OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: **14203/2018**

In the matter between:

UNIVERSITY OF STELLENBOSCH LAW CLINIC	First Applicant
SUMMIT FINANCIAL PARTNERS (PTY) LTD	Second Applicant
JENINA MARY MATTHYS	Third Applicant
SKHUMBUZO RICHARD KHUMALO	Fourth Applicant
FRANS SAULUS	Fifth Applicant
ALBERT ROBERT KLEINSMITH	Sixth Applicant
GLADYS SEIKGOTLA JANTJIES	Seventh Applicant
ESTER KORDOM	Eighth Applicant
SARAH FELICITY VISSER	Ninth Applicant

EDGAR ARNOLDS	Tenth Applicant
PATRICK MOEMEDI TLADI	Twelfth Applicant
LEBOGANG VICTOR MOKATE	Eleventh Applicant

and

THE NATIONAL CREDIT REGULATOR	First Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF TRADE AND INDUSTRY	Third Respondent
KOEGELNBERG ATTORNEYS	Fourth Respondent
FLEMIX AND ASSOCIATES INCORPORATED	Fifth Respondent
DE BEER & DE KLERK INC	Sixth Respondent
GERHARD VAN DER MERWE ATTORNEYS	Seventh Respondent
BIRMAN BOSHOFF DU PLESSIS	Eighth Respondent
CG STEYN INC T/A/ STEYN ATTORNEYS	Ninth Respondent
EXPERATOR (PTY) LTD	Tenth Respondent
ONECOR (PTY) LTD	Eleventh Respondent

BAYPORT SECURITIZATION RF LTD	Twelfth Respondent
FINBOND GROUP LTD	Thirteenth Respondent
FULL HOUSE RETIAL (PTY) LTD	Fourteenth Respondent
EASTERN BLUE INVESTMENTS 186 CC T/A FAST CASH	Fifteenth Respondent
D & AG FOURIE T/A CASH FOR CASH 1	Sixteenth Respondent
THE COUNCIL FOR DEBT COLLECTORS	Seventeenth Respondent
ASSOCIATION FOR DEBT COLLECTORS	Eighteenth Respondent
NATIONAL FORUM ON LEGAL PROFESSION	Nineteenth Respondent
LAW SOCIETY OF SOUTH AFRICA	Twentieth Respondent
LAW SOCIETY OF NORTHERN PROVINCES	Twenty First Respondent
CAPE LAW SOCIETY	Twenty Second Respondent
FREE STATE LAW SOCIETY	Twenty Third Respondent
KWAZULU-NATAL LAW SOCIETY	Twenty Fourth Respondent
BLACK LAWYERS ASSOCIATION	Twenty Fifth Respondent
THE GENERAL COUNCIL OF THE BAR	Twenty Sixth Respondent

THE NATIONAL ASSOCICATION OF DEMOCRATIC LAWYERS	Twenty Seventh Respondent
NEDBANK LTD	Twenty Eighth Respondent
CAPITEC BANK LTD	Twenty Ninth Respondent
FIRSTRAND BANK LTD T/A FIRST NATIONAL BANK	Thirtieth Respondent
ABSA BANK LTD	Thirty Second Respondent
INVESTEC LTD	Thirty Third Respondent
AFRICAN BANK LTD	Thirty Fourth Respondent
GRINDROD BANK LTD	Thirty Fifth Respondent
UBANK LTD	Thirty Sixth Respondent
THE BANKING ASSOCIATION OF SOUTH AFRICA	Thirty Seventh Respondent
MICROFINANCE SOUTH AFRICA	Thirty Eighth Respondent
BAYPORT FINANCIAL SERVICES 2010 (PTY) LTD	Thirty Ninth Respondent
STANDARD BANK OF SOUTH AFRICA LTD	Thirty First Respondent
REAL PEOPLE (PTY) LTD	Fortieth Respondent
SOUTHERN VIEW FINANCE SA (PTY) LTD	Forty First Respondent

CENTURY CAPITAL (PTY) LTD T/A CAPFIN	Forty Second Respondent
CONSUMER GOODS COUNCIL OF SOUTH AFRICA	Forty Third Respondent
THE FOCHINI GROUP LTD	Forty Fourth Respondent
TRUWORTHS LTD	Forty Fifth Respondent
MR PRICE GROUP LTD	Forty Sixth Respondent
EDCON LTD	Forty Seventh Respondent
LEWIS GROUPO LTD	Forty Eighth Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Forty Ninth Respondent

CORAM:	**HACK, A J**
DATE OF HEARING:	**12 August 2019**
DELIVERED:	**13 December 2019**

JUDGMENT

HACK, A J:

[1] This is an application in terms of which applicants seek a declaratory order to determine the interpretation of the definition of 'collection costs' in section 1, and the application of the provisions in section 101 (1) (g) and section 103 (5) of the National Credit Act, Act 34 of 2005 (hereinafter referred to as the "credit act"). The first and second applicants render legal advice and services to many, but in particular to the third to twelfth applicants who are all consumers as defined in the credit act. Of the forty nine respondents there were only appearances on behalf of a few. The first respondent, the National Credit Regulator was represented without opposing the relief sought. The twelfth respondent, Bayport Securitization RF Ltd was represented. The twentieth respondent, the former Law Society of South African and the twenty first respondent, the former Law Society of the Northern Provinces were jointly represented but in the name of their successors in title the Legal Practice Council. The thirty seventh respondent, the Banking Association of South Africa was represented and only partially opposed the relief sought. For the sake of convenience I will refer to those of the respondents who appeared as the opposing respondents. Unless pertinently necessary I will not refer to individual respondents. The word opposing being used loosely as not all of the aforesaid stated respondents opposed all the relief sought. Some, and in particular first respondent merely expressed certain viewpoints while abiding the decision of the court.

[2] Much time and exertion was expended by the parties who participated in the hearing and the court appreciates the efforts. In the interests of all the applicants whose lives are directly affected by this judgment I will endeavour to confine myself to what are the relevant and material issues without addressing all the nuances and subtleties of the legal submissions made.

[3] Section 1 of the credit act defines 'collection costs' with the following words :

means an amount that may be charged by a credit provider in respect of enforcement of a consumer's monetary obligations under a credit agreement, but does not include a default administration charge;

[4] Section 101 (1) of the credit act says :

"Cost of credit

101. (1) A credit agreement must not require payment by the consumer of any money or other consideration, except

(a) the principal debit, being the amount referred to in terms of the agreement, plus the value of any item contemplated in section 102;

(b) an initiation fee, which

(i) may not exceed the prescribed amount relative to the principal debt; and

(ii) must not be applied unless the application results in the establishment of a credit agreement with that consumer;

(c) a service fee, which

(i) in the case of a credit facility, may be payable monthly, annually, on a per transaction basis or on a combination of periodic and transaction basis; or

(ii) in any other case, may be payable monthly or annually ; and

(iii) must not exceed the prescribed amount relative to the principal debt;

(d) interest, which

(i) must be expressed in percentage terms as an annual rate calculated in the prescribed manner; and

(ii) must not exceed the applicable maximum prescribed rate determined in accordance with section 105;

(e) cost of any credit insurance provided in accordance with section 106;

(f) default administration charges, which

(i) may not exceed the prescribed maximum for the category of credit agreement concerned; and

(ii) may be imposed only if the consumer has defaulted on a payment obligation under the credit agreement, and only to the extent permitted by Part C of Chapter 6; and

(g) collection costs, which may not exceed the prescribed maximum for the category of credit agreement concerned and may be imposed only to the extent permitted by Part C of Chapter 6.

[5] Section 103 (5) is within Part C chapter 6 and it says :

"Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in 101(1) (b) to (g) that accrue during the time a consumer is in default under the credit agreement may not in aggregate exceed the unpaid balance of the principle debt under the credit agreement as at the time that the default occurs.

[6] The applicants seek three declaratory orders. In summary form, firstly an order declaring that the collections costs as defined in the act must be read to include legal fees incurred to enforce the monetary obligation under the credit agreement, regardless of whether such fees are charged before, during or after litigation. Secondly that the limitation in terms of section 103 (5) that all amounts (bar the capital) cannot exceed the balance of the debt, must apply at all times regardless of whether a judgment has been granted. Thirdly, that legal fees may not be claimed

until they are agreed upon or taxed. The applicants seek further and conditional upon the declaratory orders, a recalculation of the indebtedness of third to twelfth applicants to tenth to sixteenth respondents and payment of any amounts so determined to be due them.

[7] The contention of the applicants is that this interpretation of the act will give true effect to the provisions of the act whereas at present the exclusion of legal fees is undermining the protection which the act was intended to afford consumers. The contention being that creditor providers, while having their recovery of costs curtailed in terms of the act, are nevertheless enjoying the protection of recovering legal fees resulting in a failure to prevent the exploitation of the consumer. Or to put it in alternative terms the creditor providers have no incentive to look after consumers or to be more direct not to exploit consumers because they can utilise their resources to pursue consumers who default with a degree of impunity knowing that they will ultimately, even if it takes a considerable time, recover all that is owed to them, including their very substantial legal costs incurred.

[8] The applicants explain the aforesaid contentions with reference to the individual circumstances of the third to twelfth applicants. It is not necessary to dwell on the detail. A summary was given to me of the details contained in the founding and confirmatory affidavits and I repeat it in brief, with only reference to a few, and with figures rounded to the nearest hundred. The third applicant borrowed R5600, has paid R13 000 and still owes R13 300. The fourth applicant borrowed R5 600 and paid R17 500 and still owes R2 200. Fifth applicant borrowed R16 000 has paid R19 700 and still owes R13 800. Sixth applicant borrowed R6 000 has paid R14 300 and still owes R10 000. Seventh applicant borrowed R700, has paid R5 100 and still owes R600. Eighth applicant borrowed R5 000 has paid R1 300 and still owes R8 000. These are the facts presented to court. Whiles there are some quibbles in the papers on behalf of the respondents concerning certain of the calculations the factual circumstances of these individual applicants are not disputed nor is it disputed that they represent a very small number of persons who are in the same debt spiral with allegedly little hope of paying off their debt in any reasonable period.

[9] The applicants set out in detail that this spiralling of the initial debts is as a result of collection charges with the biggest item being legal fees. This is not disputed by the respondents. The respondents however say that these legal fees are lawfully and proper incurred and recovered. Applicants respond by saying that these legal fees are not lawfully and properly incurred and recovered because they should be included in the definition of collection costs in terms of the credit act and therefore be significantly curtailed in term of the two sections of the act which the applicants seek to be interpreted.

[10] The applicants set out as background to the launching of this application recent developments concerning this problem of the spiralling costs of what is best described as small or micro loans. These are loans are incurred by consumers for short term needs rather than capital acquisition or investment. The applicant sets out the various statements made by role players over recent years to address the debt spiral in particular as it affects the poorer members of society. In particular the stated intention to avoid or minimize the use of emoluments orders, which applicants' describe as the enablers for the collection of the costs of credit. Applicants conclude that very little came of these statements. Applicants alleged that the credit providers have reverted to collecting debt using emoluments attachment orders on the pretext that this is pending the availability of alternatively tools. Applicants say the various law societies (now Legal Practices Council) have resorted to blaming the courts and the legislature for the on-going debt spiral. Applicants submit that the conclusion to be drawn is that while the credit providers are able to recover their debts without limitations on legal costs and procedures they will continue to extend credit to the vulnerable without the necessary care and caution. All parties before me agree that there is a problem of spiralling debt. The question therefore is whether this is a problem which cannot be solved if credit is going to remain available equally to all, or whether alternative tools can be adopted voluntarily by the credit providers to address the problem or should a solution still be created by the legislature or is the interpretation of the act as sought by the applicants' already a solution in place.

[11] The applicant submits that the language used to define collection costs is clear and unambiguous and accordingly the interpretation which the applicant seeks is consistent with the words used in the act. Applicants submit that collection costs

include legal costs as part of enforcing the consumer's monetary obligation. The parties have differing stances in regard to the words 'enforce'. Applicant says it applies to all possible procedures up until payment. The respondents who oppose the relief say that the word 'enforce' is limited up to the commencement of litigation. They aver that once litigation commences the credit agreement is cancelled and there is no longer the enforcement of the agreement but rather proceedings (an action or application) for a judgment against the consumer in favour of the credit provider and then thereafter the recovery of a judgement debt.

[12] Applicants' contention that the actual words used in the definition of collection costs show that legal fees are included is not correct. The words legal costs do not occur in the section 1. Nor do they occur in either sections 101(1) (g) nor 103 (5). Applicants however raise the following reasons why they say the act must be read to include all legal costs up to final recovery after judgment.

[13] The first reasons why applicants submit that collection costs include legal costs is because the definition clause is particularly broad and refers to any charge levied in terms of the agreement where the creditor provider is attempting to enforce the consumer's monetary obligation except for default administration charges[1].

[14] Secondly, applicants say that the provision of Part C of Chapter 6 governs enforcement by means of legal proceedings. The section refers to the definition of collection costs to the process of debt enforcement in a court and therefore the act includes legal fees in its definition of collection costs. The applicants aver therefore that collection costs are synonymous with legal costs or that legal costs fall within the definition of costs incurred in the enforcing of the monetary obligations under the credit agreement.

[15] Thirdly the applicants contend that the term enforcement of monetary obligations refers to all measures taken by the credit provider to enforce payment in part or whole of a consumer's obligations under the credit agreement. The contention being that when a credit provider invokes an acceleration clause in the

[1] It is common cause that administration charges are small and not relevant to the issues herein.

agreement and proceeds to court to recover the entire debt as a result of a default the agreement is not cancelled but what is sought is specific performance of the accelerated indebtedness. Applicants rely on the authority of **Nkata v FirstRand Bank Ltd** 2014 (2) SA 412 (WCC) with reference to paragraph [39]. The court proceedings are therefore an enforcement of the monetary obligations as provide for in the act for which collection costs would include legal fees. Applicant relies equally on the constitutional court decision **Nkata v Firstrand Bank Ltd** 2016 (4) SA 257 (CC) in support of all its contentions before this court including in particulars their prayer that legal costs can only be recovered if agreed or taxed. The applicants contend, in summary, that the Nkata constitutional court decision is support for the submission that collection costs include pre judgment, judgment, execution and post –execution costs (effectively all legal costs, including the costs charged by attorneys and advocates) for so long as the consumer is in default. In the case of micro-loans as entered into by third to twelfth applicants that will be until final payment. Applicant equally contends that litigation steps taken to obtain payments all arise from or 'under" the credit agreement. Applicants make the point in argument that in each instance applicable to the third to twelfth applicants the judgment creditors obtained orders for specific performance of the credit agreement. They make the averment that while not impossible, it is highly unlikely that credit providers would cancel the credit agreement and then approach the court with a claim for damages.

[16] The applicants claim for an order that costs must be agreed or taxed arises from their complaint that in utilising emolument attachment orders credit providers add costs as and when incurred without any determination of how they are quantified, whether they are reasonable and whether they are in fact due and payable.

[17] To turn to the opposing respondents contentions. A preliminary ground of opposition is that the issues herein are *lis pendens*, as they are already being considered in the **Lonmin Ltd.** At the time this application was launched that application had been dismissed on the basis that there was no proper joinder of interested parties. I am satisfied that the court has not made any ruling on the issues raised herein and the opposition based on *lis pendens* has no merit.

[18] On the merits of the application various grounds are submitted in opposition to the applicants' contentions. These grounds are broadly in support of the averment that the legislation could not have intended to include legal costs in collection costs. In the first instance it is averred that the interpretation sought would encroach on the discretion of a court to award costs orders. Applicants respond thereto by saying, that the interpretation of the act sought, would not curtail the courts' discretion on costs but merely puts a ceiling on what can be recovered. This is a subtle distinction. Respondents contend the view of the applicants means orders can be made that are ineffective and this undermines the administration of justice. In my view the legislature has always imposed significant limitations on courts when it comes to order as to costs. The court has never had an unfettered discretion. Its discretion is purely in terms of the prescripts of tariffs etc. imposed by the legislature. A court has never had a discretion to impose cost orders indiscriminately. The discretion has always between within the scope of options set down by legislative enactments.

[19] Secondly the submissions by the opposing respondents is that the interpretation sought by the applicants would result in consumers stopping making any payments once the cap is reached in fear of triggering further liability. Applicants respond that this is applying principles applicable to the common law *in duplum* rule which are not applicable in the terms of the act. This is the view held in **Nedbank v National Credit Regulator** 2011 (3) SA 581 (SCA) at paragraph [38]. I agree with the applicants contentions. Payment in terms of the act does not have the same consequences of reactivating to the extent of the payment the liability for interest as is the case in the *in duplum* rule. The interpretation sought by the applicants will not be an incentive either way. It is in my view a reasonable conclusion to make that consumers will pay, as and when they can, to clear their name so as to once again receive credit or they will continue reneging for whatever reason, regardless, of whether their indebtedness increases or remains fixed.

[20] Thirdly the opposing respondents say that the common law definition of collection costs supports their contentions. They refer to various authorities where

the distinction is drawn between collection costs and legal fees.[2] They then contend that one of the rules of interpretation is that the legislature does not intend to amend the common law. It is to be noted that the authorities relied upon by the opposing respondents all pre-date our constitutional democracy and; firstly the rights of equality and fairness enshrined therein, but secondly and more importantly the need to redress inequalities of the past. Applicants' response is that the legislature clearly did intend, in this instance, to amend the common law and include legal fees in collection costs for the reasons they have submitted set out above.

[21] The opposing respondents raise the further point that the legislature would have been aware of the issue of legal costs and expressly excluded them from the definition. As stated the applicants say that the definition is intentionally broad as all possible costs could not necessarily be anticipated. The opposing respondents make the point that costs could include various costs and amongst others, give the example of the costs of tracing a debtor. That is not named in the definition. The very broadness supports the conclusion that I make and that is that there was no express decision to exclude legal costs but on the contrary they were included.

[22] The opposing respondents aver further that disallowing a party the opportunity to recover even taxed costs would effect a litigant's, (by that of course they mean the creditor providers) constitutional right of access to court. There is no merit in that submission. Any inability to recover costs does not remove a litigant's right to access the court. It happens often that litigants institute proceedings knowing full well that they will never recover costs because of the impecunious position of the defendant or respondent. The further submission is made that there will be unanticipated consequences as the same interpretation would have to apply to all credit agreements including those of significant sums not falling within the realm of micro-lending. In my view this risk is over stated. It could apply notionally when a consumer reneged only once a very substantially part of the indebtedness has been paid. The outstanding debt then could be very small and thereby limit what can be recovered. In my view that does not accord with reality. It in terms of both these submissions

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[2] Commencing in D& DH Fraser Limited v Waller 1916 AD 494 including Sentraal Westerlike Kooperatiewe Maatskappy Beperk v Smith 1980 (2) SA 371 OPD and others

referred to in this paragraph one of the consequences might be to encourage alternative dispute resolution or a greater emphasis on reaching a settlement before rushing into court to obtain redress on any default by a consumer that would be a salutary result.

[23] On the issue of the need for an order to ensure that all costs are either agreed or taxed the opposing respondents' submit that this is already settled law in accordance with the constitutional court's decision in **University of Stellenbosch legal Aid clinic and others v Minister of Justice and Correctional Services and Others** 2016 (6) SA 596 (CC). Furthermore it is submitted by the opposing respondents that the Magistrates' Court Act, rules and regulations make sufficient provisions in this regard. The applicants dispute this, firstly as this would imply that the credit providers and those service providers who collect on their behalf diligently comply with the provision of the Magistrates' Court Act. Secondly that the regulatory provisions do not apply to costs after the granting of a default judgment and the imposition of an emoluments attachment order. It is in particular these costs that applicants say are arbitrarily debited to the account of consumers without any judicial oversight. I am of the view that an existing judicial decision cannot prevent a further finding that a provision in any legislature must be interpreted in the same manner as already judicially established. It is hardly necessary to say that legislation must be drafted in accordance with the principles of our law and in particular as established by the constitutional court. When the need arises for interpreting legislation there cannot be a bar to interpreting that legislation in a manner which accords with a prior finding of the highest court of the land.

[24] Finally and the most significant ground proffered by the opposing respondents is that when a judgement is granted after a summons or application is issued and served it constitutes a new cause of action against the defendant or respondent and therefore all further costs incurred are not collection charges. A distinction is drawn between collection costs recoverable in terms of the act and costs arising from the judicial process. It is then argue that legal fees are no part of collections costs for this reason. The suggestion is made that the judgment is a novation. The applicants point out with reference to **Sadif (Pty) Ltd v Dyke 1978 (1) SA 928 (A)** that what the opposing respondents' are relaying on would be a voluntary novation. It is submitted

by applicants that a voluntary novation can never be used as a way to escape the consequences of section 103 (5) of the act. Additionally applicants answer these contentions by saying that when a court order awards costs against a defaulting party in terms of a claim arising from a credit agreement it is giving effect to a specific term of the agreement. Accordingly the submission is made that the orders flow directly from the operation of the agreement and not from any other juridical bond between the creditor provider and creditor consumer. I agree. Reliance was also placed on regulation 47 promulgated in terms of the act which refers expressly to the various cost provisions in other legislation which constitutes the various courts of the land. The regulation provides that collection costs may not exceed the provision of part C of chapter 6 of the act and the provision of the various statutes. In my view the word "and" simply means, as submitted by applicants, that the limitations imposed in terms of Part of Chapter 6 are furthermore or in addition curtailed by the provision of the act. It does not amount in my view to suggesting there is a distinction between the two. I agree with the submission made by quoting the decision in **Sadif** at page 941 H that "a judgment enforcing rights under a contract has the effect of confirming and reinforcing such rights rather than superseding them."

[25] In my view the argument by the respondents who oppose the relief is contrived and wrong. It is contrived to try to distinguish legal fees which are part of collections costs and legal fees which are part of ligation costs as the twenty and twenty first submit. In particular the twenty and twenty-first respondents submit that the costs incurred in drafting a summons are already litigation costs. In others words litigation costs are not post judgment costs. That contradicts the view of other opposing respondents. When a summons or application is issued and served and thereafter a judgment is granted it does not constitute a new cause of action against the defendant or respondent. It is a continuation of one cause of action and is simply a further procedural step to enforce the claim. The claim retains exactly the same character that it always had. Whether it is recovery for damages arising from delict, the enforcement of the terms of a sale agreement or in the instant matter contracts in the form of credit agreements. I agree with the sentiments express by applicants that it makes no sense that the credit act should be of less value and provide less rights after a judgment is granted.

[26] In coming to a decision the starting point is of course the National Credit Act and the rules of interpretation of legislation. The determination of this matter concerns the rules which our courts have developed to be applied to the interpretation of legislation.

[27] Legislation may be described as being in the form of a continuum. Legislation can be very clear leaving no area of doubt or at the other end of the continuum vague and difficult to discern. The Credit Act has been described as not being a model of clarity by the Supreme Court of Appeal[3]. The approach of the courts has in turn been described as having been a pendulum with also a degree of movement in the applicable approaches to interpretation. In interpreting the credit act I must be guided by the decision in **Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk** 2014 (2) SA 494 (SCA). The judgment commences by referring to the then prevailing principles of interpretation, as being in accordance with the decision of **Coopers & Lybrand and Others v Bryant** 1995 (3) SA 761 (A). The court in **Bothma-Batho** *at page* 499 says that the position in **Coopers** was as stated at paged 768 A-E of that judgment to be : 'The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking to have regard : (1) to the context in which the word or phrase is used with its interrelation to contract as a whole, including the nature and purpose of the contract ...(2) to the background circumstance which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted...(3) to apply extrinsic evidence regarding the surrounding circumstance when the language of the document is on the fact of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.'

[28] The court in **Bothma-Batho** then continues at paragraph [12] to say : "[12] That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instrument or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the

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[3] **De Bruyn NO and Others v Karesten** 2019)1) SA 403 (SCA) at paragraph [1]

process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach.' The court based its aforesaid conclusions on a series of cases culminating in **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA).

[29] In **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) the starting point was restated namely that that the language used in the light of the ordinary rules of grammar and syntax must be followed. The court however went on to find that In the event of the uncertain for reasons of vagueness or otherwise there is no fixed standard approach. Each case must apply what are the appropriate considerations to aid the interpretations for the issues. When it comes to legislation one of these appropriate considerations is the intention of the legislation. That proposition can equally be stated as 'what is the ill' that was being sought to cure. But this is not the absolute final and binding rule. Courts have essentially concluded that there a range of factors some of which will be more important than others depending on the matter before the court. This of course allows for greater argument on which should be the primary guiding principle which can make a decision difficult. On the other hand the court is not constrained to strict rules of interpretation and must ultimately seek to ensure that justice is done. I stress these principles apply when the language is not clear. That of course is the case in this matter. Not to over simplify the matter but what the applicants' are asking is that the court must read into the definition of collection costs the words legal fees up to final payment. As stated the process of interpretation is one unitary exercise in which all relevant and admissible context including background and surrounding circumstances can be considered. The interpreter must look at the language of the provision and then place it contextually within the provisions of the relevant section and the purpose of the legislative instrument itself as stated in **Endumeni** at paragraph 18

[30] The crucial purpose of the act is set out in the long title of the act in the words "to promote responsible credit granting". The respondents have emphasised the obligation on the consumers to be responsible and not seek credit when they know they cannot pay or there is a risk that they might not be able to pay. I am of the view that the credit providers are thereby attempting to thereby shield themselves from the responsibility imposed on them by the credit act.

[31] In a series of case there has been an emphasis on equity and fairness. It has repeatedly been said that the national credit act's intention or purpose is principally to protect the consumer. However it has equally been restated that the creditor provider's rights should be respected and protected as well. This is in accordance with the provision of section 3 (d) of the credit act which provide that there should be a balance between competing rights and obligations. In each instance there is however a reliance on the credit providers willingness to be socially conscience and behave fairly. The question before me is, is that happening? The facts in this matter suggest the answer is no.

[32] In **Sebola and Another v Standard Bank of South Africa Ltd and Another** 2012 (5) SA 142 (CC) the court at page 154 A states that the main object of the act is to protect consumers. However the court, and with respect rightly, says that the credit market must be competitive and sustainable. The court acknowledges that there must be responsibility but adds the act must be interpreted without disregarding or minimising the interest of credit providers. I hasten to say that I agree entirely and respectfully with the statements of the court. The question is whether in the seven years that have followed the Sebola judgment credit providers have shown the responsibility called for to balance the respective rights and responsibilities of creditor providers and consumers. The facts of this case suggest no. The escalation of the indebtedness as a result of costs set out in the founding affidavit on behalf of third to twelfth applicants suggest the credit providers are not even paying lip services to the need for fairness and equity. They are running up costs with what appears to be no concern for the consumer.

[33] In **Nkata v Firstrand Bank Ltd** 2016 (4) SA 257 (CC) the court at paragraph [94] addressed the responsibility of consumers to honour their undertaking to their

creditors but acknowledged that circumstances arise that might not make this possible. The court then went on to so that when a credit consumer honestly runs into financial distress that precipitates repayment default and then a resolution of the dispute must bear the hallmarks of equity, good faith, reasonableness and equality. In other words the court placed an obligation on credit providers to act in a certain manner when a credit receiver (consumer) defaults. That of course, again with due respect, is correct and laudable. But the facts in this case show that in practice that does not happen. None of the credit providers in this matter can be said to have attempted to resolve the dispute by adhering to the hallmarks of equity, good faith reasonableness or equality. On the contrary again they have allowed costs to run up with apparent abandon.

[34] In an attempt to address the aforesaid difficulties of escalating consumer indebtedness an application was brought in the North West Division of the High Court held in Mahikeng descried by applicants as synonymous if not identical to this application. The citation of the case is **Lonmin Ltd and Others v CG Steyn and Others**, case number M619/2016 and it was referred to in the papers and arguments before me. It was dismissed on what are descried by applicants as technical grounds in March 2018. At the time of the hearing this matter I was advised that it was subject to an application for leave to appeal.

[35] In applying the rules of interpretation as I have set out above I regard it as important in considering the intention of the legislation to ask what was the ill which the legislature sought to cure is.

[36] Not much was said before me in submissions by the parties concerning the manner in which debt of this nature was incurred. In particular relatively small debt being incurred by the poor. Such amounts of indebtedness might be small to many but they are of great significance and consequence in the lives of the borrowers who are poor. I regard this to be of considerable significance. In my view a significant question is; 'where does responsibility lie' for the initiation (incurring) of these debts. A further question then arises is whether the legislation considered this question and whether it addressed the question or whether the problems must still be address in the future.

[37] If equality requires all persons an equal right to access to credit but consumers are not equal in their ability to pay then it must equally mean that the cost of credit must be adapted accordingly. In reality the converse has happened and the cost of credit for small loans is disproportionately higher than for large loans. This was common cause between the parties.

[38] Applicants make the overriding submission that the applicant's interpretation supports the contention that applicable section exists for the protection of the consumer. Practically the limitation imposed by section 13(5) in the context of a large credit agreement would seldom be met. However in the context of micro loans its effect is profound and operates to protect the consumer from collection costs far exceeding the amount that was initially borrowed. I agree that the consumers obtaining micro loans generally being the poorer members of our communities need and must be given this protection and that this was the legislature's intention when the credit act was promulgated.

[39] A relevant, and in my view important submission by the applicants, is that the interpretation sought encourages and promotes responsible lending be ensuing that creditor provider properly vet their clients. Applicants submit further the interpretation underscores the importance of conducting a proper affordability assessment to ensure that a consumer can in fact repay the loan. If small loans are determined too costly to collect, then credit provider will be forced to ensure that they are extended responsibly to start with. Credit should only be extended to consumers who can afford it and would not become over indebted as a result. To these submissions by applicant which I accept and with which I agree, I would add that this might contribute to stopping the conduct of lenders in seducing consumers to obtain credit. I take judicial notice of the notorious fact that consumers are constantly being cajoled and encourage applying for credit. This occurs not only by advertising but particularly by the use of mobile phone technology. More often than not these adverts or invitations to consumers rely on their vulnerability to succumb to the universal pursuit of consumer goods and the rubric of 'buy now pay later'. The result, as is pertinently demonstrated in the cases before this court, is that the poor, in succumbing to the alluring of credit, simply get poorer. In my view the credit act had has an essential purpose the need to address disparities of wealth in this country. I share the view of

the highest courts over years that profit is essential to for the growth of the economy. But if the pursuit of profit results in the exploitation of the poor and the ever widening disparity of wealth, this gives meaning to the other rubric that the rich are getting richer and the poor are getting poorer. I am satisfied the legislature intervened in the national credit act to curb such exploitation resulting in the ever widening gap of wealth in this country. I accept that the result may be that certain of the wealthier institutions or enterprises in this country will have their profits reduced. This is an acceptable result if has the concomitant consequence that the poor will not be enslave even further in spiralling debt. I am satisfied that the credit act must be interpreted to obtain this purpose. A purpose which the legislature intended. Accordingly I am satisfied that the applicants have made out a case for the declaratory orders.

[40] As to further relief that the individual applicant's accounts should be recalculated I am also of the view that justice requires this relief to be granted. The entire application will have no direct result at all for the third to twelfth applicants if they do no obtain the benefit of the declaratory order. The opposing respondents contended that this would effectively be the making of a retrospective order. Applicants respond that what is being sought is simply confirmation of what the correct legal position has been since the act came into being in 2007. I agree. Submission were made that it would not be necessary for the relief in paragraph 2 of the notice of motion namely the appointment of an independent expert as the credit providers could do their own calculations. I believe it best to ensure that mechanisms are in place to expedite a just and equitable determination of the amounts due. It will be within the ability of the credit providers to determine how quickly and therefore how costly an independent expert can carry out his or her task. The credit provider can provide all the necessary information in a clear and understandable form thereby requiring the expert merely to apply his or her mind to confirming the accuracy of the figures. As to the appointment of the expert I provide for either agreement or the appointment by an independent third party.

[41] As to costs, the applicants sought costs orders in its notice of motion against the tenth to sixteenth respondents and such parties as opposed the application. The tenth to sixteenth respondents were the credit providers with whom the third to

twelfth applicants contracted. Notice of opposition were filed on behalf of the 12th, 13th, 14th, 20th, 21st, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th and 37th respondents. However not all filed papers or appeared. At the hearing of the matter counsel for the applicants sought costs orders against the tenth to sixteenth respondent, the twentieth and twenty first respondents only. No compelling reason was placed before me why those parties against whom costs ordered were sought or who nevertheless did not participate in the hearing should not bear the applicants costs.

[42] In the premises I find that the applicants are entitled to the relief sought. Accordingly the following orders are made :

a) **It is declared that collection costs as referred to in Section 101 (1) (g), as defined in Section 1, and as contemplated in Section 103 (5) of the National Credit Act, Act 34 of 2005 includes all legal fees incurred by the credit provider in order to enforce the monetary obligations of the consumer under a credit agreement charged before, during and after litigation.**

b) **It is declared that section 103 (5) of the National Credit Act, Act 34 of 2005 applies for as long as the consumer remains in default of his/her credit obligations, from the date of default to the date of collection of the final payment owing in order to purge his default, irrespective of whether judgment in respect of the default has been granted or not during this period.**

c) **It is ordered that legal fees, including fees of attorneys and advocates, in as much as they comprise part of collection costs as contemplated in section 101 (1) (g) of the National Credit Act, Act 34 of 2005, may not be claimed from a consumer or recovered by a credit provider pursuant to a judgment to enforce the consumer's monetary obligations under a credit agreement, unless they are agreed to by the consumer or they have been taxed.**

d) An independent expert shall be appointed, either as agreed between the parties or in the case of no agreement, by the Chief Executive Officer or his or her nominee of the South African Institute of Chartered Accounts, which expert need not be a member of the institute, to re-calculate the outstanding amounts of the emolument attachment orders granted against the third to twelfth applicants in accordance with the provisions of this order which appointment is to be made within ninety days of the granting of this order. The obligation to give effect hereto shall be open the credit providers jointly and severally, in each respective case.

e) The tenth to sixteenth respondents are ordered to provide to each of the respective applicants, and the duly appointed expert in terms of section 65 (4) (as read with section 92 and section 93 where applicable) and section 68 (1) of the National Credit Act, Act 34 of 2005, copies of the following documents in order to assist with the recalculation referred to above, namely

   i) The pre-agreement quotation;

   ii) The credit agreement;

   iii) The current statement; and

   iv) A statement on the default date.

f) That the tenth to sixteenth respondents are ordered to repay to the particular applicant, within seven days of receipt of the recalculation, any amount found to be due and owing after such recalculation.

g) The tenth, eleventh, twelfth, thirteenth, fourteenth, fiftieth, sixteenth and the successor in title the Legal Practice Council of the twentieth and twenty first respondents are ordered to pay the applicants' costs including the costs of three counsel were employed.

HACK, A J