

It has been a long and bumpy road... Are we getting closer to our destination? Some random thoughts memories and dreams.

Frans Haupt

Director

University of Pretoria Law Clinic

DRAFT FINAL REPORT AND PROPOSAL THE DEBT AND FINANCIAL COUNSELLING PROGRAM TO CONSUMERS EXPERIENCING DEBT AND FINANCIAL PROBLEMS 9 MAY 2001 TO 8 MAY 2002

1.Introduction

Having had the privilege of being project leader in the pilot project: “Debt and Financial Counselling to Consumers experiencing Debt and Financial Problems” for the Directorate National Consumer Affairs Office (NCAO) within the Department of Trade and Industry (DTI); and

having experienced the myriad of problems faced by consumers suffering debt and financial problems and the scale thereof ...

39 and ...We wish to recommend...

That the existing applicable legislation such as, but not limited to, the Credit Agreements Act and the Usury Act be repealed , replaced or where possible be amended and be replaced by **a comprehensive and progressive National Consumer Credit Act (NCCA)**; and...

**BE CAREFUL
WHAT YOU WISH FOR
BECAUSE YOU
JUST MIGHT GET IT.**



Government Gazette

REPUBLIC OF SOUTH AFRICA

Vol. 489 Cape Town 15 March 2006 No. 28619

THE PRESIDENCY

No. 230

15 March 2006

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

No. 34 of 2005: National Credit Act Act, 2005.



AIDS HELPLINE: 0800-123-22 Prevention is the cure

The Supreme Court of Appeal :

“Unfortunately the NCA cannot be described as the best drafted Act of Parliament which was ever passed, nor can the draftsman be said to have been blessed with the draftsmanship of a Chalmers. Numerous drafting errors, untidy expressions and inconsistencies make its interpretation a particularly trying exercise”

■ *Nedbank v NCR* 2011 ZASCA 35

The Gauteng Division of the High Court:

“A court is forced to go round and round in loops from subsection to subsection, much like a dog chasing its tail. Indeed, the language used in the Act from time to time suggests that foreign draftspersons rather than South African lawyers had a strong hand in preparing the text.”

FirstRand Bank Ltd v Seyfert [2010] ZAGPJHC

And my personal favourite :

“It has become a notorious fact that cases requiring the interpretation of the NCA result in a scarcely muffled cry of exasperation resounding from the leathered benches of the judiciary.”

- *Renier Nel Inc and Another v Cash on Demand (KZN) (Pty) Ltd* [2011] ZAGPJHC 20

Don't worry we will amend the Act... which they did... 5years

later

- In section 86 (2) the reference to section 129 is substituted with section 130 ie steps contemplated in 130 – enforcement procedures in court .In practical terms this meant that the debt counsellor despite delivery of the section 129 (1) (a) notice to the consumer could now include the agreement iro which the sec 129 notice was sent in the debt review This overturned a serious drafting error and the decision of the SCA in Nedbank and others v National Credit Regulator [2011] ZASCA 35

“Don’t worry , the courts will sort it out...”

- “As Professor JM Otto said in *Verkoop van Regte teen ’n Diskonto en die Toepaslikheid van die National Credit Act*: “Mens hoef nie wyle Siener Van Rensburg se gene in jou te hê om te voorspel dat dié wet nog tot baie litigasie gaan lei nie”. Judge Willis in *Renier Nel Inc and Another v Cash on Demand (KZN) (Pty) Ltd* [2011] ZAGPJHC 20

And did they sort it out! Different courts different answers...in different cases

- **Section 86 (10) termination**
- **23 April 2010** Standard Bank of South Africa Limited v Kruger; South Gauteng High Court – **cannot** terminate once matter has been referred to court for recommendation
- **8 June 2010** SA Taxi Securitisation (Pty) Ltd v Nako and others –Eastern Cape High Court – **can** terminate
- **2 September 2010** First Randbank Ltd v Collett **can** terminate
- **1 February 2011** Wesbank v Papier –Westernn Cape High Court (full bench) **cannot** terminate
- **27 May 2011** Collett v First Rand Bank –Supreme Court of Appeal –**can** terminate

The “reinstatement of credit agreements” Section 129 (3)

- (3) *Subject to subsection (4) a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying the credit provider all amounts that are overdue, together with the credit provider’s prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied*

Provided different answers in same matter

- Nkata v Firstrand Bank Ltd and others Western Cape High Court (16 January 2014) **single judge -reinstated**
- Firstrand Bank Ltd v Nkata
Supreme Court of Appeal (26 March 2015)-**unanimous decision not reinstated**
- Nkata v Firstrand Bank (Constitutional Court (21 April 2016) **majority judgment -reinstated**

This continues today :withdrawal
by consumer/debt counsellor.

- **Conflicting judgments**

- Rougier v Nedbank [2013] ZAGPJHC 119 28 May 2013
- Magadze v Adcap ; Ndlovu v Koekemoer [2016] ZAGPPHC 1115 (2 November 2016)
- Mokubung v Mamela Consulting [2017] ZAGPPHC 462 (14 June 2017)
- Manamela v Du Plessis t/a Debt Safe [2017] ZAGPHC 289 (21 June 2017)
- Less v Vosloo [2017] ZAKZPHC (22 September 2017)
- Du Toit v Benay Sager t/a Debt Busters [2017] ZAWCHC141 (17 November 2017)
- Phaladi v Lamara and another ; Mashesa v Lamara and others [2018] ZAWCHC 1 (12 January 2018)

- **PLUS NCR GUIDELINES and INDUSTRY FORMS**

Withdrawal of debt review application

- Rougier v Nedbank [2013] ZAGPJHC 119 (28 May 2013)
 - Debt counsellors as pro forma applicants enjoyed no power to release a debtor from debt review proceedings after form 17.2 issued ; no statutory provision for withdrawing debt review application : any such attempt ultra vires
- Magadze v Adcap ; Ndlovu v Koekemoer [2016] ZAGPPHC 1115 (2 November 2016)
- Mokubung v Mamela Consulting [2017] ZAGPPHC 462 (14 June 2017)
- Manamela v Du Plessis t/a Debt Safe [2017] ZAGPHC 289 (21 June 2017)
 - Application to be declared no longer over-indebted prior to mag court order made granted due to lacuna in NCA and/or based on inherent jurisdiction of High Court

Withdrawal of debt review application(continued)

- Less v Vosloo [2017] ZAKZPHC (22 September 2017)
 - The application for a declaration of over-indebtedness and restructuring is only instituted once it is filed at court.
 - whilst pending (ie after 17.1 and 17.2 issued but no application to court yet) the consumer can instruct the debt counsellor not to proceed with the application.
 - Debt counsellor must instruct credit bureaus accordingly

Withdrawal of debt review application(continued)

- **Du Toit v Benay Sager t/a Debt Busters [2017] ZAWCHC141 (17 November 2017)**
 - High Court can not intervene
 - Consumer can apply to Mag Court where application lodged for an order to be declared no longer over-indebted and/or
 - Challenge the accuracy of the credit bureau information and /or
 - File a complaint against debt counsellor failing/refusing to issue a clearance certificate and /or
 - Take the dc decision on review to the tribunal
- **Phaladi v Lamara and another ; Mashesa v Lamara and others [2018] ZAWCHC 1 (12 January 2018)**
 - Consumers restricted to the remedies contained in section 71 of the NCA ie issuing of clearance certificate by the debt counsellor
 - Application to be declared no longer over-indebted misconceived as courts not empowered to craft a remedy that the statute does not provide.

Don't worry the industry will sort it out

- **From the Report on debt counselling for the NCR**
 - Lack of trust
 - Lack of knowledge
 - Failure of self regulation
 - Divisions in the ranks of role players
- **“ Agreements are like roses and young ladies- they last while they last”**



the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA



MICRO FINANCE REGULATORY COUNCIL

DRP

Debt Relief Programme

Training Manual for Debt Counsellors



2 April 2007

National Credit Regulator
127 – 15th Road
Randjespark
Midrand

ATT: MS MPHOTO THEKISO

E.mail: mthekiso@ncr.org.za

MS ANDREA V/D WESTHUIZEN

E.mail: andrea@thrive.co.za



Dear Ms Thekiso & Ms Van der Westhuizen

**REPORT ON THE FIRST NCR DEBT COUNSELLOR TRAINING COURSE
HELD AT PRETORIA ON 5 CONSECUTIVE SATURDAYS:
23 FEB, 3, 10, 17 & 24 MARCH 2007**

| No | Name | Organisation | Contact details |
|----|--------------------|-------------------------|--|
| 1 | Abrahams, Angelo | Advocate | angelo1@yahoo.co.za |
| 2 | Abrahams, Earl | Standard Bank | earl.abrahams@standardbank.co.za |
| 3 | Abrahams, Hyan | Absa Technology Finance | hyan@atfs.co.za |
| 4 | Cloete, Kobus | Land Bank | cloete@hantam.co.za |
| 5 | Da Silva, Mel | Octogen (Pty) Ltd | mel@gu.co.za |
| 6 | Grové, Loulene | Felicitas School | loulenegrove@gmail.com |
| 7 | Logan, Stephan | Logan Attorneys | stephan@loganattorneys.co.za |
| 8 | Mogosoane Tebogo | University of Pretoria | m.mogosoane@up.ac.za |
| 9 | Mokgata, Elizabeth | Self employed | sthemba@mweb.co.za |
| 10 | Richards, Tony | Octogen(Pty) Ltd | tonyr@octogen.co.za |
| 11 | Slot, Paul | Octogen(Pty) Ltd | paul@gu.co.za |





National Credit Regulator

DEBT COUNSELLING EXAMINATION
MARCH 2007

Examination Date:

Full Names and Surname of Learner:

ID number:

Contact telephone number:

Fax Number:

Postal Address:

Instructions

- Please complete all the questions
- Read questions carefully
- Complete your answers in English, and write legibly
- You need 80% to be declared competent
- You have 180 minutes to complete the exam

GOOD LUCK



DEBT COUNSELLOR TRAINING PROGRAMME

Franciscus Haupt

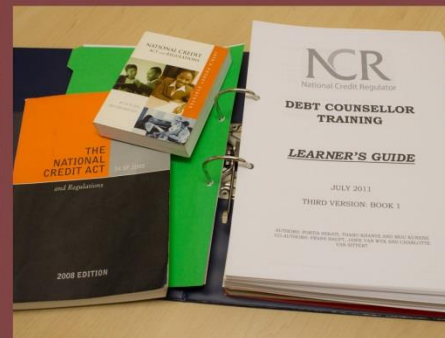
Director
Law Clinic,
University of
Pretoria

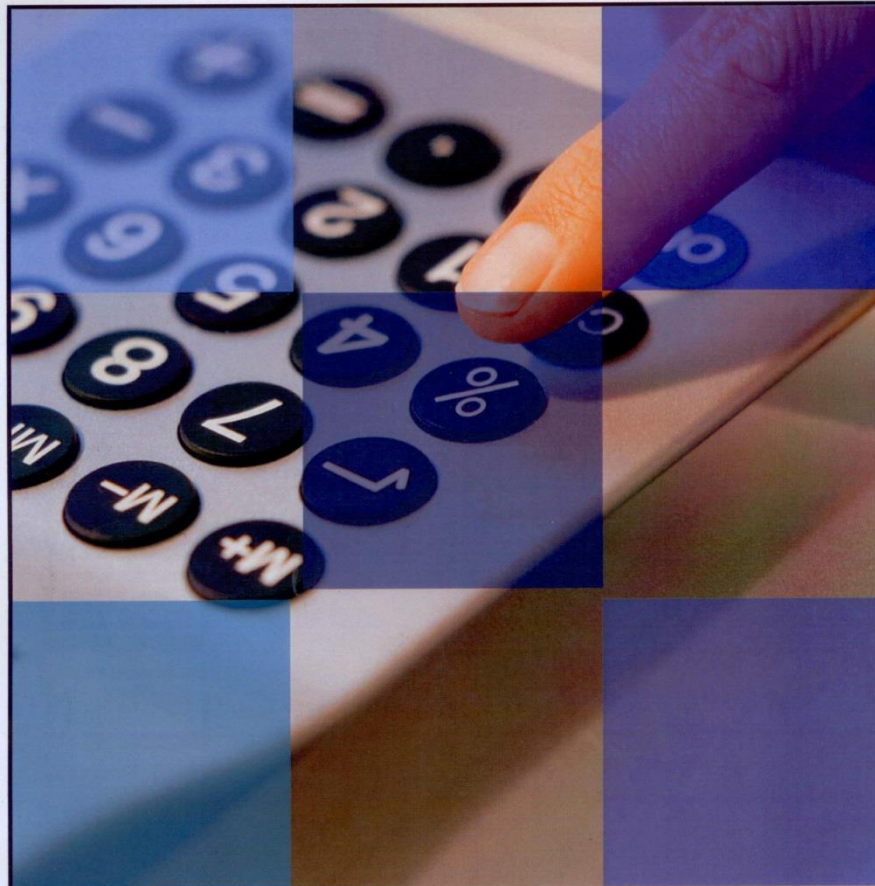
MODULE 1 FINDING YOUR WAY THROUGH THE ACT



MISSION

- To use the practice of law (simulated and actual) as a context to teach and research substantive and procedural law, ethics, professional skills, effective interpersonal relations, appropriate dispute resolution techniques and the ability to integrate law, fact, procedure and values.
- To provide quality legal services to the indigent thereby increasing access to justice.
- To provide access to and transformation of the organised legal profession by providing opportunities and training to candidate attorneys especially those from previously disadvantaged groups.
- To foster a commitment in staff and students to build a society based on democratic values, social justice and the rule of law.





**DEBT COUNSELLING -
PRINCIPLES & GUIDELINES
ANNEXURES**

MEL DA SILVA, FRANCISCUS HAUPT,
HERMIE COETZEE, MAREESA ERASMUS

E | **ENTERPRISES**
University of Pretoria

Shifting knowledge to insight

you
& your
MONEY
TOWARDS FINANC



AULAI
Justice through
Legal Education



RUDO CONSULTING
Research & Training

For the love of knowledge



Compuscan Academy
COMPUSCAN ACADEMY OF LEARNING



Damelin
live • love • learn • leave a legacy



DEBT COUNSELLING PROVINCIAL ROADSHOW

It is with great pleasure that we invite you to the provincial debt counselling road show hosted by the National Credit Regulator. The previous national debt counselling conferences and exhibitions took place in Gauteng only, thus depriving many debt counsellors the opportunity to actively contribute towards better solutions and to the improvement of the debt restructuring process. This year we found it necessary to visit provinces in order to create a better platform to exchange ideas on the best practices for debt review.



Consumer Friend™
Outsource Debt Review Solutions

2017 CONSUMER FRIEND ROADSHOW



AGENDA:

• STELLENBOSCH / DURBAN / JOHANNESBURG

- 08:00am – Registration / Breakfast
- 09:00am – Welcome – Ryan Hartsliel
- 09:05am – Industry News - Rob Easton-Berry
- 09:15am – Keynote address – “Unchartered Waters” by Daniel Silke
- 10:00am – Tea Break
- 10:15am – Consumer payment behavior and collections from a DC’s perspective – Mel Da Silva
- 10:30am – Debt Review Exchange (DReX) application - demonstration of the DC portal
- 10:45am – Debt Review processes – Justin Van Der Linde will cover:
 - Proposal income and expenditure – reworks
 - 17.3 Change of Circumstance –
 - Change of DC – why the credit provider cannot process without a valid 17.7

Q & A with the Debt Counsellors

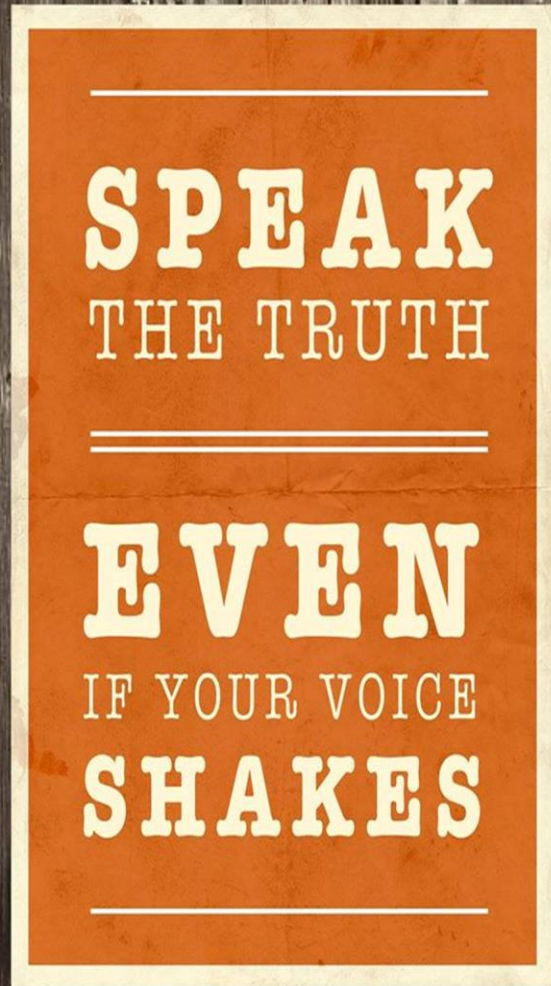
Corporate Rebels

Un-Locking True Potential





DEBT REVIEW LETS EXPOSE AND FIX THE PROBLEMS



TMC DC assist

Description

a central reference resource for NCR publications, relevant case... law & precedents, general issues affecting the DC industry. DC's and affiliates are invited to post topics of general interest and participate in discussions.

IF YOU WISH TO JOIN THE GROUP PLEASE CLICK TO JOIN AND SEND A DIRECT MESSAGE, EXPLAINING YOUR ASSOCIATION WITH DEBT COUNSELLING.

DCASA Western Cape Meeting

***You are hereby invited to attend the DCASA
Western Cape Branch Meeting taking place
on 23rd February 2016***

Venue: Parow Golf Club

Time: 10:00am

Agenda to be released in due course

***RSVP by emailing Christina,
admin@dcasa.co.za***

Members attend free; Staff R60; non-Members R100

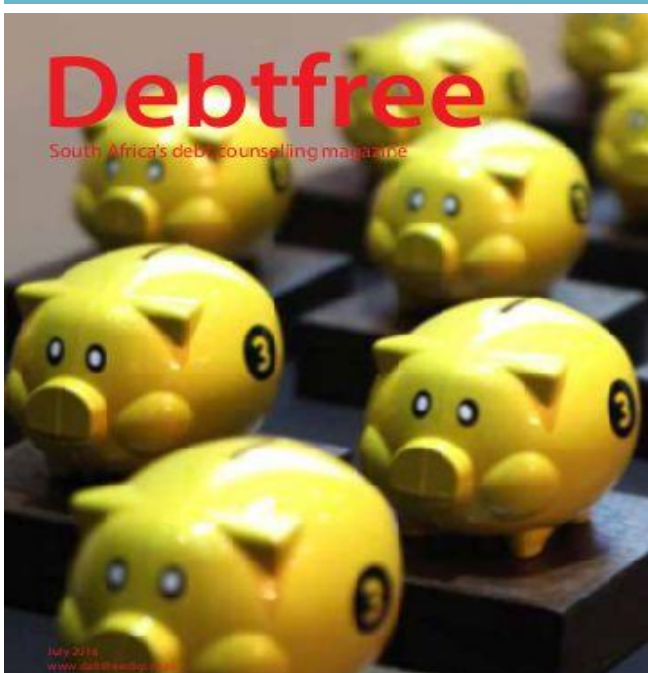
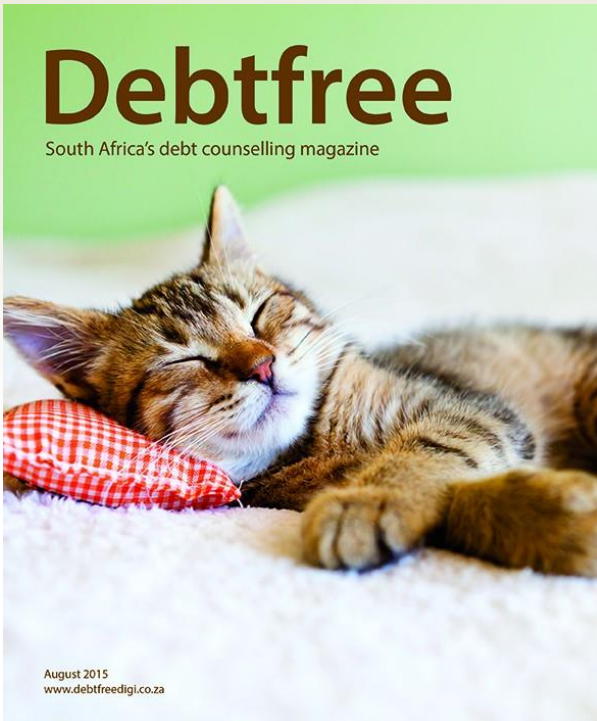
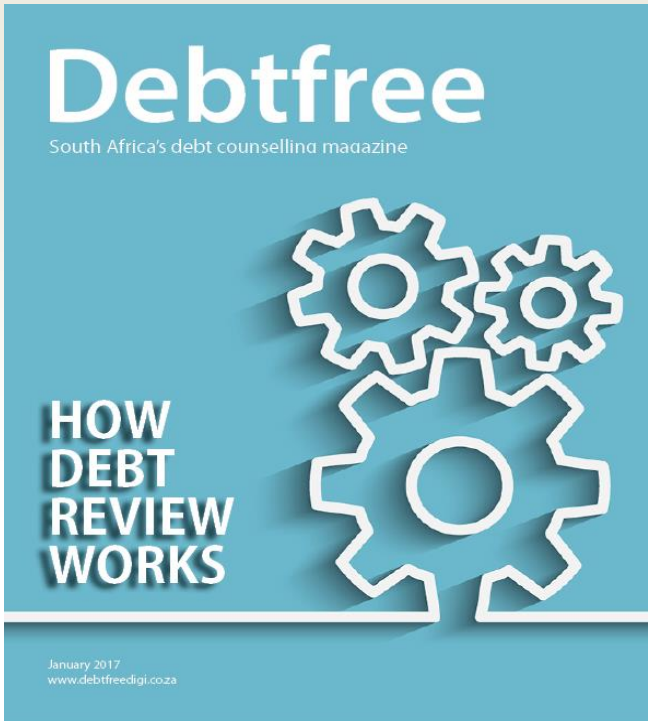
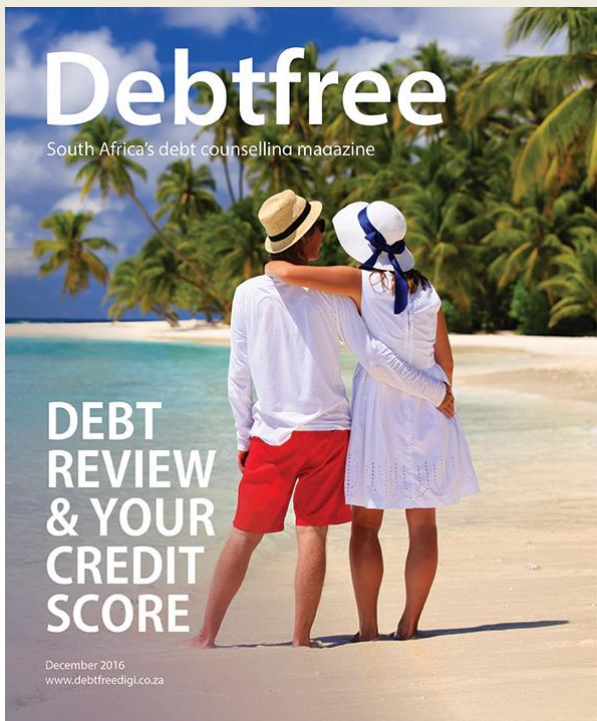


**THE BANKING
ASSOCIATION
SOUTH AFRICA**



national consumer tribunal





Programme in Advanced Debt Counselling

Workshop 3



Shifting knowledge to insight



As far as training is concerned we have indeed come a long way...

From here



To here



But are we there yet? Not quite.

- Residential courses too long, too expensive for new entrants
 - Blended learning : online and (non-)compulsory contact session/s
 - Improved and regularly updated study material
 - Get practicing debt counsellors on board
- Training too theoretical
 - Providers of software, pdas etc can contribute to create more hands on training
 - Consider an internship funded by Seta
- Is on -going training for debt counsellors sufficient.?
- Still room for improvement , huge gap between knowledge and experience in own ranks.

Is an integrated course/workshops for debt counsellors and credit provider staff feasible?

Should , could be

- Section 163 requires training
- General training for all Credit Providers, PDA's, Debt Counsellors and ADR Agents now required on:
 - The National Credit Act
 - Financial Management
 - Business Management
 - Customer Service
 - Governance and compliance
- Plus
 - Credit providers: Risk management, computer literacy and economics
 - Debt Counsellors: Debt counselling, accounting and bookkeeping and economics
 - PDA's: Risk management, computer literacy and accounting
 - ADR: Alternative dispute resolution

Conclusion

- It has been a long and bumpy road but we are getting closer to where we want to be. Still some way to go...best of luck !
- Thank you
- frans.haupt@up.ac.za