

DEBT REVIEW: WHAT IS IT? CAN YOU EXIT IT?

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Debt review can change your life. It can help you organise your debt and structure payment plans that are manageable and achievable. The process of debt review application is fundamentally governed by the **National Credit Act 34 of 2005** (hereinafter and interchangeably referred to as the NCA or the Act). One of the hallmarks of the NCA is the dedicated debt relief measures it has introduced for South African consumers. Notably, the Act has become the first piece of credit legislation that has introduced comprehensive provisions (in Part D of Chapter 4) aimed at preventing the extension of reckless credit and alleviating consumer over-indebtedness.

In terms of section 79 (1) of the Act, a consumer is over-indebted:

If the preponderance of available information at the time that a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's;

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

There are two types of debt review processes established under the NCA. The first type being a court ordered debt review process done in terms of section 85 of the Act. The second type of debt review process is a voluntary debt review application initiated by the consumer in terms of section 86 of the NCA.

Debt review in terms of section 86 of the NCA

In terms of section 86(1) of the NCA, a natural person consumer who is experiencing difficulty or inability in paying his credit agreement debts can *voluntarily* apply to a debt counsellor for debt review. All parties to the debt review process (consumer, credit

provider and debt counsellor) must participate in the process in good faith. The debt counsellor is obliged, in terms of section 86(7) to make a determination of whether the consumer is over-indebted, likely to become over-indebted or not over-indebted.

If the debt counsellor finds the consumer not to be over-indebted (which is highly unlikely) the consumer is at liberty to approach a court on application to pronounce on whether the consumer is over-indebted or not in terms of section 86(9). If the debt counsellor determines that the consumer is not over-indebted but likely to become over-indebted, the debt counsellor may submit a debt restructuring proposal to the consumer's credit providers. If all the credit providers agree to the proposal it is referred to court to be made a consent order. If not all the credit providers agree, the proposal has to be referred to court with a "recommendation" that the court formally declare the consumer over-indebted and restructure his debts in accordance with the repayment proposal in terms of section 86(7)(c).

In practice, such a debt restructuring proposal is also made to the credit providers of a consumer where the debt counsellor determines that the consumer is indeed over-indebted and, if not agreed to by all the credit providers, the proposal must be referred to court in accordance with section 86(7)(c).

Thus, the "debt review process" has three distinct stages, namely the stage where the debt counsellor interrogates the consumer's financial situation to determine whether he is over-indebted or not; the stage where the application for a debt restructuring order (or for making a rearrangement agreement a consent order) is heard by the court; and the stage after the court has made a debt restructuring order, when the consumer is obliged to make payments in accordance with the debt restructuring order.

It is important to note that the debt counsellor does not have any power to "declare" a consumer over-indebted, but is merely obliged to make a "determination" regarding the consumer's over-indebtedness and to refer it to the court with a recommendation (a proposal) on how the debt should be restructured.

It is then the task of the court to conduct a hearing and formally declare the consumer over-indebted and afford him debt relief by restructuring his credit agreement debt (unless a debt rearrangement order is made by consent as contemplated in section 86(8)(a) read with section 138, in which event a full hearing is not conducted). The court that is approached for such debt restructuring will be a Magistrate's Court with

jurisdiction over the consumer and it is to be noted that the court is not obliged to declare the consumer over-indebted and make a restructuring order, but that it has a discretion – to be exercised judicially – to do so.

Section 88(1)(b) confirms that a court is not obliged to declare a consumer over-indebted and can also declare a consumer "not over-indebted" if it appears from the facts presented to the court (either by the consumer himself in terms of section 86(9) or via a restructuring application in terms of section 86(7)(c)) that the consumer is indeed not over-indebted as contemplated by section 79 of the NCA. The Magistrate's Court's jurisdiction in the context of debt restructuring further entails that even where, after a hearing, a court is satisfied that the consumer is indeed over-indebted, it still has the discretion as to whether to grant a debt restructuring on the terms proposed by the debt counsellor or on other (more appropriate) terms, or the court may even reject the proposal if it is not financially viable in terms of section 86(7)(c) read with section 88(1)(b) of the Act.

It is to be noted that the Act does not prescribe a specific time period within which the debt review process, comprising the three stages referred to above, must be finalised. Generally, the initial process before the debt counsellor should be finished within 60 days from the date of the debt review application, at which stage the matter should be referred to court – either for a consent order or for the court to consider and grant a debt restructuring order.

In the case of ***Nedbank v National Credit Regulator 2011 (3) SA 581 (SCA)*** it was held that a debt counsellor as a statutory functionary is obliged, consequent to reviewing a consumer's debt in terms of section 86, to refer a proposal to the Magistrate's Court to make certain orders, failing which he has not complied with his duty as a debt counsellor. However, in practice it appears that some debt counsellors enter into voluntary debt rearrangement agreements on behalf of the consumer without referring the matter to court for a consent order, and that the consumer then continues to pay in terms of that informal voluntary arrangement.

The NCA provides that a consumer who entered the debt review process and whose debts have been successfully "re-arranged" (restructured) in terms of Part D of Chapter 4 can be granted a clearance certificate in certain circumstances. Such a certificate then serves to facilitate the consumer's exit from the "completed" debt review process.

How to exit Debt review/ Removal of the Debt Review Flag

The position on the removal from and termination of a debt review process by a consumer who alleges that he/she is now financially fit to pay the debts or has paid all the debts subjected to a re-arranged payment plan has been clarified in the case of ***Van Vuuren v Roets and Others (37407/2018) [2019] ZAGPJHC 286, (Van Vuuren)***.

This case is about the interpretation of certain provisions of the NCA. A controversy exists about whether the High Court has jurisdiction, as a court of first instance, to address the alleged plight of the two applicants being Van Vuuren and Nel. Both sought relief from the High Court to release them from debt review, essentially, on the premise that since their initial applications in terms of section 86(1) of the NCA, their financial positions had so improved that they could pay their way again, albeit that they had not discharged all of their indebtedness.

The plight of the two applicants in this case was that they contended that they are trapped in debt review when they no longer need to facilitate their financial rehabilitation through that process. The court however pronounced circumstances and ways in which both the applicants may successfully exit debt review through.

The court held that the predicament in which Nel finds himself, i.e. where no order of rearrangement has been made, is resolved by his debt counsellor presenting the proposal to the Magistrate and, together therewith, submitting the additional information about his revived fortunes, whereupon the Magistrate must, as section 87 (1) stipulates “conduct a hearing and having regard to the proposal and information before it and the consumer’s financial means prospects and obligations” decide whether to reject the recommendation or otherwise. On the facts alleged by Nel, the Magistrate must, logically, reject the proposal because, in terms of section 88(1)(b) the Magistrate must conclude, logically, that Nel is not over-indebted.

The court further held regarding Van Vuuren’s case, that the position is quite different. Where a section 87 order by a Magistrate was made, the consumer is bound to the provisions of section 88(1)(c) and 88(2): In short, until all the consumer’s obligations under a rearrangement are discharged or all novated obligations in terms of a consolidation agreement are discharged.

The court further held that in the above circumstances, a consumer may exit debt review in terms of section 71 of the NCA. The court held that section 71 requires that a debt counsellor, under the stipulated conditions, may issue a clearance certificate. If the debt counsellor fails to give a clearance certificate, the consumer must lodge a complaint with the Tribunal. It emphasised that what the Tribunal does is not deal with a *rescission* of the Magistrate's order – the order is *per se* undisturbed. In this case and on the facts alleged by Van Vuuren, the court held that if he can satisfy section 71(1)(b) he can exit debt review. If the facts do not meet the prescripts, he cannot. To belabour the critical point – no Court has jurisdiction to order a release.

Most importantly, the court in this case had to answer six questions regarding debt review that were posed to it for the sake of clarity and certainty. The court answered these questions in paragraphs 53-59 of the judgement as follows:

- (1) Is a High Court able to make an order confirming that an applicant is no longer over-indebted, where no valid declaration of over-indebtedness is before Court?

No. No textual or purposive interpretation exists that can cogently substantiate the idea that the High Court has jurisdiction as a court of first instance.

- (2) Where fresh facts arise since a debt counsellor's notification to all credit providers and every registered credit bureau of the consumer's application for debt review, or after the assessment and conclusion that a consumer appears to be over-indebted, and new facts demonstrate material change in the circumstances of a consumer causing such consumer to no longer be over-indebted, is the High Court the forum of first instance that the consumer should approach to provide an order to rectify his credit status with credit providers and credit bureaus?

No. A consumer who is not yet the subject of a Magistrate's order in terms of section 87, may together with the proposal of the debt counsellor present the additional facts to bring about a rejection of the proposal. If a Magistrate has already made a rearrangement order, section 71 regulates the only route to termination of debt review, and its terms must be met.

(3) Is the relief sought [by the applicants; i.e. an application to high court to terminate debt review] consistent with the scheme of the National Credit Act?

No. No interpretation of the statute can support the relief sought; i.e. the High court may not order a release of the consumers from debt review.

(4) The concepts of 'over-indebtedness' (including that of financial difficulty falling short of 'over-indebtedness' contemplated by s 86(7)(b)) and the attendant remedy of 'debt review' within the meaning of the National Credit Act are statutory creations. How they work is governed entirely by the National Credit Act. In the absence of a challenge to their constitutionality, are the Courts' powers delineated by these provisions?

Yes. As a wholly statutory conception, debt review does not trespass into the realm of the common law.

(5) Does section 71 of the National Credit Act afford an adequate remedy in the circumstances to expunge the record that the applicants were in debt review?

The question posed is about legislative policy and deliberately chosen objectives. If the remedies provided for do not cater for certain eventualities, it is the province of the legislature to contemplate amendments based on its preferred policy choices. The anomaly concerning section 71 and 88 must however be eliminated.

(6) Is the only remedy at the disposal of the applicants the limited relief provided for in terms of section 71 of the National Credit Act and is it further limited to be sought in the manner set out therein?

The applicants *per se* have different remedies, (i) where no rearrangement order is made the applicant can place further information before a magistrate to section 87 to procure a rejection by the magistrate of a proposal put up by the debt counsellor for a rearrangement order; (ii) section 71 offers a remedy where a rearrangement order has been made, complicated by the effect of section 88(1) if the applicant can satisfy the prescriptions of that those sections

(7) Would the Court in exercising its powers in terms of section 21 of the Superior Courts Act to grant such relief, be inappropriate considering the environment regulated by the National Credit Act?"

Yes, it would be inappropriate.

The above answers to the questions posed constituted the court's order to the applicants' request to be released from debt review.

Subject to all the conditions discussed above and further taking into consideration the position established by our court, it can be concluded that it is possible for one to exit debt review or have the debt review flagging expunged against their names.

I advise that whoever finds themselves entangled in the debt review process and now seeks to be let go from that process must approach a legal practitioner who specialises in debt review matters for assistance.

You can further contact us, Mudau and Netshipise Attorneys, for all your debt review related matters.