

A WORKABLE DEBT REVIEW PROCESS FOR SOUTH AFRICA: AT LAST?

by

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**submitted in partial fulfilment
of the requirements
for the degree**

LLM (Law of Contract)

in the

**Faculty of Law
University of Pretoria**

May 2010

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SUMMARY

The National Credit Act 34 of 2005 and its Regulations came into full effect on 1 June 2007. In order to protect consumers by addressing over-indebtedness, the Act introduces a novel process of debt review in which a new agent, the debt counsellor, plays an important role to help relieve a consumer's over-indebtedness.

However, after the Act commenced, problems soon came to pass with regard to the debt review process. This was mainly due to loopholes and shortcomings in the National Credit Act and its Regulations. The key problems in debt review practice which are identified and analysed in this dissertation, are as follows:

- a) The interpretation of "the steps contemplated in section 129" in section 86(2).
- b) The application for debt review (Form 16 in the Schedule of the Regulations).
- c) The procedure to be followed when approaching the court.
- d) The format and contents of the "proposal" mentioned in sections 86 and 87.
- e) The omission of section 86(7)(c) in section 87.
- f) The non-provision for consent orders in terms of sections 86(7)(a) and 86(7)(c).
- e) The non-regulation of payment distribution agencies.
- f) The termination of debt review by the debt counsellor or a consumer.
- g) The qualifications, training and expertise of debt counsellors.

Consequently measures taken by the industry or suggested by scholars to solve these problems are evaluated, for example the work stream agreement, the publication of two sets of new draft regulations, the request for a declaratory order in the High Court, a research commission to the UP Law Clinic and numerous conferences. Somewhat oversimplified, it can be said that most of the measures taken to solve the problems moved in the wrong direction, that is away from a simple, easy, quick, cheap and consumer-friendly process. At the moment the debt review procedures are very complex, extended, expensive and even consumer-hostile.

In conclusion additional measures are proposed to those that other sources already recommended. Effective implementation of these measures would hopefully improve the practice of debt review in the Republic of South Africa, although it can realistically be assumed that there will always remain challenges in this regard.

Chapter 1

Introduction

1.1. Background

During 2004 the need for reform of the credit industry in South Africa was formulated in a document called “A Policy Framework for Consumer Credit”, published by the Department of Trade and Industry.¹ One of the needs identified was to alleviate serious debt problems (also called over-indebtedness) amongst consumers by introducing more effective measures which are less drastic and more flexible than the older methods of sequestration or administration.²

As a result the National Credit Act 34 of 2005³ and its Regulations⁴ came into full effect on 1 June 2007.⁵ The Act strives to protect consumers who become over-burdened by *inter alia*

- (a) addressing and preventing over-indebtedness of consumers.⁶
- (b) providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations.⁷
- (c) providing a consistent and accessible system of consensual resolution of disputes arising from credit agreements.⁸
- (d) providing a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.⁹

According to Goodwin-Groen and Kelly-Louw¹⁰ three different types of regulation are used to protect credit customers in countries which have developed financial sectors. Each of these is in

¹ Department of Trade and Industry South Africa *Consumer Credit Law Reform: Policy Framework for Consumer Credit* (2004) (hereafter “*Framework*”) ch 2.

² *Framework* ch 6.10-6.13; Kelly-Louw “The Prevention and Alleviation of Consumer Over-indebtedness” 2008 *SA Merc LJ* (hereafter “*Kelly-Louw*”) 222.

³ Hereafter the “NCA” or the “Act”.

⁴ GN R489 in GG 28864 of 2006-05-31.

⁵ Da Silva *Debt Counselling – Principles and Guidelines* (2008) (hereafter “*Principles*”) 3; see in general Renke, Roestoff and Haupt “The National Credit Act: New parameters for the granting of credit in South Africa” 2007 *Obiter* (hereafter “*Parameters*”) 229-270.

⁶ S 3(g).

⁷ *Ibid.*

⁸ S 3(h).

⁹ S 3(i).

some form or another applied in the National Credit Act after they were streamlined for the South African environment. The three pillars are as follows:¹¹

- (a) Lenders may be required to keep within the limits of clients' credit redemption capacities.
- (b) Lenders are obliged to disclose fully all costs of credit arrangements before a client signs a contract.
- (c) Caps may be put on the pricing of consumer credit or usury laws may determine that pricing.

Building on these pillars the NCA provides opportunities for a debtor who is over-committed to address his dilemma better than before and also rearrange debt repayments to credit providers more effectively. According to Otto, the NCA protects consumers over a wider range than is normally the case with other consumer credit legislation worldwide.¹² The new credit legislation, while protecting consumers, introduces the concepts of over-indebtedness and reckless credit, and also the process of debt review.¹³ Debt review offers the consumer another chance by rescheduling his debt payments.¹⁴

Being novel to the credit market industry, debt review introduces a new role player, the debt counsellor. The NCA presents this new office of a debt counsellor as part of the reform of the credit industry regulation structure.¹⁵ In regulation 1 a debt counsellor is defined as "a neutral person who is registered in terms of section 44 of the Act offering a service of debt counselling",¹⁶ the latter being understood as "performing the functions contemplated in section 86 of the Act".¹⁷ The process to register as a debt counsellor, the criteria applied to be accepted for registration, as well as the basic functions of a debt counsellor are described extensively in the NCA.¹⁸

¹⁰ *The National Credit Act and its Regulations in the context of access to finance in South Africa* (2006) Report to Finmark Trust 19.

¹¹ *Ibid.*

¹² Otto *The National Credit Act explained* (2006) (hereafter "Otto") 2; Scholtz *Guide to the National Credit Act* (2009) (hereafter "Guide") par 1.1.

¹³ Parameters 244-247; Otto 11.

¹⁴ Otto 54.

¹⁵ S 44; *Guide* par 11.3.3.2(b); Otto 33-34.

¹⁶ NCA reg 1.

¹⁷ *Ibid.*

¹⁸ NCA ss 44-47 and reg 4-11; *Guide* par 5.2.4. and par 11.3.3.2(b).

The NCA commenced, but soon problems arose with regard to the debt review process. The main reason was the fact that the exact procedure to be followed when conducting a debt review was not fully regulated in the Act or the Regulations.¹⁹ Soon the major role players realised that action should be taken. Some debt counsellors, the major credit providers and the National Credit Regulator²⁰ met at various work stream sessions²¹ and in July 2008 published a set of rules and procedures to streamline the debt review process.²¹ For example, the work stream gave an overview of how the debt review process should be conducted, a model to which the parties to this agreement agreed.²²

However, serious problems still remained. Impaired credit records rose with a yearly 4% in March 2009.²³ While just over 50 000 consumers have applied for debt review, less than 3 000 proceeded through the courts and were finalised.²⁴ Especially the slow rate by which debt review applications went to court and the fact that they did not proceed to finality was alarming.²⁵ It seemed that debt counselling did not function as effectively as the NCR foresaw it to be.²⁶ Consumers did not enjoy the protection which the legislation should provide them.²⁷ In many instances debt problems were not solved and debt restructuring was not being successfully achieved.²⁸ Unfortunately, breach of the work stream agreement, especially by credit providers, also caused further ineffectiveness.²⁹

The NCR decided on multiple approaches to address this dilemma.

Firstly, the first draft debt counselling regulations were issued in May 2009.³⁰ These regulations purported to curb confusion in the debt counselling industry, especially to simplify the procedures of how the debt counsellor and a consumer can approach the court for a hearing to take place.

¹⁹ Roestoff "The debt counselling process - closing the loopholes in the National Credit Act 34 of 2005" 2009 *PER* (hereafter "Debt counselling process") 249.

²⁰ This body (hereafter the "NCR" or the "Regulator") was created by the NCA to identify factors that may undermine consumer protection and promote strategies to overcome them (see NCA ss 12–18); *Guide* par 3.2.; Kelly-Louw 209-210.

²¹ *Principles* 3.

²² *Idem* 11–20.

²³ Credit Bureau Monitor 2009 (Mar) – www.ncr.org.za.

²⁴ *NCR Annual Report* (2008) 7.

²⁵ Credit Bureau Monitor 2008 (Dec) – www.ncr.org.za.

²⁶ Debt counselling process 248.

²⁷ *Guide* par 2.3. and par 11.1.

²⁸ *Legalbrief Today* 2009-09-30.

²⁹ Debt counselling process 249.

³⁰ GN R503 in GG 32229 on 2009-05-15.

Secondly, the NCR lodged an application to the High Court to obtain a declaratory order with respect to the difficulties that particularly debt counsellors experience when taking proposals to court.³¹ The matter was heard in Pretoria in March 2009 and judgment was handed down on 21 August 2009.³²

Thirdly, earlier in 2009 the NCR commissioned the Law Clinic at the University of Pretoria to investigate the reasons for the ineffectiveness of the debt review process and to identify the parties who were to blame for these. A major report of 331 pages to the NCR followed, namely *The debt counselling process: challenges to consumers and the credit industry in general*.³³ This document discusses not only serious problems in debt review practice, but key changes to legislation are also proposed, firstly to remove confusion, but also to close loopholes which existed on the ground level of debt review practice. After the Law Clinic's report has been published, part of it was shortened into a journal article which focused on possible amendments to the Act and the Regulations.³⁴

The decisions handed down by the declaratory order differed quite remarkably from what the first draft regulations proposed. That was possibly one of the reasons why a new set of debt counselling regulations were redrafted and published in January 2010 for public comment.³⁵

Much discussion took place after the declaratory order was handed down, informally and at seminars.³⁶ The credit market, the debt counsellors and the courts are still struggling to make amends with the new developments. Without any doubt the scene of debt counselling in South Africa has changed. Although it can be said that the process of debt review has been defined more clearly, not all problems have been resolved and a few new ones have been created.

³¹ *National Credit Regulator v Nedbank Ltd & others* 2009 (6) SA 295 (GNP) (hereafter the “declaratory order”) 2.

³² *Idem* 1.

³³ The research was done during January to May 2009 (hereafter “*Challenges*”) http://www.ncr.org.za/The_debt_counselling_process.php.

³⁴ Debt counselling process 247–360.

³⁵ GN R22 in GG 32869 on 2010-01-14.

³⁶ See Logan “Presentation on the declaratory order (Case No. 19638/2008)” (Unpublished paper delivered at the NCR on 2009-08-27 at Midrand) (hereafter “Logan”).

1.2. Purpose of the dissertation

As was said *supra*, numerous problems were experienced in practice after the new debt review process has been enacted by the NCA. Further analysis of these problems and how they can be addressed are necessary, although the scope of investigation has to be limited for practical reasons.

The purposes of this dissertation are to

- (a) identify the main problems practitioners encountered with debt review since the NCA commenced due to loopholes and shortcomings in the Act and the Regulations or problems with its interpretation;
- (b) investigate to what extent the measures that were taken to address the above, presented workable solutions for the problems that debt counsellors experienced in practice;
- (c) evaluate what possible other challenges still exist; and
- (d) recommend measures to effect a more workable debt review process in practice.

To delineate the scope of this study some issues or stumbling blocks that occur in debt review practice are not touched upon at all, although they may have an important impeding effect. For example, since it is a complex and too elaborate matter, the interpretation of the new statutory *in duplum* rule³⁷ is purposefully not covered. The issue of the High Court's jurisdiction as a court of the first instance is also excluded.

1.3. Structure of the dissertation

A brief overview of the debt review process as set out by the NCA is given in Chapter 2. Chapter 3 focuses on some of the reasons why the debt review process became impracticable, as well as the attempted solutions put in place by the work stream agreement and the first draft debt counselling regulations. Other main initiatives taken by the NCR and the Department of Trade and Industry to address the problems that remained and the response thereto are covered in chapter 4. Chapter 5 contains a summary, own conclusions and recommendations.

³⁷ S 103(5).

Chapter 2

An overview of the debt review process as envisaged by the NCA

2.1. Introduction

A general discussion of the NCA's main sections on debt review follows.³⁸ The definition of debt counselling in regulation 1 is significant in this respect, namely "performing the functions contemplated in section 86 of the Act".³⁹ It immediately highlights the importance of section 86 with regard to debt review.

Section 86 forms part of Part D of Chapter 4 of the NCA which is headed "Over-indebtedness and reckless credit". Importantly, there are some exclusions though. Part D does not apply to credit agreements in terms of which a consumer is a juristic person,⁴⁰ therefore a juristic person can not be put under debt review and the provisions regarding reckless credit do not apply to such a person. The provisions relating to reckless credit do also not apply to the following:⁴¹ a school or student loan, an emergency loan, a public interest credit agreement, a pawn transaction, an incidental credit agreement and a temporary increase in the credit limit under a credit facility.⁴²

2.2. The new concepts

New concepts "over-indebtedness"⁴³ and "reckless credit"⁴⁴ are introduced by the NCA and properly explained.⁴⁵ In layman's terms over-indebtedness is when a consumer cannot pay his debts, mostly when he fails to pay the monthly installments that are due. More formally, a consumer is over-indebted if he is or will be unable to satisfy in a timely manner all the obligations under all credit agreements to which he is a party.⁴⁶ A determination to declare a consumer over-indebted considers the preponderance of available information with respect to

³⁸ See in general *Principles* 11–20; Stoop "South African Consumer Credit Policy: Measures Indirectly Aimed at Preventing Consumer Over-indebtedness" 2009 *SA Merc LJ* 367–372.

³⁹ NCA reg 1.

⁴⁰ S 78(1).

⁴¹ S 78(2); *Guide* par 11.2.

⁴² See the definitions of most of these agreements in s 1.

⁴³ S 79(1).

⁴⁴ S 80(1).

⁴⁵ *Guide* par 11.1.

⁴⁶ S 79(1).

the consumer's overall debt burden and circumstances as they are at that moment of the determination.⁴⁷ Section 85 provides that if it is alleged in court that a consumer under a credit agreement is over-indebted, the court may either refer the matter directly to a debt counsellor to evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7) or declare that the consumer is over-indebted and make any order envisaged in section 87 to relieve the consumer's over-indebtedness.⁴⁸

When applying for credit the consumer must fully and truthfully answers any requests for information,⁴⁹ so that the credit provider can assess if the consumer himself, his credit history and his financial means confirm a reasonable basis for a successful credit agreement to be closed.⁵⁰ Reckless credit lending should be avoided.⁵¹ This happens when a credit provider grant credit without conducting a proper assessment of the consumer's financial position whether the credit agreement will be viable or successful.⁵² It is also reckless if a credit provider does a credit assessment and still enters into a credit agreement, although the consumer does not understand the risks, costs, rights or obligations under the credit agreement or the credit provider ignores the results of a negative assessment and still proceed to extend credit recklessly, thereby making the consumer over-indebted.⁵³ Section 83 sets out the measures a court can apply while making orders as regard findings of reckless credit, namely setting aside the consumer's obligations or part thereof, suspension of the effect of the credit agreement, and the restructuring of a consumer's total debt obligations.⁵⁴

2.3. Debt review

The NCA clearly suggests the route of debt review as the first alternative and less drastic option before debt enforcement in the courts is embarked upon. Section 86(2) stipulates that debt review and debt enforcement can not take place simultaneously.⁵⁵ Debt review normally starts at the initiative of the consumer who realises that he needs help and therefore approaches a

⁴⁷ S 79(2); *Guide* par 11.3.2.

⁴⁸ S 85; *Guide* par 11.3.3.1.; Debt counselling process 257.

⁴⁹ S 81(1).

⁵⁰ S 81(2); Otto 66.

⁵¹ S 81(3); see Kelly-Louw 218-222.

⁵² S 80(1)(a).

⁵³ S 80(1)(b)(i) and (ii).

⁵⁴ S 83(2) and (3).

⁵⁵ S 86(2).

debt counsellor of his own accord.⁵⁶ Secondly, the consumer can also apply for debt review after receiving a section 129(1) notice from a credit provider in which this option is indicated.⁵⁷ Thirdly, a court can refer a matter directly to a debt counsellor for debt review, if a consumer alleges over-indebtedness under a credit agreement in such a court.⁵⁸ Related to this, but somewhat different are the provisions in section 83 by which a court may declare a credit agreement reckless.⁵⁹ If the court declares a credit agreement reckless in terms of section 80(1)(b)(ii),⁶⁰ the court must also consider if the consumer is over-indebted,⁶¹ and if so, may make an order suspending the effect of such an agreement and restructuring the consumer's other obligations in terms of section 87.⁶² This is a different process as the debt review provided for in section 86 and it is not certain in which instances this procedure will be utilised.

When a consumer approaches a debt counsellor the aim is primarily to be declared over-indebted, so that he can be protected and his debt be restructured.⁶³ Application for debt review takes place in a prescribed manner when the consumer fills out a Form 16 and signs it.⁶⁴ It is paramount that a consumer understands fully what debt review entails and how the process works.⁶⁵ The debt counsellor should explain all relevant matters to the consumer,⁶⁶ for example that the exploration into his level of over-indebtedness may have different outcomes.

Assessment by a debt counsellor involves an analysis of the consumer's current and future monthly cash flows, together with a survey of his assets and liabilities.⁶⁷ With respect to which credit agreements can be included for debt review, if a credit provider has already proceeded with enforcement steps as contemplated in section 129, that credit agreement is excluded from debt review.⁶⁸ Whether these steps begin with the sending of a notice in terms of section 129(1)(a) or rather with the legal action taken to enforce the agreement as mentioned in section 129(1)(b), is not precisely specified in the Act and this creates uncertainty.

⁵⁶ S 86(1); *Guide* par 11.3.3.1.

⁵⁷ S 129(1)(a).

⁵⁸ S 85(a); Otto 54.

⁵⁹ S 83(1).

⁶⁰ When a credit provider, after conducting an assessment, still entered into a credit agreement, despite the information indicating that entering into the agreement would make the consumer over-indebted.

⁶¹ S 83(3)(a).

⁶² S 83(3)(b).

⁶³ Parameters 247.

⁶⁴ See reg 24; *Guide* par 11.3.3.2(c).

⁶⁵ Debt counselling process 258-259.

⁶⁶ See Form 16 Schedule 1 to the present Regulations; *Guide* par 11.3.3.2.(c).

⁶⁷ Reg 24(1).

⁶⁸ S 86(2); *Guide* par 11.3.3.2(d).

The debt counsellor has to notify, in the prescribed manner and form, all credit providers that are listed in the application and every registered credit bureau⁶⁹ of the fact that the consumer has applied for a debt review process. With immediate effect creditors shall not be permitted to institute any legal proceedings against the consumer and they should also not contact the consumer to make collections for a period of at least 60 business days.⁷⁰

Creditors must as soon as possible, after receiving the notifications of the debt review, provide the debt counsellor with updated outstanding balances, statements and contracts.⁷¹ If this is not provided, the Act allows the debt counsellor to take the consumer's assumed balances as correct,⁷² in case creditors do challenge these balances in court.

Goodwill amongst the parties is important. A consumer who applies for debt review and all credit providers must comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's level of indebtedness.⁷³ It is also expected that the parties participate in good faith in the review and during any negotiations which may result in responsible debt re-arrangement.⁷⁴

The major aspects a debt counsellor should determine are whether the consumer appears to be over-indebted and if any of the consumer's credit agreements appears to be reckless.⁷⁵ To make a determination in this regard a full exploration into the consumer's credit history and present status has to be made.⁷⁶

After a debt counsellor has conducted the assessment prescribed by the NCA, three possible findings can be made as regard to the level of over-indebtedness:⁷⁷

⁶⁹ S 86(4); *Guide* par 11.3.3.2(f).

⁷⁰ S 86(10).

⁷¹ Reg 24(3).

⁷² Reg 24(4).

⁷³ S 86(5)(a).

⁷⁴ S 86(5)(b).

⁷⁵ S 86(6).

⁷⁶ See reg 24(1); Debt counselling process 266-268.

⁷⁷ S 86(7); *Guide* par 11.3.3.2(h).

- (a) The consumer is not over-indebted (finding 1).⁷⁸
- (b) The consumer is not over-indebted, but is nevertheless experiencing, or is likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner (finding 2).⁷⁹
- (c) The consumer is over-indebted (finding 3).⁸⁰

In each of the three scenarios the debt counsellor employs different actions following his finding.

If the consumer is found to be 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.⁸¹ If his application is rejected by the debt counsellor, the consumer may, after leave was granted by the magistrate's court, apply for an order which declares one or more of the credit agreements reckless and/or restructures his debt obligations.⁸²

If the consumer is found to be not over-indebted, but is nevertheless experiencing, or is likely to experience, difficulty satisfying all the consumer's obligations under his credit agreements in a timely manner, the debt counsellor may recommend to the consumer and the respective credit providers that they voluntarily consider and agree on a plan of debt re-arrangement.⁸³ If this plan is accepted by all parties, the debt counsellor may file the proposal as a consent order at a magistrate's court⁸⁴ or the National Consumer Tribunal (hereafter the "NCT").⁸⁵ If the parties are undecided on the plan, the debt counsellor must refer the matter to court with a recommendation for consideration in terms of section 87.⁸⁶ The court may reject this recommended proposal or make one or both of the following orders: an order to declare any credit agreement reckless and/or an order to re-arrange the consumer's obligations.⁸⁷

⁷⁸ S 86(7)(a).

⁷⁹ S 86(7)(b).

⁸⁰ S 86(7)(c).

⁸¹ S 86(7)(a); *Guide* par 11.3.3.2(h)(i).

⁸² S 86(9).

⁸³ S 86(7)(b); *Guide* par 11.3.3.2(h)(ii).

⁸⁴ S 86(8)(a).

⁸⁵ S 135. The NCT was also enacted by the NCA to adjudicate applications, grant certain orders and exercise any other power conferred on it by law (see s 27); *Guide* par 3.3; Otto 31-32.

⁸⁶ S 86(8)(b).

⁸⁷ S 87(a) and (b); Debt counselling process 272-273.

If the consumer is over-indebted,⁸⁸ the same does not hold as with finding 2. There is no provision in the NCA that the creditors have to be consulted or even can be consulted in this instance. The debt counsellor can draw up a restructuring plan for the payment of debt installments and directly approach the court to declare one or more of the credit agreements as reckless and/or to order a plan of newly arranged installments.⁸⁹ This proposal for restructuring the consumer's obligations will entail that one or more of the consumer's obligations be re-arranged by certain measures.⁹⁰ These measures involve primarily the extending of the periods of payment (thereby reducing the amount of monthly installments) or postponing the periods of payment or recalculating the consumer's obligations in certain circumstances.⁹¹

The NCA does not fully spell out how the installments under the repayment plan must be made and paid over to the credit providers. Mention is made of a debt counsellor who may receive money on behalf of a consumer and/or distributes such funds to credit providers in terms of debt restructuring.⁹² Such a debt counsellor must comply with the required legislation and must advise the NCR of this practice.⁹³ It seems however that the NCA envisaged that other agents should rather take on this distribution function.

Debt review has certain effects, the most important being the fact that a consumer may not incur any further debts with any credit provider if he has applied for debt review or has alleged in a court to be over-indebted, unless one of the following occurs:⁹⁴ the debt counsellor rejects the application and the consumer does not approach a court, a court determines that the consumer is not over-indebted and rejects the debt counsellor's proposal in terms of section 86(7)(b) or the consumer's application in terms of section 86(9), or the consumer fulfils all of his obligations under debt review.⁹⁵ If the credit providers do extend credit while the consumer is under debt review, it will be seen as reckless lending.⁹⁶

⁸⁸ Finding 3 ito s 87(7)(c); *Guide* par 11.3.3.2(h)(iii).

⁸⁹ S 86(7)(c).

⁹⁰ S 86(7)(c)(ii).

⁹¹ *Ibid*; Debt counselling process 272-273.

⁹² Reg 11.

⁹³ *Ibid*.

⁹⁴ S 88(1); *Guide* par 11.3.3.4.

⁹⁵ S 88(1)(a), (b) and (c); Otto 55.

⁹⁶ S 88(4); *Guide* par 11.3.3.4.

While the debt review is pending, litigation by the credit provider against the consumer is suspended,⁹⁷ but a credit provider is not without remedy during the period of debt review. At any time at least 60 business days after the consumer applied for debt review, he may give notice to terminate the review to the consumer, the debt counsellor and the NCR.⁹⁸ This will mostly happen if the debt counsellor does not propose a repayment plan within 60 business days after which the debt review commenced or the consumer defaults again on the payment of the installment amount agreed to by the parties. Hereafter the credit provider can proceed to enforce his rights under the credit agreement in court. However, the court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances, thereby sending the parties back to the drawing board.⁹⁹

Debt review is concluded if the consumer has fully satisfied all the debt obligations under every credit agreement that was subject to the debt re-arrangement order or agreement made during the period of debt review.¹⁰⁰ Such a consumer can apply to a debt counsellor for the issue of a clearance certificate¹⁰¹ of which Form 19 is the *pro forma*.¹⁰² This certificate warrants that a consumer has fully satisfied all the obligations subject to the debt re-arrangement order or consent order in accordance with such an order.¹⁰³ On receiving a copy of this certificate, credit bureaus and/or the national credit register have to remove the debt review status against the customer's name.¹⁰⁴ Therefore, no prejudice should be held against the credit record or future credit applications of a customer who has been under debt review.

2.4. Conclusion

The new process of debt review as a measure to alleviate over-indebtedness is set out mainly in sections 86 and 87 of the NCA, although a few other sections and some regulations also have to be taken into account. We shall now consider at face value some problems that could be encountered with the application of the Act and the Regulations in this regard.

⁹⁷ Otto 55.

⁹⁸ S 86(10); *Guide* par 11.3.3.2(i).

⁹⁹ S 86(11).

¹⁰⁰ Reg 27.

¹⁰¹ S 71(1); *Guide* par 11.5.

¹⁰² See Form 19 Schedule 1 of the Regulations.

¹⁰³ S 71(2)(b)(i); *Guide* par 11.5.

¹⁰⁴ S 71(5).

A serious problem exists with regard to section 86(2). If the credit provider has proceeded to take steps contemplated in terms of section 129 to enforce an agreement, this agreement falls outside the scope of debt review.¹⁰⁵ However, the NCA is not clear on what these steps entail.¹⁰⁶ Does it involve the steps described in section 129(1)(b), namely the commencement of legal proceedings by approaching a court by way of section 130? Or does it also include the step in section 129(1)(a) which entails the sending of a notice to the consumer warning him of pending action against him, suggesting the route of debt review as a first alternative to resolve the dispute. This vagueness in the Act would lead to great confusion in practice, as will be seen later in chapter 4.

It should further be noted that the term “proposal” and the terms “recommendation”, “referral” and “application” are used interchangeably in sections 86 and 87, as if they are synonyms. Their meaning is not at all clear. It seems that if any of these become court documents, it must be drafted in the form of an order,¹⁰⁷ but the NCA is silent on the format of documents and the procedure which must be used to approach a court to obtain orders.¹⁰⁸ However, it is clear that the NCA envisaged the magistrate’s court as the primary forum to which the draft orders must be directed.¹⁰⁹ It is nonetheless not stipulated which instruments of the court should be used and by which Act’s authority the documents are used to lodge applications at court, namely the NCA and/or the Magistrates’ Court Act 32 of 1944.¹¹⁰

Certain possible actions are not provided for in the NCA. If a consumer was found to be not over-indebted in terms of section 86(7)(a), it is not clear if he may file a consent order into court when the parties agreed to a payment plan. The same holds for a consumer who is found to be over-indebted in terms of section 86(7)(c). No mention is made of a consent order in this case. It is submitted that the legislator of the NCA surely would prefer consent orders to court orders, since the former is much faster and less expensive. But the Act is not explicit.

The consumer is the agent who lodges an application to the court according to section 86(9), firstly to obtain leave to appeal and thereafter for an order as contemplated in section 86(7)(c). Who assists him: an attorney or a debt counsellor? Surely a new assessment of the consumer’s

¹⁰⁵ S 86(2).

¹⁰⁶ See Monty “Sec 129 of the NCA - What constitutes ‘steps contemplated in s 129’?” (unpublished paper delivered at a Conference on Debt Enforcement Johannesburg 2009-10-21) slides 20-21.

¹⁰⁷ For example the consent order in section 86(8).

¹⁰⁸ *Guide* par 11.6.

¹⁰⁹ See the references in s 86(7)(c), 86(8), 86(9) and 87.

¹¹⁰ Hereafter the “MCA”.

financial position as set out in section 86(6) has to be made by another debt counsellor who is supposedly the specialist in this regard. The Act does not say. With regard to the qualifications and expertise needed to be a good debt counsellor, a question may well be asked if it is not too easy to become a debt counsellor. The practice of debt counselling demands various skills from a debt counsellor to be effective and successful.

There is also no provision in section 87 that a debt counsellor's proposal (after finding 3)¹¹¹ be rejected or accepted in court,¹¹² as is possible with the other two scenarios or findings.¹¹³ It seems absurd that a section 86(7)(c) finding can not lead to either one or both of the possible section 86(7)(c) orders in court, only because section 87 is silent on it.

No mention is made in the NCA and the Regulations of a payment distribution agency (hereafter a "PDA").¹¹⁴ It has soon become practice in debt review after 1 June 2007 that a preferred debit order is signed against the consumer's account to make the aggregate of payments in favour of a PDA.¹¹⁵ A PDA is a private entity mandated by the NCR to facilitate payments to creditors included in the consent or court order. It can create serious problems if a debt counsellor also fulfils this function, just as an administrator previously has been doing. The fact that PDA's were not legally instituted, is without a doubt a serious omission in the Act.

It should also be possible for the debt counsellor to cancel or for the consumer to withdraw from debt review under certain circumstances,¹¹⁶ but the Act and the Regulations are not clear on when and how this can be done. It only provides for a credit provider to terminate a debt review,¹¹⁷ but the possibility of reversal by the court in section 86(11) should be noted in this respect.

The Act and Regulations did not stipulate everything that was necessary to conduct the process of debt review effectively. This was left to the practice of debt review to find its way around, as I shall discuss in the next chapter.

¹¹¹ S 86(7)(c) – see par 2.3 *supra*.

¹¹² S 87(1)(a).

¹¹³ Following ss 86(8)(b) or 86(9).

¹¹⁴ *Guide* par 5.2.5.

¹¹⁵ *Principles* 16-17; Kelly-Louw 224.

¹¹⁶ *Idem* 18-20.

¹¹⁷ S 86(10).

Chapter 3

First efforts to streamline the debt review process

3.1. Introduction

The NCA commenced fully on 1 June 2007. By the end of March 2008 a total of 2 535 credit providers, 11 credit bureaus and 336 debt counsellors had been fully registered.¹¹⁸ Soon the debt review process encountered operational and procedural challenges.¹¹⁹ The main problem was the uncertainty regarding the exact procedure to be followed when conducting a debt review. It was not fully regulated in the Act or by the Regulations.¹²⁰

Apart from the practical issues of debt counselling, the biggest challenge in the effective implementation of the NCA was the capacity of the courts to interpret and apply the NCA. This impacts both on applications for debt restructuring and on the normal process of contract enforcement that involves applications for judgment. In both these areas alarming backlogs were developing.¹²¹ More effective co-ordination between debt counsellors and credit providers seemed to be another challenge.¹²² Gabriel Davel, the CEO of the NCR, predicted in March 2008¹²³ that the then following 12 to 18 months were going to be challenging and stressful for consumers, credit providers and the NCR.¹²⁴

3.2. The work stream initiative

3.2.1 General

Major role players realised that action should be taken to address the challenges mentioned *supra*. Some debt counsellors, the major credit providers and the NCR met at various work stream sessions to seek solutions. In July 2008 they published a set of rules and procedures to

¹¹⁸ *NCR Annual Report (2008)* 5.

¹¹⁹ *Principles* 3.

¹²⁰ Debt counselling process 249.

¹²¹ *NCR Annual Report (2008)* 10.

¹²² *Ibid.*

¹²³ Only ten months after the NCA has been fully enacted.

¹²⁴ *NCR Annual Report (2008)* 11.

streamline the debt review process.¹²⁵ The parties jointly agreed to hold themselves to the guidelines that were approved.

3.2.2. The work stream material

The work stream material is aptly titled *Debt counselling – Principles and Guidelines*.¹²⁶ It consists of two books: an instruction manual which also served as a guide and a set of annexures. The guide deals with the following topics: professionalism, overview of the debt counselling process, affordability assessment, verification and rearrangement proposals, application to the Magistrates' Courts in terms of section 86 of the NCA and default process.¹²⁷

The work stream material takes into account that most of the debt counsellors are not attorneys and fills in some necessary information that is nowhere available, for example how to conduct oneself in a professional manner and how to maintain a good relationship between a debt counsellor and consumer.¹²⁸ Ethics and honesty are paramount to establish a professional status for the newly incepted occupation of debt counsellor.¹²⁹ The relationship between a debt counsellor and the NCR is discussed and the importance of compliance to the Act and Regulations is highlighted.¹³⁰ The NCR provides proposed conditions for the registration of debt counsellors as envisaged in section 48(3) which must be signed by an applicant before being registered as a debt counsellor.¹³¹ The following condition is most relevant for the purpose of this study: “the debt counsellor must not take part in activities that are in conflict with the interests of the consumer, or that may lead to such a conflict”.¹³² It is furthermore obvious that a debt counsellor should demonstrate a variety of skills to be able to assist consumers effectively.

The work stream agreed to a model of how the debt review process is to be conducted.¹³³ It is relatively simple, but comprehensive. The thirty business days allowed to make a determination with regard the level of over-indebtedness plus some extra thirty days are divided into practical and manageable periods. All that must be done in terms of section 86 and regulation 24 are set

¹²⁵ *Principles* 3.

¹²⁶ *Ibid.*

¹²⁷ *Idem* 2.

¹²⁸ *Idem* 5.

¹²⁹ *Idem* 10.

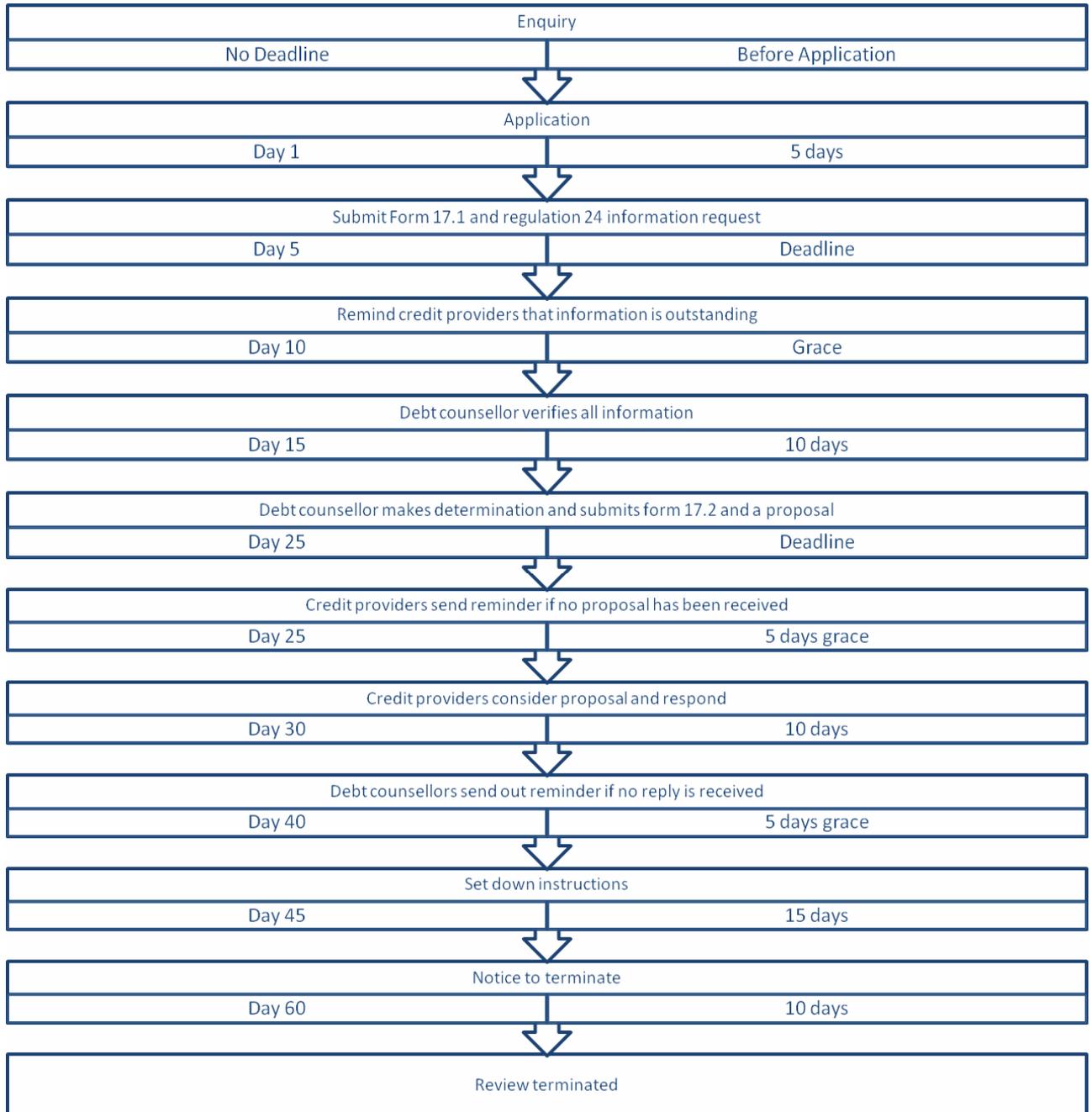
¹³⁰ *Idem* 9.

¹³¹ *Idem* 9-10; *Guide* par 5.2.8.

¹³² *Idem* 10.

¹³³ *Idem* 11–20.

out in a detailed schedule with 13 logical steps.¹³⁴ The process of debt review would mostly last sixty days and involve something like the following:¹³⁵



All parties to the work stream agreed that enforcement of a credit agreement commences upon the issuing and service of a summons, after the credit provider adhered to the requirements set

¹³⁴ *Ibid.*

¹³⁵ *Idem* 12.

out in section 129 and 130.¹³⁶ Legal action therefore does not begin with the delivery of a section 129(1)(a) notice to a consumer.¹³⁷ This interpretation of section 86(2) ruled out any confusion as regards which credit agreements are to be excluded from debt review and from when this should happen.

Assessment, verification and debt re-arrangement comprise the bulk of a debt counsellor's work. Detailed instructions and guidelines are given how to attain these.¹³⁸ It is important to compute the monthly amount available for distribution correctly and how to split this fairly amongst the credit providers.¹³⁹ All figures must be checked and documentary proof thereof has to be assembled. Thereafter negotiations with the credit providers can start when a proposal is drawn up and presented to all parties involved. Counter proposals by the credit providers should be considered and hopefully some settlement can be reached.¹⁴⁰

The NCA does not explicitly say that a debt counsellor has to negotiate with credit providers in case of a section 86(7)(c) finding. It seems that restructuring in court is the only remedy provided for in the Act. The work stream indicates otherwise and suggests that the parties should firstly attempt to negotiate a repayment plan.¹⁴¹ The work stream agreement has therefore no problem with a consent order in the case of finding 3 contemplated in section 86(7)(c).¹⁴² However, if the credit providers do not respond at all, the debt counsellor must notify the credit providers that he will proceed as if the proposal had been declined.¹⁴³

According to the work stream material the collection and distribution of the monthly repayments should wherever possible be handled by a registered payment distribution agency and not by the debt counsellor himself.¹⁴⁴ This follows from a condition of registration set by the NCR: "the debt counsellor must not take part in activities that are in conflict with the interests of the consumer, or that may lead to such a conflict".¹⁴⁵ In the proposal for repayment the banking

¹³⁶ *Idem* 14.

¹³⁷ *Ibid.*

¹³⁸ *Idem* 21-44.

¹³⁹ *Idem* 40-44.

¹⁴⁰ *Idem* 44.

¹⁴¹ *Idem* 38.

¹⁴² *Idem* 17 and 45.

¹⁴³ *Idem* 17.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Idem* 10.

details of the agency and the credit providers must be included, so that a debit order or emoluments attachment order can be set up as part of the consent or court order.¹⁴⁶

The process by which a consumer may withdraw from debt review is formulated in the work stream material.¹⁴⁷ Written notice must be given to the debt counsellor, upon which the debt counsellor must inform the consumer *inter alia* that credit providers may take legal action on those agreements that are in default, but that he may re-apply for debt counselling again.¹⁴⁸ The debt counsellor must inform the credit providers of this event and update the NCR debt help website.¹⁴⁹ The debt counsellor may also withdraw from debt review if a consumer is dishonest or does not co-operate. The process to effect such a withdrawal is therefore set out by the work stream material.¹⁵⁰

Eventually debt review has to end up in court, either for the issue of a consent order or for an order contemplated in section 87 of the NCA.¹⁵¹ Since the Act does not provide a detailed procedure how matters can be referred to a magistrate's court, the work stream attempts to provide guidelines and give some examples in this regard.¹⁵² Possible fancy legal footwork and *in limine* objections of a technical nature are as far as possible counter-acted by the work stream agreement.

If all the parties agree to a payment plan, the debt counsellor may file a proposal as a consent order at the court.¹⁵³ The clerk of the court will receive this, the magistrate will sign off the order and no hearing in court is needed. A draft consent order is provided in the work stream material as "Annexure I".¹⁵⁴ It is remarkable that no mention is made of the possibility of lodging a consent order with the NCT as is provided as an alternative by the NCA in certain instances.¹⁵⁵ With regard to costs, the draft consent order in the given example¹⁵⁶ prays that the costs of the application, in the case of opposition, be awarded against the credit providers, but that each party will pay their own costs, in the case of consensus.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Idem* 18-19.

¹⁴⁸ *Idem* 19.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Idem* 19-20.

¹⁵¹ *Idem* 45.

¹⁵² *Ibid.*

¹⁵³ *Principles* 47.

¹⁵⁴ *Work stream Annexures* 16-17.

¹⁵⁵ S 138(1).

¹⁵⁶ *Work stream Annexures* 17.

If no consensus can be reached, the debt counsellor should invoke the assistance of an attorney to draw up a notice of motion, annexed by at least a founding affidavit and the debt counsellor's recommendation.¹⁵⁷ The notice of motion should request an order from the court to declare the consumer over-indebted and thereafter re-arrange the consumer's debt obligations. The consumer is the applicant who seeks relief against his credit providers as respondents.¹⁵⁸ The work stream suggests that Rule 55 of the Magistrates' Courts Act 32 of 1944 should be used when the court is approached, that is the application procedure.¹⁵⁹ This gives clarity on what the term "proposal" and other related terms in sections 86 and 87 of the Act entail.

To be practical, the work stream agreed on some other issues:¹⁶⁰ jurisdiction of the court should be founded by the person of the applicant, that is the consumer, and not the respondents. Alternatively, the court in which area the debt review takes place will also have jurisdiction, being the area where the whole cause of action arose. Furthermore, the parties agreed that no monetary limit would be placed in debt review matters before the magistrate's court and that service of documents and pleadings could also be done by fax or e-mail.¹⁶¹ The lay-out of an application to court is fully set out in the work stream material.¹⁶² It was mentioned that in terms of the MCA only an admitted attorney or the applicant himself may appear before the court, but the one who appears can and should call on the debt counsellor to give oral evidence.¹⁶³

Lastly, procedures are laid down how to deal if a consumer defaults, either in terms of the original credit agreement or the debt re-arrangement agreement.¹⁶⁴ The practical implications of section 129, 130 and 86(10) are worked out and explained in detail. Each party should know what he may do or not. If a credit provider terminates a debt review in terms of section 86(10), it effects only that credit agreement, not the other agreements in the review.¹⁶⁵

3.2.3. Evaluation

¹⁵⁷ *Principles* 48.

¹⁵⁸ *Idem* 49.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Idem* 51.

¹⁶¹ *Idem* 51 and 53.

¹⁶² *Idem* 51-53.

¹⁶³ *Idem* 53.

¹⁶⁴ *Idem* 54.

¹⁶⁵ *Idem* 56.

The work stream agreement is a remarkable and influential event. As regards the way in which the work stream agreements enlighten and expand the legislative framework as set out in the NCA, the following can be remarked in general: the professional role and functions of a debt counsellor are expanded and explained to promote a fitting style for the debt counsellor (sections 44 and 48, regulations 10 and 11); the skeleton of the debt review process provided by the NCA (section 86) has been given flesh to provide a systematic and effective procedure that could work in practice; and, assessment, verification and debt restructuring are explained and enlightened with abundant practical examples (section 82, regulations 24 and 25).

Specifically, as regards the loopholes in and vagueness of the NCA, the following can be noted:

- (a) the work stream interpreted that the referral to “steps taken” in section 86(2) does not imply section 129(1)(a) - the sending of the notice does not constitute the first step to enforcement.
- (b) the unfortunate omission of a section 86(7)(c) assessment¹⁶⁶ in section 87, as well as the silence on the possibility to negotiate with credit providers in such a circumstance,¹⁶⁷ are taken to be legislative glitches and the debt counsellor should proceed very much in the same vein as during a section 86(7)(b) assessment.¹⁶⁸
- (c) the vagueness concerning consent orders is addressed by the work stream – in all 3 instances or findings as set out in section 86(7) consent orders are viable and preferable.
- (b) possible ways to draft consent orders and restructuring orders as proposals to court are set out extensively (sections 86 and 87).
- (c) the way to approach the court is now by invoking Rule 55 of the magistrate’s court, thereby lodging an application on behalf of the consumer, instructing an attorney to draw the application and to appear eventually in court.
- (e) withdrawal from debt review by the consumer and also by the debt counsellor, is regulated in the work stream material.
- (f) it is agreed that monthly payments be made to a payment distribution agency as part of the restructuring to ensure that the consumer does not default again.

¹⁶⁶ Finding 3 – see par 2.3.

¹⁶⁷ In section 86(7)(c) itself.

¹⁶⁸ Finding 2 – see par 2.3.

On the website of the NCR the last matter is dealt with even more harshly.¹⁶⁹ Debt counsellors are prohibited by the NCR from collecting and distributing payments to credit providers once the consumers' debts have been restructured. The NCR has accredited PDA's who are responsible for collecting repayments from consumers and distributing this to the credit providers in line with the restructured agreements. These entities can be found on the NCR's website.¹⁷⁰ The NCA, however, has not been changed yet to accommodate this.

The work stream agreement is the first milestone in the history of how the NCA should be applied. It streamlined all the important procedures and managed to get the credit providers and the debt counsellors to agree on the process in the future.

It should be mentioned, however, that not all credit providers and debt counsellors agreed to the work stream agreement. Furthermore, since the approaches adapted were in general not of a binding nature,¹⁷¹ there would always be some credit providers and debt counsellors who just go their own way despite the agreements, thereby frustrating the debt review process. Unfortunately the latter did happen extensively.

3.3. The first draft debt counselling regulations

3.3.1. General

On 15 May 2009 the so-called first draft debt counsellor's regulations were published in the *Government Gazette* for public commentary.¹⁷² It contained amendments to the present regulations 11 and 26 and Form 18 and also some additions. The publication of these regulations represent another endeavour to expand the Act and earlier Regulations with regard to some of the aspects which were not clear at all.

3.3.2. The proposed regulations

In the proposed regulations new definitions are suggested, as well as the procedure for confirming a consent order in terms of section 86(8)(a) of the NCA. The format of the proposal

¹⁶⁹ http://www.ncr.org.za/Payment_Distribution_Agencies.php.

¹⁷⁰ *Ibid.*

¹⁷¹ *Guide* par 14.10.

¹⁷² GN R503 in GG 32229 on 2009-05-15 (hereafter "Draft reg (A)").

to court in terms of sections 86(7)(c) and 86(8)(b) of the NCA is prescribed, as well as the format for the application and the proceedings for the hearing to facilitate an order contemplated in section 86(7)(c) of the NCA. The receipt of monies and distribution of payments by debt counsellors and other persons are regulated.¹⁷³ Numerous *pro forma* forms are added which are to be used to assist with the applications mentioned in draft regulations 2,3 and 4.¹⁷⁴

Following the work stream agreement a new definition of court and a description of jurisdiction is suggested: “court” means a magistrate’s court established in terms of the MCA, which has jurisdiction over a consumer by virtue of such consumer’s residence or place of business, or the residence or place of business of a debt counsellor, irrespective of the monetary value involved.¹⁷⁵ Being quite a mouthful, it proposes firstly that the consumer’s residence or place of business should found geographical jurisdiction, and alternatively, also the debt counsellor’s residence or place of business. Secondly, it states that no monetary cap should be put on the credit agreements involved. The total debt of a consumer under debt review may thus exceed R 100 000,00.¹⁷⁶

The term “proposal” used in section 86(7)(c) is suggested to imply Form B of the Annexure to the draft regulations.¹⁷⁷ This definition attempts to bridge the gap left by the Act by not specifying the format of the document needed when approaching the court by way of a proposal¹⁷⁸ or a recommendation.¹⁷⁹ Form B takes the format of a draft order and must be read in conjunction with proposed regulation 3,¹⁸⁰ which allows for an alternative and less cumbersome procedure to Rule 55 of the MCA. If it comes to a hearing in court, this hearing must be administrative in nature and shall be conducted expeditiously in accordance with section 33(1) of the Constitution of the RSA¹⁸¹ which reads as follows: “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair”.¹⁸²

¹⁷³ Draft reg (A) 1-5.

¹⁷⁴ *Idem* Annexure Forms A-H.

¹⁷⁵ *Idem* 1.

¹⁷⁶ The standard monetary cap in the magistrate’s court by which jurisdiction is normally limited.

¹⁷⁷ Draft reg (A) 1.

¹⁷⁸ S 86(7)(c).

¹⁷⁹ S 86(8)(b).

¹⁸⁰ Draft reg (A) 3.

¹⁸¹ *Idem* 4(9).

¹⁸² S 33(1) of the Constitution of the Republic of South Africa 1996.

The same holds for an application made by a consumer in terms of section 86(9),¹⁸³ that is after leave was granted to a consumer to apply for an order in terms of section 86(7)(c). In this case Form F is applied here, which is somewhat different from Form B. The hearing in this case shall also be administrative in nature and conducted as suggested by draft regulation 4(10).¹⁸⁴ Strikingly, this hearing should be much less formal as the normal court custom directs: for example, no legal practitioner is allowed as a representative, except in certain circumstances; no cross examination is allowed; no cost orders are to be made; and the presiding officer shall within 30 days after the hearing make his order furnishing reasons why it is made.¹⁸⁵

In the same vein the draft regulations attempt to fill the hiatus in the NCA which does not indicate how the format of a draft consent order in terms of section 86(8)(a) should look like.¹⁸⁶ Draft regulation 2 set out the suggested format of this draft consent order and directs that Form A of the Annexure to the draft regulations be employed.¹⁸⁷ The draft order shall contain all the arrangements agreed upon with regard to the re-arrangement of obligations, the manner in which payments will be collected and distributed, the costs payable by the consumer and/or the credit providers and a possible suspension of the accrual of interest in case the statutory *in duplum* rule is applicable.¹⁸⁸

Lastly, the draft regulations deal with the receipt and distribution of payments by debt counsellors and other persons.¹⁸⁹ It proposes that any person receiving monies and distributing payments in terms of debt repayment arrangements contemplated in sections 86 and 87 of the NCA, shall formally be registered at the NCR as a payment distribution agent.¹⁹⁰ Draft regulation 5 sets out how this registration shall take place and what compliance to the guidelines published by the NCR entails.

3.3.3. Evaluation

The first draft debt counselling regulations were never enacted, but they represented a conscientious effort by the NCR to close the loopholes in the NCA which soon came to the fore

¹⁸³ Draft reg (A) 4.

¹⁸⁴ *Idem* 4(10).

¹⁸⁵ *Ibid.*

¹⁸⁶ Draft reg (A) 2.

¹⁸⁷ *Idem* 2(1).

¹⁸⁸ *Idem* 2(2).

¹⁸⁹ *Idem* 5.

¹⁹⁰ *Idem* 5(1).

in debt review practice. The format of the regulations resembles provisions which are typical of statutes. Maybe they signify a short cut to evade the long process of statutory amendments, thereby raising the question if some of them are perhaps not *ultra vires*.¹⁹¹ However, this investigation will not enter into this rather technical debate.

Contrary to the work stream agreement that embraces the application procedure in Rule 55 as the way to approach the magistrate's court, the draft regulations opted for a faster, easier and cheaper method of obtaining consent and re-arrangement orders in terms of sections 86(8) and 87 of the NCA. This *sui generis* procedure was developed to put as little as possible stress on the overburdened and cashless consumer. However, the draft regulations do not clear up the omission of a section 86(7)(c) finding in the sections of the Act mentioned *supra*.¹⁹² It is still not clear how a debt counsellor can approach the court in this circumstance to get either a consent order or a restructuring order as provided for in section 86(8).

Regulation 4(10) prescribes how a hearing in terms of sections 86(7)(c) and 86(8)(b) should be conducted,¹⁹³ being much less complex as the normal custom of the magistrate's court. This is more administrative in nature¹⁹⁴ and would be to the advantage of the consumer. It is, however, not certain if this kind of hearing would be accepted and embraced by the courts.

The draft regulations also attempt to resolve the problem of possible misconduct by persons receiving money from consumers and distributing payments to credit providers, an aspect on which the Act is silent.¹⁹⁵ The proposal that such a person, being a debt counsellor or not, should register with the NCR and be monitored, is a step in the right direction.

3.4. Conclusion

The work stream agreements and the first draft debt counselling regulations were not really legally enforceable. The first was based on a gentlemanlike agreement and the second were not promulgated in the end. In the mean time the courts were approached to solve disputes and clear up vagueness as regards the interpretation of the Act. The next section deals with the influence of the courts in addressing these issues.

¹⁹¹ Remark made by Prof M Roestoff of UP in 2009.

¹⁹² See par 2.4.

¹⁹³ Draft reg (A) 4(10).

¹⁹⁴ *Idem* 4(9).

¹⁹⁵ *Idem* 5.

Chapter 4

Other initiatives to improve the debt review process

4.1. Introduction

Serious problems still remained after the work stream agreement was implemented. Impaired credit records rose in a comparison of year on year figures confirmed in March 2009.¹⁹⁶ The slow rate at which debt review applications went to court and the fact that many were never finalised indicated that all was not well.¹⁹⁷ It seemed that debt counselling did not function as effectively as the NCR trusted it to do.¹⁹⁸ Unfortunately, breach of the work stream agreement by credit providers also contributed to the ineffectiveness.¹⁹⁹ The NCR took some other steps since the end of 2008 to address these challenges. These efforts are discussed *infra*.

4.2. The declaratory order and other court cases

4.2.1. General

Case law normally assists to interpret how a statute has to be applied. As mentioned before,²⁰⁰ the NCR approached the High Court in Pretoria for a declaratory order. There were also other cases, mostly in the High Court, where debt review matters ended up in court. Some of these directly impact on this dissertation's scope of study. However, the declaratory order is of extreme importance for purposes of this study.

In the NCR's notice of motion to the High Court in 2008 there were no less than twelve respondents.²⁰¹ The Regulator prayed for the proper interpretation of certain sections of the NCA. Those sections related mainly to the practice of debt review and the role of a magistrate when hearing a proposal that was referred by a debt counsellor to the magistrate's court.²⁰² The Regulator lodged this application to obtain clarity on difficulties that debt counsellors in particular

¹⁹⁶ Credit Bureau Monitor 2008 (Dec) and 2009 (Mar) – www.ncr.org.za.

¹⁹⁷ Credit Bureau Monitor 2008 (Mar) – www.ncr.org.za.

¹⁹⁸ Debt counselling process 248.

¹⁹⁹ *Idem* 249.

²⁰⁰ At par 1.1.

²⁰¹ Declaratory order 295.

²⁰² Applicant's heads of argument to the declaratory order (hereafter "Heads") par 2.

experience in practice.²⁰³ Most of these problems have been touched upon previously in this dissertation. Judgment in this matter was handed down on 21 August 2009.²⁰⁴

4.2.2. Relevant prayers, orders and judgments

With regard to the fifteen prayers in the NCR-case²⁰⁵ only eleven declaratory orders resulted.²⁰⁶ Some prayers were granted without change, some were amended and others were fully dismissed. The prayers that are discussed *infra* are only those that deal with the *lacunae* in the Act and Regulations or those that bring more clarity on how provisions should be applied in practice. There are other orders which may be relevant but less important, and they are therefore excluded to keep the scope of this research within limits.

4.2.2.1 Procedure after a section 86(7)(c)–finding

Prayer and the arguments before court

In prayer 1.15 of its notice of motion,²⁰⁷ the Regulator sought the following order:

“On a proper interpretation of section 86(8)(b), it applies in the circumstances contemplated in section 86(7)(c).”

The opening words of section 86(8) and the reference to subsection (7)(b) only, cause doubt as to whether section 86(8) also applies to subsection (7)(c).²⁰⁸ Section 86(8) provides as follows:

“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

²⁰³ Declaratory order 297.

²⁰⁴ *Idem* 295.

²⁰⁵ It is the declaratory order.

²⁰⁶ *Idem* 321-322.

²⁰⁷ Notice of Motion and Founding affidavit of the applicant – *National Credit Regulator v Nedbank Ltd and others* 2009 (6) SA 295 (GNP) (hereafter “Notice of motion”) 6.

²⁰⁸ Heads par 134.

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

As indicated in chapter 2 *supra*, section 86 is silent on the procedure a debt counsellor should follow after he has issued a proposal recommending that the magistrate's court makes orders as contemplated in section 86(7)(c)(i) and (ii). The applicant submitted that although section 86(8) does not refer to the procedure to be followed when a recommendation in terms of section 86(7)(c) is made,²⁰⁹ section 86(8)(b) should apply in such a case, and that the debt counsellor should refer the recommendation to the magistrate's court for a hearing under section 87.²¹⁰ To remedy any uncertainty in this regard, it is suggested that section 86(8) should be interpreted to refer also to section 86(7)(c), the instance where a finding of over-indebtedness is made.

The Regulator submits that a purposive construction of section 86(8)(b) applies to the circumstances contemplated in section 86(7)(c) for *inter alia* the following reasons:²¹¹

(a) Section 86(8)(b) should be read as a distinct and disjunctive requirement to the opening words of section 86(8). The conjunction "*and*" which appears at the end of section 86(8)'s intro line should be read as ruling subsection (a) only. The conjunction "*or*" which appears at the end of subsection (a) governs subsection (b), so that the subsection should read: "*If a debt counsellor makes a recommendation in terms of subsection (7)(b) ... or (b) if paragraph (a) does not apply ...*".

(b) Unless the interpretation *supra* is adopted, section 86 would provide no means to refer the recommendation contemplated in section 86(7)(c) to the magistrate's court, thereby rendering the section futile and frustrating the clear intention of the legislature.

(c) Section 87(1)(b)(ii) envisaged that the legislature contemplated a recommendation in terms of section 86(7)(c) to be referred to the magistrate's court for a hearing.

The applicant contends that this is a hiatus in the NCA which must be clarified by a wider application of section 86(8)(b). The first to sixth respondents agree that a hiatus exists, but argue that it goes somewhat further than contended for by the applicant.²¹² Accordingly they seek a more drastic declaratory order and submitted additionally that the provisions of section

²⁰⁹ S 86(8) pertains to a recommendation to subsection 86(7)(b), while s 86(9) concerns the procedure that could be initiated when the debt counsellor rejects the debt review application to s 86(7)(a).

²¹⁰ *Guide* par 14.10.

²¹¹ *Heads* par 136.

²¹² *Heads* par 137.

86(8)(a) with respect to consent orders should also apply to cases where the consumer was found to be indebted (as in finding 3).²¹³ A finding of over-indebtedness in terms of section 86(7)(c) sets in motion a debt re-arrangement process that is not voluntary. Should the parties be able to settle the matter and agree on a repayment plan, the parties could seek a consent order in the same manner as provided for in section 86(8)(a).

The court's arguments and decision

The Court points out²¹⁴ that a consumer's application to a debt counsellor to be declared over-indebted, according to section 86(7), may have three possible outcomes:

- (a) The debt counsellor may find the consumer not over-indebted (finding 1).
- (b) The debt counsellor may find that, although the consumer is not over-indebted, he is experiencing, or is likely to experience, difficulties satisfying his obligations (finding 2).
- (c) The debt counsellor may find the consumer over-indebted (finding 3).

If the debt counsellor makes finding 1, he must reject the application but the consumer may approach the magistrate's court for relief.²¹⁵ If the debt counsellor makes finding 2, he must initiate a process to set up a voluntary debt re-arrangement plan.²¹⁶ If he makes finding 3, the debt counsellor must issue a proposal recommending that the magistrate's court makes an appropriate order.²¹⁷

However, section 86(8)(b) provides for a recommendation in terms of section 86(7)(b) (in case of finding 2) to be referred to the magistrate's court, but section 86(8)(b) makes no provision for a recommendation (in case of finding 3) to be referred to the magistrate's court.

Following a finding in terms of section 86(7)(c) that the consumer is over-indebted (finding 3), the debt counsellor has to issue a proposal for the magistrate's court to make an order. It follows by necessary implication that the debt counsellor "must refer the matter to the

²¹³ See par 2.3.

²¹⁴ Declaratory order 302-303; *Guide* par 11.3.3.3.

²¹⁵ S 86(7)(a) read with s 86(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)."

²¹⁶ S 86(7)(b).

²¹⁷ S 86(7)(c).

magistrate's court with the recommendation".²¹⁸ Accordingly it can be concluded that the very words of section 86(8)(b) are implied by section 86(7)(c).²¹⁹

An order 1 in terms of prayer 1.15 was granted as follows:

"On a proper interpretation of section 86(8)(b), it applies in the circumstances contemplated in section 86(7)(c)."

As regards the plea for a consent order, the Court reiterated that if parties settled into a restructuring plan after a section 86(7)(c) finding, they could approach the court for a consent order at any time. Section 86(8)(a) does not say so explicitly, nor should be interpreted to prescribe this.

Discussion

Although the work stream agreement²²⁰ assumes that a section 86(7)(c) finding should be handled in the same way as a section 86(7)(b) finding, debt counsellors should welcome this decision, also since uncertainty has been cleared up as regards the term "hearing" referred to in section 87(1).²²¹ It seems that once the matter goes to court, no formal distinction has to be made between a hearing following a recommendation in terms of section 86(7)(b) or a proposal in terms of section 86(7)(c).²²² They are both processes of the magistrate's court. However, this order does not prescribe or suggest a specific form which facilitates the referral to a court, it only puts them on the same level.²²³ It also does not say whether the consumer or the debt counsellor should instigate the process in court.

What does declaratory order 1 imply for a debt counsellor in practice? Importantly, it puts the procedure to approach the court in the case of a section 86(7)(b) finding (where no consent could be reached) on the same level as a section 86(7)(c) finding (where no consent could be reached also). The debt counsellor can use the same procedure in either case when making an application to the magistrate's court.

²¹⁸ As in s 86(8)(b).

²¹⁹ Declaratory order 304.

²²⁰ *Principles* 47-48.

²²¹ *Guide* par 14.10.

²²² Declaratory order 305.

²²³ *Guide* par 14.7.

4.2.2.2. Judicial or administrative role of the magistrate's court

Prayer and the arguments before court

In prayer 1.4 of its notice of motion,²²⁴ the Regulator sought the following order:

"In discharging his or her duties under section 87 of the Act the relevant magistrate fulfils an administrative as opposed to a judicial role and consequently he or she must:

(1) comply with the relevant provisions of the Constitution and the Promotion of Administrative Justice Act, 2000 ("PAJA");

(2) devise appropriate procedures which will facilitate an inexpensive, fair and expeditious hearing in terms of section 87 of the Act."

The respondents contended on the other hand that a magistrate should fulfil a judicial and not an administrative role.²²⁵

The court's arguments and decision

Sections 86 and 87 of the Act consistently refer to the "magistrate's court" and not to "the magistrate" or "a magistrate". The magistrate's court is one of the courts referred to in section 166 of the *Constitution of the Republic of South Africa, 1996*. For the purpose of the present inquiry, the question is whether the judicial officer (magistrate) who presides in a magistrate's court to which a matter has been referred, performs a judicial function when he deals with the matter.²²⁶

The Court pointed out that, apart from requests for consent orders, matters that are referred to the magistrate's court under sections 86 and 87 will in many, if not most cases, be contentious.²²⁷ While either the consumer or one or more of the credit providers may agree with the debt counsellor's proposal, it is probable that either or both may not. In applications under section 86(9) the very reason for the application is a rejected contention that the consumer is over-indebted.

²²⁴ Notice of motion 3.

²²⁵ Heads par 43.

²²⁶ Declaratory order 305.

²²⁷ *Idem* 306.

A magistrate dealing with a matter referred to the magistrate's court is called upon to make a number of possible findings on contentious matters.²²⁸ The court must decide whether to accept or reject the debt counsellor's recommendation with respect to the consumer's application. That involves a finding as to whether the consumer is over-indebted or not. If it is found that the consumer is over-indebted, the magistrate will have to consider whether the consumer's obligations must be re-arranged. With regards to the provisions of section 86(7)(c)(ii), the magistrate will then also have to consider how the re-arrangement is to be structured.²²⁹

Each of the findings mentioned involves a consideration of the relevant evidence, the making of factual findings, a consideration of the relevant statutory and other legal provisions, rules and principles, and finally, an application of the law to the facts.²³⁰ In most cases the findings will aim to resolve one or more disputes between two or more parties. To resolve disputes, and generally to make findings based on the application of law to the facts, are the essential elements of a judicial function.²³¹

The Court concluded that in discharging his duties under section 87 of the Act the relevant magistrate should fulfil a judicial role.²³² Prayer 1.4 was accordingly dismissed.²³³

Discussion

This prayer was dismissed, since the High Court held that the magistrate who had to decide under section 87 of the NCA fulfilled a judicial and not an administrative role.²³⁴ The more informal means of approaching the court will be touched upon again later on this dissertation. However, it should be noted again that the NCT²³⁵ can also issue consent orders and that this procedure is certainly more administrative in nature.²³⁶

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ See *Old Mutual Life Assurance Co (SA) Ltd v Pension Fund Adjudicator* 2007 (3) SA 458 (C) par 12.

²³² *Guide* par 11.6.

²³³ Declaratory order 306.

²³⁴ *Ibid.*

²³⁵ S 27(a)(i).

²³⁶ As discussed *supra* in par 2.3.

4.2.2.3. A referral is (not) an application?

Prayer and the arguments before court

In prayer 1.1 of its notice of motion,²³⁷ the Regulator sought an order as follows:

“A referral of a recommendation by a debt counsellor to a magistrate’s court in terms of section 86(8)(b) of the Act does not constitute an application for the purposes of the Magistrate’s Courts Act, 32 of 1944 or the Rules of Court promulgated there under and consequently a debt counsellor referring such a recommendation to a magistrate’s court in terms of that section is not required to comply with the Magistrates’ Courts Act or the Rules.”

The applicant argued that section 86(8)(b)²³⁸ of the NCA does not explicitly require a debt counsellor to make an application to a magistrate’s court.²³⁹ It follows, according to the applicant,²⁴⁰ that if the referral by a debt counsellor of his recommendation to a magistrate’s court is not an application for the purposes of the MCA, such referral does not have to comply with the MCA or its Rules and, more particularly, with Rule 55.

The court’s arguments and decision

While motivating his decision for order 3 (dealing with the power of a magistrate to conduct hearings and make orders in respect of debt review proposals), Judge Du Plessis indicated that the referral of a matter to the magistrate court under section 86 of the NCA constituted an extraordinary procedure in which the debt counsellor acted as a *pro forma* applicant,²⁴¹ while the consumer acts as the first respondent. But in these cases²⁴² the MCA and the Rules of the Magistrates’ Courts still apply, not some administrative procedure. The Court made an order 4²⁴³ in pursuance of order 3, given previously:

²³⁷ Notice of notion 2.

²³⁸ “or (b) if paragraph (a) does not apply, the debt counsellor must refer the matter to the magistrate’s court with the recommendation.”

²³⁹ Heads par 36.

²⁴⁰ *Idem* par 37.

²⁴¹ Declaratory order 309; *Guide* par 11.6.

²⁴² *Idem* 310.

²⁴³ *Idem* 310-311; *Guide* par 11.6.

“A referral by a debt counsellor to a magistrate’s court under section 86(8)(b) and section 86(7)(c) of the National Credit Act, 2005 is an application within the meaning of the Magistrates’ Courts Act, 1944 and the Rules of the Magistrates’ Courts and falls to be treated as such in terms of Rule 55 of the Rules.”

Discussion

No alternative *sui generis* method was put in place by the NCA and/or the MCA to be used by the magistrate’s court. Order 4 implies that, at least for the moment, the magistrate’s court can only be approached in terms of section 86 and 87 by utilising the application procedure, already set out by Rule 55 of the MCA.²⁴⁴ This entails the issue and service of a notice of motion together with founding and confirmatory affidavits.²⁴⁵

Form 1, the general form by which a debt review application in the magistrate’s court should commence,²⁴⁶ does not have a clause dealing with a notice of intention to defend or respond. It also does not provide for the option of an answering affidavit within certain time limits (as Form 2(a) of the High Court have). Form 1 reads as follows:

“REPUBLIC OF SOUTH AFRICA

1: NOTICE OF APPLICATION (GENERAL FORM)²⁴⁷

In the Magistrate's Court for the District of
held at

Case of year

In the matter between

..... Applicant

and

..... Respondent

Take notice that application will be made to the above-mentioned Court on the day of of the (year) at(time) for an order (state terms of order applied for).

Dated at this day of of (year)

²⁴⁴ See NCR “*Communiqué: declaratory order*” (2009) par 2 (hereafter “*Communiqué*”); Debt counselling process par 2.2.5.2.

²⁴⁵ *Principles* 45-57.

²⁴⁶ Declaratory order 310.

²⁴⁷ Magistrates’ Courts Rules GN R1108 in RG 980 on 1968-06-21 Form 1 of Annexure 1.

.....
Applicant/Attorney for the Applicant

To:

And:
.....”

Form 1 does not mention a founding affidavit that can accompany the notice of motion. It seems also that a respondent does not have to respond at all in writing to the averments and prayers of the applicant before the court date. I would submit that if there is no proper exchange of process documents between the parties before the hearing takes place, the parties and especially the applicant cannot prepare properly for court. It can be said that there was already an exchange of documents during the debt review process, but at this late stage the position can still change if the parties rethink the matter and suggest more acceptable proposals. This position is not ideal and many a court day can be wasted in arguments which could have been dealt with on paper before the hearing in court takes place.

In the declaratory decision Judge Du Plessis quoted²⁴⁸ from the Rules of the Magistrates’ Courts which say that the forms contained in the annexure may be used with such variation as circumstances require.²⁴⁹ Making use of this liberty, I would suggest that a debt counsellor should amend the wording to make mention of the affidavit(s) forming part of the notice of motion and point out a possible response of the respondent by an answering affidavit within a time limit of ten working days. The notice of motion should contain the prayers of the order asked for. The following may serve as an example:

“It is ordered that:

1. The Applicant is granted leave in terms of section 86 of the National Credit Act 34 of 2005 to bring this application to court.
2. The First Respondent is declared over-indebted as set out in section 79 of the National Credit Act 34 of 2005.
3. The re-arrangement plan in Annexure “J” hereto is made binding on the parties in terms sections 86 and 87 of the National Credit Act 34 of 2005.
4. All parties bare their own costs of this application.”

²⁴⁸ Declaratory order 310.

²⁴⁹ The heading to Annexure 1 of Rule 69(b) Magistrates’ Courts Rules.

The debt counsellor is now deemed to be the applicant and the consumer the first respondent. Credit providers as the second and further respondents²⁵⁰ can in their turn reply per affidavit to the relief sought against them, but do not have to. In my opinion this is not ideal, as was remarked *supra*. The debt counsellor as the applicant, whether by himself or assisted by an attorney, must now bring the notice of motion in terms of Rule 55 of the MCA, as stipulated in order 4 *supra*.

4.2.2.4. Role of the debt counsellor

Prayer and the arguments before court

In prayer 1.7 of its notice of motion,²⁵¹ the Regulator seeks an order declaring that a debt counsellor who refers a proposal to a magistrate's court in terms of section 86(8)(b), is entitled to adduce evidence and present arguments in support of his recommendation in any hearing under section 87.

The Regulator submits that section 87 of the NCA envisages an informal inquisitorial hearing, rather than a formal adversarial one. In other words, a magistrate should initiate, direct and control the proceedings, thereby permitting the debt counsellor to adduce evidence and advance arguments to explain his recommendation.²⁵² All parties agree in principle that a debt counsellor should be entitled at a hearing to furnish evidence before a magistrate to explain his recommendation.²⁵³ This is consistent with the spirit and object of the NCA and is always desirable in order to assist a magistrate in determining which orders he ought to grant.²⁵⁴ According to the applicant nothing bars the granting of an order in terms of the prayer of the Regulator's notice of motion.²⁵⁵

The court's arguments and decision

²⁵⁰ Idem 49.

²⁵¹ Notice of motion 3.

²⁵² Heads par 85.

²⁵³ *Idem* par 90.

²⁵⁴ *Ibid.*

²⁵⁵ *Idem* par 91.

The Court found that a debt counsellor's role in terms of section 86 is that of a neutral functionary who does not seek to advance any particular party's cause.²⁵⁶ There is no reason why the debt counsellor could not make submissions regarding his proposal in court.²⁵⁷ In view of his investigation in terms of section 86, the debt counsellor will highlight the relevant facts and make the necessary submissions to assist the court.

The Court granted order 8 as follows:²⁵⁸

“A debt counsellor who refers a matter to the magistrate’s court in terms of sections 86(7)(c) and 86(8)(b) of the National Credit Act, 2005 has a duty to assist the court and should be available and able to render such assistance by way of furnishing evidence or making submissions as to his or her proposal or to answer any queries raised by the Court.”

Discussion

This order brings significant clarity with regard to the role of a debt counsellor during court proceedings. The debt counsellor is purported to be the specialist with respect to the financial affairs of the consumer. The court is dependant on the debt counsellor’s knowledge to assist the court. This implies that he should be available to appear in court, able to give evidence or make submissions, and answer any queries raised by the court. In practice this is clearly not a normal application procedure. The debt counsellor acts as an agent, a representative, whose role is to present the case of a over-indebted consumer to the court. As regards neutrality his position resembles that of attorneys and advocates who are first and foremost officers of the court, although he is not sworn to it. It does not seem possible for the court to proceed only with the attorney for the *pro forma* applicant present. The debt counsellor must at least be present or on stand by.

It remains a question whether a debt counsellor who is not also an attorney, will be able to fulfil all the functions trusted upon him/her. For example, to draw an application for a court order can be a daunting task, as the following proposed *pro forma* structure would suggest:²⁵⁹

²⁵⁶ Declaratory order 313.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid*; *Guide* par 11.6.

²⁵⁹ See in general Stadler “The High Court and debt review” 2009 *De Rebus* 46; also a *pro forma* application developed by UP Law Clinic 2009.

“The debt counsellor:-

- (a) declares formally under his/her full names.
- (b) states his/her status as applicant and debt counsellor (registration number).
- (c) sets out all the respondents and their details.
- (d) claims jurisdiction in terms of the residential or work address of consumer.
- (e) confirms the consumer’s application for debt review and payment of fee.
- (f) claims proper notice of Form 17.1 to credit providers and credit bureaux.
- (g) reports on a verified assessment of consumer’s financial state of affairs to determine over-indebtedness and reckless credit or not.
- (h) claims proper notice of Form 17.2 to credit providers and credit bureaux.
- (i) claims over-indebtedness and/or reckless lending with proper motivation.
- (j) reports on the drafting of proposed payment plan and notice to credit providers of such.
- (k) provides relevant personal circumstances of the consumer.
- (l) claims that the draft order proposed in the notice of motion is made in terms of the relevant sections of the NCA.
- (m) prays that the draft order be granted.
- (n) signs as deponent.
- (o) takes care that a commissioner of oaths attests the oath and signature”.

Numerous annexures may be needed as a proof to the averments made in the affidavit. These must be referred to in the affidavit by an identifiable letter or number and added as part of the court documents. It is uncertain if all debt counsellors can perform these tasks and also present their clients’ case in court without being an attorney. On the other hand, it would be less costly if a debt counsellor could perform all these tasks without the assistance of an attorney. This would be in line with the policy of the NCA, which purports to put a relatively cheap dispute resolution process in place for the protection of the consumer.²⁶⁰ If the latter is preferred, it implies that a debt counsellor must be well trained and equipped with exceptional expertise.

4.2.2.5. Emoluments attachment orders

Prayer and the arguments before court

Prayer 1.12 continues as follows:

²⁶⁰ The whole of s 3.

“A magistrate’s court making an order in terms of section 87 may, with the consent of the consumer and pursuant to a recommendation by the debt counsellor, issue an order of the nature contemplated in rule 65J of the Rules, attaching the emoluments of the consumer and obliging him or her to make periodic payments to the credit provider.”

The respondents took the view that emolument attachment orders are only granted in terms of section 65 of the MCA. This happens after judgment has been obtained by a judgment creditor.²⁶¹ They infer that since orders made by a magistrate under section 87 of the NCA do not flow from any judgments being granted at the instance of a credit provider, the magistrate is not empowered to issue any emolument attachment order.²⁶²

The Regulator does not contend that Rule 65 of the MCA applies here. The Regulator, appreciating the merit of an order of the nature contemplated in Rule 65(J), merely envisages a magistrate to be able to grant an order similar to that in Rule 65(J). This prayer is sought, since some magistrates held that they are not entitled to grant such orders, even after consent of the credit providers.²⁶³

The court’s arguments and decision

The Court pointed out that the powers of the magistrate’s court upon a referral are to be found in the Act. There is no provision in the NCA for the making of an order in terms of section 65J of the Magistrates’ Courts Act that deals with emolument attachments orders. The consumer is not a judgment debtor and the debt counsellor or the credit providers are not judgment creditors. The order sought was accordingly refused.²⁶⁴

Discussion

The Court’s viewpoint is to be understood according to present law. However, the current situation is not ideal. In practice it is important that a consolidated debt repayment amount should be paid over regularly to a payment distribution agency in one transaction. This can be

²⁶¹ Heads par 120.

²⁶² Heads par 121.

²⁶³ *Idem* par 122.

²⁶⁴ Declaratory order 316.

arranged by means of an order against the consumer's salary and could form part of the recommendation before court to be decided in terms of section 87(1).

4.2.2.6. Section 86(2) refers to section 129(1)(b) only

Prayer and the arguments before court

In prayer 1.13²⁶⁵ the Regulator sought a declaratory order that would explain the reference to "take the steps" in section 86(2) fully and clearly. None of the respondents oppose the relief sought by the Regulator in this prayer,²⁶⁶ namely a declaration that "take the steps" refers to section 129(1)(b) only.

In terms of section 86(2) an application in terms of section 86(1) "may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement".

Section 129(1) prescribes certain steps that a credit provider must take before a debt is enforced and provides as follows:²⁶⁷

"If the consumer is in default under a credit agreement, the credit provider -

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before -

(i) first providing notice to the consumer, as contemplated in paragraph (a) or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130."

²⁶⁵ Notice of motion 5.

²⁶⁶ Heads par 124.

²⁶⁷ Declaratory order 318.

All the parties before Court agreed that this order is needed.²⁶⁸ The purpose of section 86(2) is to ensure that consumers do not apply to be declared over-indebted, only to frustrate a credit provider who has already started to enforce a credit agreement under which the consumer is in default. Section 129(1)(a) envisages alternative dispute resolution and "a plan to bring payments under the agreement up to date"²⁶⁹ and is the final step preliminary to debt enforcement. According to Scholtz²⁷⁰ the legislature intended the debt review process to be available to a consumer as a possible remedy as long as the credit provider has not served a summons on him/her.

The court's arguments and decision

"In the absence of a full argument, and in view that there were many other persons with an interest in this order",²⁷¹ the judge deemed it unwise to say more and did not grant the order. The court indicated that it was not satisfied that the applicant's approach was correct and that no full argument was presented in terms of it.²⁷²

Discussion

This decision of the declaratory court is regrettable, since confusion still remains on when enforcement in actual fact begins. It is submitted that the legislator's reference to section 129 in section 86(2) is rather a reference to the commencement of legal proceedings mentioned in section 129(1)(b) and a consumer should not be barred to apply for debt review in respect of a specific credit agreement after receipt of a section 129(1)(a) notice.²⁷³ According to Van Loggerenberg²⁷⁴ it does not make sense to propose that the consumer should approach a debt counsellor and at the same time also preclude the consumer from applying for debt review. Borraine and Renke maintain that the steps in section 86(2) refer to the whole of section 129 and by incorporation also section 130.²⁷⁵ The section 129(1)(a) notice is a prerequisite or a *sine qua*

²⁶⁸ *Ibid.*

²⁶⁹ *Idem* 319.

²⁷⁰ *Guide* par 11.3.3.2.(d); Van Heerden en Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 TSAR 667.

²⁷¹ Declaratory order 319.

²⁷² *Guide* par 11.3.3.2.(d).

²⁷³ Founding affidavit par 69 -71; *Guide* par 12-6.

²⁷⁴ Van Loggerenberg "Aspects of debt enforcement under the National Credit Act" 2008 *De Rebus* (Jan/Feb) 40-41; Founding affidavit par 70.

²⁷⁵ "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 (Part 2)" 2008 *De Jure* 9 n 61.

*non*²⁷⁶ before the court can be approached and serves to inform a consumer of his right to apply for debt review.²⁷⁷

The judge in *Frederick v Greenhouse Funding (Pty) Ltd*²⁷⁸ found in 2008 that the sending of a section 129(1) notice is a step to enforce the credit agreement which reflects commercial reality.²⁷⁹ In *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors*²⁸⁰ the court emphasised that compliance with section 129(1)(a) was a prerequisite before a credit provider could enforce a credit agreement and the notice had to be delivered effectively to the consumer.²⁸¹ This interpretation differ from the findings in the *Greenhouse*-case *supra* in that the sending of the 129(1) notice is seen here as a last opportunity given to the consumer to settle a dispute before enforcement in the court begins.²⁸² What proper compliance with the delivery requirement pertaining to section 129(1)(a) entails, is directly addressed in *Marimuthu Munien v BMW Financial Services (SA) (Pty) Ltd*²⁸³ and discussed fully by Van Heerden and Coetzee.²⁸⁴

A debt counsellor should be watchful for the time limit set by a section 129(1)(a) notice, especially since consumers are sometimes very slow to get help and it takes time to get in touch with a debt counsellor. It is also not appropriate for a debt counsellor to exert pressure on the consumer to apply for debt review immediately. Mostly a consumer tarry to decide whether he should go under debt review, while time run out for an application to be made before the credit provider approaches the court. Although this position is still unsure, Otto warns consumers, following the *Olivier*-case,²⁸⁵ not to ignore a notice under section 129(1)(a), but rather to seek the advice of a debt counsellor timeously and definitely within the 10 days after a section 129 notice has been received.²⁸⁶

Although this issue concerning the interpretation of section 86(2) has been dealt with in a number of court cases, it has not yet been adequately and satisfactorily addressed.²⁸⁷

²⁷⁶ Parameters 262.

²⁷⁷ *Idem* n 64.

²⁷⁸ Unreported case no 31825/2008 (WLD).

²⁷⁹ See also *Nedbank Ltd v Ditsheko Isaac Motaung* (Unreported case no 22445/07 (TPD)) and *Mercedes Benz Financial Services (Pty) Ltd v Viljoen* (Unreported case no 18995/09 (NGP)).

²⁸⁰ 2009 (2) SA 512 (D).

²⁸¹ *Idem* par 28 and 55.

²⁸² *Idem* par 34 and 54.

²⁸³ 2010 (1) SA 549 (KZD).

²⁸⁴ "*Marimuthu Munien v BMW Financial Services (SA) (Pty) Ltd*" 2009 *PER* 333-360.

²⁸⁵ *First Rand Bank Ltd v Olivier* 2009 (3) SA 353 (SE).

²⁸⁶ Otto "Over-indebtedness and applications for debt review in terms of the National Credit Act" 2009 *SA Merc LJ* 277-278.

²⁸⁷ *Guide* par 12.4.12.

4.2.3. Evaluation

The declarator is without a doubt a turning point in the history the NCA. The first stage of opportunistic chaos has finally ended. The practice of debt counselling has now reached a next stage in which there is somewhat more clarity. The orders do impact on the practice of debt review and will continue to shape the credit industry, although not everything has been cleared up. Next the second draft debt counselling regulations which followed the declaratory order and which are in direct response thereof, will be discussed.

4.3. The second draft debt counselling regulations

4.3.1. General

The second draft debt counselling regulations were published on 14 January 2010,²⁸⁸ purporting to be a re-publishing of the first draft regulations for public comment.²⁸⁹ They are designated to be amendments to the present regulation 26.²⁹⁰ It rather seems like a replacement *in toto* of the very short current regulation 26, although the proposals are not so longwinded as the first proposed draft counselling regulations suggest.

4.3.2. The proposed regulations

The second draft regulations also start with definitions like the first set.²⁹¹ “Court” is described as a magistrate’s court which has jurisdiction over a consumer by virtue of such consumer’s residence, irrespective of the monetary value involved.²⁹² This description is much shorter than the first draft regulations’ version and omits the consumer’s place of business and both the residence and the place of business of the debt counsellor. “Deliver” makes provision for the possibility of using a facsimile or e-mail as alternatives for delivery in the customised way.²⁹³ “Proposal” is now the proposal contemplated by section 86(7)(c) of the Act, made by a debt

²⁸⁸ GNR22 in GG 32869 (hereafter “Draft reg (B)”).

²⁸⁹ GNR503 in GG 32229 on 2009-05-15.

²⁹⁰ Draft reg (B) Title Page.

²⁹¹ Draft reg (A) 1.

²⁹² Draft reg (B) 1.

²⁹³ *Ibid.*

counsellor or consumer.²⁹⁴ The format of the proposal which was annexed as Form B to the first draft regulations is omitted here.²⁹⁵

Draft regulation 2²⁹⁶ clearly illustrates the effect of the declaratory order. A consent order contemplated by section 86(8)(a) of the NCA must now be drafted in accordance with Rule 55 of the MCA,²⁹⁷ and not according to Form A of the Annexure to the first draft regulations.²⁹⁸ Affidavits should indicate that all parties gave their consent and agreed to a plan of debt restructuring and then elaborate fully on all the arrangements made in this regard.²⁹⁹

The proposal for the order(s) contemplated in section 87 of the NCA must also be lodged in terms of Rule 55 of the MCA.³⁰⁰ The content of what this proposal should consist of is prescribed, the credit providers must be informed that they may oppose the application and some other related matters are also addressed in this regulation.³⁰¹

When a consumer wants to obtain leave to institute proceedings in terms of section 86(9) of the NCA, an *ex parte*-application should be used as stipulated by the MCA.³⁰² The documents that should accompany this application are prescribed, as well as the procedure to apply directly to the court, after leave is granted.³⁰³ Amongst others, the information that should be included in the affidavits are listed and the rest of the procedure is set out. Significantly, the nature of the hearing in this case is to be judicial,³⁰⁴ not administrative as previously proposed,³⁰⁵ but the hearing should be conducted expeditiously in accordance with the Constitution of the Republic of South Africa.³⁰⁶

The way in which the hearing is to be conducted is stipulated with the remarkable provision that a debt counsellor shall not be liable for costs,³⁰⁷ possibly also following declaratory order 7

²⁹⁴ *Ibid.*

²⁹⁵ Draft reg (A) Annexure Form B.

²⁹⁶ Draft reg (B) 2(1).

²⁹⁷ *Ibid.*

²⁹⁸ Draft reg (A) Annexure Form A.

²⁹⁹ Draft reg (B) 2(2).

³⁰⁰ *Idem* 3(1).

³⁰¹ *Idem* 3(2) and (3).

³⁰² *Idem* 4(1).

³⁰³ *Idem* 4(2) and (4).

³⁰⁴ *Idem* 4(8).

³⁰⁵ Draft reg (A) reg 4(9) and (10).

³⁰⁶ Draft reg (B) 4(8).

³⁰⁷ *Idem* 4(9)(e).

here.³⁰⁸ This is to be welcomed, since the magnitude of work and the risk taken by a debt counsellor applying to the court can become very costly compared with the relatively meagre fees that are allowed at present.³⁰⁹ It augurs that in the end only “rich” people will be able to afford debt review.

The magistrate presiding shall within 30 days of the conclusion of the application furnish reasons for any order which the court makes,³¹⁰ and the debt counsellor or consumer must deliver copies of the court’s order to the credit providers for execution within five (5) days after the order was made.³¹¹

4.3.3. Evaluation

The second draft debt counselling regulations is to a certain degree a hybrid between the first draft debt regulations and the declaratory order. At least it can be said that the declaratory order served as the editing template before the second set of regulations were published.

The High Court’s decision to reject the possibility of an administrative procedure in favour of a judicial process³¹² and thereafter opting for Rule 55 of the MCA³¹³ forms part and parcel of the proposed regulations. It remains a pity that the plea for a less cumbersome and cheaper procedure was not adhered to. However, it makes sense, since such a procedure does not yet exist in terms of the statutes. However, it remains a possibility that the NCA could be adapted to make provision that the NCT rather than the magistrate’s court hears “applications” for orders.

The proposed second draft regulations, if promulgated, can help debt counsellors a lot. It sets out the format for proposals and draft orders as was never done before. The content information that the different affidavits should contain are set out much clearer now. In essence the proposed regulations strive to expedite hearings and promote the effective execution of orders.

4.4. The Law Clinic’s report

³⁰⁸ Declaratory order 311-312.

³⁰⁹ Debt Counsellor’s Association of South Africa’s (hereafter “DCASA”) fee structure at <http://www.dcasa.co.za/debtstructure.asp>.

³¹⁰ Draft reg (B) 4(9)(f).

³¹¹ *Idem* 4(10).

³¹² Declaratory order 306.

³¹³ *Idem* 310-311.

4.4.1. General

The Law Clinic of the University of Pretoria, headed by Mr Franciscus Haupt, is a valuable partner of the NCR. Previously, in 2008, the Law Clinic completed a research project related to debt review, namely *The incidence of and the undesirable practices relating to garnishee orders in South Africa*.³¹⁴ In January 2009 the Law Clinic was again tasked, this time to assess the reasons why debt counselling is ineffective in South Africa and why applications are not being finalised by magistrates' courts. The parties responsible for this delay or for preventing the finalisation of cases were to be identified and finally measures had to be suggested to improve the situation.

This mammoth task led to a final report of 331 pages, which was finalised in May 2009,³¹⁵ but only published by the NCR on 30 September 2009, after the declaratory order has been handed down. The report fall out mainly in two parts: practical problems of debt review in practice and confusing loopholes or shortcomings in the NCA.³¹⁶ In this chapter we shall focus on the last, but a few remarks are also made with regard to the first.

4.4.2. The findings and recommendations

The research team conducted a survey amongst debt counsellors as respondents.³¹⁷ The major obstacle to efficient debt review is the fact that credit providers are not co-operating (72%). This was followed by the insufficiency of the Act and Regulations (53%), consumers not co-operating (36%) and incompetent debt counsellors (27%). The last factor is worsened by some debt counsellors who act unscrupulously.

A number of case studies were also undertaken by the research team in which problem issues were identified and discussed.³¹⁸ Breach of the work stream agreement regarding court procedures is still one of the main causes frustrating the debt review process.³¹⁹ This concerns the following issues which were previously agreed on: geographic jurisdiction, monetary jurisdiction, the procedure for referring debt review matters to court where the consumer was

³¹⁴ See http://www.ncr.org.za/Garnishee_Orders.php.

³¹⁵ *Challenges* 1.

³¹⁶ *Idem* 17-46.

³¹⁷ *Idem* 307.

³¹⁸ *Idem* 21-24.

³¹⁹ *Idem* 21-22.

found to be over-indebted, interest rate reductions, particularity of consumers' founding affidavits and availability of documentary proof and service of application.

Negligent mistakes pertaining to procedure and process are also encountered.³²⁰ These include notices addressed to the wrong debt counsellor, sloppy counter proposals, termination of the debt review process before the required sixty business days have lapsed or after notice of a court application was already given.

The research team came across numerous examples of problems encountered with the collection, distribution, payment and acceptance of monthly payments.³²¹ However, the report did not elaborate on these as it is dealt with in a report authored by Marlene Heymans.³²² It was suggested that this report should be read in conjunction with the Law Clinic's report.

The second part of the Law Clinic's report deals with possible shortcomings in legislation pertaining to the debt review process, those which cause lack of legal certainty and which contribute to the apparent ineffectiveness of the debt counselling process.³²³ Although the report welcomes the work stream effort for their attempt at finding a solution for these problems, the research team was of the view that the current situation at that time was not desirable.³²⁴

The NCR's application to the High Court for a declaratory order, discussed *supra*, ran concurrent to this research. As said before, the Law Clinic's report was completed in May 2009, a few months before judgment in the High Court was handed down, but was made public more than a month after the declaratory order.³²⁵ The research team could therefore only anticipate that the declaratory order may shed some light on the problems experienced in debt review, but submitted that the best solution would be if the legislator address these shortcomings properly by amendments or additions in order to bring about an effective debt review process.³²⁶ The report proposed some drastic additions and amendments to the Act and the Regulations which

³²⁰ *Idem* 22-23.

³²¹ *Idem* 23.

³²² *Blockages in payment distribution – An investigation into the matters that influence the effectiveness of payment distribution in the debt counselling system 2009 (May) Report to the NCR*
www.ncr.org.za/gabriels%20presentations/Consultant's/Blockages%20Debt%20counsellors%2013a%20Oct%20%202009.ppt.

³²³ *Challenges* 19.

³²⁴ *Ibid.*

³²⁵ On 2009-09-30.

³²⁶ *Challenges* 318.

were all convincingly motivated. The proposed changes that the legislator should consider and which fall within the scope of this dissertation are as follows:

(a) A review of the requirements pertaining to the education, experience and the competence of debt counsellors is needed, since many debt counsellors fail in practice.³²⁷ They are even judged as incompetent by some.³²⁸ The declaratory order assigns even more daunting tasks to a debt counsellor:³²⁹ he/she is the *pro forma* applicant, a neutral officer of the court and a specialist with regard to the financial dilemma of the consumer. A high level of training and expertise is required. The current sub-regulation 10(b)(i)(ff) dealing with experience should be deleted, since its application is too wide and allows for almost any working experience to be sufficient.³³⁰ It is also suggested that regulation 10(ee) be amended as follows:³³¹

“10. A person who applies for registration as a debt counsellor must meet the following further requirements–

(b) Experience and Competence:

(i) a minimum of five years working experience in any of the following fields–

(aa) consumer protection, complaints resolution or consumer advisory service;

(bb) legal or para-legal services;

(cc) accounting or financial services;

(dd) education or training of individuals;

(ee) counselling of individuals provided that if a person who applies for registration in terms of this regulation does not comply with the criteria pertaining to experience as contemplated in sub-regulation (b)(i) of this regulation, such a person will still be able to apply for registration as a debt counsellor if he/she possesses a tertiary qualification in either the field of law or economic and management sciences.

(ff) (*deleted*)

(ii) demonstrated ability to:

(aa) manage his/her own finances at the time of applying for registration; and

(bb) provide counselling or transfer skills.”

³²⁷ *Idem* 318-319.

³²⁸ *Idem* 307.

³²⁹ Declaratory order 309.

³³⁰ *Challenges* 318.

³³¹ *Idem* 318-319.

(b) A new Form 16 is promoted which would assist debt counsellors to better inform their clients of the consequences of debt review.³³² For example the consumer's attention is drawn to the following: when his debt review has been listed under the credit bureaus, the consumer will not be able to obtain further credit; and, until such time as the application is accepted and all required documents are submitted, credit providers may still institute legal action.³³³ In his declaration under the application the consumer has to agree to the following new terms:

“I agree not to utilise any available credit on any overdraft or credit facility and consent to all my credit cards being destroyed;

I agree to continue making payments towards all my credit providers as instructed by my debt counsellor and I am aware that my debt review application may be withdrawn should I fail to do so;

My debt counsellor has explained the cost of the application to me and I consent to and agree to pay any agreed upon fees applicable to this process;

I take note that should I fail to co-operate in this process or fail to provide true and honest information to my debt counsellor, my debt counsellor may withdraw my debt review application and thereby enables my credit provider to take legal action against me;

I confirm that the contents of this declaration have been explained to me and that I fully understand the contents thereof and consequences should I not comply”.³³⁴

(c) Section 86(2) is to be amended by substituting the words “section 129” with “section 130”.³³⁵ This would make it clear that the sending and delivery of a section 129(1)(a) notice is not the first step in enforcing the credit agreement, but rather a prerequisite.³³⁶

(d) Section 86(8) is appended to include the instance where a recommendation is made by the debt counsellor in terms of section 86(7)(c). It should specifically provide for the obtaining of a consent order when a debt restructuring proposal is accepted by all credit providers and also for a court order when no consensus could be reached in these circumstances. The following changes in subsection 8 is recommended:³³⁷

³³² *Idem* 320.

³³³ *Idem* 103.

³³⁴ *Idem* 111.

³³⁵ *Ibid*; Van Heerden en Otto 668.

³³⁶ See *Challenges* 61-63 for a compelling argument in this vein.

³³⁷ *Idem* 321.

“(8) If a debt counsellor makes a recommendation in terms of subsection (7)(b) or (7)(c) and–

(a) the consumer and each credit provider concerned accept that proposal, the debt counsellor must record the proposal in the prescribed form, and if it is consented to by the consumer and each credit provider concerned, the debt counsellor, by notice to the consumer and credit providers, must apply in the prescribed form and manner to the magistrate’s court for the proposal to be made an order of court;

(b) if paragraph (a) does not apply, the debt counsellor, by notice to the consumer and credit providers, must apply in the prescribed form and manner to the magistrate’s court for an order contemplated in subsection (7)(c) and section 87.”³³⁸

(e) Clarity is needed on the procedure to be followed in court when a matter is “referred” to the magistrate’s court, when the consumer and credit providers could not reach consensus on a debt restructuring proposal.³³⁹ In this regard the following amendment to section 87(1) is suggested:³⁴⁰

“**87.** (1) If a consumer applies to the Magistrate’s Court in terms of section 86(8)(b) or 86(9), the Magistrate’s Court must conduct a hearing as prescribed in the Magistrates’ Courts Act, 1944 and, having regard to the proposal and information before it and the consumer’s financial means, prospects and obligations may–

(a) reject the application; or

(b) declare that the consumer is over-indebted and make–

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

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

(iii) an order contemplated in section 86(7)(c)(iii); or

(iv) an order appointing a payment distribution agent, registered by the National Credit Regulator in terms of section 44A, and which will be responsible for the collection and distribution of payments received from the consumer after a debt restructuring order or agreement; or

³³⁸ *Idem* 323; *Explanatory memorandum to proposed amendments to the National Credit Act 34 of 2005* (2009) UP Law Clinic Pretoria Report to the NCR (hereafter “*Memorandum*”) par 4.

³³⁹ *Idem* 322.

³⁴⁰ *Idem* 323.

(v) all the orders contemplated in subparagraph (i), (ii), (iii) and (iv) of subsection (1)(b).”

Related issues, such as the jurisdiction of the court to entertain debt review matters, the person who should approach the court and the issue of notification regarding the eventual hearing for debt re-arrangement, should also be addressed, according to the report.³⁴¹

With regard to jurisdiction, the report promoted the viewpoint that the magistrate’s court in which area the whole cause of action arises, should also have jurisdiction to hear a debt review matter.³⁴² The report furthermore expounds on Form B of the first draft regulations as a proposed format of a document to approach the court and the surrounding procedure that is further set out in regulation 3 of the same set of regulations.³⁴³ Here the debt counsellor lodges the proposal at court and not the consumer, *contra* to the viewpoint in Scholtz.³⁴⁴ This may suggest that some legal fees, for example to employ an attorney to appear in court, be saved by the over-burdened consumer.³⁴⁵ It seems that the declaratory order decided the issue of who should approach the court, namely the debt counsellor as the *pro forma* applicant.³⁴⁶

(f) The suggested amendment in section 87(1)(b)(iv) in (e) *supra* attends to the need to appoint a payment distribution agency at the same time an order in court is made. This is important to conclude the debt review process effectively. Other issues such as the registration and monitoring of PDA’s by the NCR, should be addressed, *inter alia* by adding a new section 44A:³⁴⁷

“Registration of payment distribution agents

44A. (1) The National Credit Regulator must establish and issue standards and conditions for registration of payment distribution agents.

(2) The National Credit Regulator may not register a person as a payment distribution agent unless that person has, in the opinion of the National Credit Regulator–

(a) sufficient human, financial and operational resources to enable it to function efficiently and to properly perform its functions in terms of the Act; and

³⁴¹ *Ibid.*

³⁴² *Challenges* 76; see also *Principles* 51.

³⁴³ Draft reg (A) 6-7.

³⁴⁴ Par 14-16.

³⁴⁵ *Idem* par 14-7.

³⁴⁶ See par 4.2.2.3. *supra*, order 3.

³⁴⁷ *Challenges* 324.

(b) sufficient administrative measures and safeguards to enable it to function efficiently and to properly perform its functions in terms of the Act.”

(g) Regulation of the process to be followed when a consumer or the debt counsellor withdraws from the debt review process is also needed by adding a new section 86A:³⁴⁸

“**86A** (1) A consumer may voluntarily withdraw an application in terms of section 86 at any time before an order of court as contemplated in section 86(8) has been granted, by delivering a written notice to the debt counsellor that the consumer is withdrawing the application, including the reasons for such withdrawal.

(2) Within five business days after receiving a notice as contemplated in subsection (1), the debt counsellor must notify all credit providers that are listed in the application in terms of section 86 and every registered credit bureau in the prescribed manner and form that the consumer has voluntarily withdrawn the application in terms of section 86.

(3) A debt counsellor may withdraw an application in terms of section 86 if the debt counsellor is of the opinion that the consumer is dishonest or is not cooperating with regard to the application in terms of section 86.

(4) Within five business days after a withdrawal as contemplated in subsection (3), the debt counsellor must notify the consumer and all credit providers listed in the application in terms of section 86 as well as every registered credit bureau in the prescribed manner and form of the withdrawal.

(5) A notice of withdrawal contemplated in subsection (4) may only be delivered after at least 10 business days have elapsed since the debt counsellor delivered a written notice to the consumer of the debt counsellor’s intention to withdraw the application, including the debt counsellor’s reasons for such intended withdrawal, and the consumer has failed to respond to such a notice.

(6) If a consumer or the debt counsellor withdraws an application for debt review as contemplated in terms of this section, the debt counsellor must inform the consumer that–

(a) any of the consumer’s credit providers may approach the court for an order to enforce a credit agreement in respect of which the consumer is in default;

(b) the consumer’s credit record will, for a period of six months, reflect that the consumer has voluntarily withdrawn the application or that the debt counsellor has withdrawn the application, as the case may be;

³⁴⁸ *Idem* 326-327.

- (c) the consumer is liable for all debt counselling fees prescribed in terms of the Act and which are due up to the date of withdrawal;
- (d) the consumer is entitled to re-apply for debt review in terms of section 86.”

There are also other proposals for amendments and additions, but these fall outside the scope of this dissertation.

4.4.3. Evaluation

The report of the Law Clinic discloses some shocking tendencies in debt review practice. These attitudes lead to ineffectiveness and unacceptable practices which on their part cause the debt review process to be frustrated and prolonged without end.

The report also found that the Act and Regulations were inadequate in regulating the debt counselling process and that they needed to be amended and supplemented. The credit providers reneging on the industry agreements have fully exploited the *lacunae* in the Act, thereby preventing debt counselling proposals to be heard on the merits by courts.³⁴⁹

With regard to the legislative issues ground moving work was done by the research team. The proposals to add and amend sections of the Act and Regulations are bold and incisive, as well as useful and appropriate. These will be visited again and utilised in the closing chapter on recommendations.

4.5. Responses to the declaratory order

4.5.1 General

The waiting time for the declaratory order was exceptionally long, the hearing being on 2 March 2009 and the judgment delivered only on 21 August 2009. There was mixed reaction to the judgment: positive as regards some of the court procedures,³⁵⁰ negative with respect *inter alia*

³⁴⁹ *Idem* 45.

³⁵⁰ See Logan 1.

to the fact that prayer 15 regarding a clarification on the “steps taken” in terms of section 82(2) was not granted.³⁵¹ However, much activity followed.

4.5.2. Reactions, seminars, scholarly sources and a task team

Stephen Logan was asked by the NCR to talk on the declaratory order a few days after it has been handed down. On the whole he was positive about the judgment, while highlighting some constructive aspects. In terms of the order the debt counsellor must now make an application to the magistrate’s court, if a voluntary agreement cannot be reached with the creditors or if a consumer is found to be over-indebted.³⁵² The judgment gave valuable insight into what magistrates will have to consider and how they will have to apply themselves in future.³⁵³ The Court declared a debt review application as an extraordinary procedure, but given the absence of *sui generis* procedural rules in the NCA, the Magistrates’ Court Rules have to apply.³⁵⁴ The fact that the debt counsellor’s role is clarified to be a neutral functionary reduces the perception that the debt counsellor is the credit provider’s adversary.³⁵⁵ Logan concludes that the declaratory order significantly assists all parties to understand how the law regulates debt counselling applications.³⁵⁶

On request of the NCR M Roestoff and DW de Villiers of the UP Law Clinic drafted a *Communiqué: Declaratory Order* which explained the salient features of the order to all registered debt counsellors.³⁵⁷ It deals firstly with the determination made in terms of section 86(7), then follows the procedure when a matter is brought to a court, jurisdiction, service, the role of a debt counsellor, costs, emoluments attachment orders, credit agreements excluded from debt review applications by section 86(2) and matters enrolled before the declaratory order judgment.³⁵⁸ The last issue can really cause problems, for example where the consumer is acting as applicant or the jurisdiction is founded on where the debt counsellor resides or work as

³⁵¹ Informal remarks by Mr F Haupt of the UP Law Clinic.

³⁵² Logan 1.

³⁵³ *Idem* 2.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ Logan 3.

³⁵⁷ See http://www.ncr.org.za/Communiqué_Declaratory_Order.php (hereafter “*Communiqué*”).

³⁵⁸ *Idem* par 1,2,3,5,6,7,8,9 and 10.

was previously agreed in the work stream.³⁵⁹ Debt counsellors were advised to discuss these dilemmas with the magistrates of the areas where they had filed the proposals before.³⁶⁰

An article was published in the *Potchefstroom Electronic Law Review (PER)* late in 2009 with the title “The debt counselling process – closing the loopholes in the National Credit Act 34 of 2005”,³⁶¹ written by M Roestoff, F Haupt, H Coetzee and M Erasmus. It serves as a summary of the UP Law Clinic’s report³⁶² and is very informative with regard to our research problem.

An indaba was held in October 2009 by the NCR to discuss the way forward concerning debt enforcement after the declarator.³⁶³ A paper “Proposed changes to the MCA” was delivered by C Loots,³⁶⁴ I Meiring talked on “The respondents story on the NCR declaratory order”,³⁶⁵ and S Monty explored the old dilemma, namely “What constitutes ‘steps contemplated into s 129’?”.³⁶⁶ In the last paper the lack of direction not given by the declaratory order is regretted.³⁶⁷

The NCR set up a task team on 7 December 2009 to tackle mounting debt review challenges.³⁶⁸ This team is tasked to provide solutions to the bottlenecks in the debt review process by *inter alia* proposing common standards and procedures which would facilitate the processing and finalisation of applications for debt counselling.³⁶⁹

Since November 2009 Sybrandt Stadler has been running a consumer law update column in *De Rebus*. The first update dealt with how the declaratory order gave structure to the debt review process in the magistrate’s court.³⁷⁰ The other updates up till March 2010 considered the effect of the declaratory order on the debt review process from different angles.³⁷¹

³⁵⁹ *Idem* par 10.

³⁶⁰ *Ibid.*

³⁶¹ 2009 247–360.

³⁶² *Challenges supra.*

³⁶³ Conference on Debt Enforcement Johannesburg 2009-10-21.

³⁶⁴ Unpublished paper delivered at a Conference on Debt Enforcement Johannesburg 2009-10-21.

³⁶⁵ Unpublished paper delivered at a Conference on Debt Enforcement Johannesburg 2009-10-21.

³⁶⁶ Unpublished paper delivered at a Conference on Debt Enforcement Johannesburg 2009-10-21.

³⁶⁷ Monty slide 3.

³⁶⁸ NCR Media Release 2009 (Dec).

³⁶⁹ *Ibid.*

³⁷⁰ 2009 *De Rebus* (Nov) 46-47.

³⁷¹ 2009 *De Rebus* (Des) 45-46; 2010 *De Rebus* (Jan/Feb) 48-49; 2010 *De Rebus* (Mar) 37-38.

The NCR requested the UP Law Clinic to supply with motivation the amendments and additions to the Act and Regulations which the first report previously recommended.³⁷² The document is annexed to the bibliography of this dissertation and is called *Explanatory Memorandum to proposed amendments to the National Credit Act 34 of 2005*.³⁷³ It contains more concise, yet still adequate motivation as compared to the first report.³⁷⁴ The *Judicial Matters Amendment Bill 2010* was published in January 2010,³⁷⁵ but only addresses the issue of jurisdiction in the magistrate's court by directing as follows: if the consumer is ordinarily resident, carries on a business or is employed in the magisterial district of a magistrate's court, irrespective of the monetary value of the over-indebtedness of the consumer, that court will have jurisdiction over the matter. These amendments reflect the ruling of the declaratory order.³⁷⁶

Clauses 78 and 79 of the Bill amend sections 86 and 138 of the NCA, respectively, in order to clarify which magistrate's court has jurisdiction to conduct a debt review procedure referred to in section 86, read with section 87, as regards an application for debt review in terms of section 86(8)(b) or (9) and the confirming of a consent order in terms of section 138. The present NCA does not specify which magistrate's court will have jurisdiction to entertain any of the aforementioned procedures. This omission resulted in an *impasse* where, although applications are made for debt review, magistrates' courts decline to entertain these procedures based on the fact that they do not have jurisdiction. The amendments aim to remedy this omission by conferring jurisdiction on the magistrate's court in whose district the consumer is usually resident, carries on business or is employed. These amendments emanated from a request of the Department of Trade and Industry.³⁷⁷

The Magistrate's Court of Pretoria instructed debt counsellors in its jurisdiction how applications for section 87 orders should be drafted.³⁷⁸ Amongst other things the debt counsellor's registration certificate from the NCR must be included in the annexures and with regard to each credit agreement entered into after 1 June 2007, it must be averred whether credit was extended recklessly or not. If an agreement led to reckless lending, the kind of reckless lending must be defined and motivated and a recommendation in terms of section 83(2) or (3) be made.

³⁷² *Challenges*.

³⁷³ This memorandum was presented to the NCR in Oct 2009.

³⁷⁴ *Challenges* 50-112 and 316-327.

³⁷⁵ At http://www.justice.gov.za/legislation/bills/2010_judmatamendBill.pdf.

³⁷⁶ Declaratory order 314.

³⁷⁷ Memorandum on the objects of the *Judicial Matters Amendment Bill 2010* at http://www.justice.gov.za/legislation/bills/2010_judmatamendBill_memo.pdf.

³⁷⁸ According to Anneke Smit, Head of Debt Counselling, UP Law Clinic Pretoria.

4.5.3. Evaluation

After the declaratory order much debate, proposed applications, suggestions and writing took place, all with the purpose to apply the declaratory order effectively. It seems that some of the directions were well accepted, but others still pose problems.

4.6. Conclusion

There are still some challenges facing the debt review process in South Africa. The responses of the relevant state departments to the declaratory order, failing to make effective amendments to the Act and Regulations, are disappointing. A vital stumble block still remains: the Act and the Regulations need urgent changes or additions.

Chapter 5

Summary, recommendations and conclusion

5.1. Introduction

In this chapter I attempt to summarise the efforts made up till March 2010 to address the gaps and loopholes in the NCA and its Regulations with regard to the debt review process, as well as problems related to its interpretation. In conclusion attention is drawn to the main problems debt review encountered in this respect since the NCA commenced. The remedies already taken or suggested are evaluated in terms of their (possible) success. Where some other challenges are still experienced, certain measures are recommended to address them.

5.2. Problems, solutions and challenges

The most problematic issues that came to the fore due to legislative shortcomings in the Act, are now summarised and discussed with possible options to solve them.

5.2.1. Section 86(2)

A serious problem still exists with regard to section 86(2). If the credit provider had already proceeded to take steps contemplated in terms of section 129 to enforce an agreement, this agreement apparently falls outside the scope of debt review.³⁷⁹ However, the NCA is not clear on what these steps entail.³⁸⁰

The work stream submitted that legal action commences upon the issuing and service of a summons, after the credit provider adhered to all the requirements set out in section 129 and 130. Before the declaratory order Van Loggerenberg,³⁸¹ Borraine and Renke,³⁸² Van Heerden and Otto³⁸³ echoed the above viewpoint and also suggested an amendment to the Act. A

³⁷⁹ S 86(2).

³⁸⁰ Monty slide 20.

³⁸¹ 40-41.

³⁸² Part 2 8-9.

³⁸³ 667-668.

section 129(1)(a) notice delivered to a consumer by a credit provider does not constitute enforcement, as the heading to section 129 explicitly refers to “required procedures *before* debt enforcement”.³⁸⁴

The declaratory order unfortunately failed to give clarity here.³⁸⁵ After this order the question still remains as to what constitutes “*steps taken to enforce the credit agreement in terms of section 129*”,³⁸⁶ for the purpose of excluding certain credit agreements in terms of section 86(2) from debt review. To clarify the uncertainty as to when enforcement for the purposes of section 86(2) commences, I agree with Roestoff’s proposal³⁸⁷ that section 86(2) be amended by substituting the words “section 129” with “section 130”.

5.2.2. An improved Form 16

The present Form 16, as in Schedule 1 to the Regulations, is not satisfactory. It is used as an application form for debt review filled out by the consumer with the help of a debt counsellor. It supplies information about the consumer and his financial affairs, sets out the debt review process and presents a contractual basis on which the process will proceed.

One possible reason why the debt counselling process is perceived to be ineffective, is the fact that debt counsellors do not properly inform consumers about what the debt review process and its consequences entail.³⁸⁸ In order to ensure that consumers are properly informed, it is suggested that a revised Form 16, which deals with the relevant matters more comprehensively, could help to ensure that consumers are properly informed of the immense consequences of debt review.³⁸⁹

The present form, for example, does not explicitly mention that a consumer may not take on further debt while under debt review, that the debt counsellor may withdraw from debt review if the consumer is not co-operating or fail to give honest information, and that the consumer

³⁸⁴ *Idem* 667.

³⁸⁵ Declaratory order 319.

³⁸⁶ Monty slide 21.

³⁸⁷ Debt counselling process 263; see also Van Heerden & Otto 668; *Guide* par 12.16.

³⁸⁸ *Challenges* 60.

³⁸⁹ *Ibid.*

should continue to make payments to all credit providers as instructed by the debt counsellor while under debt review.³⁹⁰

I suggest that the new Form 16 as proposed by the UP Law Clinic³⁹¹ replaces the old Form 16 in Schedule 1 to the Regulations formally by amendment.

5.2.3. The procedure followed to approach the court

Since the Act was silent on procedure, the first draft debt counselling regulations 3 and 4 proposed a less formal “administrative” procedure for obtaining an order in terms of section 86(7)(c)(i) and/or (ii).³⁹² Concept forms were supplied by the draft regulations how to draw up the court documents.³⁹³ Draft regulations 4(9) and 4(10) deal with referrals in terms of section 86(9) to invoke an order contemplated in section 86(7)(c). These draft regulations attempt to address the issue where the Act is silent on the procedure to be employed when a “hearing” takes place.³⁹⁴

The declaratory order did not entertain the more informal procedure, since no Act made provision for it. The application procedure as prescribed by the MCA and its Rules was the only other option available. However, I still submit that a *sui generis* procedure for matters referred in terms of sections 86 and 87 of the NCA should seriously be considered, a process which is less complicated than the one prescribed in Rule 55. The main purpose of the NCA, namely to protect consumers indirectly also against cumbersome and costly procedures, should be of a concern when redesigning the procedure for a referral to court and the hearing itself.³⁹⁵

According to Loots³⁹⁶ the Rules Board is in any event considering changes to the rules of the magistrate’s court. For example: a new sub-rule is devised to indicate which documentation should be included in the application to the court. The question is whether this would also simplify the procedure.

³⁹⁰ *Idem* 59-60.

³⁹¹ *Idem* 103-112.

³⁹² Draft reg (A) 3 and 4.

³⁹³ *Idem* Annexure Forms A-H.

³⁹⁴ In terms of s 87.

³⁹⁵ Debt counselling process par 2.2.5.2.

³⁹⁶ “Proposed changes to the MC Rules” (Unpublished paper delivered at a Conference on Debt Enforcement Johannesburg 2009-10-21).

It seems that there are two possible other options: the first, to provide in the NCA and/or the MCA for different procedures to be applied in the magistrate's court, or to provide in the NCA for these different procedures to be applied in a totally different forum, like the NCT or the Consumer Court. The NCT has already been given the powers to make any order provided for in the NCA, for example consent orders.³⁹⁷ It is possible to widen the scope of the NCT³⁹⁸ to hear opposed proposals and to make restructuring orders. The wording of especially section 86 will have to be amended to at least provide an alternative to the magistrate's court's route. The NCT's manpower facility will also have to be boosted with able commissioners to preside over these matters.

5.2.4. The “proposal” mentioned in sections 86 and 87

The vagueness as regards the term “proposal” and related terms “recommendation”, “referral” and “application” which are used in sections 86 and 87 as if they are synonyms, is somewhat clarified. The format of documents and the procedure to approach a court to obtain orders have received considerable attention. The declaratory order found that the documents should resemble the format of an application in terms of Rule 55 of the MCA, which consist of a notice of motion, (an) affidavit(s) and numerous attachments.³⁹⁹

The second draft debt counselling regulations followed the direction of the declaratory order, but talks of a proposal and not an application. Regulation 3, to mention one example, prescribes the factors that should be incorporated into the proposal to court for (an) order(s) to be made in terms of section 87(1)(b).⁴⁰⁰ It also states that the proposal must inform credit providers that they may oppose the proposal made by the debt counsellor.⁴⁰¹ This is an improvement to Form 1 of Annexure A of the Rules of the MCA which is silent on the reaction of the respondents in a normal application.

In conclusion I am still of the opinion that debt review proposals should not be taken to the magistrate's court, or at least that there should be an option to take them to the NCT or the Consumer Court. In case of the latter option the framework suggested by the first draft debt

³⁹⁷ S 27(a)(1) and 142; on the website of the NCT an application form for a consent order can be downloaded: http://www.thenct.org.za/forms/Form%20T%20I%20138_1_.pdf.

³⁹⁸ S 142.

³⁹⁹ 309-311.

⁴⁰⁰ Draft reg (B) 3(2).

⁴⁰¹ *Idem* 3(3).

counselling regulations can be revived, since the format of the specific documents is extensively described there, as well as the procedure on how to seek consent and contested orders. The format of a hearing in this case,⁴⁰² say in front of a Commissioner of the NCT or the Consumer Court, is much more informal, easier, cheaper and speedier than a proceeding in the magistrate's court. The motto of the NCT is quite appropriate here: quick, accessible and fair. No legal representation would be allowed in such a hearing and the debt counsellor will be able to put his/her point across without the need for too much legal knowledge and procedural expertise. Also the standard forms that can be used to expedite the making of orders are helpful.⁴⁰³

5.2.5. The omission of section 86(7)(c) in sections 86(8) and 87(1)

No provision is made in sections 86(8) and 87(1) of the Act that a debt counsellor's proposal after making a finding 3⁴⁰⁴ be rejected or accepted in court,⁴⁰⁵ as is possible with the other two scenarios or findings.⁴⁰⁶ It seems absurd that a section 86(7)(c) finding cannot lead to either one or both of the possible section 86(7)(c) orders in court, only because section 87 is silent on it. These are either deliberate omissions or bad legislative drafting of the Act.

However this *lacuna* was cured provisionally by the declaratory order.⁴⁰⁷ It should now be enacted in the Act by appending sections 86(8) and 87(1) to include references to section 86(7)(c) to ensure full clarity and remove any uncertainty.

5.2.6. The non-provision for consent orders in sections 86(7)(a) and 86(7)(c)

If a consumer was found to be not over-indebted in terms of section 86(7)(a), the Act is not clear if he may file a consent order into court when the parties agreed to a payment plan. The same holds for a consumer who is found to be over-indebted in terms of section 86(7)(c). No mention is made of a consent order in this case. A consumer would rather opt for a consent order than a court contested order, since the former is much faster and less expensive. But for some reason the Act does not spell it out.

⁴⁰² Draft reg (A) 4(10).

⁴⁰³ *Idem* Annexure Forms A-H.

⁴⁰⁴ S 86(7)(c). See par 2.3. *supra*.

⁴⁰⁵ S 87(1)(a).

⁴⁰⁶ That is following ss 86(8)(b) and 86(9).

⁴⁰⁷ 304.

It is a pity that the declaratory order has not been more directive about a consent order after a section 86(7)(c) finding.⁴⁰⁸ In the light of the spirit of the NCA all parties should participate in good faith in the process of debt review and negotiations pertaining to debt rearrangement.⁴⁰⁹ Therefore it is submitted that credit providers' responses to debt restructuring proposals should be requested in an effort to reach a settlement. It seems that on a proper interpretation of subsection 86(7)(c) an effort to negotiate with the credit providers is not even suggested by the Act. If a proposal is eventually accepted by the credit providers and a payment plan has been set up, a consent order could then be obtained. This cannot be done without negotiations between the parties.

The NCA, however, does not specifically provide for obtaining a consent order in such a situation. Section 86(8)(a) only refers to the case where the debt counsellor makes a recommendation in terms of section 86(7)(b), in other words, where the debt counsellor finds that the consumer is not over indebted, but nevertheless experiences financial problems. In my opinion the option of a consent order in terms of section 86(7)(c) and also section 86(7)(a) should overtly be mentioned in the Act and stressed much more prominently in practice to clarify any uncertainty in this regard. These can also be filed as consent orders in terms of section 138.⁴¹⁰ Consent orders are surely preferred to contested orders which involve a court hearing, regardless of what finding is made regarding the level of over-indebtedness.⁴¹¹

5.2.7. The non-regulation of PDA's

No mention is made in the NCA and the Regulations of a payment distribution agency (hereafter a "PDA"). After 1 June 2007 it soon became practice in debt review that a debit order was signed against the consumer's account to make the aggregate of payments in favour of a PDA.⁴¹² A PDA is a private entity mandated by the NCR to facilitate payments to creditors included in the consent or court order. It seems the NCR started to register PDA's out of its own accord as early as in 2008 and to recommend the approved PDA's on its website.⁴¹³

⁴⁰⁸ Declaratory order 305.

⁴⁰⁹ See s 86(5)(b); Debt counselling process par 2.2.5.

⁴¹⁰ S 86(8)(a).

⁴¹¹ See s 86(7) for the three possibilities.

⁴¹² *Principles* 16-17.

⁴¹³ See par 3.2.3. *supra*.

It can create serious problems if a debt counsellor also performs this function, just as administrators previously had been doing. This is without a doubt a serious omission in the Act, the fact that PDA's are not legally regulated yet. I agree here with the recommendations of the UP Law Report that the office of a PDA be instituted formally by the Act and also be properly regulated by an additional regulation 44A. A reference to the chosen PDA, the monthly amount to be paid over by the consumer and the method of payment should be part and parcel of the draft order that goes to court.

5.2.8. The non-provision for the termination of a debt review by a debt counsellor and the consumer

It should also be possible for the debt counsellor to cancel or the consumer to withdraw from the debt review under certain circumstances.⁴¹⁴ The Act and the Regulations are not clear on when and how this can be done. Although quite expansive, I agree with the UP Law Clinic's addition of a new section 86A to provide for a controlled withdrawal from debt review by the consumer or the debt counsellor.⁴¹⁵

5.2.9. The qualifications and training of debt counsellors

One of the reasons indicated for the ineffectiveness of debt counselling has been the shortage of competent, experienced and knowledgeable debt counsellors.⁴¹⁶ It has been asked whether a review of the requirements pertaining to education, experience and competence of debt counsellors has not become necessary.⁴¹⁷

The declaratory order puts an enormous responsibility on the debt counsellor by promoting him/her to a *pro forma* applicant, seemingly an independent neutral officer of the court, and a specialist with regard to the financial dilemma of the consumer.⁴¹⁸ Not only should he/she be a master of compilation, communication and computation, he/she should also be an able drafter of legal documents and a fine exponent of trial advocacy. He/she should be able to rebut any grandiose legal objections in court and display some fancy footwork him/herself to keep the application on track. I have serious doubts whether most debt counsellors would be able to cope

⁴¹⁴ *Idem* 18-20.

⁴¹⁵ *Challenges* 326-327.

⁴¹⁶ *Idem* 307.

⁴¹⁷ Debt counselling process 245.

⁴¹⁸ *Challenges* 310-311.

with these extreme demands which are now made on the profession. In my opinion the debt review process has become too complex.

Possible amendments to at least regulation 10 are indicated to upgrade the acumen of debt counsellors. It seems that an entry degree in either law or economic and business management sciences is an advised prerequisite for a debt counsellor to hold.⁴¹⁹ The need for retraining and upgrading the skills of debt counsellors while in office is also paramount. This is at present continuously addressed, *inter alia* by the NCR, DCASA and Octogen.⁴²⁰

5.3. Conclusion

This dissertation investigated the loopholes and shortcomings in the National Credit Act and its Regulations with specific regard to the debt review process. The main problems in practice were indicated and analysed, the measures taken by the industry or suggested by scholars to solve these problems were evaluated, and in the end some other or new measures were recommended. Somewhat oversimplified, it can be said that most of the measures taken to solve the problems in debt review moved in the wrong direction, that is away from a simple, easy, quick, cheap and consumer-friendly procedure. At the moment the debt review process is very complex, extended and even consumer-hostile.

Effective implementation of the suggestions and recommendations made by this dissertation would hopefully improve the practice of debt review in the Republic of South Africa, although, realistically seen, there will always remain challenges in this regard.

⁴¹⁹ Debt counselling process 288-289.

⁴²⁰ A prominent debt counselling agency mostly active in Gauteng.

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KEY TERMS

National Consumer Tribunal

National Credit Regulator

National Credit Act 34 of 2005

Magistrates' Courts Act 32 of 1944

Magistrate's Court

Declaratory order

Judicial discretion

Jurisdiction

Service

Emoluments attachment order

Debt review

Debt counsellor

Consumer

Credit provider

Application procedure

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