

**EVALUATION OF THE EFFECTIVENESS OF DEBT REVIEW IN TERMS OF THE
NATIONAL CREDIT ACT 34 OF 2005**

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Summary

The National Credit Act (hereinafter the Act) introduced debt review to the Republic of South Africa in 2007. Debt review was introduced to provide debt relief to over-indebted consumers. The legislature was not able to foresee and address several implementation obstacles and accordingly courts are forced to assist in the interpretation of the Act. Courts have created some legal certainty, but there are different opinions on the correctness of these interpretational principles.

This study will consider current precedents and whether the current precedents are in accordance with the intention of the legislature. Section 2 of the Act stipulates that Act should be interpreted to give effect to the purposes of the Act. The purpose of the Act is contained in section 3. One of the purposes of the Act is to promote equality between the rights of consumers and credit providers in credit agreements. This dissertation illustrates that the Act aims to achieve this equality of rights in the debt review process by the inclusion of countervailing rights in part D of chapter 4 of the Act.

The legislature considered recommendations made by certain role players in the debt review process. Proposed amendments were published on 29 May 2013 in the Government Gazette for public consideration. These proposed amendments were considered in the scope of this study.

The dissertation concludes that the proposed amendments need to be supplemented in order to ensure that debt review becomes and remains an effective debt relief measure for over-indebted consumers, without prejudice to the rights of credit providers.

CHAPTER 1 INTRODUCTION

1.1. Background

With the National Credit Act¹ fully in force, there is a general feeling that the legislator not only identified one of the roots of the Republic of South Africa's economic crisis, but that the legislature is also willing to implementing an Act to assist consumers with protection in the credit market.² This Act has a codified purpose³ which, among others, is to promote granting of fair credit to all people in South Africa⁴ and to allow consumers to utilise the protection provided by the Act when they find themselves in financial distress due to reckless credit⁵ and/or over-indebtedness.⁶

The Act codified consumer protection as far as it relates to credit agreements,⁷ in an attempt to level the playing field between consumers and credit providers. The Act aims to regulate the relationship⁸ between consumers and credit providers with regard to credit agreements in a single Act and subsequently replace the Credit Agreements Act⁹ and the Usury Act.¹⁰

The Act further introduces a new legal concept to the Republic of South Africa, namely the debt review process,¹¹ which is aimed at assisting over-indebted consumers. Practical problems have arisen from introducing this legal concept which has been addressed on various occasions and in a variety of forums. However, the solutions which are being implemented are not without criticism and subsequently the parties involved need to consider the levity of the debt review process.

¹ From here on all references to the National Credit Act, 34 of 2005 will read as "the Act".

² Kelly-Louw (2012) par 12.1.

³ S 3.

⁴ *Ibid.*

⁵ *Ex Parte Ford And Two Similar Cases* 2009 (3) SA 379 (WCC) Judge Binns-Ward AJ ruled that consumers should utilise "mechanism of the NCA instead of the blunter instrument afforded in terms of the voluntary-surrender remedy under the Insolvency Act."

⁶ See also M Roestoff and H Coetzee 'Consumer Debt Relief in South Africa; Lessons from America and England; and Suggestions for the Way Forward' (2012) 24 SA Merc LJ p1.

⁷ S 8 of the Act, there are several types of credit agreements which will not be addresses in this study. In sort, a credit agreement is when there is a deferral of payment in respect of goods and services rendered and costs and/or interest are levied.

⁸ S 3.

⁹ Credit Agreements Act, 75 of 1980.

¹⁰ Usury Act, 34 of 1964.

¹¹ S 86.

1.2. Brief overview of the debt review process

Debt review is not a new concept globally, but was only introduced to the Republic of South Africa by the Act.¹² Debt review is not a replacement for the longstanding debt relief procedures available to debtors,¹³ but it seems to be a very popular¹⁴ and cost-effective alternative.

The debt review process is regulated by section 86 and regulations 24, 25 and 26 of the Act,¹⁵ which should be considered with sections 85, 87,¹⁶ 88, 89 and sections 129 and 130.¹⁷

In a nutshell, debt review is a procedure in terms whereof a consumer, who entered into credit agreement(s),¹⁸ may approach a debt counsellor in a prescribed manner, to act as an agent on behalf of the consumer and to renegotiate certain factors of an already existing credit agreement. The factors that may be renegotiated are the monthly instalments and the repayment terms of the agreement. It should be noted that the general principles of the law of contract are still applicable and the Act only allows the debt counsellor to renegotiate the above factors.¹⁹ All the other terms of the agreement will remain unchanged and the consumer's contractual rights and obligations will remain unchanged. If any of the other terms of the agreement are to be amended, for whatever reason, that amendment need to be done in terms of the credit agreement or common law.²⁰ A debt counsellor is an important role player as the Act provides the debt counsellor with certain powers.²¹ However, a debt counsellor is not the presiding officer in a debt review application. The legislature intended for the debt review process to be governed by the legal profession by indicating that the debt counsellor should refer the matter to the magistrate's court.²² By doing so, the legislature ensured that the debt review process is governed by the

¹² This part of the Act only came into effect in 1 June 2007.

¹³ For example Administration (in terms of rule 74 of the Magistrate Court Act 32 of 1944) and sequestration or voluntary surrender of an estate (in terms of the Insolvency Act 24 of 1936).

¹⁴ *Ex Parte Ford And Two Similar Cases* 2009 (3) SA 379 (WCC) applications for voluntary surrender of estates were refused by the court on the basis that the Act was not considered prior to the bringing of the applications.

¹⁵ The regulations are very detailed and comprises of the different stages of the debt review process.

¹⁶ S 85, 86, 87 and reg 24 will be discussed in chap 2 below.

¹⁷ S 129 and 130 will be discussed in chap 3 below.

¹⁸ S 8.

¹⁹ *SA Taxi securitisation (Pty) Ltd v Lennard* 2012 (2) SA 456 (ECG).

²⁰ Scholtz et al (2008) par 11.3.3.2. See also *SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A) with regards to non-waiver clauses.

²¹ S 86.

²² S 86(7)(c).

magistrate's court rules and procedures.²³ Therefore, the debt review process becomes part of the public domain and is required to be transparent. This is consistent with the legislature's intention if consideration is given to section 3²⁴ of the Act.²⁵

Furthermore, by forcing a debt review matter to go to the magistrate's court, the constitutional principle of *audi alteram partem*²⁶ will apply²⁷, which will allow the consumer and relevant credit providers to have a fair opportunity to address the presiding officer with regard to their specific concerns in such an application.

After applying for debt review, a debt counsellor considers all the consumer's credit agreements and provide a proposal to the relevant credit providers containing a payment plan. This proposal should be referred to the magistrate's court for a court order to be made.²⁸ The proposal indicates how the consumer's monthly debt obligation is collected and accordingly distributed between the respective credit providers. The Act does not refer to payment distribution agencies, but the National Credit Regulator allows registered payment distribution agencies²⁹ to attend to the collection and distribution on behalf of the consumer.³⁰ A debt counsellor is prohibited to act as a payment distribution agent.³¹ The Act further provides for a clearance certificate to be issued by a debt counsellor if the consumer has satisfied all debt obligations in terms of all credit agreements.³² Once a clearance certificate is issued, the consumer is no longer under debt review.

The purpose of the Act is to protect natural persons who act as consumers.³³ Debt review is not applicable³⁴ if a consumer is a juristic person in terms of the Act.³⁵ This

²³ *The National Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP).

²⁴ S 3 contains the purpose of the Act.

²⁵ Chap 2 and chap 3.

²⁶ Latin meaning: "to hear/listen to the other side".

²⁷ S 34 of the Constitution of the Republic of South Africa 1996.

²⁸ S 86(7) and reg 24.

²⁹ The National Credit Regulator indicates which payment distribution agencies are duly registered on their website www.ncr.org.za.

³⁰ See Scholtz et al (2008) par 5.2.5.

³¹ See Scholtz et al (2008) par 5.2.5 'it is commonly stipulated in the conditions of registration as a debt counsellor that all payments from consumers in respect of debt obligations and / or debt counselling fees must be received and distributed to the respective parties by a payment distribution agency approved by the National Credit Regulator'. See also *National Credit Regulator v Nsibandé* (NCT/3915/2012/57 (1)(P) NCA).

³² S 71. See chap 2 and 3.

³³ S 2, s 3, s 4 and s 6. See also Scholtz (2008) par 12.4.10.

³⁴ S 6. See also Scholtz et al (2008) par 11.2.

³⁵ S 1 of the Act provides the definitions relevant to the Act. A juristic person, for purposes of the Act is defined as: 'juristic person includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if –

differentiation between a natural and a juristic person as consumers is not considered to be unconstitutional.³⁶

1.3. Aim of this study

The aim of this study is not to discuss the different remedies available to debtors in financial distress, nor is this study comparing debt review to other debt relief remedies. This study will not address reckless credit in terms of the Act, or the implementation of the enforcement of reckless credit by the courts. This study will further not address the involvement of payment distribution agencies in the debt review process.

In this study, the focus will be on the practicality of the debt review process, with exclusion of the consent orders in terms of section 138, and how the courts have interpreted the legislature's intention. This study will discuss several steps in the debt review process and how the Act is applied in practise. Finally, the study will investigate whether the current precedents are in accordance with the purpose of the Act and if the debt review process is an effective debt relief measure.

1.4. Structure of this study

This study consists of 5 chapters. Chapter 2 discusses the role players in the debt review process and relevant sections of the Act. In chapter 3 current case law and practise directives will be discussed and in chapter 4 suggestions will be made in order to alleviate the uncertainty governing the debt review process with consideration of the proposed amendments.³⁷ Chapter 5 will conclude the founding of the study and address the long levity of the debt review process.

(a) *there are three or more trustees or the*
(b) *trustee itself is a juristic person, but does not include a stokvel'.*

³⁶ *Standard Bank of South Africa Ltd v HunkyDory Investments 194 (PTY) Ltd and another (No1) 2010*
(1) SA 627 (C).

³⁷ Government Gazette 36505 published 29 May 2013.

1.5. General foundation for this study

In 2007 the debt review process was relatively unknown and the uniqueness of this concept in the South African legal system led to some confusion with respect to the enforcement of the Act, with specific reference to the interplay with the debt review process. In *The National Regulator v Nedbank Ltd and Others*³⁸ the National Credit Regulator³⁹ approached the court for a declarator to render the debt review process more efficient. This order assisted Magistrates, attorneys, debt counsellors and credit providers to some extent by streamlining the process.⁴⁰ Since the debt review process was introduced the legal certainty has grown as a result of case law.

This study raises several concerns regarding the debt review process, from the application for debt review, to granting of a debt review court order. These concerns illustrate the practical problems legal practitioners, debt counsellors, credit providers and consumers need to deal with every day. This dissertation further strives to provide suitable solutions to some of the practical problems experienced in practice.

³⁸ *The National Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP).

³⁹ The National Credit Regulator is the governing body established in part A of chap 2 of the Act, more specifically s 12.

⁴⁰ The declaratory *order inter alia* confirmed the application for debt review is to be brought in terms of rule 55 of the magistrate court rules, which made the manner in which an application for debt review is brought nationally uniform.

CHAPTER 2

DEBT REVIEW PROCESS

2.1. Introduction

It is imperative to recognise that the debt review process is mainly governed by the National Credit Act.¹ The Act prescribes the steps to be taken by consumers and debt counsellors as well as the credit providers' response thereto.² By doing this the legislature intended to minimise the discretion that the relevant parties might have in the debt review process. Unfortunately, the legislature did not anticipate the interpretational obstacles which the courts will have to deal with in order to create legal certainty.

The aim of this chapter is to provide an overview of the Act with regard to the debt review process, more specifically the debt review process driven by a debt counsellor. Some sections and the regulations of the Act have already been interpreted by the courts, whereas others are deemed to have been interpreted by practise. These interpretations will be explained where reference is made to the relevant sections.

2.2. Role players in the debt review process

The Act is a comprehensive piece of legislation governing the relation between consumers and credit agreements. The most prominent role players will be discussed below.

2.2.1 Debt counsellor

As previously stated, debt review is a new legal concept which was introduced to the South African legal system and therefore a debt counsellor is also a new concept to South African law. A debt counsellor acts as an intermediary between consumers and credit providers in order to fulfil the purpose of the debt review procedure. A debt

¹ From here on all references to the National Credit Act, 34 of 2005 will read as "the Act".

² S 86 and reg 24.

counsellor is a natural person who is registered by the National Credit Regulator as a debt counsellor.³ Regulation 10 of the Act stipulates what requirements a debt counsellor should meet⁴ in order to be considered for registration as a debt counsellor, which registration needs to be renewed on an annual basis.⁵

Debt counsellors are entitled to a fee for their services, payable by the consumer.⁶ Credit providers may not provide a debt counsellor with a fee in respect of an application for debt review.⁷ The Debt Counselling Association of South Africa (DCASA) made suggestions for fees in respect of services rendered by debt counsellors, and these suggestions were approved by the National Credit Regulator.⁸ A debt counsellor may not collect and/or distribute monies on behalf of a consumer.⁹ The National Credit Regulator regulates (and disciplines) debt counsellors' in accordance with the Act.¹⁰

There is a statutory duty on a debt counsellor to refer a debt review matter to the magistrate's court.¹¹ A debt counsellor further has a duty to assist the court by providing evidence with regards to the proposal or any other queries a court may have.¹²

2.2.2 Consumer

It is required for a consumer to act in good faith during the debt review process by complying with the debt counsellor's requests and participating in negotiations.¹³ In a

³ S 44(3), s 46 and reg 10.

⁴ Reg 10 determines that a natural person should have a grade 12 certificate a working experience of minimum 2 years in certain fields (not exclusively in the legal field), and needed to complete a prescribed course.

⁵ Sch 2 of the regulations determines that a yearly fee of R100.00 needs to be paid to the National Credit Regulator in respect of annual renewal.

⁶ S 86(3)(a). See also Scholtz et al (2008) par 11.3.3.2(e).

⁷ S 86(3)(b).

⁸ The fee guidelines came into effect on 1 August 2011. See www.ncr.org.za/pdfs/Guidelines/2011/Debt_Counselling_Fee_Guidelines.pdf.

⁹ See also Scholtz et al (2008) par 5.2.5 'it is commonly stipulated in the conditions of registration as a debt counsellor that all payments from consumers in respect of debt obligations and / or debt counselling fees must be received and distributed to the respective parties by a payment distribution agency approved by the National Credit Regulator'. See also *National Credit Regulator v Nsibande* (NCT/3915/2012/57 (1)(P) NCA).

¹⁰ Debt counsellor needs to submit certain reports to the National Credit Regulator in terms of reg 69.

¹¹ In *National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP) the court indicated that if a debt counsellor act improperly or in bad faith, the court hearing the debt review matter may make an adverse cost order against the debt counsellor.

¹² See *SA Taxi Securitisation v Matlala* 6359/10 unreported case nr 6359/2010 29 July 2010 (SGJ).

¹³ S 86(5).

credit agreement, the consumer is defined as follows, based on the definitions of the Act:

- (a) the party to whom goods or services are sold under a discount transaction incidental credit agreement or instalment agreement;*
- (b) the party to whom money is paid, or credit granted, under a pawn transaction;*
- (c) the party to whom credit is granted under a credit facility;*
- (d) the mortgagor under a mortgage agreement;*
- (e) the borrower under a secured loan;*
- (f) the lessee under a lease;*
- (g) the guarantor under a credit guarantee or;*
- (h) the party to whom or at whose direction money is advanced or credit granted under any other credit agreement;'*

The consumer receives credit in terms of the credit agreements defined in the Act.¹⁴ A consumer is not only a natural person, as juristic persons may also enter into credit agreements. The application of the Act is limited with regard to juristic persons.¹⁵ Debt review is not available to juristic persons.¹⁶

A consumer may not apply for further credit, other than a consolidation agreement, after successfully applying for debt review.¹⁷ If a consumer enters into a credit agreement after being placed under debt review, such agreement may not be included in future debt review proceedings.¹⁸

2.2.3 Credit providers

Credit providers may be natural or juristic persons. A credit provider provides credit¹⁹ to a consumer in terms of a credit agreement.²⁰ If a credit provider already

¹⁴ S 8.

¹⁵ S 6.

¹⁶ *Standard Bank of South Africa v Hunkydory Investments 194 (Pty) Ltd and another (No1) 2010 (1) SA 627 (C) and Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another 2009 (3) SA 384 (T).*

¹⁷ S 88(1).

¹⁸ S 88(5).

¹⁹ S 1 contains the definitions.

²⁰ S 1 and s 8 deals with what is to be considered as a credit agreement.

proceeded to institute legal action by complying with sections 129 and 130 of the Act, such agreement may not be included in debt review process.²¹

It is required that credit providers act in good faith during the debt review process by complying with the debt counsellor's requests and participating in negotiations.²² Credit providers should assist debt counsellors by providing debt counsellors with the necessary information required to complete a proposal.²³ If a credit provider grants credit to a consumer, whose credit record indicates that that consumer has applied for debt review, such credit may be considered to be reckless credit.²⁴

2.2.4 Credit bureaux

Credit bureaux²⁵ are entities with consumer's credit information and are required to be registered in terms of section 43 of the Act which means that the National Credit Regulator will regulate their compliance with the Act. Section 70(2) indicates that a credit bureau must verify and accept the filling of a consumer's credit information²⁶ and make a report available to a third party requesting such a report.²⁷ There are several credit bureaux in the Republic of South Africa²⁸ which have the unfortunate outcome that the information available to the public may vary depending on the credit bureau contacted or the type of search and/or report requested. The information available on a credit bureau's report is further not always up to date.

During the debt review process a debt counsellor may rely on the credit bureau report to ascertain certain information with regard to credit agreements. Once the debt counsellor informed the credit bureaux that the consumer has successfully applied for debt review, the status of that consumer will be amended to reflect same.²⁹ If a debt counsellor issues a clearance certificate, the credit bureau must

²¹ S 86(2).

²² S 86(5).

²³ If the debt counsellor request information to investigate possible reckless credit the credit provider should not ignore or deny such request.

²⁴ S 88 (4).

²⁵ S 3(f) indicates that one of the purposes of the Act is "*improving consumer credit information and reporting and regulation of credit bureaux*".

²⁶ S 70(1) indicates what information is deemed to form part of a "*consumer's credit information*".

²⁷ S 70(2)(g).

²⁸ The most common is Transunion, Experian, XDS and Windeed.

²⁹ S 86(4)(b) read with s 70(2).

expunge from its records reference to the fact that the consumer was under debt review.³⁰

2.2.5 National Credit Regulator

The National Credit Regulator is the governing body³¹ responsible for, among others, regulating all the relevant role players in the Act. The National Credit Regulator is actively participating in the clarification of the legislature's intention and therefore fulfilling its role as a governing body. A declarator order³² was sought by the National Credit Regulator and since then the National Credit Regulator has joined other cases³³ in an attempt to obtain legal certainty.

2.2.6 Magistrate's courts

Magistrate's courts remain creatures of statutes and therefore the magistrate's courts' powers in relation to the debt review process are limited to rule 55 of the magistrate's court rules³⁴ and section 83, 85, 86, 87, 88 of the Act. Rule 55 of the magistrate's court rules is the rule governing the application procedure in the magistrate's court.³⁵ It is submitted that applying rule 55³⁶ is not sufficient due to the fact that there are several circumstances unique to the debt review process not addressed in rule 55. Other shortcomings are currently addressed by the magistrate hearing the application.

There is no monetary jurisdiction on a debt review application³⁷ and jurisdiction is determined by considering which magistrate court has jurisdiction in respect of the consumer.³⁸

³⁰ S 71(5).

³¹ S 13.

³² *National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP).

³³ See also *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC).

³⁴ *National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP).

³⁵ Debt Counseling Regulations 2012 published by the Department of Trade and Industry in the Government Gazette on 10 May 2012.

³⁶ It is accepted in practise to utilise all magistrate court rules applicable/or referring to rule 55.

³⁷ S 86.

³⁸ *Mclaren v Badenhorst* 2011(1) SA 214 (ECG).

2.2.7 Legal practitioners

Debt counsellors have a duty in terms of section 86(7) to refer a debt review matter to the magistrate's court. The Act provides debt counsellors with the *locus standi*³⁹ to bring⁴⁰ an application for debt review,⁴¹ but it is not advisable for a debt counsellor, who is not an admitted attorney⁴² to appear in an application for debt review. Debt counsellors do not have the necessary legal knowledge pertaining to magistrate's court practice. Attorneys are acquainted with what evidence should be provided, how to supplement certain shortcomings and/or address a magistrate's request. It is submitted that debt counsellors simply do not have the basic court etiquette.

Now that all the role players have been identified, the focus will turn to the debt review process. The debt review process will be explained by referring to the subsections of section 86 of the Act.

2.3. Debt review process

Section 86 forms part of chapter 4, part D⁴³ of the Act, which deals with over-indebtedness and reckless credit.⁴⁴ This study will investigate several sections under part D, chapter 4 of the Act for purposes of a holistic view of the intention of the legislature, as no section of an Act should be read in isolation.⁴⁵ Section 86 is the section which regulates the debt review process and must be read and applied with regulations 24, 25 and 26. Regulation 24 is very detailed and will not be addressed in its entirety.⁴⁶

³⁹ Latin meaning "the right of a party to appear and be heard before a court".

⁴⁰ Shotlz (2008) par 14.10.

⁴¹ S 86(7).

⁴² Admitted attorney per the Attorneys Act 53 of 1979.

⁴³ S 78 to s 88.

⁴⁴ Reckless credit will not be addressed in this study.

⁴⁵ *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 SCA (12) "The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning".

⁴⁶ For the purposes of completeness, reg 24, 25, 26 and 27 are attached to this study as sch 1.

2.3.1 Application for Debt Review

Section 86(1) indicates that a consumer may apply to a debt counsellor in the prescribed manner and form⁴⁷ to be declared over-indebted. Regulation 24 prescribes that an application form, namely a form 16, should be completed.⁴⁸ A form 16 needs to contain certain information of the consumer, including personal details, income and monthly expenses.⁴⁹ The completion of the form 16 is deemed to be the cause of action with regards to the debt review court application⁵⁰ and it is submitted that it must form part of the court application.

Section 86(2) contains an exclusion, which is one of the controversial matters in the Act. If a consumer is in default under a credit agreement and a credit provider proceed to institute legal action⁵¹ by complying with section 130⁵² and delivering a notice in terms of section 129⁵³ *inter alia* advising the consumer to approach a debt counsellor, that agreement, may not be included in the debt review process.⁵⁴

Section 86(2) enables a credit provider bringing the protection and assistance in terms of section 86 to the consumer's attention, to be excluded from the debt review process.⁵⁵ Section 2(1) of the Act stipulates that the Act should be interpreted to give effect to the purposes of the Act contained in section 3. Section 3 read together with the long title of the Act promotes fairness and equality. It is submitted that section 86(2) fails to promote fairness and equality.

Section 86(3) allows a debt counsellor to charge a fee for the service which will be provided to the consumer and not a credit provider.⁵⁶ The National Credit Regulator

⁴⁷ All the forms to be completed in the debt review process are prescribed in chap 10, sch 1 of the reg.

⁴⁸ *BMW Financial Services (SA) (PTY) Ltd v Donkin* 2009 (6) SA 63 (KZD) p72–75 Judge Wallis discusses the implication of debt review and the purpose of completing a form 16. In par 16 Judge Wallis confirms “*Ordinarily the completion of form 16 serves that purpose (commencement of debt review). Where form 16 is not completed reg 24 requires a debt counsellor to be furnished with all the information that would be provided in if the statutory form had been completed by the consumer.*”

⁴⁹ See also Kelly-Louw (2012) par 12.3.4.1.

⁵⁰ It has not been considered if prescription will apply if a matter is not placed before a magistrate court within three years.

⁵¹ S 129 and s 130 forms part of part C of the Act with the heading “*debt enforcement by repossession or judgment*”.

⁵² S 130 deals with what is required procedures before debt enforcement .

⁵³ S 129 deals with debt procedures in a court.

⁵⁴ *Nedbank Ltd and Others v National Credit Regulator* 2011 (3) SA 581.

⁵⁵ Scholtz (2008) para 11.3.3.2(d) and 12.4.11.

⁵⁶ This fee is a professional fee for a debt counsellor for considering the application for debt review.

approved fee guidelines proposed by The Debt Counselling Association of South Africa (DCASA) which may be amended from time to time.⁵⁷

Section 86(4), read together with regulation 24, prescribes how the success of an application for debt review is brought to the attention of the relevant parties. The debt counsellor needs to inform the consumer, all the relevant credit providers and the credit bureaux by delivering⁵⁸ a form 17.1.⁵⁹ The form 17.1 should be delivered after 5 (five) business days⁶⁰ since the completion of the application for debt review namely completion of the form 16.⁶¹

In section 86(5) the legislature intended for the debt review process to include all the relevant parties in every step of the process. This section determines that the consumer and the credit providers should comply with the reasonable request from the debt counsellor and participate in good faith⁶² in order to reach a responsible debt rearrangement.⁶³

To act in good faith is viewed to be a *catch-all* phrase in our legal system. Seemingly this term should be universally understood by all legal professionals. However, practise has shown that good faith is not only considered on the facts of each matter, good faith is also influenced by personal opinions and arguments on behalf of the relevant parties. It is submitted that good faith is not an objective term. Furthermore, there seems to be no agreement on what is expected from the parties with regard to negotiations. In *SA Taxi Securitization (PTY) Ltd v Mbatha*⁶⁴ the court indicated that the Act does not impose sanctions if a credit provider fails to act in good faith. The legislature neglected to identify the obligations which rest on each party involved in the negotiations.⁶⁵

⁵⁷ The fee guidelines came into effect on 1 August 2011. See www.ncr.org.za/pdfs/Guidelines/2011/Debt_Counselling_Fee_Guidelines.pdf.

⁵⁸ Reg 24(5).

⁵⁹ Kelly-Louw (2012) par 12.3.4.1.

⁶⁰ S 2(5) determines that business days excludes public holidays and weekends and the first day should be excluded in the calculation of the days.

⁶¹ Reg 24(2).

⁶² *Mercedes Benz Financial Services SA (Pty) Ltd v Dunga* 2011 (1) SA 374 (WCC).

⁶³ If a credit provider fails to participate in good faith, it may not be raised as a defence *Collett v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

⁶⁴ *SA Taxi Securitization (PTY) Ltd v Mbatha* 2011 (1) SA 310 (GSJ) par 60.

⁶⁵ For example, the debt counsellor should confirm that the credit provider received the proposal, the credit provider should answer to the proposal with a counter proposal and the consumer should disclose all possible future income (bonuses and/or increases) in order for the negotiations to be transparent.

2.3.2 Over-indebtedness

An application for debt review may only be successful if a debt counsellor finds a consumer to be over-indebted, or on the verge of becoming over-indebted.⁶⁶ Section 79 defines over-indebtedness as follows:

- '(1) A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's –*
- (a) financial means, prospect 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'*

A debt counsellor must determine whether a consumer is over-indebted, by considering the information applicable at the time the determination is made.⁶⁷ The criterion in sections 79,⁶⁸ 80⁶⁹ and 82⁷⁰ of the Act also need to be considered. The

⁶⁶ S 86(7).

⁶⁷ S 78(2) and s 78(3).

⁶⁸ S 79 deals with over-indebtedness and the process to be followed in the determination of over-indebtedness.

⁶⁹ S 80 '(1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)-

- (a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or*
- (b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that-*
 - (i) the consumer did not generally understand or appreciate the consumer's*
 - (ii) entering into that credit agreement would make the consumer over-indebted.*

- (2) When a determination is to be made whether a credit agreement is reckless or not, the person making that determination must apply the criteria set out in subsection (1) as they existed at the time the agreement was made, and without regard for the ability of the consumer to risks, costs or obligations under the proposed credit agreement; or*
- (a) meet the obligations under that credit agreement; or*
 - (b) understand or appreciate the risks, costs and obligations under the proposed credit agreement ,*
- at the time the determination is being made.'*

⁷⁰ S 81 deals with the prevention of reckless credit and describes the responsibility of the credit providers in order to prevent reckless credit.

determination,⁷¹ whether the consumer appears to be over-indebted, needs to be made within thirty (30) business days after receiving a form 16⁷² from a consumer.⁷³ The debt counsellor also needs to consider if any of the consumer's credit agreements appear to be reckless.⁷⁴

After the completion of the assessment, the debt counsellor must submit a form 17.2 to all the credit providers and all registered credit bureaux within five (5) business days.⁷⁵ The purpose of the form 17.2 is to inform the credit providers and credit bureaux that the consumer has successfully applied for debt review.⁷⁶

In practice, a payment proposal is provided to the credit providers when the form 17.2 is submitted. A debt counsellor prepares a proposal by calculating the consumer's distributable amount⁷⁷ and distributing that amount amongst the consumer's credit providers. If a consumer is over-indebted this calculation will lead to a reduced monthly instalment and an extended repayment term. Debt counsellors may not re-negotiated interest rates⁷⁸ along with the monthly instalment and the repayment term.⁷⁹ It is submitted that by reducing the monthly instalment and extending the repayment term but allowing interest to be calculated on the outstanding amount, per the credit agreement, will increase the consumer's debt obligation.⁸⁰

Credit providers have the opportunity to accept or reject a proposal.⁸¹ On occasion negotiations will commence between the credit providers, the debt counsellors and the consumers with regard to the instalment and re-payment terms. In the event that a debt review proposal is accepted by all the credit providers, a debt counsellor may

⁷¹ A debt counsellor may not declare a consumer over-indebted, only a court may declare a consumer over-indebted after considering the debt counsellor's assessment. See Kelly-Louw (2012) par 12.3.4.1.

⁷² Reg 24(7)(a).

⁷³ Reg 24(10).

⁷⁴ *Ex Parte Ford* 2009 (WCC).

⁷⁵ Reg 24(5).

⁷⁶ A debt counsellor finds the consumer to be over-indebted.

⁷⁷ Reg 24(1). Nett income less monthly expenses equals distributional amount.

⁷⁸ Par 2.3.3.

⁷⁹ *SA Taxi securitisation (Pty) Ltd v Lennard* 2012 (2) SA 456 (ECG).

⁸⁰ Government Gazette 35876 published on 16 November 2012 contained the bill to become the National Credit Amendment Act proposed an inclusion of s 86(7)(c)(ii)(ee) suspend the accrual of interest for a period of up to 5 years.

⁸¹ Proposals must be economically justifiable, see *First National Bank v Seyffert* 2010 (6) SA 429 (GSJ).

or may not make a recommendation to the magistrate court in terms of section 87(8) and file it as a consent order in terms of section 138.⁸²

2.3.3 Referral to the magistrate's court

Section 86(7) is important to this study as it includes the magistrate's court in the debt review process and therefore limits the powers bestowed unto a debt counsellor in terms of the Act. The magistrate's court remains a creature of statute⁸³ in the debt review process as is evident from the restriction to the relief which may be granted in terms of section 86(7)(c). Section 86(7)(c) also determines if the consumer will enjoy the protection of a court order to re-arrange the consumer's debt obligations.

In terms of section 86(7), if a consumer is found not to be over-indebted, a debt counsellor must reject the application for debt review.⁸⁴ If a consumer is not over-indebted but will have difficulty in satisfying all debt obligations timeously, debt review may still be considered. A debt counsellor may make a recommendation⁸⁵ that the consumer and credit providers voluntarily consider and agree on a debt re-arrangement⁸⁶ plan to prevent the consumer to become over-indebted.

Section 86(7)(c) determines that if a debt counsellor found a consumer to be over-indebted a debt counsellor may make a proposal recommending that a magistrate make one of the following orders:

- (i) *that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and*
- (ii) *that one or more of the consumer's obligations be re-arranged by –*

⁸² When all parties reach consensus, then an application is brought in terms of section 138 in order to obtain a consent order. This application is not brought in terms of rule 55 of the magistrate court rules. Consent orders in terms of section 138 are not included in the scope of this study.

⁸³ A magistrate court may only hear matters and make orders in respect of the matter based on the powers bestowed on the magistrate court through legislation – meaning magistrate courts does not have inherent 3 jurisdiction.

⁸⁴ S 86(7)(a).

⁸⁵ S 86(7)(b).

⁸⁶ S 138 read with s 87 deals with the court application in these circumstances.

- (aa) extending the period of the agreements and reducing the amount of each payment due accordingly;*
- (bb) postponing during a specified period the dates on which payments are due under the agreement;*
- (cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or*
- (dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, of Part A of Chapter 6.*

Section 86(7)(c) does not make provision for the magistrate's court to alter the contractual interest rate. This seems to indicate that it was the legislature's intention to uphold the legal principle that interest is a penalty charged for delay in payments due to the creditor.⁸⁷ It is submitted that the legislature could have easily included that the magistrate may reduce the interest rate if it was the intention to do so.⁸⁸ However, it is submitted that the legislature should consider prescribing minimum rates for credit agreements included under debt review. The same principles of regulation 42 may be applied.⁸⁹

If a debt counsellor rejects an application due to the fact that a consumer is found not to be over-indebted, the consumer may, in terms of section 86(9) apply directly to the magistrate's court, in the prescribed manner and form,⁹⁰ for an order contemplated in subsection (7)(c).⁹¹

2.3.4 Termination of the debt review process

A credit provider may terminate the debt review process with regards to a specific credit agreement. Termination may only be effected after sixty (60) business days

⁸⁷ *Reuter v Yates* 1904 TS 855.

⁸⁸ Government Gazette 35876 published on 16 November 2012 contained the bill to become the National Credit Amendment Act proposed an inclusion of s 86(7)(c)(ii)(ee) suspend the accrual of interest for a period of up to 5 years.

⁸⁹ Table A to reg 42 contains the maximum prescribed interest rates.

⁹⁰ This application will also be brought in terms of rule 55 of the magistrate court rules.

⁹¹ If a debt counsellor is of the opinion that a consumer is not entitled to the relief provided by the debt review process, a consumer may apply to the magistrate court directly in terms of s 87.

after the application for debt review in terms of section 86(10), if a consumer is in default under a credit agreement that is being reviewed. A credit provider may terminate the debt review process with regard to a specific credit agreement simply by giving notice to the consumer, the debt counsellor and the National Credit Regulator.⁹² The Act does not indicate that the notice needs to be drawn to the attention of the consumer as it does in section 129(1)(a). However, Scholtz is of the opinion that the same considerations should apply to the notice in terms of section 86(10) and 129(1)(a).⁹³ In *Standard Bank v Wessels*⁹⁴ the court held that section 168⁹⁵ should be adhered to and therefore sending the notice in terms of section 86(10) by fax or e-mail to the relevant debt counsellor⁹⁶ is not in compliance with the Act.

One of the purposes of the Act is to level the playing field between consumers and credit providers.⁹⁷ It is submitted that section 86(10) is a very good example of equality between credit providers and consumers.⁹⁸ Section 86(10) grants a right to the credit providers to terminate the debt review process, in answer to the right of the consumer to apply for debt review.

The high courts of the Republic of South Africa have been burdened to interpret the legislature's intention with regards to section 86(10) mainly due to uncertainty why a period of sixty (60) business days has been allocated before a credit provider may terminate the debt review process.⁹⁹ The practical application of this section will be addressed in chapter 3 and chapter 4 of this study.

⁹² *Collet v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

⁹³ Scholtz (2008) par 1.3.3.3.

⁹⁴ *Standard Bank v Wessels and Others* unreported case nr 64923/2011 11 and 12 April 2013 (GNP).

⁹⁵ S 168 "Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either-
(a) delivered to that person; or
(b) sent by registered mail to that person's last known address"

⁹⁶ *Standard Bank v Wessels and Others* unreported case nr 64923/2011 11 and 12 April 2013 (GNP) para 28-31.

⁹⁷ S 3.

⁹⁸ *Firstrand Bank Ltd v Mvelase* 2011 (1) SA 470 (KZN) par 20-21 'The NCA strikes this balance through a push/pull tension which ensures that, whenever sections of the NCA tip the scales in favour of the consumer, countervailing rights of the credit provider in other sections sway the balance in favour of the latter, and vice versa'.

⁹⁹ *Pelzer v Nedbank* 2011 (4) SA 388 (KZD) the court held that debt review should lapse after a reasonable time. See also Kelly Louw (2012) par 12.3.4.4.

2.4. Re-instatement of debt review

It is submitted that the balancing of rights between consumers and credit providers are again illustrated in section 86(11).¹⁰⁰ Section 86(11) allows the enforcement court¹⁰¹ to order that the terminated debt review, resume¹⁰² on any conditions the court considers to be just in the circumstance.¹⁰³ This application may not be considered in the debt review court.¹⁰⁴

2.5 Section 85

Section 85 and section 86(11) should not be used in the alternative.¹⁰⁵ Section 86(11) should be applied if an agreement was under debt review and terminated, if the consumer wants to reinstate the terminated account under debt review. Section 85 is to be applied in the event where enforcement proceeding commences before the consumer applied for debt review.¹⁰⁶ As already stated, if a credit provider proceeds to enforce a credit agreement by complying with section 129 and section 130 that agreement is excluded from the debt review process in terms of section 86(2). A consumer may then utilise section 85 to include that agreement in debt review.¹⁰⁷

Section 85 makes it possible for consumers to utilise the relief provided by the debt review process in terms of section 86, when legal action has already been instituted against an over-indebted consumer in terms of sections 129 and 130.¹⁰⁸ Section 85 determines that a consumer's over-indebtedness may be considered as a defence when litigation has been instituted in order to enforce a credit agreement and such a

¹⁰⁰ *Ibid.*

¹⁰¹ Meaning the court enforcing a credit agreement.

¹⁰² If the credit agreement was terminated in terms of s 86(10) see also *Collet v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

¹⁰³ Further confirmation of *Firstrand Bank Ltd v Mvelase* 2011 (1) SA 470 (KZN).

¹⁰⁴ *Collet v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

¹⁰⁵ A credit provider is not able to terminate debt review proceedings instituted in terms of s 85. See *Collet v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

¹⁰⁶ It is unclear why the court entertained an application in terms of s 85 when s 86(11) should have been applied in *Seyffert & Seyffert v Firstrand Bank Ltd* (577/2011) [2012] ZASCA 81; 2012 (6) SA 581 (SCA) (30 May 2012)

¹⁰⁷ See Scholtz et al (2008) par 11.3.3.4 for a discussion on the courts' approach on consumers who do not act pro-actively by applying for debt review in terms of s 86 but wait for credit providers to institute legal proceedings and then rely on s 85.

¹⁰⁸ In terms of s 86(2) these credit agreements is to be excluded from the debt review process.

matter is being heard by any court. A court may, in terms of section 85 refer the matter to a debt counsellor in order to proceed with a recommendation in terms of section 86(7) or the court hearing the matter may declare that the consumer is over-indebted and make any order¹⁰⁹ contemplated in section 87 to relieve the consumer's over-indebtedness.¹¹⁰

In *Greef v Firstrand Bank*¹¹¹ the court mentioned that the onus of proof in a section 85 application is much higher than in an application for summary judgment. In the latter the consumer only need to make a *prima facie*¹¹² case for a possible defence, while in the section 85 application the consumer needs to prove, on a balance of probabilities that the consumer is indeed over indebted. Subsequently a mere averment will be insufficient and the consumer will be required to place all the evidence with regards to the consumer's financial circumstances before court.

2.6. Section 87

Section 87 deals with the process to be followed when a consumer is found not to be over-indebted by the debt counsellor and section 86(7) cannot be applied. A consumer or a debt counsellor may in terms of section 87 approach the magistrate's court to conduct a hearing having regard to the proposal and information before it and the consumer's financial means prospects and obligations and the court may:¹¹³

- (a) *Reject the recommendation or application as the case may be;*
or
- (b) *Make –*
 - (i) *an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) or (3) if the Magistrate's Court concludes that the agreement is reckless;*
 - (ii) *an order re-arranging the consumer's obligation in any manner contemplated in section 86(7)(c)(ii); or*

¹⁰⁹ *Standard Bank of South Africa v Kallides* 1061/2012 unreported (WCC) par 9 the court found that s 88(3) will be applied in the event of default or non-compliance to the order granted in terms of s 85.

¹¹⁰ *Greef v Firstrand Bank Ltd* 2012 (3) SA 157 (NCK).

¹¹¹ *Ibid.*

¹¹² Latin meaning "at first sight".

¹¹³ S 87(1).

(iii) both orders contemplated in subparagraph (i) and (ii)'.¹¹⁴

This section is not addressed in depth in this study. It is submitted that applications for debt review brought before a magistrate's court is not generally in terms of section 87¹¹⁴ and the reason therefor is mainly due to uninformed consumers or eagerness by debt counsellors to assist over-indebted consumers. However, in *Nedbank Ltd v National Credit Regulator* the supreme court of appeal indicated that when a recommendation is made in terms of section 86(7)(c), a hearing in terms of section 87 must occur.¹¹⁵

2.7 Clearance certificate

Consumers under debt view need to apply for a clearance certificate to be issued by their debt counsellor.¹¹⁶ A clearance certificate will allow a consumer access to the credit market again and remove any reference to debt review from the consumer's credit profile.¹¹⁷ A clearance certificate may only be issued if the consumer has satisfied all debt obligations in terms of all credit agreements included in the debt review order.¹¹⁸ Regulation 27 indicates that form 19 is to be used when a consumer has settled all the debt included under the debt review process. The only alternative available to consumers to cancel the debt review process, is to voluntarily withdraw. The Act does not make provision for withdrawal from the debt review process, but it is accepted in practise and a form 17.4¹¹⁹ was created for this purpose. A debt counsellor may also rely on form 17.4 if the consumer fails to participate in the debt review process in a *bona fide*¹²⁰ manner.¹²¹

¹¹⁴ See also Scholtz (2008) par 11.3.3.2(i).

¹¹⁵ *Nedbank v National Credit Regulator* 2011 (3) SA 581 (SCA).

¹¹⁶ S 71.

¹¹⁷ *Ibid.*

¹¹⁸ S 71(2)(b)(i).

¹¹⁹ Form 17.4 is not included in the Act or Regulations but have been accepted in practise in terms of the work stream agreements see Roestoff, Haupt, Coetzee and Erasmus "The Debt Counselling Process-Closing the Loopholes in the National Credit Act 34 of 2005" [2009] PER 23.

¹²⁰ Latin meaning: "to act in good faith".

¹²¹ For example when a consumer is not making payments or appears to be deceitful.

2.8 Purpose of the act

The long title of the Act includes amongst others, but is not limited to, the provisions for debt re-organisation in cases of over-indebtedness. The Act further contains an entire section¹²² explaining what the purpose of the Act is. Section 3 is again not without interpretational problems and has been disputed by debt counsellors and credit providers. It is important to consider the legislature's intention before this study proceeds to investigate the current case law on the debt review process.

The purpose Act is¹²³ to “*promote and advance the social and economic welfare of South Africans promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers.*” The legislature intended to achieve this by:

- a) promoting the development of a credit market and responsibility in the credit market;
- b) encouraging responsible borrowing; discouraging reckless credit avoidance of over-indebtedness;¹²⁴
- c) promoting equity in the credit market in balancing the respective rights and responsibilities of credit providers and consumers;¹²⁵
- d) addressing and correcting imbalances in negotiations power between consumers and credit providers;¹²⁶
- e) providing mechanisms for resolving over-indebtedness, based on the principle of satisfaction by the consumer of all responsible financial obligations;¹²⁷
- f) providing for a consistent and accessible systems of consensual resolution of disputes arising from credit agreements;¹²⁸ and
- g) providing for consistent and harmonised system of debt restructuring, enforcement and judgment.¹²⁹

¹²² S 3 is provided in the schedules to this study.

¹²³ S 3.

¹²⁴ S 3(c).

¹²⁵ S 3(d).

¹²⁶ S 3(e).

¹²⁷ S 3(g).

¹²⁸ S 3(h).

¹²⁹ S 3(i).

2.9 Conclusion

In this chapter the relevant role players¹³⁰ and sections of the Act relevant to the debt review procedure were addressed. The debt counsellors, consumer and credit providers should all act in good faith¹³¹ throughout the debt review process in order to ensure that there is compliance to section 86.

The debt review process commence with an application for debt review by a consumer seeking debt relief.¹³² The debt counsellor needs to fulfil a statutory duty and comply with all the requirements in section 86 and regulation 24, 25, 26 and 27.¹³³ A magistrate court will declare the consumer over-indebted and make an order to re-arrange the consumer's monthly debt obligations per the debt counsellor's proposal. Credit providers may terminate the debt review process any time before the court order is granted.¹³⁴

The Act introduced several new concepts to our legal system and these concepts need to be incorporated into the legal system of South Africa. This incorporation will be done by considering the longstanding legal principles already vested in the law of the Republic of South Africa. In chapter 3 the focus will turn to the application of the Act in practise and how the new concepts have been received by the public and the courts. Chapter 3 will also discuss several matters that have been interpreted by the courts.

¹³⁰ Par 2.2.

¹³¹ Par 2.3.3.

¹³² Par 2.3.1.

¹³³ *Ibid.*

¹³⁴ *Collett v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

procedures in court. Debt enforcement in respect of a credit agreement may not commence without compliance to sections 129 and 130.⁴

The aim of the study is to consider the practicality of the debt review process and how the courts have interpreted the legislature's intention in order to ascertain if debt review is an effective debt relief measure.⁵ The courts have played an important part to provide guidance in the application of sections 129 and 130.

Debt review may not be applied to that credit agreement in terms of section 86(2) if there is compliance to sections 129 and 130. During the course of this chapter various elements of sections 129 and 130 will be considered.

3.2.1 Purpose of compliance

In terms of the Act a credit provider may only proceed to enforce a credit agreement if there is compliance with sections 129 and 130.⁶ In the *Investec v Ramuranzi* matter⁷ the court found that the service of a summons will not interrupt prescription⁸ if there is no compliance with section 129 and 130 of the Act. This matter illustrates how important compliance to section 129 and 130 is before a credit provider may proceed with enforcement. In *Greef v Firstrand Bank*⁹ the judgment indicated that non-compliance with sections 129 and 130 is a full defence and that a credit provider is not entitled to judgment in such circumstances. Even in the matter of *ABSA v Prochaska*¹⁰ the court acknowledged that a presiding officer may postpone a matter in terms of section 130(4) in order to allow the credit provider to comply with sections 129 and 130. The importance of this matter is that the court understood that there is no discretion vested in the courts to condone the non-compliance with sections 129 and 130. In *Sebola v Standard Bank of South Africa Ltd*¹¹ the constitutional court confirmed that in the event that there is no compliance to section 129 and section

⁴ *ABSA Bank Ltd v De Villiers* 2009 (3) SA 421 (SEC).

⁵ Par 1.3.

⁶ Van Heerden and Coetzee refers to compliance with s 129 and s 130 as pre-debt enforcement procedures "Perspectives on the Termination of Debt Review in terms of Section 86(10) of the National Credit Act 34 of 2005" PER / PELJ 2011(14) 2 par 2.1

⁷ *Investec v Ramuranzi* 12554/2008 (heard on 5 March 2013).

⁸ S 15(1) of Act 68 of 1969, prescription is interrupted upon service of the summons.

⁹ *Greef v Firstrand Bank Ltd* 2012 (3) SA 157 (NCK).

¹⁰ *ABSA v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D).

¹¹ *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC).

130, the court should adjourn the matter in terms of section 130(4)(b).¹² In *Beets v Swanepoel*¹³ the court stated that compliance to section 129(1)(a) is a pre-enforcement notice and forms part of a credit provider's cause of action. Subsequently, compliance with section 129(1)(a) must be dealt with as such and be included in the credit provider's pleadings.¹⁴ In *Nedbank Ltd v The National Credit Regulator and Another*¹⁵ the supreme court of appeal concluded that the delivery of a section 129(1)(a) notice is a mandatory requirement before enforcement of a credit agreement by way of litigation.

3.2.2 Time periods with regards to the notice and the amount of notices required

Section 130(1) determines that a consumer must be in arrears for a period of at least twenty (20) business days. A consumer must have a period of ten (10) business days, since it has been delivered, to respond to the notice in terms of section 129(1)(a),¹⁶ before a credit provider may proceed to enforce the credit agreement.

A section 129(1)(a) notice is commonly combined with a letter of demand for the practical reason that credit providers do not need to give the consumer double notice, meaning a notice in terms of section 129(1)(a) and a further notice serving as a letter of demand, to remedy their default. This was confirmed in *Firstrand Bank Ltd t/a Honda Finance v Owens*¹⁷ when the supreme court of appeal found that a section 86(10) notice need not be followed by a section 129(1)(a) notice. In *Standard Bank v Rockhill*¹⁸ and *Standard Bank v Bekker*¹⁹ the court confirmed that the time limits may be longer but may not be less than the prescribed times. In *Rossouw and Another v Firstrand Bank*²⁰ the supreme court of appeal reminded us that the credit provider needs to consider the terms of the agreement as compliance to sections 129 and

¹² See Van Heerden and Coetzee "Artikel 129(1)(a) van die Nasionale Kredietwet 34 van 2005: verwarrende verwarring oor voldoening" Litnet/akademies/regte 2012-11-28 for a discussion on questions raised if a matter is postponed in terms of s 130(4)(b).

¹³ *Beets v Swanepoel* 2010 JOL 26422 NC.

¹⁴ *Ibid.*

¹⁵ *Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581 (SCA).

¹⁶ The 20 days and the 10 day time periods may run concurrently. See Kelly-Louw (2012) p 437.

¹⁷ *Firstrand Bank Ltd t/a Honda Finance v Owens* 2013 (2) SA 325 (SCA).

¹⁸ *Standard Bank v Rockhill* 2010 (5) SA 252 (GSJ).

¹⁹ *Standard Bank v Bekker* 2011 (6) SA 11 (WCC).

²⁰ *Rossouw and Another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA).

130 do not eliminate or overrule the contractual obligations. Subsequently if the agreement contains additional requirements before enforcement proceedings may commence that contractual requirements and the requirements in terms of the Act needs to be complied with before enforcement may commence.

3.2.3 Contents of the notice

The section 129(1)(a) notice is not only a simple letter of demand. The notice should indicate that the consumer is in arrears,²¹ and inform the consumer who may be approached for assistance in resolving disputes or making arrangements to settle the arrears.²² Subsection (1)(a) indicates that a consumer may refer the credit agreement to “a debt counsellor,²³ alternative dispute resolution agent,²⁴ consumer court²⁵ or ombud with jurisdiction”.²⁶

The wording of the notice was also interpreted by the courts. In *Standard Bank v Maharaj*²⁷ the court found that it is sufficient if the notice in terms of section 129(1)(a) contains only the averments in section 129(1)(a). In *BMW v Molaudzi*²⁸ the court was of the opinion that more flesh and substance should be added to the averments contained in section 129(1)(a)²⁹. In *Dwenga v Firstrand Bank* the court indicated that the section 129(1)(a) notice should enable a consumer to exercise any of the rights described in section 129(1)(a). In *Firstrand Bank v Folsher*³⁰ the court found that in the event that the object of the credit agreement which is being enforced, is the consumer’s primary residence, the wording of the section 129(1)(a) notice should also set out the consequences in the notice. It is therefore submitted that the notice

²¹ Letter of demand contains the averment of breach and the opportunity to remedy the breach within a certain time before legal action is instituted.

²² S 129 does not contain any reference to the consequence of this notice.

²³ S 86 and reg 24.

²⁴ S 1 defines an alternative dispute resolution agent as follows: “a person providing services to assists in the resolution of consumer credit disputes through conciliation, mediation or arbitration”.

²⁵ S 1 defines a consumer court as follows: “a body of that name, or a consumer tribunal, established by provincial legislation”.

²⁶ S 1 defines an ombud with jurisdiction as follows: ‘in respect of any particular dispute arising out of a credit agreement in terms of which the credit provider is a “financial institution” as defined in the Financial Services Ombud Schemes Act, (Act No 37 of 2004), means an “ombud” or the “statutory ombud” as those terms are respectively defined in that Act, who has jurisdiction in terms of that Act to deal with a complaint against the financial institution’.

²⁷ *Standard Bank Maharaj* 2010 (5) SA 315 (D).

²⁸ *BMW Financial Services v Dr MD Molaudzi* 2009 (3) SA 348 (BOP).

²⁹ *Dwenga v Firstrand Bank Ltd* 2011 ZAECELLC 13 (29 Nov 2011).

³⁰ *Firstrand Bank v Folsher* 2011 (4) SA 314 (GNP).

should inform the consumer that the section 129(1)(a) notice is the first step to possible foreclosure and eviction.

3.2.4 Delivery of the notice

Section 129(1)(a) determines that the notice should be delivered to the consumer. At first glance, this does not seem to be problematic, but after consideration it is clear that “delivery to the consumer”, does not necessarily mean “received by the consumer”. It is not disputed that the legislature intended for the notice to be brought to the notice of the consumer, which cannot be done if the notice is not received by the consumer.³¹ In the matter of *Rossouw and Another v Firstrand Bank*³² the supreme court of appeal ruled that the section 129(1)(a) notice should be delivered to the consumer in the manner chosen by the consumer in terms of section 65³³ and to the address chosen by the consumer in terms of section 96.³⁴ Thus the risk of receiving a notice in terms of section 129(1)(a) is carried by the consumer.³⁵

The constitutional court was approached in the matter of *Sebola v Standard Bank of South Africa Ltd*³⁶ to consider the factual implication of the terms *deliver to* and *received by*. The constitutional court accepted the principles of the *Rossouw* matter but indicated that the mere averment of compliance by a credit provider is insufficient. It is unfortunate that *Sebola v Standard Bank of South Africa Ltd* only

³¹ *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC).

³² *Rossouw and Another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA).

³³ S 65(1) ‘Every document that is required to be delivered to a consumer in terms of this or Act must be delivered in the prescribed manner, if any. (2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must -
(a) make the document available to the consumer through one or more of the following mechanisms-
(i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer’s expense, or by ordinary mail;
(ii) by fax
(iii) by email; or
(iv) by printable web-page; and
(b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).’

³⁴ S 96(1) “Whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at-
(a) the address of that other party as set out in the agreement, unless paragraph (b) applies; or
(b) the address most recently provided by the recipient in accordance with subsection 2”.

³⁵ *Otto & Otto* (2013) p116

³⁶ *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC).

referred to instances where the notice in terms of section 129(1)(a) is delivered by registered mail.

The constitutional court did not address the other methods of deliver available to consumers in terms of section 65. The constitutional court indicated that in order for a credit provider to succeed in the burden of proof with regard to compliance with sections 129 and 130 a credit provider should provide the court with more than just the registered slip from the post office. In the event that the matter is unopposed, the court should be provided with a track and trace report³⁷ in order for the court to ascertain that the letter indeed reached the designated post office (not the consumer). In the event that the matter is opposed, then the court should consider the facts to ascertain if the section 129(1)(a) notice did come to the notice of the consumer.³⁸ It is not disputed that the courts may interpret legislation, however it is submitted that the constitutional court's ruling is causing the three legs of parliament to cross boundaries by allowing the courts to draft legislation.³⁹

In *ABSA Bank Ltd v Mkhize and Another and Two Similar Cases*⁴⁰ the court accepted the principles of the constitutional court, however the circumstances in these matters were not addressed in the *Sebola v Standard Bank of South Africa Ltd* ruling. In the *ABSA Bank Ltd v Mkhize* the applicant provided the court with the track and trace reports, however, the track and trace reports indicated that the section 129(1)(a) notice was returned to sender, meaning that the notice failed to come to the notice of the consumer's. The court was of the opinion that due to the fact that the credit agreements did not contain a chosen method in terms of section 65, it is insufficient to assume that the consumer will collect the registered letter from the post office. The court adjourned the matters in terms of section 130(4) and advised that the applicant should revert to the other methods stipulated in section 65 to ensure that the section 129(1)(a) notice will come to the notice of the consumer. In *Nedbank v Binneman*⁴¹ the court found that the *Sebola* matter did not overturn the

³⁷ This report may be obtained from the website of the South African Post Office. The report will indicate the different steps in transit of the notice until it reaches the consumer, or returned to back to sender.

³⁸ *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC) par 87.

³⁹ The tract and trace report is an arbitrary measure to determine compliance to section 129(1)(a) due to fact that the Act does not make provision for this measure . See Van Heerden and Coetzee "Artikel 129(1)(a) van die Nasionale Kredietwet 34 van 2005: verwarrende verwarring oor voldoening" Litnet/akedemies/regte 2012-11-28.

⁴⁰ *ABSA Bank Ltd v Mkhize and Another and Two Similar Cases* 2012 (5) SA 574 (KZD).

⁴¹ *Nedbank v Binneman and Thirteen Similar Cases* 2012 (5) SA 569 (WCC) par 6.

principle in the *Rossouw* matter and the credit provider is not required to prove that the section 129(1)(a) notice actually reached the consumer.

In a nutshell a credit provider should ensure that the credit agreements contain a method of delivery in terms of section 65 and an address in terms of section 96. The notice should be delivered accordingly and proof that same was done, should be disclosed to the court. It is submitted that it is not required that the consumer actually receive the notice in terms of section 129(1)(a).

3.3. Interplay between section 129 and 130 and debt review

Section 86(2) clearly states that as soon as a notice in terms of section 129(1)(a) is delivered, that specific credit agreement may not be included⁴² in a consumer's debt review.⁴³

Otto and Otto⁴⁴ submit that credit providers may harm their reputation and lose their clients if they consistently act unsympathetically towards debtors; therefore credit providers rarely institute legal action immediately when a consumer is in default. In *ABSA v Mkhize*⁴⁵ it was made clear that the major banks in the Republic of South Africa enter into legal steps as a last resort.

It is submitted that the practicality of this is that if a credit provider issues the section 129(1)(a) notice prior to the consumer referring the matter to a debt counsellor, that credit provider will be in the position similar to a secured creditor. This conclusion is reached due to the fact that, that credit agreement will not be included in the debt review proposal⁴⁶ where all the credit agreements must be treated equally *pro rata* to their exposure.⁴⁷

⁴² Boraine and Renke "Some Practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 (Part 2)" 2008 DJ 9 fn 186, where the authors states that it is "nonsensical" if a letter refers a consumer to a debt counsellor, but the consumer may not rely on the assistance from the debt counsellor.

⁴³ *Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581 (SCA).

⁴⁴ Otto and Otto (2013) p111 "The provisions in the Act may change this attitude as the credit providers will try to avoid being part of the debt review process". It is submitted that in future it may boil down to the long standing legal principle, *qui prior est in tempore, potior est in jure* (first in time, first in right).

⁴⁵ *ABSA v Mkhize and Another and Two Similar Cases* 2012 (5) SA 581 (SCA).

⁴⁶ The credit provider that proceeded to enforce the credit agreement will be able to institute legal action. The credit provider and consumer may enter into a settlement agreement and re-negotiate an acceptable monthly repayment amount. This amount will be conveyed to the debt counsellor and subsequently included in the consumer budget as a monthly expense. The inclusion of a debt obligation in a consumer's monthly expenses,

In *Nedbank Ltd v National Credit Regulator* the supreme court of appeal noted that if a credit provider delivers a notice in terms of section 129(1)(a), that notice does not prohibit a consumer to be placed under debt review. The court referred to the fact that it is only the credit agreement referred to in the section 129(1)(a) notice that may not be included in the debt review process.⁴⁸ The court further noted that a consumer may further utilise the remedy of section 85 in order to place that account under debt review.

3.4. Termination of debt review

The Act is not only an act which provides protection to the consumers, the Act aims to encourage a balance of rights between consumers and credit providers and subsequently, for every right a consumer has, a credit provider has a countervailing right and *vice versa*.⁴⁹

If a consumer is in default with regards to a credit agreement and a period of sixty (60) business days has lapsed since the completion of the application for debt review, a credit provider may terminate the debt review proceedings.⁵⁰ This termination will only effect the specific credit agreement⁵¹ and a credit provider may proceed with enforcement steps.⁵²

The most recent interpretational debates were with regards to section 86(10). The reason being, as poetically stated in a full bench ruling in *Wesbank v Papier*,⁵³ why would the legislature provide a consumer with an umbrella (debt review process) but proceed to take same away as soon as it started raining (debt enforcement by credit providers). The high court judges⁵⁴ following this approach do not want consumers to

will reduce the consumer monthly distributable amount (the distributable amount is determined by income, less deductions, less necessary monthly expenses). The distributable amount is distributed via the proposal to the consumer's credit agreements. It is submitted that these circumstances were not anticipated by the legislature.

⁴⁷ No credit provider should receive preferential treatment in a debt review proposal due to the fact that the consumer needs to satisfy all their debt obligations.

⁴⁸ *Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581 (SCA) para 9–11 and par 14.

⁴⁹ *Firstrand Bank v Mvelase* 2011 (1) SA 470 (KZP).

⁵⁰ S 86(10).

⁵¹ *Collet v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

⁵² S 130, reference made to s 86(9) is deemed to be s 86(10) as s 86(9) does not refer to a notice. The proposed amendments published in the Government Gazette 36505 on 29 May 2013 will rectify this.

⁵³ *Wesbank v Papier* 2011 (2) SA 395 (WCC).

⁵⁴ *Standard Bank of SA Ltd v Kruger* 2010 (4) SA 635 (GSJ) and *SA Taxi Securitisation v Matlala* unreported case number 6359/2012 29 July 2012 (SGJ) and *Wesbank Ltd v Papier* 2011 (2) SA 395 (WCC).

be prejudiced by the overloaded judicial system. It is commonly known that the civil court roles are very full and to obtain a court date and finalising a debt review matter does not seem possible within the guidelines⁵⁵ provided by the legislature.⁵⁶

In the *Wesbank v Papier* matter, it was decided that when a debt review matter has been referred to the magistrate court in terms of section 86(7)(c), 86(8) or 86(9), termination in terms of section 86(10) may no longer be done.

In answer to *Wesbank v Papier*, the supreme court of appeal in *Firststrand Bank v Collett*⁵⁷ determined that a credit provider may terminate a consumers debt review with regard to that specific account⁵⁸ if a consumer is in default with his or her contractual obligations and the sixty (60) business days has lapsed since the consumer applied for debt review.

In *Subramanian v Standard Bank Ltd*⁵⁹ it was determined that the section 86(10) notice should be duly delivered to both spouses if they are married in community of property and their joint estate is under debt review.⁶⁰ Delivery of the section 86(10) notice to one spouse is not considered to be compliance to section 86(10).

In practice, the mere averment of termination by a credit provider is sufficient for that credit agreement to be excluded from the debt review process. This is due to the fact that the legality of the termination must be addressed in the enforcement court,⁶¹ and not the court attending to the debt review.⁶² Magistrates attending to the debt review matters are now of opinion that including a credit agreement, which is possibly terminated, will lead to an order being *ab ignition*⁶³ void with regard to that account.

⁵⁵ *Inter alia* the sixty business days mentioned in s 86(10).

⁵⁶ *Collett v Firststrand Bank Ltd* 2011 (4) SA 508 (SCA) par 12 the court accepted that it is unreasonable to expect that a debt review application will be enrolled and finalised within 60 business days.

⁵⁷ *Collett v Firststrand Bank Ltd* 2011 (4) SA 508 (SCA) para 20-21.

⁵⁸ *Ibid* this will not derail the entire debt review process as it only effect the specific account.

⁵⁹ *Subramanian v Standard Bank Ltd (KZP)* unreported case no 7008/11 13 March 2012.

⁶⁰ *Subramanian v Standard Bank Ltd (KZP)* unreported case no 7008/11 13 March 2012 para 7-11 Judge Lopes confirms that even if only one spouse is a party to a certain credit agreement, termination of that agreement in terms of section 86(10) will directly affect the other spouse.

⁶¹ *Collett v Firststrand Bank Ltd* 2011 (4) SA 508 (SCA) confirmed the enforcement court is the court attending to the enforcement of the credit agreement and may be a magistrate court of a high court. The enforcement court is not the court considering the application for debt review.

⁶² *Collett v Firststrand Bank Ltd* 2011 (4) SA 508 (SCA).

⁶³ Latyn meaning: "from the beginning".

3.5. Re-instatement of the debt review process

Section 86(11) is the countervailing right to section 86(10).⁶⁴ If a credit provider delivers a notice in terms of section 86(10) and proceeds to enforce that credit agreement a consumer may utilise section 86(11). The terminated debt review may resume with relief from the court in terms of section 86(11). This relief needs to be sought in the enforcement court, and not the magistrate court attending to the debt review.⁶⁵ Subsequently a consumer may only request the court to reinstate the debt review after termination⁶⁶ and after enforcement.⁶⁷

Once the notice in terms of 86(10) is delivered and the specified account is excluded from the debt review process, the consumer's debt review may proceed with regard to other accounts included in the debt review process.⁶⁸ It remains unsure what the situation will be if the application for debt review is granted before the enforcement court orders that the terminated account is to be re-instated in the consumer's debt review.

3.6. Debt review and insolvency

It is mentioned in the introduction of this study that the debt review process will not be compared to the other debt relief measures available to consumers. However the question of whether the application for debt review can be considered to be an act of insolvency in terms of the Insolvency Act is of importance to this research.⁶⁹ An application for debt review is admittance by a consumer that he or she is not able to satisfy his or her debt obligations timeously.⁷⁰

It is submitted that the legislature did not intend that an application for debt review, which is supposed to provide protection to an over indebted consumer, will entitle the

⁶⁴ *Firststrand Bank v Mvelase* 2011 (1) SA 470 (KZP).

⁶⁵ Enforcement court can be a magistrate court of a high court - *Collett v Firststrand Bank Ltd* 2011 (4) SA 508 (SCA).

⁶⁶ After delivery of the s86(10) notice and after the 10 business days have passed- Van Heerden and Coetzee "Perspectives on the termination of debt review in terms of section 86(10) of the National Credit Act 34 of 2005" PER / PELJ 2011(14) 2 p 55.

⁶⁷ Van Heerden and Coetzee "Perspectives on the termination of debt reviews in terms of section 86(10) of the National Credit Act 34 of 2005" PER / PELJ 2011(14)2 p 55.

⁶⁸ *Collett v Firststrand Bank Ltd* 2011 (4) SA 508 (SCA).

⁶⁹ Insolvency Act 24 of 1936.

⁷⁰ See Van Heerden 2010 ABLU 258 278 for an opinion that the application for debt review constitutes a deed of insolvency and subsequently a credit provider, may proceed with an application for sequestration.

credit providers, from whom the consumer is seeking protection the means to proceed with sequestration.⁷¹ In *Firstrand Bank v Van Rensburg*⁷² the court held that for an act to be considered as an act of insolvency in terms of section 8(g) of the Insolvency Act,⁷³ the written notice by the consumer must be given deliberately and with the intention of giving such notice.⁷⁴ This judgment clearly states that a form 17.1 does not automatically constitute an act of insolvency.

Section 172 of the Act refers to the Insolvency Act, indicating that the legislature is aware of possible conflicts between these two statutes.⁷⁵ Section 172⁷⁶ neglects to make any reference to amendments to a deed of insolvency. In chapter 4 a final comment will be made in this regard.⁷⁷

Credit providers may institute sequestration proceedings after a consumer has applied for debt review.⁷⁸ In *Naidoo v Absa Bank Ltd*⁷⁹ the supreme court of appeal confirmed that sequestration not only effects the litigants, but institute the mechanisms of insolvency and therefor it is not enforcement of a credit agreement. In *Investec Bank Ltd v Mutemeri*⁸⁰ the court held that because sequestration is not enforcement of a credit agreement, section 88⁸¹ will not apply. Therefor debt review does not provide protection against sequestration proceedings.

3.7. Conclusion

The purpose of the Act is clear, by no interpretation should the consumer be unfairly prejudiced. It is submitted that debt review places a burden on the court process and the administration of the credit providers. It is further submitted that debt review also

⁷¹ See also L Steyn “Sink or swim? Debt review’s ambivalent ‘lifeline’ – a second sequel to a tale of two judgments PER/PELJ 2012 (15) 4 p 190.

⁷² *Firstrand Bank v Van Rensburg* 2012 (2) All SA 186 (ECP).

⁷³ Insolvency Act 24 of 1936.

⁷⁴ See also L Steyn “Sink or swim? Debt review’s ambivalent ‘lifeline’ – a second sequel to a tale of two judgments PER/PELJ 2012 (15) 4 p 213.

⁷⁵ Kelly-Louw (2012) par 13.5.2.

⁷⁶ S 172 indicates that schedule 2 to the Act will provide guidance with regards to any conflict between the Act and other legislation.

⁷⁷ Par 4.5.

⁷⁸ *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ).

⁷⁹ *Naidoo v Absa Bank Ltd* 2010 (4) SA 597 (SCA).

⁸⁰ *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ).

⁸¹ S 88 prohibits a credit provider to institute enforcement proceedings after a consumer applied for debt review.

places a risk on the consumer, who it initially aims to protect. The question is if debt review is worth incorporating in our legal system.

The Act prescribes what steps a credit provider should take before a credit provider's rights are enforced in terms of a credit agreement.⁸² The courts have interpreted these prerequisites to enforcement with long standing legal principles in credit legislation. The result is that a section 129(1)(a) notice, containing the necessary averments including the consequence of the notice⁸³ must be delivered to the consumer. The delivery of the section 129(1)(a) notice must be done in accordance with section 65 and 96, but the risk of receipt of the notice rest on the consumer.⁸⁴ It is sufficient if a credit provider satisfies the court that the section 129(1)(a) notice reached the correct post office.⁸⁵ Compliance to section 129 and 130 should be contained in the credit provider's pleadings.⁸⁶

If a credit provider proceeded with enforcement proceedings as contemplated in section 129 and section 130, that credit agreement may not be included in debt review proceedings.⁸⁷ Debt review may be terminated by a credit provider after sixty (60) business days since the application for debt review, if a consumer is in default in respect of the agreement.⁸⁸ Termination may be done after the matter is referred to the magistrate court for consideration in terms of section 86(7)(c).⁸⁹ Once the debt review has been terminated in respect of a specific account, the enforcement court may be approached for relief in terms of section 86(11).⁹⁰ Debt review is not deemed to be an act of insolvency if the consumer did not have the intention of giving a notice constituting an act of insolvency.⁹¹

This chapter deals with the relevant case law applicable to the relevant sections of the Act as discussed in chapter 2 and it is clear that a solution is necessary to improve the application of the Act. In chapter 4 suggestions will be made to improve the current imbalance in the Act in order to give effect to the true purpose to the Act.

⁸² Para 3.2.1-3.2.2.

⁸³ Par 3.2.3.

⁸⁴ Par 3.2.4

⁸⁵ *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC).

⁸⁶ Par 3.2.1.

⁸⁷ Par 3.3.

⁸⁸ Par 3.4.

⁸⁹ *Collett v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

⁹⁰ Par 3.5.

⁹¹ Par 3.6.

CHAPTER 4 RECOMMENDATIONS

4.1 Introduction

Chapter 2 provides an explanation with regard to the relevant role players and sections of the National Credit Act¹ applicable to the debt review process. Chapter 3 deals with the manner in which legislation is applied in practise and how any interpretational discrepancies have been addressed by the courts of the Republic of South Africa. It is clear from the prior discussion that the Act needs to be amended. It is unfortunate that no substantial amendments were made since inception of the Act in 2007, as the shortcomings and interpretational difficulties relating to the debt review process is constantly referred to the courts.

In this chapter the focus will turn to suggestions in order to correct the shortcomings in the Act and resulting problems in practice. During the course of this study, the Department of Trade and Industry published proposed amendments to the Act.² The amendments relevant to this study will be evaluated in order to establish whether they will provide suitable solutions.

4.2 Notice in terms of section 129

Otto and Otto³ initially accepted that the legislature intended that a credit agreement should be excluded from a consumer's debt review if a credit provider delivered the notice in terms of section 129(1)(a) before the consumer applied for debt review.⁴ This view was accepted by the supreme court of appeal in *Nedbank Ltd v National Credit Regulator and Others*.⁵ Otto and Otto⁶ later joined other writers in the opinion, that the legislature did not intend for a section 129(1)(a) notice, informing a consumer to approach a debt counsellor for relief, to lead to the exclusion of that credit agreement from such relief.⁷

¹ From here on all references to the National Credit Act, 34 of 2005 will read as "the Act".

² Government Gazette 36505 published 29 May 2013.

³ Otto and Otto (2013) p 107–108.

⁴ S 86(2).

⁵ *Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581.

⁶ Otto and Otto (2013) p 107–108.

⁷ Borraine and Renke "Some practical and comparative aspects of the cancelation of instalment

It is proposed that section 86(2) be amended⁸ to refer to the enforcement proceedings in section 130 and not to the notice in terms of section 129(1)(a). This will ensure that consumers receiving a notice in terms of section 129(1)(a) have the opportunity to utilise the protection provided by section 86.⁹ If the proposed amendment is accepted the notice in terms of section 129(1)(a) will have no more power than merely being a pre-debt enforcement procedure.¹⁰ The section 129(1)(a) notice will thus no longer provide for a credit agreement to be excluded from the debt review process. This amendment is welcomed as the current sections are not in accordance with the purpose of the act.¹¹

The suggestion for the proposed amendment of section 86(2) will not influence the time periods, amounts of notices, contents or delivery of the notice in terms of section 129(1)(a) and the principles confirmed in case law¹² will still be applicable. In short, the proposed amendment will only affect the interplay between the notice in terms of section 129(1)(a) and debt review.

4.3 Termination of debt review

Section 86(10), which is the subject of several debates, is another section recommended for amendment. Similar to the circumstances surrounding section 86(2) and section 129(1)(a), the wording of section 86(10) does not illustrate the intention of the legislature. The outcome of applying section 86(10)¹³ is not compatible with the purpose of the Act.¹⁴

The proposed amendment¹⁵ suggests that a credit provider may not terminate a consumers' debt review if the debt counsellor or the consumer already referred the matter to a magistrate's court in terms of section 87.¹⁶ The proposed amendment

agreements in terms of the National Credit Act 34 of 2005' (part 2) (2008) De Jure at 9 fn 186.

⁸ Government Gazette 36505 published 29 May 2013.

⁹ This will reduce the urgency to proceed with legal action as discussed in chap 3. As per the intention of the legislature credit providers and consumers will be in an equal position when a debt counsellor is approached.

¹⁰ Van Heerden and Coetzee "Perspectives on the termination of debt review in terms of section 86(10) of the National Credit Act 34 of 2005" PER / PELJ 2011(14) 2 p 46.

¹¹ Par 3.3.

¹² Chap 3.

¹³ Par 3.4.

¹⁴ *Wesbank Ltd v Papier* 2011 (2) SA 395 (WCC).

¹⁵ Government Gazette 36505 published 29 May 2013.

¹⁶ S 87 deals with debt review matters referred to the magistrates court in terms of s 86(8)(b) [when a consumer is not found to be over indebted but the debt counsellor is of the opinion that the consumer is "experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit

does not contain reference to matters referred to the magistrate's court in terms of section 86(7)(c). Subsequently we should rely on the conclusion of the supreme court of appeal in *Nedbank Ltd v The National Credit Regulator*¹⁷ that section 87 includes matters referred to in section 86(7)(c).¹⁸ The remainder of section 86(10) is not to be amended. Thus a credit provider may terminate the debt review process if the consumer is in default in terms of the credit agreement and sixty (60) business days have lapsed since the completion of the form 16 prior to a referral to the magistrate's court.¹⁹

It is submitted that this proposed amendment will not address all the concerns raised in previous debates with regard to section 86(10). The termination notice is still only required to be delivered to the consumer, the debt counsellor and the National Credit Regulator. The notice in terms of section 86(10) need not be delivered to any other credit provider or the magistrate attending to the matter.²⁰

It is submitted that the proposed amendment should be reconsidered with consideration of section 3 of the Act, rule 55 of the magistrate court rules and court rulings. It is further submitted that the proposed amendment should include that the notice in terms of section 86(10) must be sent to other credit providers and magistrate attending to the debt review matter. It is submitted that the term "lodged" will lead to future interpretational debates.

4.4 Re-instatement of debt review

Another proposed amendment²¹ relates to section 86(11). In the *Collet*²² matter the supreme court of appeal interpreted the reference to a magistrate court to include any court enforcing the credit agreement.²³ Section 86(11) is to be amended to

agreements in a timely manner"] and s 86(9) when a debt counsellor does not find a consumer to be over-indebted and a consumer approaches the court directly.

¹⁷ *Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581 (SCA).

¹⁸ *Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581 (SCA) the supreme court of appeal indicated that when a recommendation is made in terms of s 86(7)(c), a hearing in terms of S 87 must occur. See also Scholtz (2008) par 11.3.3.2(i).

¹⁹ *Collet v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

²⁰ *Wesbank v Papier* 2011 (2) SA 395 (WCC) par 32.

²¹ Government Gazette 36505 published 29 May 2013.

²² *Collet v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

²³ *Collet v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA) par 16–17.

incorporate the interpretation of the supreme court of appeal by the deletion of the word “magistrate” from section 86(11). Subsequently any argument with regard to termination must be addressed in the court attending to the enforcement proceedings.²⁴ Thus the section 86(11) relief will be considered by the enforcement court and not the debt review court.²⁵

It is submitted that this proposed amendment will unfortunately have widespread negative consequences as a consumer will have to wait for the enforcement proceedings to commence.²⁶ Three problematic questions arise. Firstly, what will the consequence be on the credit agreements that are still subject to the debt review? Secondly, what will the effect be if the consumer’s application for debt review is finalised during the time period after the termination of the debt review with regard to a specific agreement and the time were a consumer may approach the court for relief in terms of section 86(11). Further what if the enforcement court reinstates the terminated account after the remaining credit agreements have been included in the debt review court order? Thirdly, what will the court’s attitude be towards a consumer, who is found to be over-indebted but obtained funds to enter into lengthy and costly litigation?

Generally credit agreements place the burden to pay all legal cost’s with regards to enforcement of an agreement on the consumer and these days the scale is set at an attorney and client scale. In these circumstances the credit provider’s risk to institute legal proceedings is minimal as the credit provider simply debit the consumer’s account accordingly. This increases the clients outstanding debt and have interest implications for an already over-indebted consumer.

It is therefore submitted that the proposed amendment will create more problems than already exist as the section currently reads. It seems that the ruling of the supreme court of appeal did not consider the practical implication of referring the relief described in section 86(11) to the enforcement court and not the debt review court. It is submitted that the proposed amendment should rather enable the debt review court to consider all matters relating to termination and re-instatement of debt review.

²⁴ *Collet v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

²⁵ Par 3.5.

²⁶ Serving of the summons or notice of motion.

4.5 Debt review and insolvency

Section 172 and schedule 2 dealing with the interaction of the Act with other legislation is also included in the amendments.²⁷ The proposed amendment²⁸ to schedule 2 determines that a section 8A is to be inserted in the Insolvency Act²⁹ in order to exclude the possibility that an application for debt review is to be considered as an act of insolvency.³⁰ The consequence of this amendment is that credit providers may not rely on an application for debt review to constitute an act of insolvency. The proposed amendment does not affect credit providers' right to institute sequestration proceedings after a consumer applied for debt review.³¹

It is therefore submitted that the Act aims to provide an additional debt relief measure, with less extreme consequences than sequestration,³² and not initiate the process of insolvency on behalf of the credit providers. This proposed amendment eliminates the concerns with regards to the act of insolvency.

4.6 Debt review court application

It is submitted that the legislature wanted to minimize the legal costs³³ of a debt review application as it is a *sui generis*³⁴ application and *locus standi*³⁵ rests on a third party namely a debt counsellor in terms of the Act. This is not the case in practise as most debt counsellors appoint attorneys to assist them with the formal court application³⁶ because debt counsellors are not familiar with the magistrate's court rules, regulations and practises.³⁷ On 10 May 2012 the Department of Trade and Industry published debt counselling regulations indicating that all debt review applications should be brought in terms of rule 55 of the magistrate court rules,³⁸

²⁷ Par 3.6.

²⁸ Government Gazette 36505 published 29 May 2013.

²⁹ Insolvency Act 24 of 1936.

³⁰ Van Heerden 2010 ABLU 258 278.

³¹ *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ).

³² Kelly-Louw (2008) par 13.5.2.

³³ S 86(3) read with reg 24 and confirmed by the National Credit Regulator's fee guidelines. See www.ncr.org.za/pdfs/Guidelines/2011/Debt_Counselling_Fee_Guidelines.pdf.

³⁴ Latin meaning "unique".

³⁵ Latin meaning "*the right of a party to appear and be heard before a court*".

³⁶ A debt review application in brought in terms of rule 55 of the magistrate court rules.

³⁷ Par 2.2.7.

³⁸ Debt Counseling Regulations 2012 published by the Department of Trade and Industry in the Government Gazette on 10 May 2012.

thereby accepting the principles in *National Credit Regulator v Nedbank Ltd and Others*.³⁹

Magistrate's courts are flooded with debt review applications and due to the frequent debates on several debt review issues, debt review applications are postponed which results in an even bigger burden on the already overburdened court roles. Due to the debt review court not being able to consider the legality of the termination and/or re-instatement of the debt review,⁴⁰ some matters are now postponed for finalisation of the findings of the enforcement court. It is submitted that the legislature did not intend to provide a magistrate's court with the ability to grant relief, and later limit the same court to grant the relief subject to the finding of another court.⁴¹

The Department of Trade and Industry is not of the opinion that the debt review court should have the power to consider the legality of the termination or any argument in terms of section 86(11) as is evident from the proposed amendments. It is submitted that if the debt review court was allowed to consider the legality of the termination as well as any argument in terms of section 86(11) some postponements might be avoided.

4.7 Clearance certificate

In the majority of debt review matters consumers rely on the debt review process to secure their home loans. The question that needs to be asked is, what is the solution for consumers who are no longer considered to be over- indebted, but still have debt obligations in terms of their debt review? A clearance certificate may only be issued by a debt counsellor if a consumer has satisfied all debt obligations in terms of all credit agreements included under debt review.⁴²

If a debt counsellor is of the opinion that the consumer will be able to re-enter the credit market in a more responsible manner, a debt counsellor may issue a form 17.4. It is submitted that debt counsellors should only consider this in the circumstances where there is only one account remaining under debt review

³⁹ *National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP).

⁴⁰ *Collet v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

⁴¹ The cost of litigation after the termination notice is addressed in *Wesbank v Papier* 2011 (2) SA 395 (WCC) par 33.

⁴² S 71.

(example the home loan account). A form 17.4 constitutes voluntary withdrawal from debt review.⁴³ The question that now needs to be addressed is, what will the effect of the withdrawal of the debt review be on the remaining credit agreement? Will the contractual credit agreement relive? If the contractual instalment and term once again becomes applicable as if debt review was never entered into, the consumer would in all probability be in arrears. Sections 129 and 130 will apply and the credit provider may be entitled to proceed with enforcement steps. This is the very situation the consumer attempted to avoid by applying for debt review.⁴⁴

The proposed amendment should indicate that consumers may withdraw from debt review, or request a clearance certificate⁴⁵ to be issued in order to resume their initial contractual obligations. It is submitted that the consumers may not be prejudiced for being under debt review and credit providers may not disregard the protection of debt review as soon as it no longer apply. It is submitted that before a form 17.4 is issued, the consumer and credit provider should reach an agreement with regards to the settlement of the remaining debt obligation. It is further submitted that the Act should indicate if, and under which circumstances, a consumer may apply for debt review again. It is submitted that a consumer may only utilise the protection of debt review after a twenty four (24) month rehabilitation period since a form 17.4 or a clearance certificate was issued.

The legislature did not propose any amendment in this regard which is concerning as the time is approaching when consumers will be seeking relief in respect of the process to be followed after debt review. It is submitted that the legislature should act pro-actively in correcting the oversight in the Act. The legislature should utilise the proposed amendments to provide for the process to be followed and the consequences thereof, before the courts are again approached for interpretational clarity.

Another concern is that once the credit bureaux receive notice that a consumer applied for debt review, their records are updated accordingly and to remove this

⁴³ Form 17.4 is not included in the Act or Regulations but have been accepted in practise in terms of the work stream agreements Roestoff, Haupt, Coetzee, Erasmus "The Debt Counselling Process- Closing the Loopholes in the National Credit Act 34 of 2005" [2009] PER 23.

⁴⁴ It is unfortunate that consumers will be victimised by their pro-activeness to enter into debt review.

⁴⁵ Chap 2 par 2.7.

notice from the credit bureaux records is a timely and frustrating process. It is submitted that consumers may be prejudiced during the time period between the issuing of the clearance certificate and the respective credit bureaux updating their records.⁴⁶ Once a consumer has been listed as “under debt review”, credit providers considering the credit record of a consumer will not grant credit to that consumer easily, as these agreements may be considered to be reckless.⁴⁷

4.8 Conclusion

Although the proposed amendments⁴⁸ are welcomed, it is submitted that the proposed amendments are not addressing all the concerns raised in practise. The legislature has the opportunity to empower the debt review process by considering all the relevant issues which were raised since the enforcement of the Act.⁴⁹ The fact that the proposed amendments fail to address several concerns may lead to future interpretative judgments, which may only extend the growing pain stage of new legislation.

This chapter considered the practical implications of the proposed amendments and the effectiveness of the amendments should it be implemented. This chapter further contains suggestions to supplement the proposed amendments in order to allow the debt review process to be applied more efficiently. In chapter 5 the study will conclude whether debt review may provide consumers with debt relief in future.

⁴⁶ S 71(5).

⁴⁷ S 88(4).

⁴⁸ Government Gazette 36505 published 29 May 2013.

⁴⁹ The Act was implemented in sections from 1 June 2012 and the part of the act dealing with debt review came into effect in 1 June 2007.

CHAPTER 5

CONCLUSION

5.1 Introduction

In this study the focus were on the practicality of the debt review process and how the courts have interpreted the legislature's intention where the relevant sections of the Act¹ resulted in legal uncertainty. The question was asked whether the current precedents are in accordance with the purposes of the Act and whether the debt review process is an effective debt relief measure.² It has become clear that the legislature's intention is not always reflected in the literal interpretation of the sections relating to debt review. As is evident from this study, the application of certain sections of the Act can be challenging.

The Act introduces a new legal concept, namely debt review, to the Republic of South Africa.³ Debt review is not a debt relief measure in terms whereof a consumer's debt and/or liability are reduced.⁴ Debt review only allows a debt counsellor to act on behalf of a consumer to re-negotiate the contractual terms of the initial agreement relating to the monthly instalment and the repayment term.⁵ Debt review therefore amongst others allows over-indebted consumers to maintain their assets in circumstances where it is not possible for such consumers to afford their monthly instalments in terms of the initial agreement over the initial contractual term.

During this study it became clear that debt review is a noble concept and it aims to assist consumers who find themselves in financial distress. However it is not a quick fix for an over-indebted consumer and will only provide relief as far as credit provider's rights will allow such relief.⁶

Unfortunately, debt review places a financial burden on credit providers as they have to establish specialised departments to deal with the volumes of debt review applications. This may be viewed as job creation but, this burden will not be carried

¹ From here on all references to the National Credit Act, 34 of 2005 will read as "the Act".

² Chap 1 par 1.3.

³ Chap 1, par 1.1.

⁴ *Collett v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

⁵ Chap 1 par 1.2.

⁶ Chap 2 par 2.3.4.

by the credit providers. It will be filtered through to the consumers by increasing the cost of credit.⁷

5.2 Overview

Chapter 2 provided the foundation for this study by referring to the relevant sections and regulations dealing with the debt review process. The legislature compiled the Act to be a comprehensive piece of legislation.⁸ Section 3 of the Act provides a codified purpose of the Act and subsequently, interpretation of any section should be compared to the purpose of the Act.⁹ It is submitted that the uncertainty in the interpretation of the Act leads to several conflicting judgments.

In chapter 3 of this study the focus turned to our judiciary authority. The Republic of South African does not solely rely on proclaimed acts and regulations as legislation.¹⁰ Courts may interpret legislation to provide legal certainty, which is considered to be binding on future matters and thus contributing to legislation. The debt review process is no exception and courts provide guidance on several issues. Although there is currently a general feeling of legal certainty among practitioners, there is no unilateral consensus as to the fairness of the courts' interpretation of the purpose of the Act.

Chapter 4 deals with the proposed amendments to the Act as well as possible solutions where such proposed amendments are deemed to be ineffective or where no amendments are proposed. The Act which assists consumers who find themselves in financial distress,¹¹ have been tested against several scenarios in the time period since it has been enforce.¹² The Department of Trade and Industry finally drafted proposed amendments, which amendments will address some of the obstacles in practice. The legislature proposed amendments to several matters which were the root of several legal arguments. It is unfortunate that the amendments are proposed after the courts have already, to some extent created

⁷ Van Heerden and Coetzee "*Artikel 129(1)(a) van die Nasionale Kredietwet 34 van 2005: verwarrende verwarring oor voldoening*" Litnet/akademies/regte 2012-11-28.

⁸ Chap 1 par 1.1.

⁹ S 2(1).

¹⁰ Chap 3 par 3.1.

¹¹ Chap 1 par 1.1.

¹² 1 June 2006, 1 September 2006 and finally, 1 June 2007 including chap 6 of the Act.

legal certainty, while there are certain issues not addressed by the legislature in the amendments.

5.3 Suggestions for the way forward

5.3.1 Interplay between section a 129(1)(a) notice and debt review

The proposed amendment of section 86(2) will allow consumers better access to the protection of the debt review process in terms the Act. It is submitted that the proposed amendment is in accordance with the purpose of the Act.¹³ The contents and time period of the notice in terms of section 129(1)(a) and the delivery of the notice have been clarified through case law.

5.3.2 Termination of debt review

The proposed amendment to section 86(10) is welcomed as it prohibits credit providers from terminating a consumer's debt review after the matter is referred to the magistrate court in terms of section 87.¹⁴ However it is criticised that the proposed amendments does not include debt review applications referred to the magistrate's court in terms of section 86(7)(c).¹⁵ It is submitted that the proposed amendments should refer to all debt review matters referred to the magistrate's court. It is submitted that the interpretation of the supreme court of appeal in *Nedbank Ltd v National Credit Regulator and Others*¹⁶ is correct and a debt review application in terms of section 87 includes a debt review application in terms of section 86(7)(c).

5.3.3 Re-instatement of debt review

It is submitted that debt review should be a cost effective alternative to litigation. The legislature accepted the supreme court of appeals' judgment in *Firststrand Bank v*

¹³ Chap 3 par 3.3 and chap 4 par 4.2.

¹⁴ Chap 3 par 3.4 and chap 4 par 4.3.

¹⁵ *Wesbank v Papier* 2011 (2) SA 395 (WCC).

¹⁶ *Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581 (SCA).

*Collet*¹⁷ and incorporated the principles of the judgment in the proposed amendments. The proposed amendment to section 86(11) force consumers to obtain and allocate funds from their already over-indebted budget to litigation proceedings in order to protect the assets intended to be included in the debt review process. It is submitted that the magistrate's court, attending to the debt review matter, and not only the enforcement court, should attend to any request for relief in terms of section 86(11).

5.3.4 Debt review and insolvency

Debt review may be an alternative to insolvency, if the consumer approaches a debt counsellor timeously.¹⁸ The legislature acknowledges that insolvency of consumers not only negatively affect the consumers, but also the credit providers and the economy of the Republic of South Africa and should therefore only be considered as a last resort.¹⁹ The proposed amendment clearly states that an application for debt review does not constitute an act of insolvency.²⁰ It is submitted that the proposed amendments will give effect to the intention of the legislature to assist over-indebted consumers, without the possibility of that assistance constituting an act of insolvency. The balance of rights between the consumer and credit providers remains unchanged²¹ as credit providers may institute sequestration proceedings, after a consumer applied for debt review.²²

5.3.5 Clearance certificate

Although section 71 indicates the role of a debt counsellor and a credit bureau in the event that a consumer applies for a clearance certificate, the Act does not address the practicality of the clearance certificate.²³ It is submitted that the proposed amendments should be amended to include reference to the circumstances

¹⁷ *Collett v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

¹⁸ Chap 3 par 3.6 and chap 4 par 4.5.

¹⁹ *Ex Parte Ford And Two Similar Cases* 2009 (3) SA 379 (WCC).

²⁰ Chap 4 par 4.5.

²¹ *Firstrand Bank v Mvelase* 2011 (1) SA 470 (KZP).

²² *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ).

²³ Chap 2 par 2.7 and chap 4 par 4.7.

surrounding the clearance certificate.²⁴ It is further submitted that the proposed amendments should include the process to be followed and the consequences thereof in the event that the consumer chooses to withdraw from the debt review process.²⁵ It is submitted that consumers should be able to withdraw from the debt review process if their affordability will allow them to resume their contractual obligations, without being penalised for being under debt review. It is submitted that consumers should be barred, for a prescribed time period, from re-applying for debt review after a clearance certificate or form 17.4 is issued in order to avoid misuse of the debt review process.²⁶

5.3.6 Court process

It is further submitted that the Act and the magistrate court rules be adapted in order for debt review matters to proceed more effectively. It is suggested that the strict requirements with regards to pleadings be re-evaluated in order for debt review applications to be considered more effectively by magistrates, without compromising the legality of the debt review process intended by the legislature.²⁷ It is submitted that magistrates should be able to attend to all queries relating to debt review, including termination of the debt review and re-instatement of the debt review issues.²⁸

It is submitted that debt counsellors should be allowed to renegotiated interest rates along with the monthly instalment and the repayment term. Alternatively the legislature should prescribe an interest rate for agreements included under debt review,²⁹ which interest rates magistrates may enforce in terms of section 86(7)(c) and section 87. It is submitted that this will enable consumers to satisfy their debt obligations sooner.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Chap 2 par 2.3.3.

²⁸ Chap 5 par 5.3.2 and par 5.3.3.

²⁹ Chap 2 par 2.3.3.

5.4 Final conclusion

It is submitted that debt review survived the growing pains of new legislation and a new legal concept. Unfortunately all the concerns raised in practise have not been tested by the courts and some has not been addressed efficiently. This is mainly due to the fact that over-indebted consumers cannot afford the legal costs to challenge these concerns. Legal cost is the majority factor in deciding if a matter is to be continued by review or appeal. Legal costs will not be carried by debt counsellors, attorneys or any of the governing bodies involved in the debt review process but by already debt struck consumer.

Theoretically, debt review is an excellent debt relief measure. Debt review, as the legislature intended, may provide relief to the credit markets in the Republic of South Africa and could be considered as an alternative measure to litigation for a consumer who is deemed to be over-indebted. Debt review may also allow the consumer to retain assets, without incurring legal costs through litigation. Credit providers may also benefit from the debt review process, if it is applied correctly, as the credit providers will no longer have to incur legal costs to enforce credit agreements with regards to assets which is worth less than the outstanding debt and legal fees. It seems that debt review, which is deemed to be a debt relief measure, is available to consumer but does not come without unintended consequences or costs.³⁰ Accordingly the Act should be amended to improve the implementation of debt review in order to ensure that debt review becomes an effective debt relief measure.

³⁰ When a consumer is under debt review, litigation still needs to be opposed by the consumer and subsequently legal cost's needs to be incurred by the consumer.

TABLE OF STATUTES AND REGULATIONS

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- Insolvency Act 24 of 1936
- Magistrate's Court Rules
- National Credit Act, 34 of 2005

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- *Standard Bank of South Africa Ltd v Bekker* 2011 (6) SA 11 (WCC)
- *Standard Bank of South Africa Ltd v HunkyDory Investments 194 (PTY) Ltd and another (No1)* 2010 (1) SA 627 (C)
- *Standard Bank of South Africa Ltd v Kruger* 2010 (4) SA 635 (GSJ)

- *Standard Bank of South Africa Ltd Maharaj* 2010 (5) SA 315 (D)
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- *The National Regulator v Nedbank and Others* 2009 (6) SA 295 (GNP)
- *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 SCA (12)
- *Wesbank v Papier* 2011 (2) SA 395 (WCC)

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- Van Heerden 2010 ABLU 258 278
- Van Heerden and Coetzee “Perspectives on the Termination of Debt Review in terms of Section 86(10) of the National Credit Act 34 of 2005” PER / PELJ 2011(14) 2 par 2.1
- Van Heerden and Coetzee “Artikel 129(1)(a) van die Nasionale Kredietwet 34 van 2005: verwarrende verwarring oor voldoening” Litnet/akedemies/regte 2012-11-28
- Roestoff and Coetzee “Consumer Debt Relief in South Africa; Lessons from America and England; and Suggestions for the Way Forward” (2012) 24 SA Merc LJ p1
- Roestoff, Haupt, Coetzee, Erasmus "The Debt Counselling Process-Closing the Loopholes in the National Credit Act 34 of 2005" [2009] PER 23

2. Textbook

- Otto and Otto “The National Credit Act explained” LexisNexis Durban 2013

- Kelly-Louw “Consumer Credit Regulation” JUTA 2012
- Scholtz, Otto, Van Zyl, Van Heerden and Campbell “Guide to the National Credit Act (ed JW Scholtz)” LexisNexis Durban (2008)

3. Media

- Schedule 2 to the Regulation of the Act contains the prescribed fees and the NCR release a media statement in July 2008 “*Understanding debt counselling and its fees*” indicating what fees may be levied by a debt counsellor

4. Government Gazette

- Government Gazette 35327 published 10 May 2012
- Government Gazette 35876 published 16 November 2012
- Government Gazette 36505 published 29 May 2013

SCHEDULE 1

Regulation 24

Application for debt review

24(1) A consumer who wishes to apply to a debt counsellor to be declared over-indebted must:

- (a) Submit to the debt counsellor a complete Form 16; or
- (b) Provide the debt counsellor with the following information:
 - (i) Personal details including:
 - (aa) name, initials and surnames; identity number, if the consumer does not have an identity number, the passport number and date of birth;
 - (bb) postal and physical address;
 - (cc) contact details.
 - (ii) All income, inclusive of employment income and other sources of income (specify).
 - (iii) Monthly expenses, inclusive of, but not limited to:
 - (aa) taxes;
 - (bb) unemployment insurance fund;
 - (cc) pension;
 - (dd) medical aid;
 - (ee) insurance;
 - (ff) court orders;
 - (gg) other (specify).
 - (iv) List of all debts, disclosing monthly commitment, total balance outstanding, original amount and amount in arrears (if applicable) inclusive of but not limited to:
 - (aa) home loans;
 - (bb) furniture retail;
 - (cc) clothing retail;
 - (dd) personal loans;
 - (ee) credit cards;
 - (ff) overdraft;
 - (gg) educational loans;
 - (hh) business loans;
 - (ii) car finance and leases;
 - (jj) sureties signed;
 - (kk) other (specify).
 - (v) Living expenses, inclusive of, but not limited to:
 - (aa) groceries;
 - (bb) utility and continuous services;
 - (cc) school fees;
 - (dd) transport cost's;

- (ee) other (specify).
 - (vi) A declaration and undertaking to commit to the debt restructuring.
 - (vii) A consent that a credit bureau check may be done.
 - (viii) Confirmation that the information is true and correct
- (c) Submit to the debt counsellor the documents specified in the Form 16.
- (d) Pay the debt counsellor's fee, if any, provided that such fee may not exceed the maximum fee prescribed in Schedule 2.
- (2) Within five business days after receiving an application for debt review in terms of section 86(1) of the Act, a debt counsellor must deliver a completed Form 17.1 to all credit providers that are listed in the application and every registered credit bureau.
- (3) The debt counsellor must verify the information provided in terms of subsection (1) above by requesting documentary proof from the consumer, contracting the relevant credit provider or employer of any other method of verification.
- (4) In the event that a credit provider fails to provide a debt counsellor with corrected information within five business days of such verification being requested, the debt counsellor may accept the information provided by the consumer as being correct.
- (5) A notice contemplated in sub-regulation (2) must be sent by fax, registered mail or e-mail provided that the debt counsellor keeps a record of the date, time and manner of delivery of the notice.
- (6) Within 30 business days after receiving an application in terms of section 86(1) of the Act, a debt counsellor must make a determination in terms of section 86(6).
- (7) When assessing the consumer's application in terms of section 86(6)(a) of the Act, the debt counsellor must refer to section 79 and further consider the following:
- (a) A consumer is over-indebted if his/her total monthly debt payments exceeds the balance derived by deducting his/her minimum living expenses from his/her net income;
 - (b) Net income is calculated by deducting from the gross income statutory deductions and other deductions that are made as condition of employment;
 - (c) Minimum living expenses are based upon a budget provided by the consumer, adjusted by the debt counsellor with reference to guidelines by the National Credit Regulator.

- (8) In making determination that a particular debt is reckless, as per section 86(6)(b) of the Act, a debt counsellor must refer to section 80 of the Act and further consider the following:
- (a) the level of indebtedness of the consumer after that particular agreements was entered into; and
 - (b) whether, when that particular credit agreement was entered into, the total debt obligations including the new agreement exceeded the net income reduces by minimum living expenses;
 - (c) the consumer's bank statement, salary of wage advice and records obtained from a credit bureau;
 - (d) any guidelines published by the National Credit Regulator proposing evaluative mechanisms, models and procedures in terms of section 82 of the Act;
- (9) Any arrangement made by the debt counsellor with credit providers must be reduced to writing and signed by all the credit providers mentioned, the debt counsellor and the consumer.
- (10) After completion of the assessment, the debt counsellor must submit a Form 17.2 to all the credit providers and all registered credit bureaux within 5 business days;
- (11) When making a determination in terms of sections 79(3)(b)(ii and 80(3)(b)(ii), the value of a credit guarantee is 0.

Regulation 25

If a debt counsellor finds that a consumer is not over indebted and makes a finding in terms of section 86(7)(a) of the Act, the debt counsellor must provide the consumer with a letter of rejection, containing the following information:

- (1) Consumer's full names, surname and identity number, if the consumer does not have an identity number, the passport and date of birth;
- (2) Name, contact details and NCR registration number of debt counsellor;
- (3) The basis for finding the consumer not be over-indebted, including –
 - (a) Calculated income considered;
 - (b) Statutory and other deductions considered;
 - (c) Living expenses considered;
 - (d) Other debts considered.
- (4) A copy of the assessment form;
- (5) A statement advising the consumer of his/her right to approach the court in terms of section 86(9) within 20 business days for an order to be declared over-indebted, have agreements declared reckless and/or restructuring his/her debt obligations;

- (6) A statement advising the consumer that the application for debt review will be removed from all registered credit bureaux within 5 business days which will result in credit providers being entitled to take legal steps against the consumer.

Regulation 26

- 26(1) An application in terms of section 86(9) of the Act must be submitted to the court within 20 business days after the debt counsellor has provided the consumer with a letter of rejection.
- (2) The court may on application by the consumer and good cause shown, extend 20 business days period.
- (3) When making an application as contemplated in section 86(9), a consumer must complete Form 18.

Regulation 27

A debt counsellor must issue a clearance certificate in Form 19 if the consumer has fully satisfied all the debt obligations under every credit agreement that was subject to the debt re-arrangement order of agreement, in accordance with that order of agreement.