

**NATIONAL CREDIT REGULATOR
DEBT COUNSELLING PROVINCIAL WORKSHOP
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**THE COURT PROCEDURES AND CHALLENGES FACED BY MAGISTRATES WHEN DEALING
WITH DEBT COUNSELLING APPLICATIONS**

(i) HISTORICAL CONTEXT

“The National Credit Act 34 of 2005 (NCA) comes to the rescue of consumers who are over-indebted (S79) and/or to whom reckless credit (S80) has been granted by affording them opportunity to obtain relief, inter-alia, by voluntarily applying for debt review in terms of Section 86 of the NCA with a view to eventually obtain restructuring of their credit agreement debt by agreement S86(8)(a) or court order S86(7)(c).

The debt review procedure, which is conducted by a debt counsellor, is set out in Section 86 of the NCA read with Regulation 24.” (van Heerden, C, Coetzee, H...”Wesbank v Deon Winston Papier and the National Credit Regulator (unreported Western Cape High Court Case No. 14256/10 (WCC)” [2011] DE JURE 29.

(ii) VIEWS OF TERMINATION OF DEBT REVIEW

- NCA is known to be notorious for its lack of clarity on termination;
- Different judgments on this topic;
- The view the a debt counsellor has referred a proposal for debt restructuring in terms of Section 86(8)(b) or 86(7)(c) of the NCA to the Magistrate’s Court, termination of debt review in accordance with 86(10) is no longer competent.

CASES SUPPORTING THE ABOVE VIEW ARE:

Taxi Securitisation v Kruger (Standard Bank of SA Ltd v Kruger; Standard Bank of SA Ltd v Pretorius (2010) JOL 25356 (GSJ); SA Securitisation (Pty) Ltd v Matlala (2010) JOL 26095 (GSJ).

A second view states that termination of debt review in accordance with Section 86(10) is competent even after referral of the proposal to a Magistrate's Court until just before the Magistrate's Court makes an order in terms of Section 87 of the NCA.

FOLLOWING CASES SUPPORT THIS VIEW

Taxi Securitisation v Nako (2010) JOL 25653 (E); First Rand Bank v Evans (unreported Case No. 1693/2010 (ECC); First Rand Bank Ltd v Collett (2010 GSA 351 (ECG).

However, the Western Cape judgement of Wesbank quoted above has persuasive effect as opposed to binding effect in other jurisdictions. In its judgment, the Western Cape Court held that the termination of the debt review in terms of S86(10) was not competent where the matter had already been referred to court and the court deemed unnecessary to deal with provisions of Section 86(11).

(iii) PROPOSED DEBT REVIEW COURT APPLICATION GUIDELINES (CREDIT INDUSTRY FORUM (2015)

To better understand the court procedure it is worthy to look at some important points raised in the guidelines (It should be borne in mind that these are mere guidelines).

- Purpose
- The NCA is silent on the legal process to be followed during the debt review process.
- Rule 55 Motion is the procedure used in these applications.
- Debt Counsellors, Credit Providers and Magistrates have different views and practises on how the applications should take place.

In the National Credit Regulator v Nedbank and Others 2010(6) SA 298 (GNP), the court held that a referral by a debt counsellor to a Magistrate's Court under Section 86(8)(b) and Section 86(7)(c) of the NCA, is an application within the meaning of the Magistrate's Court Act and the Rules and fails to be treated as such in terms of Rule 55.

This is important to understand as some of the opposing views and differences stem from this understanding. The court further held that time limits as prescribed in the Magistrate's Court Rules apply.

In dealing with service, the guidelines referred to a Declaratory Order, (National Credit Regulator v Nedbank & Others 2009(6) SA 295(GNP) the court held "there is, however, no reason in law why all or some of the affected parties cannot agree to waive service in terms of the rules and to agree on a different form of notification". Indeed, a response to magistrates who held a view that parties to an application cannot agree on a form of service different from that prescribed by the rules.

Lastly, the guidelines noted that an unopposed Debt Review Application in terms of Section 86 and Consent Order in terms of Section 138 of the Act is not the same. The impact of Regulation 24(4) of the Act had been mentioned. It is stated that some courts refuse to accept debt review applications unless a Certificate of Balance is included in the application for every credit agreement.

In this regard, the debt review timeline demands that a credit provider submit a Certificate of Balance within five days after receipt of the Form 17.1. Where no Certificate of Balance is received within the regulated period, the debt counsellor may, in terms of Regulation 24(4) of the Act, accept the information supplied by the consumer or any other method of verification. Where no Certificate of Balance was received within the required time frame, debt counsellors make use of Regulation 24(4) of the Act in order to comply with the requirements of the Act to make a final determination within 30 days (Form 17.2) as required in the Act.

The National Credit Act has introduced a procedure for relief from over indebtedness which is aimed at assisting the consumer in meeting his/her obligations.

COURT PROCEDURE

- Is the Debt Counsellor present?;
- Has s/he filed a copy of registration certificate and annual renewal fees?
Ensure copies are certificate copies of the original and not copies of a photocopy;
- Is/are the Consumer(s) present?;
- Does the Court have jurisdiction to hear the matter? (section 28(1) MCA “any person who resides, carries on business or is employed within the district;”.
The consumer may not consent in any document to the jurisdiction of a particular Magistrates’ Court – (**McLaren v Badenhorst and others 2011 1 SA 214 ECG**), consider also section 90(2) (k) (vi) (bb) of NCA;
- Has proof of residence/employment/business been supplied?;
- How has service been affected and has proof of service been provided?;
- If service is by email or fax, has the Applicant provided proof that the respondent have agreed to this manner of service? A clause inserted by the banks in the original agreement is not sufficient. General agreement not acceptable. Must be specific agreement and clear that all DRA document can be served in this way;
- Is there proof that the email/fax has been received?;
- Have the dies for notice expired?;
- Does the Application comply with the format provided for in Rule 55 of MCA?
(notice of application and founding affidavit of debt counsellor as well as a confirmatory affidavit by the consumer(s));
- Is there an affidavit or each spouse/lie partner?;
- Has the Applicant confirmed that no Credit Providers have proceeded beyond delivery of the *section 129 NCA notices*;

Has the Debt Counsellor confirmed that

- The Consumer(s) applied for Debt Review either by completing form 16 or providing the information required in terms of reg. 24(1)(a) to the debt counsellor;
- Within 5 business days of receiving this application, the Debt Counsellor delivered a notification by fax, registered mail or email in terms of *Section 86(4) (b) (i) and (ii) of NCA* to all Credit Providers listed in application and every registered Credit Bureau (reg 24(2) and (5), and that the Debt Counsellor has a record of the date, time and manner of the delivery of the notice (Form 17.1);
- The information provided by the Consumer(s) was verified and has explained in what manner (re.24(3));
- Within 30 business days after receiving the application in terms of section 86(1) of NCA, a determination was made in terms of *section 86(6) of NCA* read with reg. 24(7)(8) of NCA;
- Any arrangement made by the Debt Counsellor with Credit Providers was reduced to writing and signed by al Credit Providers mentioned, the Debt Counsellor and the Consumer;
- Within 5 days of completing the assessment the Debt Counsellor submitted form 17.2 to all the affected Credit Providers and registered Credit Bureaux;
- Has the Debt Counsellor confirmed that his fee structure was disclosed to the Consumer before s/he was accepted for Debt Counselling (*section 86(3)(a) of NCA*) and has the Debt Counsellor disclosed the fee structure (relevant to whether the fees are excessive and will interfere with the Consumer's ability to take the necessary payments to the Credit Providers) **(Van der Hoven Attorneys and The National Credit Regulator, The Department of Justice and Constitutional Development. The Banking Association of South Africa and The Debt Counsellors Association of South Africa Case 10918/2015 Gauteng Division, Pretoria.)**

Section 87 of NCA requires that a magistrate hold a **hearing**. There are no other 'hearings' in the Act or Rules, but *section 65A an section 74* of MCA provide for an inquisitorial process and it appears that is what is intended here – an inquisitorial process and it appears that is what is intended here – an inquisitorial process where the magistrate is in control of what s/he deem necessary to be placed before the court in order to be fully informed to take an evaluation and a decision. **(Van der Hoven Attorneys and The National Credit Regulator, The Department of Justice and Constitutional Development. The Banking Association of South Africa and The Debt Counsellors Association of South Africa Case 10918/2015 Gauteng Division, Pretoria.)**

"The purpose debt review is not to relieve the consumer of his/her obligations but to achieve a rearrangement in accordance with the principle of satisfaction of all responsible consumer obligations." **(Firststrand Bank v Collett 2011 4 SA 508 SCA paras 15-18)**

PROCEDURE

- Does the Debt Counsellor confirm that:
- S/he considered the information available and at the time of the determination and the preponderance of information indicted that;
- the Consumer will be unable to satisfy in a timely manner all the obligation under all the credit agreements to which the Consumer is party having regard to the Consumer's:
- financial means, prospects and obligations (*section 79(1)(a) of NCA* including such described in *section 78(3) of NCA*); and
- 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 (*section 79(1)(b) of NCA*);
- the Consumer's is over-indebted because his/her total monthly debt payment exceed the balance derived by deducting his/her minimum living expenses from his/her net income (*reg 24(7)(a) of NCA*);
- the Consumer's net income was calculated by deducting from the gross income, statutory deductions and other deductions that were made as condition of employment (*reg. 24(7)(b) of NCR*).

- The Consumer's minimum living expenses were based on a budget provided by the consumer, adjusted by the Debt Counsellor with reference to the guidelines issued by the *NCR (reg.24(7)(c) of* ;
 - Has the Debt Counsellor provided sufficient actual information on which the magistrate may make an order? Here the Magistrate exercises his/her discretion in order to get the full picture, for example:
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- Payment history in respect of all accounts. If there is a poor payment history, has an explanation been provided for it?;
 - Disclosure of all bank accounts, bonuses, share, dividends, assets, immovable property owned etc; (**Firststrand Bank Limited and Nedbank Limited and Mitchell Barnard and Barend Hendrik Coetzee Case No. A801/2014 Gauteng Division, Pretoria** which deals with the duties of debt counsellors and the fact that both the debt counsellor and the consumer must be present at the hearing.)
 - Will payments be made through a 'Payment Distribution Agency' and have those fees been accounted for?
 - Have any credit provider terminated participation in the debt review Process in terms of *section 86(10) of NCA*? This may occur up until the order is granted? Consider:
 - The consumer must have been in default under a credit agreement that is being reviewed in terms of section 86 of NCA
 - 60 business days must have elapsed from the date on which the consumer applied to the debt counsellor or debt review before the credit provider can give notice that its participation in the review is terminated;
 - If the debt review of particular credit agreement was resumed under *section 86(11) of NCA* then the 60 business day period will run from the date of resumption order and not from the date of application to a debt counsellor;
 - The notice of termination must have been given to the consumer, debt counsellor and National Credit Regulator;
 - Ensure that the notice states that the participation in the review process is terminated and not merely that it is the intention of the credit provider to terminate its participation;
 - Has the Debt Counsellor issued a proposal that complies with *section 87 of the NCA*?;
 - A proposal cannot be based on a reduction of the contracted interest rate.
(**Firststrand Bank Ltd Adams and another. 2012 4 SA 14 C.**)

- Has the Debt Counsellor addressed the issue of prescription and section 126B of NCA which came into effect on 13/03/2015
- There is a difference between a Consent Order in terms of *section 138 of NCA* and an Unopposed application in terms *section 86 of NCA*:
- A *section 138 NCA* Consent Order read with *section 86(8)(a) NCA* requires the Debt Counsellor to file it once the proposal has been accepted by the Consumer and each Credit Provider and been consented to in writing by them and recorded in the form of an Order.
- A *section 135 NCA* resolution or agreement is confirmed by the Tribunal or a Court as a Consent Order where the matter has been resolved through the ombud with jurisdiction consumer court or alternative dispute resolution agent (*section 138(1)(i) of NCA*), or investigated by the NCCR, and the NCR and the respondent agree to the proposed terms of the an appropriate order (*section 138(1)(b) of NCA*).
- A Magistrate is required to still consider a *section 86 of NCA* unopposed application whereas a Magistrate will be approached in Chambers for the noting of a *section 138 NCA* Consent Order.

Post Debt Review Order:

- Has the consumer been warned that s/he may not incur any further charges under a credit facility or enter into any further credit agreement with any credit provider, other than consolidation agreement (*section 88(1) of NCA*);
- Has the consumer been advised that any new credit agreement may be declared to be reckless credit (*section 88(4) of NCA*);
- Has the consumer advised that if s/he applies for or enters into a credit agreement contrary to *section 88 of NCA*, the provisions of Part D concerning over-indebtedness and reckless credit would not apply to it.
(*section 88(5) of NCA*);

Where the consumer defaults on payment under any credit agreement after a debt review order has been granted, the credit provider may enforce its right without further notice in terms of *section 88(3)(a) and 88(3)(b)(ii) of NCA* (**Firststrand Bank Ltd v Fillis and another 2010 6 SA 565 ECP, FRB ITD t/a Wesbank v Jili Case No. 5200/12 KZN, Durban (as yet unreported).**)

Section 86(11) Application for resumption

“There is no closed list of factors relevant to the exercise of this discretionary power though the considerations which a court would typically need to assess would include whether the credit provider engaged in the debt review process in good faith and whether there are reasonable grounds to believe that the debt review, if it were resumed, might result in an agreement or rearrangement order in terms whereof the credit provider’s claim will be satisfied.” **(Firststrand Bank Ltd v Munsamy WCD. Delivered 14 February 2013.)**

The court may order that the provision of *section 86(10) of NCA* apply on resumption but that the 60 days that must have elapsed before termination permissible run from the date of the resumption order.

CHALLENGES FACED BY MAGISTRATES

These depend obviously from court to court. I must confess that I have not dealt with serious challenges in the short time that I have been here. This is a general list which might be applicable also in the Western Cape.

(i) VARIATIONS

There is a view that the NCA has no provisions for variations of Debt Review Orders. Once the order is granted it remains in force. This has been abused by others to make money. The debt counsellor makes his/her fees partly from the application. There is a tendency to regularly bring variations which sometimes is unnecessary.

There are instances where either the consumer's income decreased due to no overtime or short time. Consumer immediately could not afford monthly payments. When he wants variations as a result, it can be done. However, there is no need to bring an application if the consumer can afford to pay more. He/she can pay directly to the creditors the increased amount. We find debt counsellors bringing these types of variations and the court has problems with same.

- (ii) Debt Counsellor's Certificate expired;
- (iii) No registration for practice;
- (iv) Fees are not paid to the Regulator and therefore no Certificate;
- (v) Processes not served properly especially to the banks;
- (vi) Lack of understanding of the purposes of NCA. It is not for money-making but creation of a level playing field. It is for the protection of both the consumer and credit provider;
- (vii) Applications for debt freeze. Debt counsellors want magistrates to backdate orders. Magistrates can only sign orders from date of order for six months debt freeze;

- (viii) Debt counsellors attaching old consents date 2011/12 or 13. If there is more information needed in the founding affidavit, the debt counsellor can file supplementary affidavit. If no consent, send by registered mail;
- (ix) It does happen that at times there is short service, service to the incorrect address or no service at all on some creditors. The matter gets postponed for the current time frame to pass and the service on creditors to be produced on postponement court date. This is a waste of time and money;
- (x) Clear court dates when served via email and 14 days if served via registered mail;
- (xi) Proof of service of how the creditors were notified;
- (xii) Founding affidavit not commissioned after the date of case number – as it can make the whole application void, confirmatory affidavit by the consumer which can be commissioned after date of case number – confirming contents of the debt counsellor's founding affidavit. So clearly the founding affidavit by the debt counsellor must be commissioned on or before the date of bringing application for issuing and allocating case number.

In conclusion, debt counsellors know that the NCR cancels registration of truant debt counsellors. This they do by obtaining orders from the National Consumer Tribunal. So issues of: failure to comply with NCA regulations and conditions; not utilising prescribed forms; excluding vital information as prescribed by the NCA; failure to send notifications within prescribed time limits; failure to submit forms to all affected credit providers within the prescribed time limits after completing the assessment as per Section 86 of NCA; receiving funds directly from consumers in contravention of specific conditions of registration; debt counsellor once agreement is reached, gives final repayment plan to consumer and to a PDA (payment distribution agency) and debt counsellors applying to be debt counsellors whilst knowing full well that they cannot i.e. whilst under administration.

Bibliography

- (i) C. van Heerden (University of Pretoria).
- (ii) H. Coetzee (University of Pretoria).
- (iii) Credit Industry Forum (CIF) (Proposed Debt Review Court Applications: Guidelines).
- (iv) SAJEI Notes (2015) (South African Judicial Education Institute).