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Case number NCT/50/2009/138(1) (P)

In the matter between

BULELWA PHANTSI **Applicant**

and

CERTAIN OF HER CREDITORS **Respondents**

On the application of ZWELI BIYELA (or Ms Phantsi herself)

ORDER AND REASONS FOR ORDER

PART A

1. This document contains the concluding order and the reasons for the order in the above matter and in the matter affecting Rhina Kenosi Moleme, case NCT/62/2009/138(1) (P). After some remedying, the applications are by debt counsellors for consent orders under section 86-8 of the National Credit Act, 2005 (the NCA) after the debt counsellors had found that the two consumers were NOT over-indebted but that financial strain existed or could (probably) be expected to arise some time in the future as is meant in s86-7-b.

2. The first impact of applying s86-8 as it stands is that the applications were not satisfactory.

3.1 s86-8-a has identifiable requirements. One requirement may to some not be immediately clear. Because consent of all to the contract is already required in the opening phrase of the subsection, the phrase 'and if it is consented to by the consumer and each creditor' must refer to the making an order in terms of the agreement reached.

3.2 The requirements for an order under s88-8-b therefore, if applied literally, entails:

You may access information held by the Tribunal for the exercise or protection of your rights, in terms of the Promotion of Access to Information Act, No2 of 2000.

(1) proof of a finding that the debtor is NOT over-indebted and further as stated in s86-7-b
(2) proof of the recommendation by the debt counsellor and communication to the creditors;
(3) proof of an agreement on one single set of terms. (Although they jointly constitute one plan, the terms may impact differently on different creditors);

(4) proof of what those terms are;

(5) proof that each of those creditors is a 'credit provider';

(6) proof that there is no credit provider that is not a signatory (consenting party) to the plan;
(7) proof that each of those credit providers does consent that the agreed plan be taken to the point of an order of court making it binding.

3.3 It may become appropriate to lay down a practice of requiring proof that creditors and debtor consent to the involvement of a PDA. We live in a world of informed consent. I was told that the terms of registration of all debt counsellors require use of a PDA. That is not patent to persons involved in debt restructuring events.

3.4 In the comments in this paragraph I am aware that under compulsory re arrangement (s96-7-c) the factors and/or the process is possibly not limited to only 'credit agreements'.

3.5 Especially in the informal context of the Tribunal, an uncontested assertion by the applicant serves as adequate proof of a fact that is within the knowledge of the counsellor. The debtor may have to give the assurance that no creditor is being omitted. Unless contested or called for by the tribunal, an affidavit is not necessary.

3.6 It is for the applicant to make out a case for the exercise of the Tribunal's discretion to make an order. That must be done in the application. In that way service of the application brings about notification to creditors of the assurances given. A later affidavit will normally not do unless the application is amended and it is re-served.

4.1 There are also requirements of form.

4.2 I ignored that the application was initially by Phantsi instead of by the debt counsellor and that without permission of the Tribunal and without notice to creditors a defective application was converted to a tolerable one. Staff should realise that what looks like a mere change of pages can have greater effect.

4.3 To comply with the requirement that the agreement be couched in the form of an order, a document (again seemingly created after service of the application) came to file which commenced with many words as 'whereas' facts and many as 'therefore' facts. That is the style of (some) contracts, not of orders. [The triple documents submitted in the Moleme matter are in acceptable style. In the Moleme case three documents were created.] A check on all the 'whereas' and 'therefore' statements has also indicated room for discrepancies, inaccuracies and a risk of wrong claims to res judicata. Nobody wants an adjournment or a new process to obtain consent of creditors because of some problem with statements about facts that need not get any attention in the order itself.

5.1 The two applications before me failed or seemingly failed to comply with most of the requirements. In view of the little experience of practitioners and the lack of previous intimations from the Tribunal, several documents intended to overcome difficulties were accepted. Refusal to do so would have only a dilatory effect and leave the deeper problems unresolved. Inter alia

5.1.1 Only after a memo from the registrar did amended pages cause the debt counsellor instead of the debtor to be the applicant;

5.1.2 The amended application was not signed. I permitted signature at the hearing

5.1.3 The "c" portion of the original application was not filled in. Neither a notice of amendment nor a notice of asking for condonation was raised before me and the new application was served on no one.
(5.1.4 In the Moleme case I received several documents late.)

5.6 There is a distinction between the statutory and other requirements. In the case of requirements of the former (paragraph 3 above) it is not only a matter of integrity to honour what the statute says, but glossing over them is not necessarily to the advantage of the consumer or

anyone else. If someone upsets the order made (or his subjection to that order) because an element was disregarded, it is liable to be a messy business.

6.1 The reasons for the leniency disclosed despite the importance of honouring fundamentals includes that I accepted that the applicants had problems in handling applications.

6.2 In the Phantsi matter the initial papers disclose that the debtor had eight debts to six creditors. I was informed that the application commenced as an application for an order affecting all six. My file contains the signature page which shows that an application was signed on 13 February or March 2009 (the required fee was paid on 17 February 2009). The front page or pages are lacking probably because of the 'amended application'. A letter of 21May thanked an employee 'for accepting the amended application form' on 20 May. That letter records that all necessary documentation could not be obtained and that the application in amended form was 'for only the agreements where the documentation is complete'. I was informed at the hearing that despite requests to accept or condone service to enable the application to proceed 'against' all, the particular creditors 'either ignored us or they did not want to consent'. All this followed a letter under the hand of the registrar (dated 15 May) in which deficiencies in the application were pointed out.

That heading shows the original parties as two banks, Edcon, Direct Axis, Woolworths and RCS. That is also the information in the 'Annexure A' which is alleged to be the agreement to which the Phantsi application relates. (But it was signed on behalf of Woolworths and RCS only on 23 April which is after the original application was commenced!). Again the front page or pages are absent. An internal letter of 28 May stated that applicant had opted for an amendment in terms of tribunal rule 15 so that the application would proceed only in respect of Woolworths, RCS and Direct Axis and that service on Direct Axis was necessary. A letter to the applicant dated 28 May informed him of the need for that service. (Another letter of the same date reads differently). Then, not chronologically, there was the said letter of 21 May. An e-mail dated 19 June asked a staff member to 'proceed with the process and exclude Direct Axis as the required document is not available'. That may explain why there is also an application form dated 4 August (there is a similar one dated 20 May) in which only Woolworths and RCS are the respondents. That is the request that came before me. I will return to the matter of the adequacy of the end result.

6.3 No end-of-form page in the file showed any qualification of the certification that the application had been served on the cited respondents. That was untrue in respect of the original application because four creditors never received service. When it comes to condonation it must be borne in mind that the form forces an applicant into a lie. Service must be of a copy of the signed application. At the time of signing it is impossible to truthfully certify in the past tense that service of the application had already taken place. That must still come.

6.4 Despite the applicant's problems, it would not be appropriate (if at all possible) to excuse applicant form the need to provide proof of consent of 'each credit provider' to the agreement and to the obtaining of an order. There was no such proof. (It may be noted that in addition clause 4 of the agreement (annexure A) required the consumer to sign a debit order in favour of some PDA ……'for monthly payments due to all parties'. I do not know what the result is if one creditor did not consent. That non-assenting creditor should have a chance to be heard on the meaning and implications. The obligation to sign a debit order was not taken up in the draft order, without notice to the creditors of the abandonment. I did not pause at the question of who the chosen PDA is and how obligations of the PDA is made binding on the PDA by the proposed order.)

6.5 In the Moleme matter the applicant claimed another difficulty about the application form. She created three applications essentially because she could not fit all the information into the space allowed on the form. One of the disadvantages of prescribed forms is that people feel constrained to keep within the limits of open spaces. Fact is that the form may be adapted. One other problem with prescribed forms is that it leads the user to the belief that all that is required from him is to fill in the form. That is evidenced in both matters now before me. Neither the rules nor anything else caused the applicants to really consider what the statute implies. Not overcoming ocular and thinking limitations can more readily be excused from laymen than from people, officially practising for monetary consideration. That includes debt counsellors.

[6.6 At this stage of inexperience of debt counsellors, nothing is made of the Moleme deviation. The three applications are treated as one. However, three orders can not be made.]

6.7 in general Case number NCT/**50/2009**/138(1)(P) outline the three draft orders are acceptable. However, the lowest grade of interference is that the consent of the creditors (and the consumer) to the making of an order should be obtained and the order should be tidied up. The first paragraph of the draft orders is not necessary and is not appropriate. Secondly, if the agreement

agreement spells out the amounts of monthly instalments, the number of instalments must be left to arithmetic because a concurrent order about the number of instalments may cause problems if the planned monthly payments amounts are not kept up to date. I have reservations about the sixth paragraph even if backdating was agreed to in the consent of creditors. I also have reservations about making an order (or finding?) about what amount is/was owing. The draft order must be in full consonance with the terms stipulated for by creditors]

6.4 The draft order may well be along the lines:

In terms of the National Credit Act, 2005, it is ordered that the debts of XYZ is restructured to the extent that, until this order is terminated, the contractual entitlements of creditors to money payments are adequately complied with (as long as the following payments are up to date) by payments on the following terms:

1 XYZ is ordered to pay to ABSA Ltd an instalment of R 645.04 per month in respect of the contract with reference 3013325214 and interest on the debt is recoverable only at the linked rate of 16.75 % per year.

2 XYZ is ordered to pay to Standard Bank Ltd an instalment of R 506.82 per month in respect of credit card account number 1111 and interest on the debt is recoverable at only the fixed rate of 16% per year.

And so forth. The phrase in brackets will be omitted where not applicable and further amendments are also possible. If it is so that PDA participation is part of executing the payment process, it may be necessary to know who the PDA is and to see proved consent to an order binding the PDA. (That may involve considering the legality of the PDA scheme, of debit orders for future payments, and of involving parties other than debtor and creditors (actually 'credit providers" in a statutory 'consent order'.) Similarly it can not be simply assumed that creditors consent to not getting payments directly, waiting for PDA delays, and so forth.]

7 The end result is that it was decided to oversee all irregularities subject thereto that shortcomings in respect of what the NCA required that still remained after all documents were considered is not a matter for condonation. That does not constitute a precedent for the future. And there is further feature. It does not follow from the permissibility of e-mail that one knows who is involved in a communication with an address like john.iis @ fair.com

8 It remains to note that in both applications persons employed for Tribunal operations were active. It is sound that they should assist parties (not only 'consumers') towards completion and development of matters and it may be difficult to define how far that should go, but that must stop short of pre-empting the Tribunal or usurping its powers. Not only the end outcome but also events that may affect either the inadequacy (or adequacy) of steps or the eventual outcome, are part of the Tribunal's functioning and, except where the law, such as Tribunal Rule 8 otherwise determines, matters such as amendments and substitutions (also of papers) and condonation - as also externally communicating a 'finding' that the papers are in order - are on the terrain of the Tribunal. Section 26-2 of the NCA reads: 'The Tribunal consists of a Chairperson and not less than 10 other men and woman ...appointed by the President.". Employees are outside the Tribunal as far as disposing of applications is concerned.

PART B

This part deals mainly with the legal issue of what s86-8 really means.

9 The present application for a consent order pursuant to some involvement of a debt counsellor, is presented as being under s138 of the National Credit Act, 2005. That section makes no mention of a debt counsellor. It is therefore fully dependant upon s86. (Form 138-1 follows the s138 basis of requiring some 'dispute' that is 'resolved' but then purportedly goes wider to a matter where there was no 'dispute' resolution, by mentioning a debt counsellor.)

10 The 'debt counsellor' to which s86-1 refers is the capacity defined in s1 as made applicable to a specific person by due registration. Relative to a particular consumer that capacity takes on life by the consumer's application to that debt counsellor. It loses that life either by loss of the underlying capacity or by cessation of handling the debt situation of the applying consumer. I will not mention factors affecting capacity. Nor is it necessary to comment on causes of cessation like death of the consumer or the petering out of the temporary protection by inactivity of the debt counsellor. For present purposes it is adequate to refer to the three outcomes dealt with in s86-7.

11 After gathering and considering the relevant information the debt counsellor, here Mr Biyela, could cause one of three outcomes.

1 Biyela could conclude that Ms Phantsi is not over-indebted. He must reject the application. Rejection of the application brings an end to the particular application. Biyela ceases being 'debt counsellor' of Phantsi.

2 He could conclude that Phantsi is not over-indebted but also conclude that her finances are under strain as envisaged by s86-7-b. His involvement ends with the making of a recommendation. I will return to this. For the moment is it emphasised that he is not even required to make a 'proposal'. Negotiating is not his task.

3 He could conclude that Phantsi is over-indebted. It is in that situation that he must propose a solution. The lines are indicated by s 86-7-c. One may expect the NCA to provide that the proposal is either agreed to or, alternatively, the court will enforce its own will. Suffice it to say that if there is acceptance of the proposal by creditors there is some stage when Biyela is no longer acting as 'debt counsellor' as contemplated in the NCA with reference to the affairs of ms Phantsi, despite the registered capacity retaining its potential for other debtors..

12 Not only in logical expectations but also on analysis of the s 86-7 role of the debt counsellor there is a stage when he is no longer 'debt counsellor' in any Phantsi affairs. If he continues involvement in or about Phantsi affairs after that critical point, he is not acting as 'debt counsellor'. That raises a query about s86-8. If it gets an amended understanding, Biyela has no locus standi.

13.1 As was remarked in 11.2 above, s86-7-b itself carries no indication that the debt counsellor is involved in promoting agreement between the consumer and any creditor or creditors. Biyela would make the recommendation and that is the end of it although Phantsi (or she together with other parties) may involve Biyela in a non-statutory role. The NCA concerns itself with reckless debt and over-indebtedness and does not, subject only to the mere recommendation of s86-7-b interfere with someone who is not over-indebted. The question is this: Does s86-8 make a difference?

13.2.1 Without s 86-8 one finds a clear s86-7-b seeking simple initiation and encouraging a cheap, uncomplicated and voluntary solution.

13.2.2 During consideration of the s86-1 application, the debt counsellor may have gained a broader perspective than that of individual creditors who are not present during all investigations and consideration. If he concludes that it is not a matter of NCA intervention yet there is some strain, he informs creditors. They do not need a counsellor as future mentor.

13.2.3 Creditors may disagree with the debt counsellor or see only a low likelihood of an over-indebted situation developing or view matters on a different time scale, but in almost all cases the solution is simple. The creditor(s) need only stay his or their hand. A contract is not inevitable.

13.2.4 The strain may disappear if the mortgage creditor who is one of eight creditors reduces the amount of instalments, the claims of small creditors being unaffected. Either a contractual tie or a mere unilateral decision of the mortgagor is adequate. Strain can notionally be reduced or removed (and will often be), without consent of one or more creditors.

13.2.5 Strain may disappear quickly and at any time. By the time creditors speak to the debtor there may be an inheritance or the spouse may be re-employed. There is no need to involve a statutory process that takes weeks to months and from which creditors cannot escape.

13.2.6 Inter se realism is pretty much free. No costs to obtaining an order and no outsider costs for payments made.

14.1 If 86-8 applies literally the picture is changed dramatically. Amended understanding of the section avoids the unacceptable result that of destroying what is a good and workable idea.

14.2 To ascertain whether that improbable result sets is, it is necessary to investigate another problem with s86 and s87 - this time with the prospect that amended understanding also solves that problem.

15.1 s86-8 applies either only to the 'strained only debtor' or only to the 'over-indebted' debtor. It depends on whether s88-8 really refers to s86-7-b or whether that reference is a misnomer for referring to s86-7-c. It refers to the one or the other but does not refer to two sub-sections.

15.2 For s87 (and s86-7c) the same choice between literal reading and sensible interpretation must be made. S87 refers back only to s86-8 which on literal interpretation refers only to the

strained only debtor. S86-7-c does not create a path to s87 and s87 does not build a bridge back to s86-7-c. There is nothing to say what the counsellor or anyone else can or must to with the 'proposal'. Nothing spells out under what circumstances the proposal goes to court or when the court must take any interest in the proposal. Worst of all, nowhere is jurisdiction created for any court to use or do anything else about the proposal or the over-indebtedness. S87 is on literal reading creates jurisdiction for the strained debtor only (and the do it yourself debtor) and by contrary reasoning, nowhere else.

16.1 To overcome those problems there is the possibility of reasoning that because under s86-7-c the debt counsellor recommends a proposal 'that' (not 'to') the court re-arranges debt, it follows that he makes the recommendation 'to' the court s87 and therefore covers also the over-indebted. That so much (and so much else) must be held to have been quietly said (on matters such as how, when and on what terms it is to be handled as mentioned in the preceding paragraph), the solution has little to rely on and comes much closer to judicial legislation than the solution that I believe is correct. In any event the importing of words into s86 does not get away from the need for some amended understanding (In Steyn's Uitleg van Wette, it would be called 'woordwysigende uitleg'). The mention in s87 of s86-8-b must then be understood either as "s86-7-c" or as "either s86-8-b or words with some similarity to also cover a s86-7-c proposal". Some amended understanding will be required in any solution.

16.2.1 The better solution is to understand s88-8 in its opening phrase as referring to s86-7-c and not s86-7-b.

16.2.2 The 'solution' mentioned in the preceding paragraph 16.1caters only for the lacuna about the over-indebted. It does not solve the destruction of he role, nature and operation of the strained only debtor procedure of s86-7-b.

16.2.3 The better solution is a concise solution based upon ascertained desire of the legislature without reliance on words that are not there.

16.2.4 It requires little more than acceptance of the reality that legislative mistakes do occur. In this case the mistake is what could readily happen through the late insertion into the Bill of s86-7-b if it is then forgotten to adjust the cross reference in s86-8.

16.2.5 Mistakes in the NCA are not improbable. There are other misnomers. S5-3-a refers to s101 instead of s101-1. S130-1-a mentions s86-9 when it intends to refer to s86-10. S43-1-b should refer back to s43-1-a or s43-1-a-i or s43-1 and not to 'paragraph (i)'. There are other slips. One is the definitions that remain in s1 of words that are never used in the NCA. S133-2 looks like a re-drafted s133-1. Elsewhere, mainly about applicability of the NCA, the same thing is on occasions said twice. And so forth.

17.1 With reference to the improbable pattern according to literal reading (no adequate provision for the over-indebted and improbable interference with the strained only debtor and the related procedures), some points should be highlighted.
17.2 The basic policy of s3 of the NCA is that debts should be honoured. It is only if there is over-indebtedness or recklessness, that courts can interfere with valid contracts. (Debtors have further rights.) The strained-only debtor falls outside that scope. The heading of part D of chapter 4 and its contents show that it is devoted to (a) reckless granting of debt and (b) to being over-indebted. There is one single sub-section that goes one step further. In clear terms it says no more than this: if the consumer is not over-indebted and thus falls outside the scope of court interference, a debt counsellor should warn creditors if he thinks that a storm may be brewing. S86-7-b.

17.3 The clear reference to s86-7-b in s86-8 causes the impact of s86-7-b to be dramatically different to where it in itself clearly stops. (Its content is a message to creditors and stops short of the debt counsellor formulating a proposal or promoting it.)

17.4.1 An agreement envisaged by s 86-7-b looks for willing parties. If a party tries to leave agreed tracks, adequate remedies are available in contract. Why would the legislature decree that the agreement MUST go further for an order? Why decree that in the absence of consent from <u>all</u> quarters, the matter must end up with a hearing?

17.4.2 Why will a court interfere with the finances of someone who is not over-indebted? On what basis is there judicial involvement with a purely voluntary accord if reached or with failure to find a change for someone who has no statutory right to obtaining an alleviation of liability?

17.4.3 A strained debtor may obtain adequate relief from financial stress if one of several debtors helps him. Why must cooperation between the parties be cast in stone by a formal order? Why would the legislature defeat the helpful outcome of some cooperation if one absent or ill-willing

creditor does not consent? Why make the other creditors and the consumer dependant upon one such a creditor? Why, if all creditors do not agree make the intervention of court obligatory? And that may be a full scale application. (Most or all of that can have justification for the over-indebted.)

17.4.4 Why would the legislature expose the strained debtor to necessarily have cost of further steps because of over-indebtedness that may never arise. The debt counsellor must be the applicant for a 'consent' order and will want a fee. (Institutional fees in the case of Tribunal is R 100.00.) In the regime created by the National Credit Regulator the debtor whose problem is resolved is subjected to future costs. The legality of that regime is not now an issue and the reality is that the legality, not unlike the Usury Act excesses, is an issue that will not easily come before courts.

The NCR has in effect decided that no one will be appointed as debt counsellor unless he agrees that received moneys will be handled though a Payment Distribution Agent It is incorporated into the standard terms of appointment. The NCR has "registered" five parties as PDA's. ("Registered" is in parenthesis because the NCA does not require registration or say that agreement to work through 'registered' PDA's can be made a pre-condition to being considered fit to become a registered 'debt counsellor'.) It means that the consumer must pay fees in respect of ongoing payments that he is quite prepared and able to make directly. The creditor must wait for the time between the payment by the debtor and distribution by the PDA. The moneys are unprotected 'trust moneys'. The creditor has no contract with the PDA. If the creditors' consent stipulates (as in the Moleme matter) that failure to pay on due date throws the parties back to their pre-consent positions, delay by the PDA (innocent or neglectful) can cause the whole scheme to fall to the ground without fault of the consumer or the creditors. If one creditor on legal grounds refuses to be bound (e.g. he never received notice of the application) all creditors are exposed to adjust to some extent. All are an unnecessary expense for the strained-only debtor. If there is a responsible way of interpreting the NCA to avoid such results, the risks appropriate to the over-indebted person should not hold good for the 'strained-only debtor'.

18.1 Next to probabilities relating to what the legislature would have wanted or avoided is the need to realise that the two procedures were never intended to be on a par.

18.2.1 For the NOT over-indebted (the 'strained-only debtor') the debt counsellor does not have to create a 'proposal' for a future solution (for a problem that has not yet arisen). He only recommends a voluntary process to consider creating some plan of debt-rearrangement.

18.2.2 For the over-indebted a (proposed) solution must be initiated by the counsellor. He must formulate a described 'proposal' that covers statutorily defined aspects. S86-7-c. If that proposal is not accepted by all concerned, the court will devise a plan that may override one or more parties. There is nothing voluntary when the court exercises its powers. Parties exercise their yes or no with respect to a defined 'proposal'.

18.3 The recommendation for the 'strained only debtor' is made to creditors and debtor. For the over-indebted a (different) recommendation is made to the court. It is not for some undefined plan in the mind of some undefined party but for applying the counsellor's 'proposal'.

18.4 The needs of the 'strained only debtor' situation and that of the over-indebted situation are different. So are the objects and nature. Equalising them obviously lacks allure.

18.5 The strained only debtor situation takes account only of 'credit agreements'. For the over-indebted the consideration and proposal may possibly go wider.

19 There are tell-tale signs that the opening reference of s86-8 contains a mistake.

19.1 S87 refers to two situations in which the magistrate has power to interfere with the valid contracts of parties. On the wording, strangely, the over-indebted person is not one of the two unless he is a self-do applicant. The alternative refers to a 'proposal' in terms of s86-8-b. That sub-section uses the word 'proposal' only in a reference to a preceding section. The only preceding use of the word 'proposal' is in s86-7-c (that refers to the over-indebted person) and not s87-7-b. S86-8 refers to 'that proposal'. That is a comfortable reference to immediately preceding use of the word 'proposal' but not so if it is 100 words back -where it is also not present.

19.2 Under s86-7-c a 'proposal' is recommended. It is recommend to court - where the over-indebted belongs. The strained debtor lacks the appropriateness of a proposal - it is not a part

counsellor's work. The legislature clearly made a distinction between a 'recommendation' and a 'proposal'

19.3 Sticking to the literal implies that the legislature omitted giving a follow-through in the case of the over-indebted (and failed to imbue a magistrate with appropriate powers) but interfered with the strained debtor despite (a) it being, subject to the comment of the counsellor under s 86-7-b, not the statute's avowed target in the particular Part of the NCA and (b) in a manner that is neither necessary nor desirable.

19.4 If amended understanding is not applied, the legislature has left (a) a lacuna and (b) many uncertainties in respect of the strained-only debtor. Unlike the over-indebted process, there is no 'proposal' that is a reference point for assessing consent or refusal of consent. There is no workable starting point for the process. Whose idea is it that must be consented to or not consented to? Who takes the initiative? Refusing whose idea is good enough to bring s86-8-b into operation. That such issues were not attended to in itself tends to confirm that it was never intended that the 'strained-only debtor' provisions will operate in tandem with s86-8. When keeping to s86-8 as it reads (whether or not one is prepared to read s86 as a whole different from is wording), the creditor who does not agree to the idea (of someone?) about a term of some plan might, sets in motion additional involvement of the debt counsellor. The chain that he sets in motion is that he and also every other credit provider must, unless along the road they all consent to a plan that no one is obliged to design, be involved in what is probably a full scale application that goes before a magistrate who can force the creditor to be bound to what he was never obliged to agree to. And pay the costs of the process. That is peculiar for a voluntary review of (and for a possible understanding or amending contract about) the debt situation of someone who is not over-indebted.

20.1 The conclusion that the reason for the problems is a misnomer in s86-8 solves the problem of a lacking bridge between s86-7-c and s87. It also determines that the tribunal can not hear consent orders where the consumer was found to be not over-indebted.

20.2 If that is wrong, the literal reading of s86-8 means that the Tribunal can only make consent orders concluded by strained debtors who are found to be not over-indebted.

20.3 Alleging the correct conclusion of the debt counsellor is thus a jurisdictional allegation

(a) There was initially no allegation at all and the allegation now made means that the Tribunal does not have jurisdiction in the present two matters.

(b) Additionally if there is no misnomer, s88 applies. There was not proved consent of 'each credit provider'.

20.4 In case of Phantsi the second (alternative) reason for dismissing the application is that if s88-7 applies to the 'strained only debtor' the consent of every creditor was necessary to (a) the 'proposal' and (b) to elevating the relieving agreement to an 'order'. That is not proved.

20.5 The Moleme application is much tidier but it also lacks consent to the making of an order.

21 It is desirable that if a debt counsellor involves himself beyond giving the prescribed comment to creditors, he should make it clear that he is no longer acting in an appointed capacity. Also that a court order is not a necessity. The strained only debtor provisions should not be used to develop a new money making industry.

22 The applications are dismissed.

H C J FLEMMING **14-9-2009**
PRESIDING MEMBER