



South African consumers in debt

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Over-indebtedness amongst South African consumers remains a very real problem. Section 79(1) of the National Credit Act (NCA) defines over-indebtedness as follows:

“A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer’s-

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

The extent of over-indebtedness amongst South African consumers is apparent from recent statistics released by the National Credit Regulator (NCR) in the Credit Bureau Monitor of June 2009. According to these statistics, there were 17,9 million credit active consumers as at June 2009. The percentage of consumers in good standing was 55.9%, decreases of 1.7% when compared with the previous quarter and 4.5 % when compared with the quarter ending in June 2008. The number of consumers with impaired records has continued to increase, reaching 7.85 million. This implies a deterioration of the credit records of 390 000 consumers when compared to the last quarter and 1.06 million year on year, thus reflecting a further increase in the level of debt stress. The NCR points out that since June 2007, there has been an upward trend regarding consumers with impaired credit records.

These figures are all the more disturbing when taking into consideration that a consumer’s credit record is only classified as impaired if any account or accounts are three or more months

in arrears, there is an adverse listing or a court judgment. What this means is that the consumers who are not able to meet their obligations timeously and are one or two months in arrears (thus over-indebted in terms of the National Credit Act) are still reflected as being in good standing. Accordingly, the percentage of over-indebted consumers is then 53.2% of all credit active consumers. This is further exacerbated by the fact that many smaller credit providers do not subscribe to credit bureaus and consequently many consumers who do not meet their obligations are never listed.

The UP Law Clinic Research Report

Debt counseling, also known as debt review or debt restructuring, was introduced by the National Credit Act as an additional debt relief measure (alongside voluntary sequestration and administration) to assist over-indebted consumers.

In brief this measure provides for over-indebted consumers to approach a registered debt counselor to be declared over-indebted and eventually to have their debt restructured in terms of a court order. Statistics provided by the NCR revealed that by December 2008 only 1 400 of 42 000 debt counseling applications had proceeded through our courts. This clearly indicates that debt counseling is not achieving its objective. Consequently, the NCR instructed the Law Clinic of the University of Pretoria “to conduct an assessment of the reasons for debt restructuring not being achieved and applications not being finalised by Magistrates’ Courts and to identify the parties responsible for the delay or preventing the finalisation of cases and the approach followed”. Research carried out during the first quarter of 2009 resulted in a comprehensive report of 350 pages report, which was submitted to the NCR in April and released into the public domain in September 2009. (The full report can be accessed at ncr.org.za).

The research team, Prof Melanie Roestoff, Department





of Mercantile Law, Mr Franciscus Haupt, Director of the Law Clinic and Ms Mareesa Erasmus, debt counselor and attorney, identified shortcomings in the Act, suggesting a number of amendments to the Act and the regulations promulgated in terms of the Act.

The proposed amendments to the Act and Regulations related to the following issues:

- The requirements concerning the education, experience and competence of debt counselors.
- The powers of High Court and Magistrate's Court in respect of debt reviews.
- Debt counselor fees.
- The regulation of payment distribution agencies and their fees.
- The procedure when debt review matters are referred to Court.
- The jurisdiction of the Magistrate's Court.
- The power of the Magistrate's Court to grant a discharge of any part of a consumer's obligations.
- Withdrawal by the consumer or debt counselor from the process.
- Uncertainties pertaining to the notification of debt review applications and allowing notification by fax or email.
- The power of the Magistrate's Court to relieve the consumer of all disabilities resulting from debt-rearrangement once the consumer has paid all arrear installments.

In addition to the above, a number of new or revised forms and amendments of a technical nature are also suggested.

Case Studies

A substantial part of the report shows how credit providers and their legal representatives deliberately obstruct the process, exploiting lacunae in the legislation and in the process renege on industry agreements. This is primarily done by way of case studies, quoting from affidavits filed by credit providers in court. Negligent mistakes made by credit providers in cases where their systems and personnel were not able to handle the number of applications they received, thus further frustrating the process, are highlighted.

The report also refers to debt counselors that renege on agreements, filing debt restructuring proposals that make no sense and do not keep to time limits. Evidence is also provided of the consequence of the use of non-standardised software by debt counselors, as this resulted in huge differences in debt restructuring proposals based on the same set of facts.

The findings from two qualitative and quantitative surveys also form part of the report. In the first sample, 300 applications for debt counseling are analysed (3288 credit agreements being reviewed) against the backdrop of statutory requirements and the time limits imposed on debt counselors and credit providers. The findings show that in general neither credit providers nor debt counselors seem able to adhere to these time limits, thus further impeding the good flow of the process.

In the second survey the views of 64 randomly selected debt counselors to non-scheduled, structured telephonic interviews are considered. The findings, with some exceptions, show a general lack of trust in the bona fides of credit providers and a negative perception of the level of service delivery by credit providers. The Main Findings can be summarised as follows:

- The Act and Regulations are inadequate.
- Credit providers renege on industry agreements
- Debt counsellors to a lesser degree also failed to adhere to the agreements.
- Generally all parties failed to keep to time limits.
- There is a lack of trust in the bona fides of credit providers.
- There is a lack of skills and knowledge amongst debt counselors and credit provider staff.
- The use of different software packages leads to non-standardised proposals.
- There were serious problems with the functioning of the Payment Distribution Agencies.

The main recommendations of the report relate to:

- Legislative and regulatory amendments.
- Improved training of debt counselors and credit provider staff.
- Improved communication between debt counselors and credit providers.
- The need to reduce future industry agreements to writing and have CEOs of relevant credit providers sign these agreements.
- Standardised certificates of balance.
- Standardised formulas and the format of proposals.
- The establishment of an ombuds office for debt review.
- The provision of a list of contact persons by credit providers to improve communication and problem solving. ■