Selected aspects of debt review in terms of the National Credit Act 34 of 2005.

by

James Ronald Florence Ernst
Student No: 28077262

A research paper submitted in partial fulfillment of the requirements for the LLM Degree in Mercantile Law, University of Pretoria, South Africa.

30 April 2015

Supervisor: Prof Corlia Van Heerden

University of Pretoria

Department of Mercantile Law

Faculty of Law

© University of Pretoria
DECLARATION

I declare that this mini dissertation is my original work and all sources of information from other authors have been acknowledged. I also declare that this dissertation has never been submitted to any other institution. I hereby present this work in partial fulfillment for the award of the LLM Degree in Mercantile Law.

[Signature]

James Ronald Florence Ernst

30 April 2015

Pretoria

South Africa
ACKNOWLEDGEMENTS

I would like to thank my parents and wife for their unconditional support throughout the pursuance of my degree.

I would also like to give a special thank you to my supervisor, Professor Corlia Van Heerden whose guidance, supervision and believe in me were the key factors in the completion of this dissertation.
SUMMARY

The National Credit Act which came into full effective operation on 1 June 2007 has introduced significant changes to the consumer credit landscape. One such novel aspect is the provisions relating to over-indebtedness and the debt relief that may be accessed by an over-indebted consumer. Section 86 of the National Credit Act introduces a procedure called ‘debt review’ in terms whereof a consumer can voluntarily apply to a debt counsellor to be placed under debt review. The purpose of this process is for the debt counsellor to do an assessment of the consumer’s financial situation with the view of ascertaining whether the consumer is over-indebted and how his credit agreement debt can be restructured. The National Credit Act does however not provide detailed procedural rules for the conduct of the debt review process. It creates rights for the credit provider to terminate such a process and also protects the consumer by allowing for the resumption of a debt review that was not justly terminated.

This lack of procedural guidance by the National Credit Act is problematic and may compromise the rights of both consumers and credit providers. This dissertation aims to identify selected procedural problems that manifest themselves in the context of termination and resumption of debt review. These problems are discussed and certain conclusions are drawn and recommendations for future reform of these problematic aspects are made in the hope that it would contribute to enhance the effectiveness of the debt review procedure.
TABLE OF CONTENTS

DECLARATION........................................................................................................II
ACKNOWLEDGEMENTS.........................................................................................III
SUMMARY..............................................................................................................IV

CHAPTER 1: THE NATIONAL CREDIT ACT AND THE INTRODUCTION OF DEBT REVIEW

1.1 Introduction......................................................................................................1

1.2 The scope and purpose of dissertation.........................................................3

CHAPTER 2: THE DEBT REVIEW PROCESS IN TERMS OF THE NATIONAL CREDIT ACT

2.1 Introduction......................................................................................................5

2.2 Determining whether a Consumer is over-indebted or not.......................5

2.3 Applying for Debt Review...............................................................................7

2.4 Key Role Players in the Debt Review Process............................................13

2.4.1 The Consumer..........................................................................................13

2.4.2 The Credit Provider..................................................................................13

2.4.3 The Debt Counsellor................................................................................14

2.5 Conclusion......................................................................................................15
CHAPTER 3: SELECTED PROBLEMATIC ASPECTS REGARDING DEBT REVIEW

3.1 Introduction........................................................................................................16

3.2 Termination of Debt Review...........................................................................16

3.3 Resumption of Debt Review..........................................................................29

3.4 Conclusion.........................................................................................................33

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1 Conclusions......................................................................................................35

4.2 Recommendations..........................................................................................36

4.3 Final Remarks..................................................................................................37

BIBLIOGRAPHY
CHAPTER 1: THE NATIONAL CREDIT ACT AND THE INTRODUCTION OF DEBT REVIEW

1.1 Introduction

The National Credit Act\(^1\) (hereinafter NCA), which came into full operation on 1 June 2007, provides the statutory framework for the regulation of the South African credit market. It is a comprehensive Act that has repealed the previous South African consumer credit legislation in terms whereof the credit market was regulated, namely the Usury Act\(^2\) and the Credit Agreements Act\(^3\). The NCA involved a wholesale reform of the manner in which the credit market was regulated and placed extensive emphasis on the protection of consumers as is clear from the stated purposes of the Act, which are as follows:\(^4\)

‘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, by-

(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;

(b) ensuring consistent treatment of different credit products and different credit providers;

(c) promoting responsibility in the credit market by-

(i) encouraging responsible borrowing, avoidance of overindebtedness and fulfillment of financial obligations by consumers; and

(ii) discouraging reckless credit granting by credit providers and contractual default by consumers;

---

\(^1\) Act 34 of 2005.
\(^2\) Act 73 of 1968.
\(^3\) Act 75 of 1980.
\(^4\) S3(a)-(i). In terms of s2 the NCA must be interpreted in a manner that gives effect to the purposes set out in s3.
(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;

(e) addressing and correcting imbalances in negotiating power between consumers and credit providers by-

(i) providing consumers with education about credit and consumer rights;

(ii) providing consumers with adequate disclosure of standardized information in order to make informed choices; and

(iii) providing consumers with protection from deception, and from unfair and fraudulent conduct by credit providers and credit bureau;

(f) improving consumer credit information and reporting and regulation of credit bureau;

(g) addressing and preventing over-indebtedness of consumers and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;

(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

(i) providing for a consistent and harmonized system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.'

It is however clear from the aforementioned stated purposes that the protection of consumers are not the sole and primary objective of the NCA.\(^5\) The rights of credit providers should also be observed and as indicated by section 3(g) the Act seeks to promote equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers. Thus both parties are protected by the Act.

---

\(^5\) Standard Bank Ltd v Hales 2009 (3) SA 315 (D&C) at 322B; Firstrand Bank Ltd v Seyffert 2010 (6) SA 429 (GSJ) at 434.
A great number of consumers in South Africa become over-indebted as a result of credit debt or are at least experiencing difficulties in servicing such debts. Renke and Van Heerden remark that it is also disconcerting that many South African consumers are exposed to adverse shocks, for instance a rise in interest rates, and therefore to the risk of becoming over-indebted in future.

As part of its objectives to extend protection to consumers the NCA has introduced the concept of “debt review” as a measure to provide debt alleviation to over-indebted consumers. In terms of section 79 of the NCA 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 the consumer’s –

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

1.2 The scope and purpose of dissertation

The purpose of this dissertation is to provide an overview of the concept of debt review as introduced by the NCA and the debt review process and to discuss selected aspects regarding termination and revival of debt review that cover practical challenges posed by this process. The dissertation will comprise of the following further chapters:

---

7 Ibid.
• Chapter 2 will deal with the features of the debt review process in terms of the NCA and will set out procedural and substantive aspects of the debt review process. Chapter 2 will also deal with the key role players in the debt review process and will address their respective roles in the said process as well as their rights and obligations with regard to debt review. The aim of this chapter is to provide an overview of the debt review process which can serve as platform for the discussion of selected aspects of the process in subsequent chapters.

• In Chapter 3 the focus will turn to certain procedural aspects pertaining to termination and revival of debt review which has given rise to a substantial body of case law which, it is submitted, is indicative thereof that these aspects are often problematic in practice. Chapter 3 will thus focus on the provisions of sections 86(10) and 86(11) of the NCA.

• Chapter 4 will comprise of conclusions and recommendations regarding problematic aspects of termination and revival of debt review as identified in this study.
CHAPTER 2: THE DEBT REVIEW PROCESS IN TERMS OF THE NATIONAL CREDIT ACT

2.1 Introduction

As indicated in Chapter 1 debt review is a remedy available to consumers who are over-indebted. The end purpose of this process is the “eventual satisfaction” of all the consumer’s credit agreements responsibly entered into and this is achieved by restructuring the said debt in accordance with section 86(7)(c) of the Act.\(^8\) The over-indebted consumer who accesses the debt review process can use the process to protect himself against debt enforcement as section 88(3) provides for an ex lege moratorium\(^9\) on debt enforcement whilst a debt review is pending, that is before it is terminated in terms of section 86(10) as discussed below.

The objective of this Chapter is to give an overview of the debt review process. Furthermore this Chapter will place emphasis on the important role players such as the consumer, debt counsellor and credit providers in the debt review process.

It is important to note that Payment Distribution Agents usually play a role in the debt review process after a debt re-arrangement order is granted or where a debt re-arrangement agreement by consent is made an order of the Tribunal or court.\(^10\)

2.2 Determining whether a consumer is over-indebted or not

---

\(^8\) Where the consumer is not yet over-indebted but likely to become over-indebted in future he can enter into a voluntary debt rearrangement agreement with his credit providers which can be made an order of court. See s 86(7)(b) read with s 138 of the Act.

\(^9\) See Kona

\(^10\) An in depth discussion of the role of payment distribution agents is beyond the scope of this dissertation. The National Credit Amendment Act 19 of 2014 which came into operation on 13 March 2015 now provide for the registration of payment distribution agents. See also regulation 10A and Schedule 2 inserted by the 2015 National Credit Regulations including Affordability Assessment Regulations published in GG with effect 13 March 2015.
For a consumer to be entitled to apply for debt review, he has to be over-indebted and in default or likely to fall in default under his credit agreement in the near future.\textsuperscript{11} A consumer would typically be over-indebted when he/she is unable to meet his/her financial obligations arising from credit agreements he/she entered into with a credit provider.\textsuperscript{12}

As indicated in chapter one the test for over-indebtedness for purposes of the NCA is set out in section 79. When having regard to the aspects indicated in that section it becomes that when assessing whether a consumer is over-indebted one should not only look at the consumer’s current financial position and what his/her current financial obligations are, but also the likelihood of meeting his/her future financial obligations.\textsuperscript{13} A consumer’s financial means does however not only include his/her income and expenditure, but also his/her assets and liabilities.\textsuperscript{14} This is essential to the debt review process, as the debt counsellor has to take the abovementioned in to account when compiling a proposed payment plan to present to the credit providers and thereafter the Magistrate’s Court, as discussed hereinafter.

In brief the debt review process consist of the following stages:
- the application by the consumer for debt review
- the assessment of the consumer’s financial position by the debt counsellor and liaison by the debt counsellor with the consumer’s credit providers
- formulation of a debt restructuring proposal by the debt counsellor
- although not borne out by the express wording of section 86, the debt counsellor will in practice usually first submit such proposal to the credit providers for their response
- the referral of the proposal to court with the objective of obtaining a debt restructuring order (which the consumer thereafter has to service by making regular payments).

\textsuperscript{11} S79(1).
\textsuperscript{12} S79(1).
\textsuperscript{13} S79(1).
\textsuperscript{14} Standard Bank of South Africa Ltd v Panayiotts 2009 (3) SA 363 (W).
It should also be noted that the National Credit Regulator has recently issued updated guidelines on how debt counsellors should conduct a debt review and which matters they must take into account.\textsuperscript{15}

\section*{2.3 Applying for Debt Review}

Section 86 of the NCA regulates the process of debt review and must be read with Regulation 24. It provides that the consumer has to apply for debt review by completing the prescribed form 16 and thereafter give the form to the debt counsellor. The form 16 has to contain all the personal information of the consumer, his/her identity document and his/her monthly income and expenses.\textsuperscript{16}

It is important to note that in the event where the credit provider has already taken steps to enforce a credit agreement in terms of section 130 of the NCA, the consumer will not be allowed to make application in terms of section 86.\textsuperscript{17} This is the current position after the National Credit Amendment Act\textsuperscript{18} came into effect and therefore the delivery of a section 129(1)(a) notice will no longer constitute a ban to an application for debt review.\textsuperscript{19}

It is important that a debt counsellor, in the case of debt review, determines all the consumer’s income and expenses and as mentioned above this includes his assets and liabilities as well.\textsuperscript{20} Hereafter the debt counsellor must determine the consumer’s obligations due to any credit agreements he

\begin{footnotesize}
\begin{enumerate}
\item Circular 2/2015 published by the National Credit Regulator available at www.ncr.org.za
\item S86(1) read with Reg24(1).
\item S86(2).
\item Act 19 of 2014..
\item S26 of the National Credit Amendment Act 19 of 2014 amends section 86(2) of the principal Act by the substitution for subsection (2) of the following subsection: “(2) An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section [129] 130 to enforce that agreement.” For an overview of the previous position see Scholtz et al \textit{Guide of the National Credit Act} (Service Issue 6) (hereinafter \textit{Guide to the National Credit Act}) par 12.2.
\item Standard Bank of South Africa Ltd v Panayiotts 2009 (3) SA 363 (W). See also \textit{Guide to the National Credit Act} ch 14 for a practical example of the income and expenditure to be taken into account by the debt counsellor during the s86 assessment.
\end{enumerate}
\end{footnotesize}
entered into. These financial means, prospects and obligations include the following:

- Income, or any other income received by the consumer, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective consumer receives, has a right to receive or holds in trust for another person;\(^\text{21}\)
- The financial means, prospects and obligations of any other adult person within the consumer’s immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily
  (i) share their respective financial means; and
  (ii) mutually bear their respective financial obligations;\(^\text{22}\); and
- If the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the reasonably estimated revenue flow from that business purpose.\(^\text{23}\)

When the debt counsellor has determined the above aspects, he/she has to consider the following when assessing the application for debt review: If the consumer’s monthly debt is more than the difference between his/her minimum living expenses and net income, the consumer is over-indebted.\(^\text{24}\) The consumer’s net income is calculated by deducting all statutory deductions and other deductions, which are made as a condition of employment, from the consumer’s gross income.\(^\text{25}\) The consumer’s minimum living expenses are evident from a budget provided by the consumer and adjusted by the debt counsellor according to the guidelines set out by the National Credit Regulator.\(^\text{26}\)

After the consumer has completed the form 16 and handed it to the debt counsellor, the debt counsellor must notify and send the credit providers as

\(^{21}\) S78(3)(a).
\(^{22}\) S78(3)(b)(i)-(ii).
\(^{23}\) S78(3)(c).
\(^{24}\) Reg24(7)(a).
\(^{25}\) Reg24(7)(b).
\(^{26}\) Reg24(7)(c). See further the aspects listed in NCA Form 16.
well as the credit bureaux a form 17.1 within 5 business days.\textsuperscript{27} The prescribed from 17.1 is a notification the debt counsellor sends to all the relevant credit providers and credit bureaux to inform them of the application for debt review by the consumer, hereafter the credit providers must issue a certificate of balance. The debt counsellor has to send the form 17.1 by email, fax or registered post and he also has to keep record of the date, time and manner of the delivery of the notice.\textsuperscript{28}

When the form 17.1 is sent to the relevant credit providers and credit bureaux, the debt counsellor must verify and confirm all the information with the credit providers and confirm the consumers’ salary with the employer of the consumer.\textsuperscript{29} In the event that any of the credit providers which is a party to a credit agreement with the consumer fails to provide verification information within 5 business days after such verification information was requested, the debt counsellor may accept the information given by the consumer as correct.\textsuperscript{30}

The debt counsellor does an assessment to determine whether the consumer is over-indebted or not and this assessment must be done within 30 business days after the consumer made application for debt review.\textsuperscript{31}

Based on the assessment done by the debt counsellor the following conclusions may be reached with regards to the consumer’s debt situation:

- If it is found that the consumer is not over-indebted the application for debt review will be rejected and thereafter all the credit providers and

\textsuperscript{27} S86(4) read with Reg24(2).
\textsuperscript{28} Reg24(5).
\textsuperscript{29} Reg24(4). According to section 2(5) of the NCA when a particular amount of business days are provided between events, it should be calculated by excluding the day on which the first event occurs and including the day on which the second event occurs. A business day does not include a public holiday, Saturday or a Sunday in the period between the two events.
\textsuperscript{30} Reg24(4). If however one has regard to s 86(10) which provides for termination of a debt review it becomes clear that the debt counsellor actually has 60 business days within which to do the debt review before it can be terminated by the credit provider.
\textsuperscript{31} S86(6)(a) read with Reg24(6).
credit bureaux must be notified thereof by means of a letter confirming the rejection of the application for debt review.\textsuperscript{32}

- The consumer may be found, based on the assessment, to not be over-indebted, but although he is not over-indebted it may yet be concluded that he will not be likely to meet his financial obligations and therefor arrangements need to be made with the credit providers in an attempt to pay off his debt.\textsuperscript{33} In the declaratory judgment of National Credit Regulator v Nedbank Ltd\textsuperscript{34} the court classified this as “voluntary re-arrangement”. In this instance the debt counsellor will get all the consumer’s credit providers to agree to a debt rearrangement order and matter will be referred to court for purposes of obtaining a so-called ‘consent order’.

- Lastly the consumer may be found over-indebted which means that the debt counsellor then has to compile a proposal regarding restructuring of the consumer’s debt that has to be presented during a hearing by the Magistrate’s Court in accordance with section 87 of the Act.

After the completion of the debt counsellor’s assessment, a form 17.2 must be submitted to all the relevant credit providers and credit bureaux within 5 business days of the determination regarding the debtor’s state of over-indebtedness.\textsuperscript{35} The prescribed from 17.2 is a notification the debt counsellor sends to all the relevant credit providers and credit bureaux to inform them whether the consumer is over-indebted or not. The reason for submitting the form 17.2 is to notify all the credit providers and credit bureaux that the consumer has successfully applied for debt review in terms of section 86 of the NCA. Together with the form 17.2 the debt counsellor will also submit a proposal that will set out a payment plan to all the consumer’s credit.

\textsuperscript{32} S86(7)(a) read with Reg 25.

\textsuperscript{33} S86(7)(b).

\textsuperscript{34} 2009 (6) SA 295 (GNP). The court further stated that the debt counsellor may refer the case to court where section 86(7)(a) does not apply or where the consumer and his credit providers are unable to reach an agreement regarding the restructuring of his/her debt.

\textsuperscript{35} Reg24(11).
providers.\textsuperscript{36} When the debt counsellor prepares the proposal he will determine what the consumer’s distributable amount is by calculating the consumer’s monthly income as well as the consumer’s monthly reasonable living expenses and based thereon the debt counsellor will determine the amount available to distribute to the credit providers.\textsuperscript{37}

The proposal of the debt counsellor may recommend one or more of the following in accordance with section 86(7)(c):

- “extending the period of the agreement and reducing the amount of each payment due accordingly;”\textsuperscript{38}
- “postponing during a specified period the dates on which payments are due under the agreement;”\textsuperscript{39}
- “extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement.”\textsuperscript{40}

After the debt counsellor has sent the form 17.2 together with the proposed payment plan and all the negotiations between the debt counsellor and the credit providers are settled, the application will be referred to a Magistrate’s Court which will exercise a discretion to grant or dismiss the application.\textsuperscript{41}

The Magistrate’s Court may then make an order that one or more of the consumer’s credit agreements or debt obligations has to be rearranged in accordance with section 86(7)(c) (as indicated below) to assist the consumer in paying off that particular debt or obligation. The Magistrate’s Court may also make an order declaring a specific agreement to constitute reckless credit where the court believes one or more of the consumer’s credit

\textsuperscript{36} S86(7)(c).
\textsuperscript{37} Reg 24(1) where it is clear that a consumer’s net income less his/her monthly expenses equals the distributional amount.
\textsuperscript{38} S86(7)(c)(ii)(aa).
\textsuperscript{39} S86(7)(c)(ii)(bb).
\textsuperscript{40} S86(7)(c)(ii)(cc).
\textsuperscript{41} The application will be in accordance with rule 55 of the Magistrates court rules. See also the 2012 Debt counseling guidelines available at www.dcaso.org.za.
agreements were granted recklessly.\textsuperscript{42} In terms of section 86(7)(c)(ii)(aa)–(cc) of the NCA the debt counsellor and the Magistrate's Court may not amend contractual interest rates when rearranging the consumer’s debt.\textsuperscript{43} It is important to note that the debt counsellor cannot “declare” a consumer over-indebted. Such declaration of over-indebtedness is a function that the court must exercise.\textsuperscript{44}

If a debt restructuring order is granted the debt counsellor must inform the credit providers that the court has granted a debt re-arrangement order.\textsuperscript{45} The consumer is then obliged to follow the payment plan as set out in the court order by making regular payments as ordered, failure of which will lead to enforcement of the credit agreement in accordance with section 88(3) of the Act. It is to be noted that credit providers are entitled to oppose court proceedings for restructuring of credit agreement debt pursuant to a debt review in terms of section 86 if for instance the payment plan is not economically viable.\textsuperscript{46}

In the context of debt review it is important to note that a credit provider must at all times assist the debt counsellor by supplying all information required to prepare the proposed payment plan – section 86(5) obliges the credit provider to act in ‘good faith’ during the debt review process.\textsuperscript{47} It is submitted that this duty of good faith also extends to the consumer and the debt counsellor: the consumer must provide complete and correct information to the debt counsellor and must be bona fide with his debt review application and the debt counsellor must display good faith in the manner which he conducts the debt review and in the formulation of a debt repayment proposal that is economically viable.

\textsuperscript{42} S86(7)(c)(i–ii). A discussion of determination of whether credit was granted recklessly is beyond the scope of this dissertation. See further Guide to the National Credit Act ch 11 for detailed discussion of reckless credit.
\textsuperscript{43} SA Taxi Securitisation (Pty) Ltd v Lennard 2012 (2) SA 456 (ECG).
\textsuperscript{44} See s85 of the National Credit Act.
\textsuperscript{45} 2012 Debt counseling regulation 4 available at www.dcasacoza.
\textsuperscript{46} Evans v Smith 2011 (4) SA 472 (WCC).
\textsuperscript{47} The credit provider may never deny a request for information from a debt counsellor.
In conclusion it is also important to mention that once a consumer is under debt review or subject to a debt restructuring order he will not be allowed to enter into any other credit agreements and if he fails to adhere to this prohibition, such a credit agreement can never form the subject of any debt review.  

2.4 Key Role Player in the Debt Review Process

2.4.1 The Consumer

The NCA defines a consumer as follows:

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 is the party to the debt review process who has initially entered into a credit agreement that is governed by the NCA. In the case of debt review the consumer is always a natural person: the NCA does not exclude a juristic person from entering into credit agreements, but it does however exclude a juristic person from applying for debt review.

2.4.2 The Credit Provider

The NCA defines a credit provider as follows:

a) the party who supplies goods or services under a discount transaction,
 incidental credit agreement or instalment agreement;
b) the party who advances money or credit under a pawn transaction;
c) the party who extends credit under a credit facility;
d) the mortgagee under a mortgage agreement;
e) the lender under a secured loan;
f) the lessor under a lease;
g) the party to whom an assurance or promise is made under a credit guarantee;
h) the party who advances money or credit to another under any other credit agreement; or
i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into;

In short, a credit provider for purposes of credit agreements that are governed by the NCA, is the party to the debt review process and credit agreement who provides the credit to the consumer.

2.4.3 The Debt Counsellor

The debt counsellor is the party in the debt review process who acts as the intermediary between the consumer and the credit provider. A debt counsellor is a neutral functionary whose duties are to assist the court in determining whether a consumer is over-indebted and how his debt should be restructured.\textsuperscript{51}

There are certain requirements a person must fulfill to be able to register as a debt counsellor, namely:

• He/she must be a natural person.\textsuperscript{52}
• He/she must satisfy all the prescribed and required education, experience and competency requirements.\textsuperscript{53}
• The National Credit Regulator must register the debt counsellor.\textsuperscript{54}

\textsuperscript{51}National Credit Regulator v Nedbank 2011 (3) SA 581 (SCA).
\textsuperscript{52}S44(1).
\textsuperscript{53}S44(3)(a).
• The natural person who intends to apply should have at least a grade 12 certificate; a minimum period of 2 years working experience in certain fields and the person needs to complete a prescribed course.55

• A debt counsellor’s registration must be renewed annually together with the annual fee of R100 that should be paid to the National Credit Regulator.56

2.5 Conclusion

The NCA affords an over-indebted consumer debt relief by providing that such consumer can voluntarily apply for debt review as envisaged by section 86 and thereby obtain a ‘breather’ by having his debts restructured and paid off over a longer time period whilst avoiding debt enforcement by his/her credit providers.57 This process is premised on the notion that all the role players in the process will participate in good faith in order to attain the objective of the NCA regarding eventual satisfaction of all responsible credit agreement debt entered into by the consumer. The debt review process can thus be utilized to serve the interests of both the consumer and the credit provider by allowing the consumer extra time during which to settle his debts and ensuring that the credit provider eventually obtains payment of whatever amounts the consumer is owing under a credit agreement. Where this process is properly observed it can also avoid the necessity and costly implications of debt enforcement litigation.

54 S44(3)(b).
55 Reg10.
56 Reg10 and Schedule 2 of the regulations.
57 Par 2.4.
CHAPTER 3: SELECTED PROBLEMATIC ASPECTS REGARDING DEBT REVIEW

3.1 Introduction

The debt review process has been marked by various procedural challenges and have also been hampered as a result of poor legislative drafting. In this chapter termination of debt review and the instances wherein a revival of a terminated debt review may be obtained and a number of selected problematic aspects regarding such termination and revival of debt review will be discussed. An in-depth discussion of all the problems relating to the process of debt review and its termination and revival is beyond the scope of this dissertation.

3.2 Termination of debt review

It may happen that a debt review does not progress smoothly and that it becomes a protracted saga of delays and inefficiencies. Just as a consumer has a right to apply for debt review, so should a credit provider have the right to terminate the debt review process if it is leading nowhere.

Section 129(1)(b) of the NCA prohibits a credit provider to enforce a credit agreement that is subject to a pending debt review from commencing court proceedings to enforce that credit agreement unless the credit provider has first terminated such debt review in accordance with section 86(10).

A credit provider may give notice to terminate a debt review application with regards to a specific credit agreement where the consumer is in default. This notice may only be given to the defaulting consumer, his debt counsellor and the National Credit Regulator at least sixty business days after the

---

58 For a detailed discussion of these problems see Guide to the National Credit Act par 11.3.
59 S86(10)(a) as introduced by the National Credit Amendment Act 19 of 2014. The wording is basically the same as that of the original s 86 although it has been ‘moved around’ a bit.
consumer applied for debt review.\textsuperscript{60} The notice to terminate must be in accordance with section 86(10) of the NCA and should indicate that it is given in respect of a specific credit agreement.\textsuperscript{61}

No format is prescribed in the NCA for the section 86(10) notice. It has however been submitted that the notice to terminate should be in the following format\textsuperscript{62}:

“To: The consumer (address)
To: The debt counsellor (address)
And to: The National Credit Regulator (address)
Notice to terminate Debt Review in terms of section 86(10) of the National Credit Act 34 of 2005.
Take notice that (Credit Provider) hereby gives notice to terminate the debt review in respect of (credit agreement account number) which application for debt review was made on (date). It is recorded that the consumer is in default with his obligations under the credit agreement and that at least sixty business days had elapsed since the date on which application for debt review was made. Further, note that the credit provider will be entitled to institute enforcements steps on the lapse of 10 business days after delivery of this notice.
Credit Provider (contact details)"

With regards to the method of delivery of the notice to terminate, the NCA does not prescribe such method of delivery, as a result whereof section 65(2)\textsuperscript{63} will apply and therefore a consumer will in a credit agreement at least

\begin{itemize}
\item[(a)] make the document available to the consumer through one or more of the following mechanisms –
\item[(i)] in person at the business premises of the credit provider, or at any location designated by the consumer but at the consumer’s expense, or by ordinary mail;
\end{itemize}

\textsuperscript{60} S86(10) and Wesbank Ltd v Papier 2011 (2) SA 395 (WCC) where the court attached specific meaning to the fact that s 86(10) does not require notice of termination to the court. 
\textsuperscript{61} Collett v Firstrand Bank Ltd 2011 (4) SA 508 (SCA) at par 17.
\textsuperscript{62} Guide to the National Credit Act par 11.4
\textsuperscript{63} S65(2) provides that if no method has been prescribed for the delivery of a particular document to a consumer , the person required to deliver that document must
be able to choose one of the following methods: in person at the business premises of the credit provider, a location designated by the consumer at his consumer’s expense, ordinary mail, fax, email or printable web-page. The address that should be used for the notice to be delivered to must be the address of the consumer as set out in the agreement or the most recent address provided by the consumer to the credit provider.

When one has regard to section 129(1)(b) it is clear that the section 86(10) notice is a statutory pre-enforcement notice similar to the notice that has to be provided to a consumer in terms of section 129(1)(a) where the consumer is not under debt review. Prior to the National Credit Amendment Act the method of delivery of a section 129(1)(a) notice was not prescribed and this lead to a long line of cases that attempted to sort out various problematic aspects regarding delivery of a section 129(1)(a) notice. The National Credit Amendment Act, now prescribes the method of delivery of a section 129(1)(a) notice but this method of delivery has not been prescribed for section 86(10) notices which would have been prudent as the section 86(10) notice is also a pre-enforcement notice. Thus, now that the National Credit Amendment Act is in operation Van Heerden points out that the effect of the aforesaid amendment regarding delivery of the section 129(1)(a) notice is that delivery of a section 129(1)(a) notice is dealt with by the newly introduced sections 129(5), (6) and (7) read with section 96 and section 168 whereas delivery of section 86(10) notice will still be governed by section 65(2) read with sections 96 and 168 of the Act.

(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).

See the discussion in Guide to the National Credit Act par 12.4

S 26 of the National Credit Amendment Act 19 of 2014 introduces new ss (5), (6) and (7) to s 129 specifically to provide for delivery of a s 129(1)(a) notice. These newly prescribed methods of delivery are of a more limited nature than those prescribed by s 65(2). See par 12.4.4.

Van Heerden in Guide to the National Credit Act par 11.3.4.
Good faith plays an important role in determining whether a credit provider validly terminated a debt review. In *Absa Bank Ltd v Walker*[^69^] it was argued that the credit provider was bound to respond constructively to the debt restructuring proposal put to it for consideration by the debt counsellor in terms of section 86(7)(c)(ii) of the Act and that its failure to respond to the proposal was an indication that “it had fallen short of the obligation … to treat the debtor with good faith” thus prohibiting the credit provider to terminate the debt review in terms of section 86(10). It should however be noted that despite the obligation that the NCA creates for the parties to participate in the debt review process in good faith the Act does not provide any guidelines on what would constitute good faith in the context of debt review. This is problematic because it has now been left to the courts to interpret this concept and may lead to divergent judgments and thus to legal uncertainty.

It should further be noted that section 129(1)(b), as stated above, which requires termination of a pending debt review in accordance with section 86(10) prior to enforcement has to be read together with section 130(1)(a) of the Act. The latter section *inter alia* provides that a credit provider may approach a court to enforce a credit agreement if at least 10 business days have elapsed after the credit provider delivered a section 86(10) notice to the consumer. Thus yet another problematic aspect relating to termination in terms of section 86(10) relates to the provision in section 130(1)(a) that 10 business days should have lapsed after delivery of a section 86(10) notice before the credit provider will be entitled to enforce a credit agreement that was subject to debt review because section 130(3)(a) contains no indication what should happen in those 10 business days. In addition, section 86(11) which provides for revival of a terminated debt review (as discussed hereinafter) only allows such termination order to be made by the court in which the credit agreement is being enforced.[^70^] Van Heerden has therefore submitted that a *lacuna* exists as neither section 86(10) nor section 130(1) provides any express indication as to what the purpose of the 10 business

[^70^]: *Collet v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).
days referred to in section 130(1)(a) is and whether it is expected that the consumer take any express steps within that time period.\(^{71}\)

There has been differing views on the purpose of the 10 business day period between delivery of a section 86(10) notice and the commencement of legal proceedings to enforce the particular credit agreement. In *Changing Tides 17 (Pty) Ltd v Erasmus*\(^{72}\) the court was of opinion that the purpose of section 86(10) appears to be to allow the credit provider to insist on timeous compliance by the debt counsellor with the debt review timetable and to afford it the right to pursue recovery proceedings if there is a failure to efficiently comply with the debt review process.\(^{73}\) It stated that the notice to the National Credit Regulator is intended to afford the Regulator the means of monitoring the proper functioning of the debt review system, including the proper discharge by debt counsellors of their statutory obligations.\(^{74}\) Binns-Ward remarked that the evident purpose of the notice by a credit provider in terms of section 86(10) is to enable the consumer and/or the debt counsellor to urgently bring an application to a magistrate in terms of section 86(7)(c) or 86(8)(b) if that has not by then already been done. Alternatively, if such an application is already pending, to approach the magistrate for an order in terms of section 86(11) of the Act that the debt review should be resumed.\(^{75}\)

In *Firstrand Bank Ltd v Martin*\(^{76}\) Binns-Ward J again dealt with this issue and held that the effect of the notice in terms of section 86(10) is in fact not *ipso facto* to terminate the debt review but rather to afford a period of notice\(^{77}\) upon the completion of which the credit provider is able, notwithstanding the debt review, to institute proceedings in a court for recovery of the debt.

Unfortunately the National Credit Amendment Act\(^{78}\) did not address this *lacuna* and it is still problematic that there is no indication of the purpose of the 10 business days after delivery of a section 86(10) notice.

\(^{71}\) *Guide to the National Credit Act* par 11.3

\(^{72}\) [2010] JOL 25358 (WCC).

\(^{73}\) Par 29.

\(^{74}\) Ibid.

\(^{75}\) Par 32.

\(^{76}\) 2012 (3) SA 600 (WCC).

\(^{77}\) As contemplated in s130(1)(a).

\(^{78}\) Act 19 of 2014.
One of the most problematic aspects regarding termination of debt review was the fact that, prior to the National Credit Amendment Act, section 86 did not contain any cut-off date whereafter a debt review could no longer be terminated in terms of section 86(10). Due to the lack of clear guidance by the Act many conflicting judgments followed and authors were also attempting to provide some guidance.

Van Heerden and Coetzee\(^79\) submitted that the following issues may influence the termination of a pending debt review application:

- Where the consumer has failed to provide the debt counsellor with sufficient information. In *BMW Financial Services (Pty) Ltd v Donkin*\(^80\) the court made it clear that if the consumer fails to provide the debt counsellor with the sufficient information required, it can influence the calculation of sixty business day period. Thus if a consumer fails to provide the debt counsellor with the required information as set out and confirmed by the court in the last mentioned case, the debt review cannot be conducted within the time frames envisaged by section 86 read with regulation 24 and a credit provider will then most likely terminate the debt review within the time allowed in section 86 because of a lack of meaningful progress with the debt review process.

- Where the debt counsellor fails to deliver a form 17.1. As discussed earlier the form 17.1 refers to the notification by the debt counsellor to all the credit providers and registered credit bureaux to confirm that the consumer has applied for debt review. The debt counsellor must notify all the relevant parties within five days after the consumer has applied for debt review. If a credit provider does not receive notice of the application for debt review he will not know that the consumer is under debt review and may proceed with enforcement. This can cause unnecessary legal costs, and further the court may refer the matter.

\(^79\) 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 at 56.

\(^80\) 2009 (6) SA (KZD) at 73-74.
back to the debt counsellor to first attend to the consumer’s over-
indebtedness.\footnote{In terms of section 130(4)(c).}

- Where the debt counsellor fails to deliver a form 17.2. As discussed earlier the form 17.2 refers to the notification by the debt counsellor to all the credit providers and registered credit bureaux to confirm the determination by the debt counsellor regarding the consumer’s over-
indebtedness. In the event where a credit provider does not receive the debt counsellor’s determination regarding the consumer’s over-
indebtedness, the credit provider has the option to wait for the sixty business day period to pass and then terminate the debt review application accordingly.

- Where the debt counsellor did not make any recommendations to the Magistrate’s Court after determining that the consumer is over-
indebted. Where the debt counsellor fails to give notice to a credit provider that the application for debt review is referred to the Magistrate’s Court, the credit provider can after the sixty business day period since the consumer applied for debt review terminate the application for debt review and thereafter enforce the specific credit agreement.

- An economically unviable repayment proposal. One of the objectives of the NCA is to ensure that a consumer eventually satisfies his obligations but the courts have held that this does not mean that the credit provider is obliged to accept a proposal that is not economically viable.

It is important to note that the National Credit Amendment Act has introduced a further subsection to section 86(10), namely section 86(10)(b) which now provides:

“No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal.”
Prior to the introduction of section 86(10)(b) no provision was made in the Act for the stage at which termination of a debt review by a credit provider would no longer be competent. This lack of an indication in the Act of the stage at which a debt review can be terminated also gave rise to much controversy.\textsuperscript{82}

Prior to the introduction of section 86(10)(b) by the National Credit Amendment Act, case law was divided on the question whether a debt review could be terminated once a debt counsellor, having made a determination, has referred the matter to a magistrate’s court with a recommendation in terms of section 86(8)(b) or 86(7)(c) but before the matter is actually heard by the court in terms of section 87.

In *Standard Bank of South Africa Ltd v Kruger*\textsuperscript{83} it was held that in those instances where a debt counsellor within sixty business days from the date that the consumer has applied for debt review, has lodged an application to a magistrate’s court for purposes of debt restructuring, the credit provider may not terminate the debt review in terms of section 86(10) despite the fact that the application for restructuring has not been heard by the court within the aforesaid sixty business days. The court held that termination in terms of section 86 is only competent in respect of the actual debt review process that is conducted by the debt counsellor and that the referral to court in terms of section 86(8)(b) for a hearing falls outside the ambit of such termination as it is done in accordance with section 87 of the Act.\textsuperscript{84} The court also referred to section 129(2) of the NCA which provides that section 129(1) of the Act, which *inter alia* requires a section 86(10) notice to be delivered prior to enforcement, does not apply to a credit agreement that is subject to a debt restructuring order or to proceedings in a court that could result in such an order and indicated that a referral by a debt counsellor falls in the latter category, thus indicating that a notice to terminate in terms of section 86(10) would be incompetent once a debt counsellor has made such a referral.\textsuperscript{85}

\textsuperscript{82} As indicated below this aspect has now been addressed by the introduction of s 86(10)(b) by the National Credit Amendment Act 19 of 2014.

\textsuperscript{83} 2010(4) SA 635 (GSJ).

\textsuperscript{84} Par 13 and 14.

\textsuperscript{85} Par 26.
In *SA Taxi Securitisation v Nako and Others*, the court, however, reached a different conclusion. It held that section 129(2) does not preclude a credit provider from instituting legal proceedings where a debt counsellor has referred a matter to the magistrate’s court, which proceedings could result in a debt restructuring order. The court decided that section 129(2) merely renders the provision of a notice recommending a consumer to refer a matter to a debt counsellor redundant, as the matter has already been referred to a debt counsellor. The court criticised the *Kruger* decision by stating that section 87 is dependent on a proposal in terms of section 86 and to argue that the words “that is being reviewed in terms of this section” in section 86(10) refers only to a debt review by a debt counsellor loses sight of this fact. It stated that the argument as put forward in *Kruger* also loses sight of the protection provided for in section 86(11) and specifically the words “hearing the matter” contained therein. The court held that it would have been unnecessary to include the words “hearing the matter” in section 86(11), if the court in *Kruger* was correct, as these words refer to a matter pending before the magistrate’s court and on *Kruger*’s construction, there would have been no matter before it in terms of section 86(10). Thus it held that the court referred to in section 86(11) is the court before which the debt restructuring proposal serves.

In *SA Taxi Securitisation (Pty) Ltd v Matlala*, the court disagreed with the interpretation that the court in *Nako* afforded to the court “hearing the matter” as mentioned in section 86(11). It stated that these words refer to the court in which the credit agreement is being enforced and not the court to which the debt review has been referred to in terms of section 87 of the NCA. The court also held that service, and not merely issuing, of a referral on the credit provider would constitute a referral to the magistrate’s court in terms of section 86(8)(b) or 86(7)(c).

---

87 Par 10.
88 Par 43.
89 [2010] ZAGPJHC 70 (29 July 2010)
90 Par 9.
91 Par 14.
In *Firstrand Bank Ltd v Evans*\(^92\) and in the similar judgment in *Firstrand Bank Ltd v Collett* \(^93\) the court considered the aforementioned conflicting judgements. It indicated that the role of the debt counsellor conducting a debt review in terms of section 86, is not completed by mere reference of his or her debt restructuring recommendation to the magistrate’s court but that the debt review process which is regulated by section 86 continues until the magistrate’s court makes an order in terms of section 87.\(^94\) Therefore, the more plausible interpretation of the words “that is being reviewed in terms of this section” is that they are used to distinguish the process in section 86 from that in sections 83 and 85.\(^95\) The court remarked that it was unable to find anything in the structure of section 86 or of the Act in its entirety which is indicative of an intention on the part of the legislature to limit the right of a credit provider under section 86(10) to the process prior to the reference to the magistrate’s court. It thus held that the credit provider’s right to terminate a debt review in terms of section 86(10) continues until the magistrate’s court has made an order in terms of section 87.\(^96\) In this regard the court referred to section 86(11) and the words “the magistrate’s court hearing the matter” and interpreted it, based on similar terminology employed in section 86(8)(b), to be a reference to the magistrate’s court to which the matter has been referred in terms of section 86(8)(b) for a hearing.\(^97\) It remarked that the jurisdiction provided for in section 86(11) is specifically restricted to a magistrate’s court and that is only the magistrate’s court which conducts a hearing and provides judicial oversight over the debt review process that would have before it all the information the consumer was required to provide in terms of regulation 24 and which is required in order to exercise a discretion as to whether the debt review should resume.\(^98\) The court however cautioned that a credit provider does not have *carte blanche* to terminate a debt review in terms of section

\(^92\) Unreported ECP case nr 1693/2010.
\(^93\) 2010(6) SA 351 (ECG).
\(^94\) Par 18 and 19..
\(^95\) Par 20.
\(^96\) Ibid.
\(^97\) Par 25.
\(^98\) Par 26 to 29. Accordingly, the consumer is not prejudiced by the right of the credit provider to terminate a debt review in terms of section 86(10) as the consumer’s rights are fully protected in section 86(11)
86(10) and that such termination would be inappropriate where the referral to the magistrate’s court is prosecuted with due efficacy.\textsuperscript{99}

As a result of the difficulties in interpretation and conflicting decisions on termination of debt review in terms section 86(10) of the National Credit Act, a full bench of the Western Cape High Court was directed to deal with the issue in \textit{Wesbank Ltd v Papier}.\textsuperscript{100} The court held that a literal interpretation of the provisions of section 86(10), read in isolation, would amount to a “blinkered” approach that could easily lead to the wrong answer.\textsuperscript{101} It stated that even where the consumer does everything by the book there will inevitably be a large number of cases where the period of 60 business days within which the consumer and/or debt counsellor is allowed to approach the court for a debt re-arrangement order as contemplated by section 87 of the Act, will have elapsed without such an order having been obtained.\textsuperscript{102} If a literal interpretation is to be followed, the credit provider would be entitled, in each case where a period of 60 business days has elapsed without a re-arrangement order in terms of section 87 having been made unilaterally “to derail the entire debt review process”.\textsuperscript{103} The court held that such conduct on the part of credit providers is inconsistent with the Act and a strong indicator that a literal approach should not be followed.\textsuperscript{104} The court therefore held that, on a proper interpretation of section 86(10), the consumer is protected against enforcement proceedings by the credit provider, not only once a re-arrangement order has been made by a magistrate in terms of section 87 but also while proceedings for such an order is pending.\textsuperscript{105} It further held that the corollary is that delivery of a notice of termination by a credit provider in terms

\textsuperscript{99} Par 30.
\textsuperscript{100} 2011 (2) SA 395 (WCC).
\textsuperscript{101} Par 22.
\textsuperscript{102} Par 29.
\textsuperscript{103} Ibid.
\textsuperscript{104} Par 30. It held that this interpretation ignores the fact that the magistrate’s court before which the application for debt re-arrangement is pending has become seized with the matter and pointed out that, in this regard, it is significant that section 86(10) does not require notice of termination to be given to the magistrate or to any of the other parties to the pending application, leading to an existing judicial process becoming contingent upon the mere sending of a letter between private parties.
\textsuperscript{105} Par 34.
of section 86(10) is not competent once any of the steps referred to in section 86(7)(c), 86(8) or 86(9) have been taken.\textsuperscript{106}

Eventually in \textit{Collet v Firstrand Bank Ltd}\textsuperscript{107} the Supreme Court of Appeal held that the approach followed in the \textit{Papier} case was too limited and that section 86(10) must be construed in view of the other provisions of the National Credit Act, particularly section 86(11) which provides for revival of a terminated debt review.\textsuperscript{108} It indicated that the debt counsellor’s involvement in the debt review is not an end in itself but part of an ongoing process culminating in the order of the magistrate’s court under section 87 (or a voluntary re-arrangement under sections 86(7)(b) and 86(8)(a)) and thus the role of the debt counsellor does not end with his referral of the matter to the magistrate’s court.\textsuperscript{109} Thus the court agreed with the conclusion reached by the court \textit{a quo} that it was “unable to find anything in the structure of section 86, or of the Act in its entirely, which is indicative of an intention on the part of the legislature to limit the right of a credit provider under section 86(10) to the process prior to the reference to the magistrate’s court”. The Supreme Court of Appeal held that the credit provider’s rights to give notice in terms of section 86(10) and to legitimately terminate the debt review process continues until the court has made an order as envisaged in section 87.\textsuperscript{110} The court further held that section 86(10) entitles a credit provider to terminate the debt review relating to a specific credit agreement and not to terminate the hearing and therefore the court “the hearing continues and, if several credit agreements are being reviewed, continues in respect of the others”.\textsuperscript{111} It also stated that the right of the credit provider to terminate the debt review is balanced by section 86(11) which provides for the revival of a terminated debt review and that it is at this moment that the good faith participation of the credit provider in the debt review becomes relevant.\textsuperscript{112}

\textsuperscript{106} Ibid.
\textsuperscript{107} 2011 (4) SA 508 (SCA).
\textsuperscript{108} Par 9.
\textsuperscript{109} Par 11.
\textsuperscript{110} Ibid. The court further stated that although notice of termination of the debt review is not required to be given to the magistrate’s court, the proceedings are governed by the rules of the magistrates’ courts, which make adequate provision for the service of process and notices.
\textsuperscript{111} Ibid. The court further stated that although notice of termination of the debt review is not required to be given to the magistrate’s court, the proceedings are governed by the rules of the magistrates’ courts, which make adequate provision for the service of process and notices.
\textsuperscript{112} Par 15.
The *Collet* judgment by the Supreme court of Appeal thus settled the problematic aspect relating to the stage at which termination of a debt review in terms of section 86(10) would no longer be competent.

However the amendment of section 86 by the National Credit Amendment Act\(^\text{113}\) to provide in section 86(10)(b) that termination is no longer competent if the application for debt restructuring has been filed at court or in the Tribunal means that the position as set out in *Collet* no longer applies. The interpretation of section 86(10)(b) may be problematic *inter alia* as a result of the use of the word “file” in the new section 86(10)(b). This concept is not defined in the National Act nor in the Magistrate’ Court Act\(^\text{114}\) or the Superior Court’s Act.\(^\text{115}\) The reference to a debt review application that has been filed at the Tribunal is also strange as the Tribunal cannot hear applications for debt review in terms of section 86 but can only, in terms of the amended section 83, restructure debt as part of the relief it can order in an instance where it makes a declaration of reckless credit.\(^\text{116}\)

Another problematic aspect relates to the proper remedy for non-compliance with section 86(10) such as where a credit provider for example delivers a section 86(10) notice to an incorrect address and thereafter proceeds with enforcement. Section 130(4)(b) deals with non-compliance with various provisions of the Act and provides that if a credit provider has not complied with the relevant provisions of the Act, as contemplated in section 130(3)(a)\(^\text{117}\) or has approached the court in circumstances contemplated in section 130(3)(c),\(^\text{118}\) the court has no discretion and must adjourn the matter before it

\(^{113}\) Act 19 of 2014.
\(^{114}\) Act 32 of 1944.
\(^{115}\) Act 10 of 2013.
\(^{116}\) See s 26 of the National Credit Amendment Act 19 of 2014.
\(^{117}\) S 130(3)(a) refers to the court being satisfied that there was compliance with the procedures required by s 127, 129 or 131.
\(^{118}\) S 130(3)(c) refers to the court being satisfied that the credit provider has not approached the court

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or
(ii) despite the consumer having

(aa) surrendered property to the credit provider, and before the property has been sold;

(bb) agreed to a proposal made in terms of s 129(1)(a) and acted in good faith in fulfilment of that agreement;

(cc) complied with an agreed plan as contemplated in s 129(1)(a) or
and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed. Although section 130(3)(a) does not expressly refer to compliance with section 86(10), it does refer to compliance with section 129 (which comprises of two subsections) and not merely to compliance with section 129(1)(a). Section 129(1)(b) requires compliance with either section 129(1)(a) (where there is no pending debt review) or section 86(10) (where there is a pending debt review) before legal proceedings to enforce a credit agreement may be commenced. Therefore it seems that section 130(4)(b) sets out the order that the court should make in the event of non-compliance with section 86(10). However it may be asked what the appropriate sanction is where there was non–compliance, not with the procedural aspects of section 86(10) but where a termination in debt review was not done in good faith?

3.3 Resumption of a terminated debt review

The process of termination of a debt review in respect of a specific credit agreement in accordance with section 86(10) has to be interpreted against section 86(11) which provides for the resumption of a terminated debt review. Section 86(11) is necessary because it may happen that a credit provider terminates a debt review in circumstances where such termination would not be just, for instance if the debt counsellor had difficulty in getting information for the credit provider or there was a general lack of participation on a good faith basis by the credit provider in the debt review process. The National Act strives to balance the rights of consumers and credit providers as indicated in chapter one and therefore section 86(11) acts as the ‘safety net’ for consumers whose debt reviews have been unjustly terminated.

(dd) brought the payments under the credit agreement up to date, as contemplated in s 129(1)(a).

119 See Mnguni and Another v Absa Bank Ltd and Others [2013] ZAGPPHC 81 (14 March 2013). The court indicated that in such instance “non-compliance with the provisions of section 86(10) leads to a pause not a nullity” and that a section 130(4)(b) order was appropriate to address such non-compliance.

120 In Nedbank Ltd v Van der Westhuizen [2014] ZAGPJHC 255 (5 June 2014) the court referred to s 86(11) as the “balancing section” provided for the consumer’s benefit.
Prior to the changes effected to it by the National Credit Amendment Act, section 86(11) provided that if a credit provider who has given notice to terminate a debt review as contemplated in section 86(10) “proceeds to enforce that agreement (in respect of which the termination occurred) in terms of Part C of Chapter 6, the magistrate’s court hearing the matter may order that the debt review resume on any conditions the court considers just in the circumstances”. The National Credit Amendment Act has now amended section 86(11) to refer to a “court” instead of a “magistrates court”. Section 86(11) gives a court a discretion to order the resumption of a debt review that has been terminated in terms of section 86(10) – as is clear from the words ‘on any condition it deems just”, this is a wide discretion.

The application of section 86(11) has not been without challenges – based on the original wording of section 86(11) prior to its amendment by the National Credit Amendment Act, there was uncertainty regarding which court may be approached for purposes of a section 86(11) order and also in respect of the appropriate time period for bringing a section 86(11) application. The one point of view was that only a magistrate’s court can be approached for an order that the debt review resume and that it thus follows that it is only the magistrate’s court hearing the debt restructuring application in terms of section 86(7)(c) which will have sufficient information before it to adjudicate on the section 86(11) application. Another approach was that the court mentioned in section 86(11) should be the enforcement court, and that the court making the section 86(11) order can be either a magistrate’s court or a high court. In Collett v Firstrand Bank Ltd the Supreme Court of Appeal settled this issue and held that the “court” mentioned in section 86(11) is the enforcement court and that the word “court” should be read to refer to a magistrate’s court as well as a high court.

---

121 S 26 of Act 19 of 2014.
122 Guide to the National Credit Act par 11.3.3.4
123 Changing Tides 17 (Pty) Ltd v Scholtz [2010] JOL 24981(ECP); Wesbank Ltd v Martin 2012 (3) SA 600 (WCC).
124 Standard Bank of South Africa (Pty) Ltd v Kruger 2010 (4) SA 635 (GSJ).
125 2010 (4) SA 635 (WCC).
126 2011 (4) SA 508 (SCA).
Another problem relates to the apparent lacuna in section 130(1) to indicate the purpose of the lapsing of 10 business days after delivery of a notice to terminate in terms of section 86(10) – this lacuna is problematic not only because it gives no indication as to what should happen after the receipt of a section 86(10) notice but also because it creates uncertainty about the stage at which an order in terms of section 86(11) is to be applied for. In Changing Tides v Erasmus\textsuperscript{127} Binns-Ward AJ held that an order in terms of section 86(11) should urgently be applied for within the 10 business days after delivery of a notice in terms of section 86(10) to terminate a debt review which had already been referred to court.\textsuperscript{128} Based on the use of the words “proceeds to enforce” in section 86(11), Van Heerden points out that it may however be argued that the section 86(11) remedy is only available once litigation to enforce the credit agreement has commenced, thus effectively meaning that a section 86(11) application cannot be brought within the 10 business days period after delivery of the section 86(10) notice, as required by section 130(1)(a), as the latter requirement must be met prior to enforcement. Unfortunately the National Credit Amendment Act did not address the 10 business days lacuna in section 130(1)(a) and this is problematic as it perpetuates the uncertainty regarding what should happen in this time period.

It is furthermore clear that a court has a discretion to order resumption of a debt review in terms of section 86(11). It can be problematic for a court to exercise its discretion if it is not provided with sufficient information in order for it to exercise such discretion judicially. In Changing Tides 17 (Pty) Ltd v Scholtz\textsuperscript{129} the court mentioned a non-exhaustive list of information that would be important for exercise of the discretion in terms of section 86(11) to order that the debt review resume, namely: information relating to the total liabilities of the consumer, the consumer’s current monthly commitments in respect of such liabilities; the consumer’s income; the required living expenses of the consumer (and his dependants); whether, in the case of hypothecated property, such property is the primary residence of the consumer or is an

\textsuperscript{127} [2010] JOL 24981 (ECP).
\textsuperscript{128} Par 32.
\textsuperscript{129} [2010] JOL 25358 (WCC).
investment asset; what the extent of the arrears is and the proposal which the
debt counsellor has made in respect of the re-arrangement of debts.\textsuperscript{130}

Good faith also plays an important role in the context of section 86(11) and
the question as to what would constitute good faith and what its impact on
resumption on debt review is, is also problematic as these aspects are not
expressly dealt with by the Act. As indicated above, in \textit{Collett v Firstrand Bank
Ltd}\textsuperscript{131} the court held that the right of a credit provider to terminate a debt
review in terms of section 86(10) is “balanced” by section 86(11) and that it is
at the moment that section 86(11) is invoked that the participation of the credit
provider in the debt review becomes relevant.\textsuperscript{132} It did not lay down guidelines
regarding what would constitute good faith but it did indicate that should a
credit provider fail or refuse to participate in the debt review, a resumption of
the debt review may well be ordered.\textsuperscript{133} However, it also stated that where a
credit provider on good grounds concludes that the proposed restructuring will
not lead to the satisfaction by the consumer of all responsible financial
obligations or a re-arrangement as contemplated by section 86(7)(c) the court
considering the resumption of the debt review may well refuse to sanction its
resumption.\textsuperscript{134}

In \textit{Wesbank a Division of Firstrand Bank Ltd v Schroder}\textsuperscript{135} the court held that
the credit provider’s attitude that once the proposal for debt restructuring was
referred to the magistrate’s court it was no longer willing to make any further
proposals thereby effectively preventing an early consensual resolution of the
matter, is in conflict with the aims of the Act and a factor that must be
considered in the exercise of the court’s discretion in terms of section 86(11)
of the Act.

\textsuperscript{130} Par 21.
\textsuperscript{131} 2011 (4) SA 508 (SCA).
\textsuperscript{132} Par 15.
\textsuperscript{133} \textit{Ibid}.
\textsuperscript{134} \textit{Ibid}.
\textsuperscript{135} [2012] ZAECLLC 1.
In Changing Tides 17 (Pty) Ltd v Parish and Another\textsuperscript{136} the high court held that the plaintiff had failed to engage in the debt review process in good faith as it had adopted “a high handed and unreasonable approach”.\textsuperscript{137}

In Van Rooyen and Jordaan: In re: Standard Bank Ltd v Jordaan\textsuperscript{138} the court, held that in light of the failure to present any realistic proposal to pay the debt and the (irregular) payment history regarding the debt in this matter, there was no basis for alleging that the credit provider had failed to negotiate in good faith in the debt review process and therefore the credit provider was entitled to terminate the debt review and proceed with enforcement.\textsuperscript{139}

Another problematic aspect relating to section 86(11) relates to the question regarding the circumstances under which such a resumed debt review can be terminated again. Section 86(10) provides for termination of a debt review that is conducted in terms of section 86. This can be done where the consumer is in default and 60 business days have expired since the consumer “applied for debt review.” The question arises whether section 86(10) can be applied to a debt review that has resumed in terms of a section 86(11) order? Surely it is possible that after a section 86(11) resumption order has been obtained the debt counsellor can for instance fail to properly complete the review or the proposals are totally unrealistic and one may then ask what the position of the credit provider is in such a situation? It is quite inconceivable that the legislature could have intended to completely take away a credit provider’s right to terminate a debt review that is not being conducted with due efficacy or that does not propose viable solutions to the consumer’s credit agreement debt situation.

3.4 Conclusion

From the above discussion it is clear that there are a number of problematic aspects regarding termination and resumption of debt review that require further attention, either by the legislature or by the courts. It is submitted that these problematic aspects compromises the effectiveness and smooth...
functioning of the debt review process to the detriment of consumers as well as credit providers and distorts the balance that the NCA aims to achieve between the rights and obligations of these parties. In the following chapters possible solutions to these challenges will be provided.
CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

4.1 Conclusions

It has been indicated in chapter one that the debt review process has been introduced by the NCA in order to provide debt relief to over-indebted consumers by allowing them to obtain a restructuring of their debts and so to afford time a ‘breather’ so that they can eventually pay off those debts without having to resolve to other more severe options which may affect their status, such as insolvency. The debt review process is a new process within the context of the South African credit market and its regulatory framework and since its inception it has experienced a number of teething problems. Some of the problematic aspects related to debt review, namely challenges in the context of termination and resumption of debt review have been highlighted in this dissertation.

The problems highlighted regarding termination of debt review can be briefly summarized as follows:

(a) There is no prescribed format for the section 86(10) notice.
(b) The method of delivery of a section 86(10) notice which is a pre-enforcement notice differs markedly from that of a section 129(1)(a) notice which is also a pre-enforcement notice.
(c) The role of good faith in the context of section 86(10) is unclear.
(d) There is a lacuna in section 130(1)(a) as it indicates that the credit provider may not proceed with enforcement prior to expiry of 10 business days but fails to state what must happen in those 10 business days- thus, it is a provision without an express purpose.
(e) The cut-off date for termination of a debt review has been addressed by the National Credit Amendment Act but it may give rise to new problems of interpretation.
(f) The sanctions for failure to comply with section 86(10) are unclear.

With regards to resumption of a debt review in terms of section 86(11) the following problems have been pointed out:
(a) The interpretation in the *Collet* judgment of the word ‘court’ in section 86 (11) to refer to the enforcement court, together with the lacuna in section 130(1)(a) regarding the purpose of the 10 business days after delivery of a section 86(10) notice but prior to enforcement, exacerbates the problem as to what should be done in those 10 business days. It forecloses the consumer’s opportunity to apply to court for resumption of the debt review during those 10 business days as it appears that such application can only be made to an enforcement court, that is, only after the 10 days and once enforcement has commenced. This might bring about unnecessary costs and delay for both the consumer and credit provider.

(b) The issue of termination of a resumed debt review is also problematic – in essence it is a court ordered debt review and one may thus ask whether the termination process envisaged by section 86 (10) applies thereto.

### 4.2 Recommendations

With regard to the problems pointed out in the context of termination of debt review it is recommended that:

(a) A format for the section 86(10) notice should be prescribed. This would aid legal certainty and determination of non-compliance with section 86(10).

(b) The method of delivery of section 86(10) and the method of delivery of the section 129(1)(a) notice, which are both foreclosure notices, should be aligned. It is submitted that the methods of delivery mentioned in section 65(2) are less restrictive than the new methods of delivery indicated in section 129(5) to (7) and that the wider choice of methods of delivery would be more advantageous to both consumers and credit providers.

(c) The concept of good faith should be defined in section 86. Such a definition will make it much easier to ascertain whether there was compliance with the good faith requirement and whether termination of a debt review can be justified as having been done in good faith.
(d) The purpose of the 10 business days in section 130(1)(a) should be clarified. The best purpose of those 10 days would be to enable a consumer to bring an application for resumption of a terminated debt review if there are grounds to justify such a revival.

(e) The new section 86(10)(b) should state that a debt review cannot be terminated once an application for debt restructuring has been served on the credit provider and filed at court. The reference to the Tribunal should be deleted from section 86(10)(b) as the Tribunal does not have any general powers to do debt restructuring but only those that the National Credit Amendment Act has afforded to it in the context of reckless credit.

(f) The remedy for procedural non-compliance with section 86(10) lies within section 130(4)(b). Where it is alleged that a debt review was not validly terminated because of a lack of good faith by the credit provider the appropriate remedy is an order for the resumption of the debt review in terms of section 86(11).

With regards to the problems identified in the section 86(11) process for revival of a terminated debt review, it is recommended that:

(a) Section 86(11) should be interpreted to the effect that ‘any’ court, that is either the debt review court or the enforcement court, can order the resumption of a terminated debt review. This would then also address the problem of what should happen in the ten days after delivery of the section 86(10) notice as provided for in section 130(1)(a), which is a considerable lacuna in the Act, because then there would be no bar against applying for such an order in the 10 business days after delivery of the section 86(10) notice but prior to enforcement.

(b) Where a debt review is resumed the credit provider’s right to terminate such debt review should also be revived ex lege. Section 86(11) should thus be amended by the introduction of a further subsection to provide that where a terminated debt is resumed section 86(10) will apply to such resumed debt review and that the date of resumption is the effective date from which the sixty business days referred to in section 86(10) should be calculated.
4.3 Final Remarks

By this time it is common knowledge that the NCA is not an example of exemplary draftsmanship. However this Act has been groundbreaking in bringing relief to over-indebted consumers. The debt review process, despite its many procedural flaws, have added a new dimension to the relief that is available to over-indebted consumers. In order to ensure that it reaches its maximum capacity that would ensure that consumers can get out of their debt trap and that credit providers get the money that is owing to them in terms of credit agreements, this process should be refined en honed so that it can deliver properly on the debt relief and debt satisfaction objectives of the Act. It is submitted that the eradication of little procedural bumps in the process such as those alluded to in this dissertation, may serve to enhance the effectiveness of the debt review process.
BIBLIOGRAPHY:

Books

• Scholtz et al Guide to the National Credit Act (LexisNexis) (Service Issue 6)
• Otto and Otto The National Credit Act Explained (2013)
• Kelly-Louw

Journal articles

• Van Heerden and Renke “Perspectives on the South African Responsible Lending Regime and the Duty to conduct Pre-agreement Assessment as a Responsible Lending Practice” 2015 International Insol Rev available at wileyonline.com
• 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’ 2010 PELJ

Cases

• Absa Bank Ltd v Walker [2014] ZAWCHC 92 (17 June 2014)
• Changing Tides 17 (Pty) Ltd v Scholtz
• Collet v Firstrand Bank Ltd 2011 (4) SA 508 (SCA)
• Evans v Smith 2011 (4) SA 472 (WCC)
• Firstrand Bank Ltd v Seyffert 2010 (6) SA 429 (GSJ)
• Mnguni and Another v Absa Bank Ltd and Others [2013] ZAGPPHC 81 (14 March 2013)
• National Credit Regulator v Nedbank Ltd 2011 (3) SA 581 (SCA)
• SA Taxi Securitisation v Matlala [2010] ZAGPJHC 70 (29 July 2010)
• SA Taxi Securitisation (Pty) Ltd v Lennard 2012 (2) SA 456 (ECG)
• Standard Bank Ltd v Hales 2009 (3) SA 315 (D&C)
• Standard Bank of South Africa Ltd v Panayiotts 2009 (3) SA 363 (W)
• Wesbank Ltd v Papier 2011 (2) SA 395 (WCC)
• Wesbank Ltd v Schroder 2011 (4) SA
• Van Rooyen v Jordaan : In re Standard Bank Ltd v Jordaan [2013] ZAGPPHC 357