon-Evans.*[10] The starting point is that where there is a dispute as to the facts, final (as opposed to interim) relief should only be granted in motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order. Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted. In certain instances, however, the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. Where the allegations or denials of the respondent are so far-fetched or clearly untenable, the court is justified in rejecting them merely on the papers. A re-arrangement order made under s 87(1)(b)(ii) is final relief.

18 This situation, where an application is brought by a person who has no legal interest in its outcome, is not unique in our law. For example, where a person is in possession of property to which there are competing claims but the person himself makes no claim to the property, the person in possession may initiate interpleader proceedings. In the case of an interpleader, the rival claimants for the property then are in a substantive sense the litigants rather than the possessor, who has no interest in the dispute except, in the usual

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10 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 A 634F-635C.

case, in relation to his costs for bringing the dispute before the court.[11] The position of the debt counsellor in the present circumstances has been described, in my view aptly, as that of a *pro forma* applicant.[12]

19 In the present case, the application by the debt counsellor in relation to the consumer's affairs was opposed by the present appellants. Both of them delivered answering affidavits in which issues were pertinently raised. I shall deal only with those I think are necessary for the disposal of this case.

20 Before I do that, I need to deal with two procedural aspects which were raised in the appeal. The first is the submission made on behalf of the appellants that the application lacked particularity as to the consumer's assets and in particular documentary material which might be relevant to an assessment of the proposal. While of course the founding affidavit should demonstrate that the consumer is over-indebted and deal with the prospects for the improvement of the consumer's financial predicament, I do not think that it is necessary for a debt counsellor to attach to the application all the documents and vouchers she has obtained from the consumer. It has been said, correctly in my view, that the debt counsellor must display good faith

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11 Costs was a significant issue in this appeal and I shall have more to say on this subject later.

12 *National Credit regulator v Nedbank Limited and Others* 2009 6 SA 295 GNP 309E

in the application. To that end, her file should be made available to all interested parties and she should tender inspection of all documents in her possession in her founding affidavit.

21 Broadly stated, the debt counsellor's application should deal with the essentials of her proposal. It cannot be expected of a debt counsellor to anticipate every objection to the re-arrangement which a creditor might raise. She need only deal, in the discharge of her duty to the court, in her founding affidavit with those issues of which she is aware or might by reasonable and diligent enquiry of the consumer become aware. Counsel referred us to the unreported judgment of *Motor Finance Corporation (Pty) Ltd v Joubert and Others*.[13] In paras 12 and following, it was held that the obligation of disclosure on an applicant debt counsellor applying for debt relief was equivalent to that resting on an applicant for the voluntary surrender of his estate. I respectfully disagree. The wide ranging obligation in such a case arises from the fact that such an application is brought *ex parte*. A case such as the present is brought on notice to all concerned. The duties of disclosure in the present case are, subject to the obligation of the debt counsellor to play open cards with other interested parties and the court, no higher than in any other opposed application.

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13 Case no A629/2013 in this court decided on 22 August 2013

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 apprised 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.

25 To return to the answering affidavits. Firstly FNB attacked the proposition that the consumer should, under the proposal, remain the owner and thus in possession of the property which was the subject of FNB's bonds. The contention was that the property ought to be sold and the consumer required to buy a cheaper property or rent a property for himself and his family. This proposition, in my view, cannot be dismissed on the papers as palpably without merit.

26 An "automated valuation report" in the papers places the value of the property in question at about R850 000, with an "estimated lower selling price" of R700 000. If these figures were placed in dispute, the value would have to be established as it would in any other case. Also of relevance would be the availability of cheaper sale property and rental property in Lydenburg and the cost of rental. It has been said that the object of debt review and restructuring is not to enable a consumer to continue in possession and use the relevant property after the instalment sale agreement under which that property is held is cancelled.[14] I think the same can be said in regard to a claim on a home loan. The policy underlying the relationship between home loan lender and borrower is that the borrower will build up equity in his own home while repaying the loan that enabled him to buy it. When he is no longer able to meet his obligations to the lender, the question

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14 *Standard Bank of SA Ltd v Newman* Cape High Court case no 27771/2001; judgment delivered 15 April 2001

arises whether it is equitable that the defaulting borrower remain in occupation at the expense of the lender. It is regrettably often overlooked that funds for home loans do not come out of a bottomless money pit and that the provision of loans to new entrants into the home loan market depends in large measure upon repayments by existing market participants.

27 It was fundamental to the proposal of the debt counsellor that the home loan debt owed to the consumer's major creditor, FNB, be restructured from R9 310 a month to R5 000. But there was a dispute of fact in that regard which could not be decided on the papers. There was no request that the issue be referred to evidence. That being the case, the proposal ought not to have been approved. In the case of FNB, the evidence before the court below was not such that justice permitted the supplanting of FNB's contractual rights by the proposal. In the case of all the other creditor respondents, the knock on effect, without any further investigation, was such that the funds proposed for the settlement of their claims would simply not be available because there would be, absent an order for re-arrangement binding on FNB, no bar to enforcement by FNB of its claim.

28 A second difficulty with the proposal relates to debt due for the Kia Cerato 2.0 motor vehicle which is the subject of Nedbank's claim. The consumer bought the vehicle on 1 February 2010. The vehicle, a 2010 model, was bought new. The repayment terms agreed were some R5 249 a month for 72 months. The parties therefore initially contemplated that the debt would be discharged by 1 January 2016. For reasons not disclosed in the papers, the instalment had increased by the time the founding affidavit was signed to some R5 695 a month. The proposal was that the instalments be reduced to R1 500 a month, that the interest rate be reduced from 15,75% to 10% per annum and the term extended to 105 months, an extension of just under three years.

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. The second problem is that no attention seems to have been given to the complaint of Nedbank that the term extension sought would mean that in all likelihood, the value of its security, the motor vehicle itself, would depreciate to far below what was owed to Nedbank if Nedbank were precluded from exercising its rights of cancellation and repossession. There is a third problem, which arises from the order made by the magistrate. I shall deal with this problem later.

30 It was established that the consumer was in possession of a total of three vehicles. It is difficult to understand why the court below decided that it would be appropriate to allow all three of these vehicles to remain in the consumer's possession rather than be sold to reduce his over all indebtedness.

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.

33 To return to the debt owed to Nedbank in relation to the Kia Cerato motor vehicle: the magistrate appreciated that the NCA as it stands does not permit a court, acting under s 87(1)(b), to reduce the interest rate applicable to any specific debt. But what the magistrate then did was to restore to the order the agreed interest rate, 15,75%, while leaving in the order the other integers of the calculation as they were in the proposal. The effect of this is that the monthly payments ordered, R1 500, are not large enough to reduce any of the capital. So on the order as made by the court below, Nedbank's claim which is the subject of this appeal will never be repaid in full. The order of the court below effectively granted the consumer perpetual credit at the expense of Nedbank and violated the purpose of the legislation to achieve eventual satisfaction of the debt.

34 Despite the opposition of the present appellants, the court below granted an order in the terms I have described. In the face of the irrationalities which I have identified, the order of the court below cannot be supported.

35 For these reasons, the appeals must succeed. The appellants asked at the hearing of the appeal only that the order of the court be varied only by the deletion of those provisions of the court's orders which relate to them specifically. Although, as I have explained, the deficiencies in the case presented to the court below should have led

to the rejection of the application, I am prepared to allow the re-arrangement to stand in relation to those creditors who were not aggrieved by the order of the court below.

36 It remains to deal with the question of costs. In that regard I must mention two procedural developments in relation to the appeal itself. The first is that the appeals of the two appellants were noted and initially prosecuted separately. Only the successful applicant in the court below, the debt counsellor, was cited as a respondent on appeal. The appeals were set down for hearing in this court on 20 March 2015. Prior to or at the hearing on that date, the point was taken on behalf of the debt counsellor that all the respondents in the court below should have been joined as respondents on appeal. This prompted the court (Ismail J *et* Nkosi AJ) to order that the appeal be postponed and that the present appellants should notify all respondents in the court below of the pending appeal. The order went on to provide that such of those respondents who wished to oppose or join issue with the appeal were to give notice to that effect. In the result only the consumer, who was obviously aware of the appeal through the debt counsellor anyway, gave such notice. The consumer thereupon became the second respondent on appeal. The costs of the hearing on 20 March 2015 were reserved and we must decide who should pay those costs.

37 The second development in the appeal related to an application brought by the debt counsellor to lead further evidence on appeal. The evidence she sought to have led related to abortive attempts to settle the appeal and the present financial position of the consumer. In fact the application to lead further evidence was withdrawn, prudently in my view. Although there was a tender of costs of the abortive application to lead further evidence in the notice of withdrawal of the application, the incidence of those costs was argued at the appeal and must too be determined.

38 Before I deal specifically with the two issues, I need to say something about the special character of the debt counsellor as applicant in s 87(1) proceedings and any appeal arising from such proceedings and of the creditor respondents in s 87(1) proceedings.

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. She must be available to the court at the hearing until excused. She may explain and defend her proposal and, of course, defend herself and her reputation if personal attacks are made on her in the proceedings.

40 A debt counsellor should when asked to do so by the court and even in some cases offer sources of information relevant to the proceedings. For example, relevant to the present case, if she has knowledge of the property selling and renting market relevant to the case, she may offer this information to the court. This may be accepted as correct by the parties. Of course, if what the debt counsellor says in this regard is not accepted as correct, the necessary facts would have to be proved in the usual way. Another example relevant for present purposes is the value of a motor vehicle. The debt counsellor might offer information contained in a reputable publication as indicative of the value of a vehicle.

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 Indeed, I do not think that the principle that costs follow the result should apply in its usual rigour in proceedings under s 87(1). The position of a consumer in such proceedings is much the same as a litigant who asks for an indulgence such as a rescission of a judgment, an amendment or an extension of time. Where the opposition of a creditor is reasonable, therefore, the creditor similarly should not be mulcted in costs. 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. On appeal, the debt counsellor adopted a partisan attitude. In bringing the abortive application to lead further evidence on appeal, she sought costs from the appellants if they opposed the application. The application to lead further evidence was brought to advance the interests of the consumer, not those properly so called of the debt counsellor.

45 In addition, the proposal made by the debt counsellor was fatally irrational. Had the debt counsellor appreciated that her proposal ought not to succeed and applied to withdraw it without more, I do not think that I would have exercised my discretion in the same way as was done in *Absa Bank and Others v Robb.*[15] In that case, a debt counsellor who appreciated that a consumer was not in fact over-indebted and withdrew the application to the court she had made under s 87(1) the day before the hearing was ordered on appeal to pay the costs of the opposing creditors.

46 A debt counsellor who formulates and circulates a proposal under s 86 is *bound* to refer it to the court in the circumstances described in s 86(8)(b). I do not think that the position of a debt counsellor who *bona fide* comes to the conclusion that her initial proposal can no longer be supported should necessarily be made to pay costs.

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.

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15 2013 3 SA 619 GSJ

48 As to the costs of the postponed hearing of the appeal: I think that the fairest result would be that those costs should be costs in the appeal. The appeal has gone against the debt counsellor. So she must pay those costs as well.

49 The consumer and the debt counsellor made common cause both in the court below and on appeal. When invited to do so in the order of this court made on 20 March 2015, the consumer gave notice of his intention to oppose the appeal. He did so in a notice dated 1 April 2015 delivered by the attorney of record for the debt counsellor. The attorney of record for the debt counsellor proceeded to act as attorney of record for the consumer in the appeal as well. The abortive application to lead further evidence was brought by both the debt counsellor and the consumer. The notice of withdrawal of the application to lead further evidence, dated 29 July 2015, two days before the appeal was due to be heard was signed by the attorney of record on behalf of both the debt counsellor and the consumer. I may add that both debt counsellor and consumer tendered in this notice the "Respondent's wasted costs".

50 There is thus no good ground upon which to exempt the consumer from liability for the costs of appeal incurred from 1 April 2015 onwards. 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.

51 Finally, the appellants seek a punitive costs order. I think the manner in which proceedings were conducted on behalf of the respondents on appeal was misguided but not morally reprehensible. I find no basis for a punitive costs order.

52 I make the following order:

1 The appeal succeeds.

2 The order of the court below is altered to read:

2.1 The application to re-arrange the debt owed to the 9th respondent, Firstrand Bank Limited, arising from a home loan is refused;

2.2 The application to re-arrange the debt owed to the 15th respondent, The Motor Finance Corporation, arising from the sale of a Kia Cerato motor vehicle is refused.

3 Save as set out in 2, the order of the court below is to stand.

4 The costs of opposition in the court below of the appellants in their capacities as 9th and 15th respondents respectively in the court below must be paid by the first respondent on appeal, Michelle Barnard.

5 The appellants' costs incurred in the appeal, including the costs reserved on 20 March 2015 and the costs of the application in terms of s 19(b) of the Superior Courts Act, must be paid by the first respondent on appeal.

6 The appellants' costs incurred in the appeal from 1 April 2015 onwards and the costs of the application in terms of s 19(b) of the Superior Courts Act must be paid by the second respondent on appeal, Barend Hendrik Coetzee.

7 The liabilities for costs imposed upon the first and second respondents in the appeal will be joint and several.

NB Tuchtén
Judge of the High Court
5 August 2015

I agree.

S Magardie
Acting judge of the High Court
5 August 2015

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