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The debt alleviation measures in terms of the National Credit Act 34 of 2005

by

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Mini-dissertation submitted in partial fulfilment of the requirements for the degree

Master of Laws

LLM in Mercantile Law

(Coursework)

in the

FACULTY OF LAW

at the

UNIVERSITY OF PRETORIA

Supervised by

Prof Stefan Renke

January 2022

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ACKNOWLEDGEMENTS

I wish to firstly acknowledge the divine power of God that has carried me over the finish line in this project. As a staunch believer in Christ, his grace and power has made all of this possible. I believe that this research project is a testimonial of God's grace and power at its best. I have so many people to thank for their support and kindness. I wish to thank Prof Renke, working under your supervision and guidance has been enlightening. I also want to thank all my friends and Tebogo, but will not mention any further names. You have instilled in me a culture of resilience and confidence. You never get tired of my endless complaints; at some point I was convinced that complaining is what I know best. I would also like to thank my family, specifically my sister, you remain unmatched.

Lastly, I also wish to thank members of my faith community, kwiNyoni Emhlophe. The following quote from the Holy Book has always kept me going:

"But *by the* grace of God I am what I am, and His grace towards me has not been void. Rather, I laboured more abundantly than all of them, yet not I, but the grace of God that *was* with me."

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SUMMARY

There is a need for expeditious and efficient debt alleviation mechanisms to counter modern-day consumer over-indebtedness, of which obligations arising from credit agreements are a main source. The debt alleviation measures in the traditional insolvency regime, sequestration and administration orders, are inaccessible to no-income no-asset ("NINA") debtors, mainly due to their lack of sufficient income and assets. In June 2007, when the National Credit Act 34 of 2005 ("NCA" or "Act") became effective, it introduced an additional (to the aforementioned) debt alleviation measure into the insolvency regime, debt review. However, the latter also has access barriers for NINA debtors, and in an attempt to rectify this, the National Credit Amendment Act 7 of 2019 promulgated an even further debt alleviation procedure, debt intervention.

The aim of my mini-dissertation is to investigate and compare the NCA's debt alleviation measures, debt review and debt intervention, with the ultimate aim to ascertain whether the plight of over-indebted NINA debtors to access a sufficient insolvency measure is being addressed. My main finding is that although it is early days and the Regulations to give effect to the Act's debt intervention process have not been promulgated yet, the legislature without doubt made a stride in the right direction when introducing debt intervention.

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CHAPTER 1

GENERAL INTRODUCTION

1.1. Introduction

This dissertation concerns the National Credit Act 34 of 2005,[1] as amended. Prior to the enactment of the NCA, the South African credit industry was characterised by outdated and fragmented legislation.[2] The credit industry was regulated by the Usury Act,[3] the Credit Agreements Act[4] and the 1999 Exemption Notice to the Usury Act.[5] These pieces of legislation had many flaws, but one of the main concerns was that the credit industry was regulated by two statutes often giving rise to conflicting regulatory frameworks.[6] Consequently there were inconsistencies in the implementation of and compliance with these pieces of legislation.[7] In some instances, some items of credit were not regulated by any statute creating a void in respect of credit regulation.[8]

On the aforementioned basis the Department of Trade and Industry undertook to launch the start of the reformation of the credit industry with the DTI Policy Framework of 2004. This document outlined the intention to repeal the Usury Act, Credit Agreements Act and the 1999 Exemption to the Usury Act and to replace it with a single piece of legislation that would regulate the entire credit industry, and in terms of which all credit transactions and credit providers would be treated equivalently.[9]

The NCA was assented to on 10 March 2006, promulgated[10] and put into operation on three different dates,[11] in order to facilitate the Act's smooth operation.[12] The coming into force of the National Credit Act was a landmark achievement in the history of South African consumer

[1] 34 of 2005, "National Credit Act", "NCA" or "Act".
[2] The Department of Trade and Industry South Africa *Consumer Credit Law Reform: Policy Framework for Consumer Credit* (2004), "DTI Policy Framework of 2004", 13.
[3] 73 of 1968, "Usury Act".
[4] 75 of 1980, "Credit Agreements Act".
[5] GN 713 of 1 June 1999.
[6] DTI Policy Framework of 2004 22.
[7] *Ibid.*
[8] *Ibid.*
[9] DTI Policy Framework of 2004 23.
[10] See GN 230 in *GG* 28619 of 15 March 2006.
[11] 1 June 2006, 1 September 2006 and 1 June 2007. Proc 22 in *GG* 28824 of 11 May 2006.
[12] Otto and Otto *The National Credit Act explained* (2016) 3 and 8.

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credit legislation.[13] The NCA *inter alia* introduced debt alleviation measures to curb and alleviate consumer over-indebtedness.[14] In the latter respect section 86 of the NCA provides for debt review, which is an application by a consumer to a debt counsellor to have the consumer declared over-indebted, followed by an investigation by the debt counsellor and a referral to the court, should the debt counsellor agree that the consumer is indeed over-indebted. The section 86 debt review process is available to over-indebted consumers under circumstances where section 85 is not applicable. The latter section may be relied on by a consumer whose credit agreement is before a court, probably as a result of the enforcement of a debt that is in default. Such a consumer may allege in court that he is over-indebted and substantiate the allegation by evidence, whereupon the court will refer the matter to a debt counsellor to be investigated. The debt counsellor will eventually refer the matter back to the court for its findings.[15]

The debt review process was created to give effect to the legislature's objective to protect consumers by "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".[16] However, the fact that the NCA's debt alleviation mechanism addresses over-indebtedness on the sole principle that the consumer must satisfy all obligations owed to the credit provider, its reliance on the courts and its failure to provide for a discharge to over-indebted credit consumers, was heavily criticised.[17] Some of the original subsections of section 86 have been amended in terms of the National Credit Act Amendment Act 19 of 2014,[18] which became effective on 13 March 2015.

In a recent amendment of the National Credit Act in terms of the National Credit Amendment Act 7 of 2019,[19] the legislature sought to address the shortcomings presented by the NCA's initial debt review process and to broaden access to it, by the introduction of the "Debt intervention process".[20] Shortcomings include the scope of application of the debt review

[13] DTI Policy Framework of 2004 22.
[14] Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008), "Van Heerden", par 11.3.1.
[15] See further par 2.2 below.
[16] S 3(g).
[17] Coetzee and Roestoff "Rectifying an unconstitutional dispensation? A consideration of proposed reforms relating to no income no asset debtors in the South African insolvency system" 2020 *Int Insolv Rev.* 1.
[18] "NCA Amendment Act 2014".
[19] "NCA Amendment Act 2019". Although the President has signed this Act, and it is therefore law, it must still be put into operation. See Otto and Renke in Scholtz (ed) *Guide to the National Credit Act* (2008) par 1.3.6.
[20] S 86A.

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process, and specifically the fact that the process is only applicable to credit agreements as defined in the NCA,[21] and not available in instances in which the credit provider has taken steps to enforce the particular credit agreement in court.[22] As far as the debt intervention process is concerned, one of the express aims of this process is to make debt alleviation more accessible to vulnerable over-indebted consumers who do not qualify for the current existing debt alleviation measures, such as the debt review process in terms of the NCA, sequestration in terms of the Insolvency Act[23] and debt administration orders in terms of section 74 of the Magistrates' Courts Act.[24] In particular, as per the Preamble to the NCA Amendment Act 2019 the debt intervention process, in summary, aims to provide an alternative debt alleviation mechanism to over-indebted consumers who do not have sufficient income and disposable assets to prove advantage to credit providers, or who cannot produce an economically viable repayment or afford the costs associated with the current existing debt alleviation mechanisms.

1.2. Research statement

The aim of my dissertation is to discuss and evaluate the debt review process in terms of the National Credit Act[25] and the debt intervention process in terms of the NCA Amendment Act 2019. My ultimate aim is to determine the effectiveness of the debt alleviation measures in the National Credit Act through identifying shortcomings and making pragmatic recommendations towards the progressive realisation of access to efficient debt alleviation.

1.3. Research objectives and overview of chapters

Pertinent research objectives have been formulated with reference to the above-mentioned research statement in order to define and restrict the scope of this study. These research objectives, and the chapters they will be addressed in, are as follows:

(a) Chapter 1 provides a general introduction to the dissertation, contains the research statement and the research objectives and serves to delineate and limit the scope of the research. The definitions of selected key concepts are provided as well.

[21] In terms of s 4(1), the NCA applies to every credit agreement between parties dealing at arm's length and made within or having an effect within the Republic. This definition is subject to exceptions contained in the Act.
[22] S 86(2).
[23] 24 of 1936, "Insolvency Act".
[24] Act 32 of 1944, "Magistrates' Courts Act".
[25] As amended in terms of the NCA Amendment Act 2014.

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(b) The purpose of Chapter 2 is to discuss and evaluate the debt review process that was introduced in terms of section 86 of the National Credit Act, as amended in terms of the NCA Amendment Act 2014.

(c) The aim of Chapter 3 is a discussion and evaluation of the newly introduced debt intervention process in terms of the NCA Amendment Act 2019.

(d) In Chapter 4, and based on the research conducted in the dissertation, conclusions are reached and, where applicable, recommendations are made.

1.4. Delineations

Section 85, which has been briefly explained above as an access route to debt review, will not be discussed in detail in the dissertation. In addition, although the South African legal landscape contains other debt alleviation measures in addition to the National Credit Act's aforementioned processes, such as natural person insolvency in terms of the Insolvency Act and debt administration in terms of section 74 of the Magistrates' Courts Act, these measures will not be addressed in this dissertation. It has to be realised that because the regulations to give effect to the provisions of the NCA Amendment Act 2019 have not been published yet, my dissertation will naturally be restricted to the aims and provisions of the Amendment Act itself.

1.5. Terminology

The definition of a few concepts, which are used frequently in the dissertation, and are defined in section 1 of the National Credit Act, are as follows:

> "**agreement**", includes an arrangement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties;

> "**consumer**", in respect of a credit agreement to which this Act applies, means
>
> (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;

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(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;

"**credit**", when used as a noun, means

(a) a deferral of payment of money owed to a person, or a promise to defer such a payment; or

(b) a promise to advance or pay money to or at the direction of another person;

"**credit agreement**" means an agreement that meets all the criteria set out in section 8;

"**credit provider**", in respect of a credit agreement to which this Act applies, means

(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;

"**Minister**" means the member of the Cabinet responsible for consumer credit matters;

"**principal debt**" means the amount calculated in accordance with section 101(1)(a).

1.6. Reference techniques

The masculine form is used throughout this dissertation to refer to a natural person. The credit provider, which is usually a juristic person, will be referred to as "it".

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CHAPTER 2

THE DEBT REVIEW PROCESS IN TERMS OF SECTION 86 OF THE NATIONAL CREDIT ACT

2.1. Introduction

The National Credit Act acknowledges the quandary of the ever-growing consumer over-indebtedness problem. Chapter 4 Part D of the Act, titled "Over-indebtedness and reckless credit", thus has a dual purpose, the prevention[26] and alleviation of over-indebtedness. Thus, it is important to first consider the definition of over-indebtedness as provided for by the NCA. Section 79(1) provides as follows:

> 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.

From the aforementioned definition it is clear that the consumer must be unable to pay his financial obligations under his credit agreements. It will not suffice as over-indebtedness if the consumer is merely experiencing difficulties in satisfying his credit agreement obligations. Section 79(1) also informs the criteria that should be considered by the debt counsellor (and then the court) to determine whether a consumer is over-indebted. In terms of section 79(1)(a) and (b), the debt counsellor or court must have regard to the consumer's "financial means, prospects and obligations"[27] and prospects of punctually satisfying all obligations owed under credit agreements, indicated by the consumer's debt repayment history.[28] It has already been mentioned that an over-indebted consumer may utilise section 85 or section 86 to have his over-indebted situation evaluated, and under which circumstances section 85 will be applicable.[29] In what follows, the debt review process in terms of section 86, which may be used when the consumer's credit agreement is not already before a court, is focused on. However, it must be realised that section 85 results in the same outcome as section 86: upon an allegation by the consumer that he is over-indebted, substantiated by evidence, the matter is usually referred by the court to a debt counsellor directly[30] for the latter's investigation. Upon

[26] By rendering credit assessments compulsory in terms of s 81(2) of the Act. Debt prevention falls outside the scope of my dissertation.
[27] S 79(1)(a).
[28] S 79(1)(b).
[29] See par 1.1. above.
[30] In terms of s 85(a).

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completing his investigation, the debt counsellor reports back to the court which will exercise its powers in terms of section 87.[31]

In terms of section 86(1) of the NCA an over-indebted consumer may file a voluntary debt review application with a debt counsellor "to have the consumer declared over-indebted". Upon receipt of the application the debt counsellor must amongst other things inform all registered credit bureaux and the consumer's credit providers of such an application.[32] Both the consumer and the credit providers involved are under obligation to cooperate with the debt review process in good faith.[33]

The debt counsellor, introduced as a functionary in terms of the National Credit Act,[34] is essential to this debt review process as they possess the function of determining whether the consumer is not over-indebted, likely to become over-indebted, or over-indebted.[35] In the instance where the debt counsellor determines that the consumer is over-indebted, such a determination must be accompanied by the debt counsellor's proposal to the Magistrate's Court that the consumer's obligations be re-arranged.[36] If reckless lending was involved according to the debt counsellor, the latter must also make recommendations that the consumer's credit agreement/s be declared reckless.[37]

The debt review process, as stipulated in section 86 of the National Credit Act read in conjunction with regulations 24 to 26,[38] is an in-depth process and comprises different stages. In this regard, there is the consumer's application for debt review, the ensuing duties of the debt counsellor, in the duration of the debt review process obligations are imposed on the consumer and affected credit providers, the determination of over-indebtedness by the debt counsellor and, lastly, the steps that may be undertaken after such a determination, such as referral of the matter to court and the court's decision. The NCA further provides for the termination of the debt review process and for the resumption of a once terminated debt review.

[31] S 87 is discussed in par 2.4.2. below. See Van Heerden par 11.3.3.5 for a complete discussion of s 85.
[32] S 86(4)(a)-(b); See Van Heerden par 11.3.3.2.
[33] S 86(5)(b); Van Heerden par 11.3.3.2.
[34] See s 44.
[35] S 86(7)(a)-(c); Van Heerden par 11.3.3.2.
[36] S 86(7)(c)(ii), discussed in par 2.4.3. below.
[37] S 86(7)(c)(i).
[38] Of the Regulations made in terms of the National Credit Act. See GN R489, *GG* 28864, 31 May 2006, "National Credit Regulations". Any reference to a regulation hereafter will be to the National Credit Regulations.

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2.2. The application for debt review

According to section 86 of the National Credit Act a consumer that believes he is over-indebted may voluntarily apply to a debt counsellor to be admitted to the debt review process.[39] However, before elaborating any further on the application process, it is important to set the foundation with a brief discussion of the debt counsellor's office. Van Heerden posits that a debt counsellor must be regarded as a "neutral person who is registered in terms of section 44 of the Act offering a service of debt counselling".[40] One of the most notable duties of a debt counsellor is investigating a consumer's over-indebtedness and then to furnish the court with appropriate suggestions for debt alleviation in the form of debt restructuring.[41] During the duration of court proceedings, the debt counsellor should not be misconstrued as a litigant, but instead as *pro forma* applicant, since they are fulfilling a statutory obligation.[42] During the course of court proceedings a debt counsellor must further be available to defend or explain suggestions submitted to the court in respect of an over-indebted consumer.[43] In some instances a debt counsellor may be requested to provide information within the realm of their expertise, for instance the market price of a property.[44] The fees of a debt counsellor are not permitted to take priority over the payment of credit providers' and consumers' expenses.[45]

Finally, at an effort to build and maintain efficient debt counselling standards, debt counsellors are required to undergo and complete a debt counselling course offered by the National Credit Regulator[46] and further to possess credentials in the form of experience working in the fields of consumer protection and legal or accounting services, amongst others.[47] This does not absolve the debt counsellor from registration with the NCR.[48] In an instance where a debt counsellor does not comply with the aforementioned requirements or conducts himself in a manner constituting gross misconduct contravening the NCA, the National Consumer

---

[39] S 86(1).
[40] Van Heerden par 11.3.3.2.
[41] Van Heerden par 11.3.3.2.
[42] See *Bornman v National Credit Regulator* 2015 JDR 1614 (GP), *"Bornman*"; Van Heerden par 11.3.3.2.
[43] *Bornman* pars 38-39.
[44] *Bornman* par 40.
[45] *Bornman* par 41.
[46] "NCR". The NCR was established in terms of s 12 and as the regulator of the South African credit industry, and *inter alia* has registration and enforcement functions in terms of ss 14 and 15 respectively.
[47] Reg 10(a)-(b).
[48] See s 46.

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Tribunal[49] has the power to deregister such a debt counsellor and/or further impose a fine in its discretion.[50]

As stated above, to initiate the debt review process the consumer must bring an application to the debt counsellor in the prescribed manner and form[51] in order to be declared over-indebted as stipulated in section 86(1) of the NCA. In this regard, the consumer is burdened with the pre-emptive obligation to undertake certain steps shall it occur to the consumer that his financial situation is deteriorating and that there is a possibility of being unable to satisfy monthly (or other, as determined by the particular credit agreement) credit obligations.[52] Furthermore, the NCA does not limit the number of times a consumer is permitted to apply for debt review and, in essence, a consumer may apply for debt review as many times as he deems fit.[53] However, consumers are prohibited from applying for debt review as a delaying tactic in response to the enforcement of a credit agreement by a credit provider, especially if debt review was terminated in terms of section 86(10) in relation to the credit agreement in question.[54]

Regulation 24 provides that when applying for debt review, a consumer must complete Form 16[55] and submit it to the debt counsellor.[56] As an alternative to Form 16, a consumer is permitted to furnish the debt counsellor with personal information, among others ranging from his sources of income, monthly expenses and debt obligations.[57] Since the latter consumer has opted not to use Form 16, such a consumer is further required to provide a declaration that consents that his records held by credit bureaux may be checked and provides an outline of his commitment towards the restructuring of his debt.[58] The consumer must also declare that he

[49] "NCT". The NCT was established in terms of s 26 of the NCA and adjudicates matters arising from the Act or the Consumer Protection Act 68 of 2008.
[50] *National Credit Regulator v Joy Victoria Minnies and Others* [2016] ZANCT 22 (13 March 2018).
[51] See par 2.2. above.
[52] Van Heerden par 11.3.3.2.
[53] Van Heerden par 11.3.3.2.
[54] S 86(10) is discussed in par 2.5. below; Van Heerden par 11.3.3.2.
[55] Form 16 comprises of five sections. The first four sections require the consumer's personal information, debt obligations, income and monthly expenses. The fifth section requires the consumer to furnish a declaration that he will comply with the debt counsellor's requests and that he grants access to his credit records kept by the credit bureaux. The latter are institutions that keep record of credit transactions and must register with the NCR in terms of s43. The information they provide *inter alia* enables the debt counsellor to assess the consumer's number of credit agreements and payment history.
[56] Reg 24(1)(a).
[57] Van Heerden par 11.3.3.2.
[58] Reg 24(1)(b)(vi)-(viii).

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has provided correct information and attach documentation stipulated in Form 16 to the debt counsellor.[59]

2.3. Over-indebtedness determination and court referrals

According to section 86(6), after a debt review application has been accepted the debt counsellor must in the prescribed manner and within the demarcated time decide on the consumer's over-indebtedness. The debt counsellor must also consider reckless credit and make a determination relating to such, if applicable. Regulation 24(6) stipulates that the debt counsellor must make the determination contemplated in section 86(6) within 30 business days[60] after receipt of the application.

In the course of making the determination contemplated in section 86(6) the debt counsellor must consider section 79 of the NCA. The latter, as previously mentioned,[61] provides the definition of over-indebtedness for purposes of the National Credit Act and the criteria that must be considered by the debt counsellor (and later, a court) to decide the consumer's over-indebtedness. To this end, an assessment is conducted to ascertain whether the consumer's total monthly debt obligations exceed monthly living expenses from the net income.[62] If the answer is in the affirmative, a determination of over-indebtedness can be made. Section 86(7) provides that, if as a result of the assessment conducted in terms of section 86(6) the debt counsellor reasonably concludes that:

> (a) the consumer is not over-indebted, the debt counsellor must reject the application, even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into;
>
> (b) the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement; or
>
> (c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders -
>
>> (i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and
>>
>> (ii) that one or more of the consumer's obligations be re-arranged[63] by -

---

[59] Reg 24(1)(b)(viii).
[60] S 2(5) defines "business days" as working days to the exception of public holidays, Saturdays and Sundays. If a number of business days have to be calculated between the occurrence of events, the last day is in and the first day is out (not considered), represented by the acronym "LIFO".
[61] Par 2.1. above.
[62] Reg 24(7)(a)-(c).
[63] S 86(7)(c)(ii) is discussed in par 2.4.3. below.

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

If the debt counsellor determines that the consumer is not over-indebted, the application for debt review must be rejected, even if the debt counsellor is of the opinion that a particular credit agreement constituted reckless lending at the time when it was entered into.[64] However, section 86(9) provides another opportunity to the consumer to access the debt review process if a debt counsellor has rejected the initial application. The sub-section provides the following:

> If a debt counsellor rejects an application as contemplated in subsection (7)(a), the consumer, with leave of the Magistrate's Court, may apply directly to the Magistrate's Court, in the prescribed manner and form, for an order contemplated in subsection (7)(c).

Van Heerden postulates that section 86(9) must be read in conjunction with section 87.[65] The implication is that if a consumer makes use of the section 86(9) application procedure to the Magistrate's Court and is granted leave by the latter to approach the court, the Magistrate's Court will conduct a hearing in terms of section 87 and, if satisfied that the consumer is over-indebted, make one or more of the orders in section 86(7)(c).

Furthermore, regulation 25 stipulates that a consumer must be provided with a rejection letter when a debt counsellor has made a determination that the consumer is not over-indebted in accordance with section 86(7)(a). This rejection letter must be provided with the assessment form as well as the basis for the rejection.[66] Moreover, regulation 25 provides that the consumer must further be advised about the right to directly approach a court in accordance with section 86(9) within 20 business days after the rejection.[67] Importantly, subsequent to the rejection, in terms of regulation 24 in conjunction with Form 17.2, all registered credit bureaux must within five business days remove the debt review application from their listings , therefore entitling credit providers to initiate legal proceedings against the consumer.[68]

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[64] S 86(7)(a). See also Van Heerden par 11.3.3.2.
[65] Van Heerden par 11.3.3.2.
[66] Reg 25(3)(a)-(d).
[67] Reg 25(5).
[68] Reg 24(10).

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When applying directly to the Magistrate's Court in accordance with section 86(9), the consumer must complete Form 18.[69] In essence, Form 18 indicates the rejected consumer's intention to bring an application to be granted leave as stipulated in section 86(9) so that an application for debt review may follow and the consumer may be declared over-indebted in line with section 87.[70] Alternatively, a consumer may elect to use regulation 4 of the 2012 Debt Counselling Regulations to apply for debt review after rejection of the initial application by the debt counsellor.[71] This regulation resembles section 86(9), with the exception that it provides an uncertainty as to whether a consumer utilising this regulation must still use Form 18.[72]

Section 86(7)(b) provides for the second determination that a debt counsellor may make upon the completion of his investigation, namely that the consumer is not over-indebted at that time, but that the latter is experiencing or is likely to experience a measure of difficulty in satisfying his credit agreement payment obligations.[73] In such an instance the debt counsellor may suggest that the consumer, together with affected credit providers, consider entering into a voluntary agreement of debt-rearrangement.[74]

After the consumer and affected credit providers have accepted the debt counsellor's proposals in terms of section 86(7)(b), the latter is required to record such proposals in the form of an order.[75] The debt counsellor must subsequently, if consented to by the consumer and all the credit providers involved, file such an order as a consent order with a court or the NCT in accordance with section 138,[76] whereupon the court or the NCT may confirm the resolution or agreement as a consent order.[77] Regulation 3 of the Debt Counselling Regulations 2012 further affirms the filing of the consent order with a court or the NCT. This consent order must be supported by confirmatory affidavits by the debt counsellor, consumer and affected credit providers, stating which existing obligations of the consumer are to be re-arranged, and the

[69] Form 18 requires a consumer to provide information on the jurisdiction of the court, thereafter list his own personal information, a rejection letter from the debt counsellor, suggestions on how the debt payment obligations should be restructured, and provide a motivation for the consideration of the application. If reckless credit is applicable, suggestions on which credit agreements must be declared reckless must be provided.
[70] Van Heerden par 11.3.3.2.
[71] "Debt Counselling Regulations 2012", published in *GG* 35327 of 10 May 2012.
[72] Van Heerden par 11.3.3.2.
[73] S 86(7)(b).
[74] S 86(7)(b). See s 86(5), which imposes an obligation on the credit provider to participate in good faith during debt re-arrangement negotiations.
[75] S 86(8)(a). See also Van Heerden par 11.3.3.2.
[76] S 86(8)(a).
[77] See s 138(1), which provides that the NCT or court has this power without hearing any evidence.

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form of payment to credit providers.[78] In addition, section 165 enables the NCT to rescind or vary its own consent orders. However, if the debt counsellor's suggested proposal is not accepted, the debt counsellor must escalate the matter to the Magistrate's Court.[79]

Section 86(7)(c) makes provision for the consumer's primary objective when applying for debt review, to be declared over-indebted in order to receive the provided for alleviation by means of a court order in terms of section 87 (discussed below).[80] The said subsection provides that after conducting the debt review assessment, if the debt counsellor is reasonably satisfied that the consumer is over-indebted, the debt counsellor may propose to the Magistrate's Court to make an order to re-arrange one or more of the consumer's obligations.[81] It is important to note that the debt counsellor's determination and proposals in accordance with section 86(7)(c) is a prerequisite for a debt re-arrangement order in terms of section 87, and must be established as a jurisdictional fact before debt re-arrangement.[82]

There has been a great deal of contention in respect of the time period within which a debt counsellor must make a referral to the Magistrate's Court once his determination has been made. Case law provides clarity in this regard. The court in *FirstRand Bank Ltd v Martin*[83] held that the prescribed time period within which a debt counsellor must make the referral in an instance where a consumer has been determined to be over-indebted, is equivalent to an instance in which a consumer was determined not over-indebted and approaches the court in accordance with section 86(9). In terms of regulation 25(5), if the consumer wishes to utilise section 86(9), the consumer must do so within 20 business days after receiving a rejection letter from the debt counsellor.[84] Moreover, section 86(10) implies that a debt counsellor is under obligation to make a referral before the expiry of 60 business days since the application for debt review was instituted.[85]

To elaborate further, if a debt counsellor makes the determination that the particular consumer is over-indebted and subsequently fails to make debt restructuring proposals to the Magistrate's

[78] Debt Counselling Regulations 2012 reg 3(2).
[79] S 86(8)(b).
[80] Par 2.4.2.
[81] S 86(7)(c)(ii). If reckless lending was found to be involved, the debt counsellor may also propose in terms of s 86(7)(c)(i) that an order of reckless credit be made in respect of one or more of the consumer's credit agreements.
[82] Van Heerden par 11.3.3.2.
[83] *FirstRand Bank Ltd v Martin* 2012 (3) SA 600 (WCC).
[84] Reg 25(5).
[85] Van Heerden par 11.3.3.2. See the discussion of s 86(10) in par 2.5. below.

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Court, that particular debt counsellor would be acting contrary to the duties of a debt counsellor imposed in terms of the NCA.[86] In practice, the position appears to be that when a debt counsellor conduct an over-indebtedness assessment and the consumer appears to be on the edge of being over-indebted as per section 86(7)(b), or where the consumer is clearly over-indebted, the first step would be to consult with the consumer's credit providers and to suggest voluntary repayment plans before a court can be approached to grant debt rescheduling in accordance with section 86(7)(c)(ii).[87]

The finding that a particular consumer is over-indebted is of crucial importance. The question is which group of consumers is affected by or has access to the debt review process, and the ensuing debt alleviation in terms of the National Credit Act, as amended by the NCA Amendment Act 2014. A related question is why the legislature deemed it necessary to promulgate the debt intervention process in terms of the NCA Amendment Act 2019, discussed in the next chapter. Although these questions are also pertinent in respect of the debt counsellor's finding of over-indebtedness, they will be attended to hereafter, in my discussion of the powers of the courts in respect of over-indebtedness. At the end of the day, whether section 85 or section 86 is used by a consumer to access debt review, the finding whether the particular consumer is over-indebted and what alleviation will be afforded the consumer in terms of the NCA, rests with the courts.

2.4. The powers of the Magistrate's Court in respect of over-indebtedness

2.4.1. Introduction

Important to the discussion of consumer over-indebtedness are the powers conferred upon the Magistrate's Court in respect of the debt review process, as stipulated in the National Credit Act. Consideration must be given to the options available to the Magistrate's Court in terms of section 87, in particular section 87(1)(b)(ii) read with section 86(7)(c)(ii). Under the latter, the right of the Magistrate's Court to reduce the interest rate comes to the fore.

2.4.2. Section 87 of the National Credit Act

As a point of departure, the heading of section 87, "Magistrate's Court may re-arrange consumer's obligations" is important as it summarises the Court's main power in respect of

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[86] Van Heerden par 11.3.3.2.
[87] *Ibid*.

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over-indebtedness. Van Heerden submits that on closer inspection it becomes apparent that the powers of the Magistrate's Court in terms of section 87 are only applicable to the instances mentioned in section 86(8)(b) and (9).[88] Moreover, Van Heerden states that the omission of reference to the instances stipulated in section 86(7)(c) is a consequence of a legislative oversight to deal with the same matter in terms of section 86(8)(b).[89] Nonetheless, this issue was resolved in the case of *National Credit Regulator v Nedbank Ltd and others*[90] which stated that "section 86(8)(b) contains a hiatus and that the very words of that provision are necessarily implied by section 87(7)(c)".[91] Therefore, after a recommendation has been made to court in terms of section 86(7)(c) that that the consumer is over-indebted, it must be followed by a hearing to be conducted in terms of section 87.[92]

To elaborate on the options available to the courts, section 87(1) stipulates that in the instance where a debt counsellor puts together a proposal to the Magistrate's Court in accordance with section 86(8)(b), or in the instance where a consumer directly applies to the Magistrate's Court in accordance with section 86(9), the Magistrate's Court must conduct a hearing in this regard.[93] In conducting this hearing the Magistrate's Court must consider the proposal submitted by the debt counsellor and other relevant information presented before it.[94] In addition to this, the financial means, prospects and obligations of the consumer must also be considered.[95]

After having taken the above-mentioned into consideration the Magistrate's Court may outrightly reject the proposal submitted by the debt counsellor or the direct application instituted by the consumer in terms of section 86(9).[96] Alternatively, if the Magistrate's Court concludes that a particular credit agreement is reckless, the court may in accordance with section 87(1)(b)(i) declare that particular credit agreement to be reckless and further grant an order stipulated in section 83(2) or (3).

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[88] *Ibid.*
[89] *Ibid.*
[90] 2009 (6) SA 295 (GNP).
[91] "*National Credit Regulator* (GNP)".
[92] See also the confirmation of this position by the SCA in the case of *Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581 (SCA), "*National Credit Regulator* (SCA)".
[93] S 87(1).
[94] *Ibid.*
[95] *Ibid.*
[96] S 87(1)(a).

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The most notable provisions in respect of the powers of the Magistrate's Court is section 87(1)(b)(ii), which is read with section 86(7)(c)(ii). Section 87(1)(b)(ii) provides that the Magistrate's Court may grant "an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii)".[97] The latter subsection is of crucial importance and is discussed below. Furthermore, section 87(1)(b)(iii) provides that the Magistrate's Court may also make a combined order containing the section 87(1)(b)(i) and (ii) options.[98] Lastly, section 87(2) provides that if a matter has been referred to the Magistrate's Court in accordance with section 87, the NCR may not intervene in that matter before the court.[99]

The Magistrates' Courts Act and Magistrates' Courts Rules make no specific mention of how the hearing procedure prescribed in section 87(1) must be conducted.[100] Thus, there existed uncertainty about the procedure a debt counsellor is supposed to use when referring a matter to court. This uncertainty also extended to the question which procedure a court must utilise when restructuring a consumer's debt obligations. However, the important case of *National Credit Regulator* (GNP)provided much needed clarity on the procedural aspects.[101] In summation of the judgment, it was held when magistrates exercise their functions in terms of section 87 they perform a judicial and not an administrative role.

2.4.3. The powers of the Magistrate's Court in terms of section 86(7)(c)(ii)

Before I consider the Magistrate's Court's powers in terms of section 86(7)(c)(ii), it must be remembered that the aim of debt review is "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".[102] This sub-aim of the

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[97] S 87(1)(b)(ii).
[98] S 87(1)(b)(iii).
[99] S 87(2).
[100] Van Heerden par 11.3.3.2.
[101] Further clarifications by the Court include the following: (a) in a debt review application the debt counsellor is the applicant in accordance with s 86(7)(c), 86(8)(b) and 87 of the NCA and the consumer and affected credit providers are the respondents; (b) the Magistrate's Court to be approached is the court with jurisdiction over the consumer; (c) when a referral is made under s 87 of the NCA, there is no monetary limit placed upon District Magistrates' Courts; (d) when a referral in terms of s 86(8)(b) and 86(7)(c) of the NCA is made, it must be treated as a Magistrates' Courts Act application and rule 55 of the Magistrates' Courts Rules applies; (e) rule 9 of the Magistrates' Courts Rules applies relating to service or recommending any documents for the purposes of ss 86(7)(c), 86(8)(b) and 87 of the NCA. The referral occurs upon the service of the documents, and not the issuing thereof. However, documents may also be served through emails or fax; and (f) a debt counsellor who has made a referral to the court must avail himself to assist the court when the need arises.
[102] S 3(g).

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National Credit Act is linked to its main aims, *inter alia* 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".[103] It is important to note that before an order can be granted in terms of section 86(7)(c)(ii), it must have already been established as a jurisdictional fact that the consumer in question is over-indebted.[104] The crux of section 86(7)(c)(ii) is that the Magistrate's Court may grant an order re-arranging one or more of the consumer's obligations.

Re-arranging in terms of section 86(7)(c)(ii)(aa) may be done through extending the duration of the credit agreement, automatically reducing the consumer's monthly or other pertinent instalment amount in terms of the credit agreement. Another option available to the court in accordance with section 86(7)(c)(ii)(bb) is that the Magistrate's Court may for a specified period of time postpone the dates on which payments in terms of the credit agreement are due. Section 86(7)(c)(ii)(cc) affords the Magistrate's Court the option of combining the aforementioned orders. In certain instances, the Magistrate's Court may recalculate the consumer's obligations, provided there has been a contravention of Part A or B of Chapter 5, or Part A of Chapter 6 of the Act.[105]

The first order, the extension of the duration of the credit agreement with a concomitant reduction in the amount of the consumer's instalments, seems to be an obvious debt alleviation measure. However, because interest, fees and other charges are calculated over the duration of a credit agreement, the question arises if the lengthening of a credit agreement will not automatically involve the payment of an increased interest, fees and cost amount.

A related question is whether the Magistrate's Court is permitted in terms of section 86(7)(c) to unilaterally alter the interest rate of a particular credit agreement so as to provide debt alleviation to the consumer. This question is answered in the negative by most authorities. The Magistrate's Court is a creature of statute and is not empowered in terms of the National Credit Act to reduce the interest rate agreed on by the parties in their credit agreement.[106]

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[103] S 3.
[104] Van Heerden par 11.3.3.2.
[105] S 86(7)(c)(ii)(dd). Part A Ch 5 concerns unlawful credit agreements and provisions, Part B Ch 5 disclosure, form and effect of credit agreements and Part A Ch 6 collection and repayment practices. This court order will not receive any further attention below.
[106] See *SA Taxi Securitisation (Pty) Ltd v Dick Lennard* 2012 (2) SA 456 (ECG) "*Dick Lennard*"; *SA Taxi Securitisation (Pty) Ltd v Mongezi Manu* [2011] ZAECGHC 11 (28 April 2011); Van Heerden par 11.3.3.2.

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In *Nedbank Ltd v Norris*[107] the court dealt with an instance where a magistrate in the course of debt restructuring reduced the interest rate in terms of the particular credit agreement to zero.[108] Consequently, an application for a rescission order of the finding was made and the decision was reversed, meaning that the contractually agreed interest rates would apply. This reversal was based on the interpretation of section 86(7)(c)(ii) in a manner that implies that magistrates do not have any express power to alter the interest rate in terms of credit agreements. The Court further remarked that:

> a re-arrangement proposal in terms of s 86(7)(c) of the National Credit Act that contemplates a monthly instalment which is less than the monthly interest which accrues to the outstanding balance does not meet the purposes of the Act and a re-arrangement order incorporating such a proposal is *ultra vires* the National Credit Act and a Magistrate's Court has no jurisdiction to grant such an order.[109]

In *Sansom v Mars and others*[110] it was found that a Magistrate's Court does not possess the authority to alter interest rates, even where a consumer and credit provider had mutually consented to alter interest rates. On appeal the High Court reiterated the purpose of debt re-arrangement, in that when making a decision a court ought to consider the extent of over-indebtedness, total amount of debt owed, financial means of the consumer, the extended period in terms of the credit agreement and if such debt re-arrangement facilitates a mediated situation between the consumer and his credit providers.[111] The Court accentuated that interest rates form an integral part in the effort to reduce consumer over-indebtedness and they must be considered when debt re-arrangement decisions are made.[112] Thus, the Court held that Magistrates' Courts do possess an "implicit" power to alter interest rates payable during a debt review period.[113] This decision is based on the assertion that when a magistrate reduces instalments payable, the amount apportioned to interest is also automatically reduced without direct alteration of the interest rate. Moreover, considering that some credit agreements are extended, not altering interest rates would result in undue hardship on the consumers and credit providers.[114]

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[107] 2016 JDR 0355 (ECP), "*Norris*".
[108] See also *First National Bank a Division of FirstRand Bank Ltd v Da Silva* [2019] ZAGPJHC 79 (7 February 2019) pars 18-20.
[109] *Norris* par 51; Van Heerden par 11.3.3.2.
[110] [2017] JOL 38810 (WCC), "*Sansom*".
[111] *Sansom* par 9.
[112] *Ibid.*
[113] *Sansom* par 29.
[114] *Sansom* par 26.

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Van Heerden submits that in a situation where a consumer and credit providers consent to altering the interest rate of a credit agreement that is subject to the debt review process, there is nothing preventing magistrates from registering such an alteration in a debt restructuring order.[115] Furthermore, since legislation neither provides for a general interest rate nor empowers magistrates to alter interest rates in terms of credit agreements, it is suggested that apart from undue hardships which could manifest to credit providers, there could also be a rise in untenable circumstances in which courts have double standards.[116] In order to clarify this, courts could apply interest rate alterations differently in the debt restructuring processes, and consequently treat consumers differently or unequally. Be that as it may, the National Credit Act, as amended in terms of the NCA Amendment Act 2014, "confers no explicit power in section 86(7)(c) on a magistrate to unilaterally reduce interest rates".[117]

The second order, in terms of section 86(7)(c)(ii)(bb), to postpone payment dates during a specified period, only entails the postponement of instalments in terms of the credit agreement, and not of interest, fees and charges. The latter accordingly continue to accrue, also during the period of postponement.[118]

2.4.4. Access to debt review and debt alleviation in terms of the National Credit Act

It needs to be accentuated that the initial National Credit Act, as amended by the NCA Amendment Act 2014, is pertinent. It must further be reiterated that the debt counsellor only does an assessment and recommendation (to court) in terms of section 86, and does not have the power to make a finding that the consumer is over-indebted, accompanied by orders, to alleviate the latter's debt.

The concept of a debt repayment proposal by a debt counsellor is inherently embedded in the submission of economic feasibility. As a point of clarification, debt counsellors are obliged to ensure that any debt repayment proposal between an over-indebted consumer and credit providers is economically feasible and rational.[119] This assertion is made against computer generated debt repayment proposals which are often irrational, absurd and impractical. It is not only the debt counsellor who bears the responsibility of ensuring that a debt repayment proposal

[115] Van Heerden par 11.3.3.2.
[116] *Ibid.*
[117] *Ibid.*
[118] *Dick Lennard* par 10. See also Van Heerden par 11.3.3.2.
[119] *Motor Finance Corporation (Pty Ltd v Jan Joubert* 2013 JDR 1912 (GNP).

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is economically feasible. In this regard courts are also urged not to merely effect a "rubber stamp" when considering a debt repayment proposal application, but instead the court must find a reason to support the rationality and reasonableness of the debt repayment proposal.[120]

The opposite is also true. A debt counsellor must not make a debt repayment proposal to the court for a debt restructuring certification if such a proposal does not meet the rationality standard and does not comply with the objects of the National Credit Act.[121] It goes without saying that an economically feasible debt repayment proposal is largely dependent on the consumer having disposable income to satisfy such a proposal.[122] From this it is inconceivable that a debt review process would succeed without a consumer having some income. The 2015 Task Team Agreement Circular of the National Credit Regulator posits that if a consumer has no disposable income available for a debt repayment proposal and there is further no prospect of acquiring an income within three months to start debt repayment, the debt counsellor is advised to outrightly reject the application for debt counselling.[123]

Debt counsellors must facilitate the consumer's financial lifestyle reduction in order to free up money for debt repayments, which will ensure that monthly repayments are not unrealistically low.[124] It is clear that debt counsellors are not only performing a mechanical function but they should apply their minds to the consumer's financial situation. Debt counsellors are further required to conduct an annual review of the consumer's financial situation when under debt review as a method of testing if increasing monthly repayments would be feasible.[125]

It is also important to note that debt counsellors perform a statutory function and therefore may not be subjected to an adverse cost order against them, unless in the course of performing their duties they acted improperly.[126]

2.5. The termination of the debt review process

The debt review and debt enforcement process[127] in terms of the National Credit Act can naturally not be in progress on the same time. Therefore, according to section 129(1)(b), if a

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[120] *Ibid.*
[121] Van Heerden par 11.3.3.2.
[122] *Driskel v Maseko and Others* [2017] ZAFSHC 150 (24 August 2017).
[123] National Credit Regulator Circular No. 2 January 2015, Annexure B, at 5.
[124] *Ibid*.
[125] *Ibid*.
[126] Van Heerden par 11.3.3.2.
[127] In terms of which the credit provider enforces a credit agreement which is in default in court.

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debt review application is pending before a debt counsellor in terms of section 86 of the NCA, a credit provider is prohibited from instituting legal steps to enforce the credit agreement before firstly furnishing the consumer with a section 86(10) termination notice to terminate the debt review.[128] A section 86(10) termination notice, similarly to the section 129(1)(a) notice, thus is a statutory pre-enforcement notice that must be furnished and delivered to the consumer by the credit provider before enforcement of a credit agreement, which is already subject to section 86, can proceed. The section 129(1)(a) notice is used when the consumer is in default in terms of his credit agreement, but not yet subject to debt review.[129] The crux of section 86(10) follows, and thereafter a few challenges in respect of the termination of debt review will be pointed out.

Section 86(10)(a) and (b)[130] permits a credit provider to terminate a credit agreement, which is subject to debt review, under the following circumstances:

(a) The consumer must be in default under the particular credit agreement.[131]

(b) At least 60 business days must have elapsed after the date on which the debt review was applied for by the consumer.[132]

(c) The application for debt review must not have been filed in court already, in which case termination in terms of section 86(10)(a) is prohibited.[133]

A credit provider terminates debt review in terms of section 86(10)(a) by means of a notice to the particular consumer, debt counsellor and the NCR.[134] Once the debt review has been terminated, the credit provider may go ahead and enforce the credit agreement in terms of

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[128] S 129(1)(b), which must be read with s 88(1) and (3). In terms of the latter sub-ss, debt enforcement is prohibited if the consumer is subject to debt review or re-arrangement or agreement, unless the debt review or re-arrangement order has been finalised (the debt counsellor and the court rejects the debt review application or the consumer has paid his re-arranged obligations) and the consumer is in default under the credit agreement. The opposite is also true. In terms of s 86(2) an application for debt review is no longer possible if the credit provider has already commenced with steps in terms of s 130 to enforce the credit agreement in court. See par 1.1. above.
[129] This debt enforcement notice is not relevant to my dissertation and will not receive any further attention.
[130] See the discussion by Van Heerden par 11.3.3.3.
[131] S 86(10)(a).
[132] S 86(10)(a).
[133] S 86(10)(b). This sub-s was inserted in the National Credit Act in terms of the NCA Amendment Act 2014. The reason for this was to neutralise the effect of a SCA decision in *Collett v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA), "*Collett*". See the brief discussion in par 2.6. below.
[134] S 86(10)(a)(i)-(iii).

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which the consumer is in default. This effectively lifts the section 88(3) bar against debt enforcement.

Since it is a prerequisite that the termination of a pending debt review must be done in terms of section 86(10), this insinuates the thought that debt review cannot lapse automatically upon the happening of a certain event.[135] Therefore, it is clear that the debt review process cannot terminate by effluxion of time and the credit provider must comply with section 88(3) (which provisions are subject to section 86(10)), prohibiting any legal proceedings against a credit agreement subject to a debt review. Van Heerden suggests that debt review must terminate by effluxion of reasonable time if no party thereto takes any action.[136] It goes without saying that reasonable time would be determined on the merits of the case.

Interestingly, the NCA does not provide any specific powers to the debt counsellor or consumer to withdraw from the debt review process. It has been argued that this is often problematic in certain circumstances, hence the call for legislative intervention.[137]

With regards to the notice of termination, there is no prescribed form, but the notice must stipulate the specific credit agreement it relates to. Moreover, the method of delivery of the section 86(10) termination notice is not prescribed. The consumer can choose the method of delivery as stated in section 65(2)[138] and it must be delivered to the address stated in section 96(1) or (2).

It is worth noting what would happen if the credit provider purports to terminate debt review in terms of section 86(10), but somehow fail to adhere to the prerequisites in respect of the notice. For instance, a credit provider may mistakenly deliver the notice to the wrong address and then proceed with enforcement proceedings. In this instance, according to section 130(4)(b), the court must notify the credit provider of the steps to complete so that the proceedings can resume and adjourn the matter.

According to section 130(1)(a), which must be read with section 129(1)(b) and section 86(10), the credit provider may institute legal proceedings for enforcement of the credit agreement after

[135] Van Heerden par 11.3.3.3.
[136] *Ibid.*
[137] *Ibid.*
[138] The methods of delivery in 65(2) are in person, ordinary mail, fax, email or printable web-page. Registered mail is of course a safer option for delivery than ordinary mail, because delivery can be proved.

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the lapse of ten business days after serving the termination notice in terms of section 86(10).[139] However, the legislator provided no explanation for the ten business days requirement in the case of the section 86(10) notice.[140]

The stage upon which debt review can be terminated created controversy. Case law was divided in relation to the question whether debt review could be terminated after the debt counsellor had made a determination and referred the matter to the Magistrate's Court with his recommendations, in accordance with section 86(8)(b) or section 86(7)(c). The Supreme of Appeal in *Collett*, in which the Court held that the credit provider had a right to terminate the debt review in terms of section 86(10) until an order stipulated in section 87 was made by the court adjudicating the debt review matter, put the matter to rest.[141] The Supreme Court of Appeal further commented that the credit provider's right to terminate a debt review at any stage before a section 87 order was made, is balanced by section 86(11), which makes it possible for the debt review process to resume.[142] The legislature reacted by the insertion[143] of section 86(10)(b) in the NCA in terms whereof, as mentioned above, the termination of debt review is no longer a possibility once the debt review application has been filed in court.

2.6. The resumption of debt review

The termination of the debt review cannot be considered in isolation. The reason is that the consumer whose debt review was terminated may apply for the presumption of his debt review under certain circumstances. In this respect, section 86(11) of the National Credit Act, as amended in terms of the NCA Amendment Act 2014, provides as follows:

> If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms Part C of Chapter 6, the court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.

Section 86(11), as amended, makes it clear that the court which should be approached by the consumer to apply for the resumption of the latter's debt review, is the court in which the credit provider enforces the credit agreement after the termination of debt review in terms of section

[139] S 130(1)(a).
[140] Van Heerden par 11.3.3.3.
[141] *Collett* at par 6.
[142] *Collett* at par 15. See the discussion in par 2.6. below.
[143] In terms of the NCA Amendment Act 2014.

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86(10).[144] The amended section 86(11) settled conflicting views by the courts in respect of the competent court that may order the resumption of debt review.[145]

Only the consumer may apply for the resumption of his debt review in terms of section 86(11), because upon the termination of the debt review by the credit provider the debt counsellor becomes *functus officio*. The debt counsellor may only file a confirmatory statement regarding the details of the debt review and the court may order the resumption based on its own motion. This is because neither section 86(11) nor the National Credit Regulations prescribe the manner and form of the application for the resumption of debt review. The consumer must convince the court that there are sufficient facts that justify resumption and if the consumer fails to do that, the court will decline the request.[146] It must be noted that the consumer is permitted to file the resumption request before the credit provider applies for summary judgment.[147] The stage at which an application for a section 86(11) resumption order must be filed, is not clear. The words "proceed to enforce" in section 86(11) could mean that the consumer-applicant may only use section 86(11) as a response to litigation proceedings to enforce that particular credit agreement. However, it could also mean ten business days after the delivery of the section 86(10) notice to the consumer in terms of section 130(1)(a)[148] of the Act.[149]

There are certain instances in which debt review resumption is not allowed. This includes where a default judgment has been granted against the consumer or were the debt review terminated automatically as a result of the consumer being in default of debt restructuring in accordance with section 88(3).[150]

When requesting the resumption of debt review a court must be well appraised with information and before ordering the resumption of debt review, the debt enforcement court must be satisfied that the consumer's request for the resumption is *bona fide* and it is not used as a delaying tactic

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[144] See also Van Heerden par 11.3.3.4.
[145] *Ibid*.
[146] In the case of *Changing Tides 17 (Pty) Ltd v Scholtz* 2010 JOL 25358 WCC at par 21, it was held that sufficient facts include: statements on the consumer's monthly income; the necessary living expenses of the consumer (also that of his dependants); statements on the total assets and liabilities of the consumer; their current monthly commitments in respect of finances; whether, in the case of a hypothecated property, such property is the primary residence of the consumer or is an 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.
[147] Van Heerden par 11.3.3.4.
[148] See par 2.5. above.
[149] *Ibid.*
[150] *Ibid.*

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to prevent the credit provider from recovering the debt owed to the latter. Finally, nothing in the National Credit Act prohibits that a debt review which has resumed in terms of section 86(11) may be terminated again by the credit provider in terms of section 86(10)(a).[151]

2.7. The effect of debt review[152]

One of the effects of a debt review application, agreement or re-arrangement order, the prohibition on debt enforcement (until the occurrence of certain events, for instance the debt counsellor's and court's rejection of the debt review application) in terms of section 88(3), has already been mentioned.[153] Other effects are that the consumer must not incur any further charges under a credit facility[154] or enter into any further credit agreements[155] with any credit provider until the occurrence of one of the aforementioned events.[156] In addition, should a credit provider enter into a credit agreement with a consumer knowing that the consumer is subject to debt review, the new credit agreement or part thereof may be declared reckless.[157] However, if the consumer takes the initiative for entering into a new credit agreement with a credit provider, knowing that he (the consumer) is subject to debt review, the consumer forfeits the protection afforded in terms of Chapter 4 Part D of the Act.[158]

2.8. Preliminary observations

The purpose of this chapter was to research the debt review process (and related aspects) in terms of section 86 of the initial National Credit Act, as amended by the NCA Amendment Act 2014, which became effective on 13 March 2015. In accordance with the research conducted, I have identified a number of aspects in respect of debt review which I intend to carry forward to my final chapter.

The most important of these aspects are access to debt review and its consequences. Access to debt review is clearly restricted to those consumers who indicate the prospect of producing an economically viable debt review proposal which is dependent on the consumer having

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[151] *Ibid.*
[152] See Van Heerden par 11.3.3.6 for more detail.
[153] Par 2.5. above.
[154] As defined in s 8(3) of the Act, eg, a credit card transaction.
[155] With the exception of a consolidation agreement. The latter is not defined in the NCA, but is merely an agreement in terms whereof existing debt is consolidated.
[156] S 88(1).
[157] S 88(4).
[158] S 88(5).

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disposable income or enough assets.[159] As far as the consequences of debt review are concerned, the absence of a discharge is striking.[160] The opposite, "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",[161] is true.

The powers of the court in terms of section 87 are limited towards the re-arrangement of the consumer's obligations and do not pertinently empower the Magistrate's Court to reduce the interest rate in a credit agreement. This is reiterated by authorities who affirmed that the Magistrate's Court is a creature of statute and is not empowered in terms of the National Credit Act to reduce the interest rate agreed on by the parties in their credit agreement.[162]

The termination of the debt review process by the credit provider in terms of section 86(10) after a period of 60 business days and the circumstances under which this may take place, must also be singled out.[163] The credit provider is only permitted to issue a section 86(10) notice of termination if the consumer is in default under that particular credit agreement and the application for debt review has not been filed in court yet at the time which the credit provider exercises his right to terminate. It is imperative that these three prerequisites are complied with in order for the credit provider to be able to effectively terminate the debt review process.

Lastly, the *lacunae* in the National Credit Act in respect of the resumption of debt review in terms of section 86(11) must be mentioned.[164] The stage at which an application must be filed for a resumption order in terms of section 86(11) is unclear. Central to this are the words "proceed to enforce" stipulated in section 86(11). These words could mean that the consumer-applicant may only elect to utilise section 86(11) as a counter-response to litigation proceedings which are undertaken to enforce a particular credit agreement. Alternatively, they could mean an application for the resumption of debt review is only possible ten business days after the delivery of the section 86(10) notice to the consumer in terms of section 130(1)(a) of the Act.

[159] Par 2.4.4. above.
[160] Sequestration and the subsequent rehabilitation of the debtor in terms of the Insolvency Act is accordingly the only debt alleviation measure in SA affording a discharge of (pre-sequestration) debts. See Nagel *et al Commercial Law* (2019) chps 33-35 for more detail.
[161] Pars 1.1. and 2.4.3. above.
[162] See par 2.4.3. above.
[163] Par 2.5. above.
[164] Par 2.6. above.

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CHAPTER 3

THE DEBT INTERVENTION PROCESS IN TERMS OF SECTION 86A OF THE NATIONAL CREDIT ACT

3.1. Introduction

The National Credit Amendment Act 2019 undertakes to introduce the debt intervention process, applicable to qualifying unsecured credit agreement debt only, through the insertion of sections 86A to 88B and definitions into Part D of Chapter 4 and section 1 of the National Credit Act respectively.[165] Considering the insertion into Part D of Chapter 4, debt intervention is integrated with the other debt alleviation mechanism offered in terms of the NCA, debt review, and therefore its application is limited to natural person consumers.[166] It is reiterated[167] that the provisions in respect of debt intervention are not in operation yet as the process of drafting regulations to facilitate the implementation of debt intervention has been ongoing.[168] In what follows the debt intervention provisions to be inserted in the National Credit Act in terms of the NCA Amendment Act 2019 will be referred to as if they had already been inserted into the NCA.

Section 1 defines the concept "debt intervention" as "a measure as contemplated in section 86A, which aims to assist identified consumers for whom existing natural person insolvency measures are not accessible in practice".[169] The main purpose of debt intervention is to provide debt alleviation to an identified group of vulnerable consumers with neither (sufficient) income nor assets ("NINA" or no-income no-asset debtors)[170] to access the existing statutory debt alleviation measures, namely sequestration, administration and debt review.[171]

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[165] See Van Heerden par 11.5 for a discussion of the debt intervention process, which was inserted through ss 13-16 of the NCA Amendment Act 2019. Also see Coetzee and Brits "Extinguishing of debt in terms of the debt intervention procedure: some remarks on 'arbitrariness'" in Ch 2 *Magister Essays vir/for Jannie Otto* par 2 for a summary of this process.
[166] Van Heerden par 11.5.1; Coetzee "An opportunity for no asset no income (NINA) debtors to get out of check? – An evaluation of the proposed debt intervention measure" 2018 *THRHR* 593.
[167] See par 1.1. above.
[168] Van Heerden par 11.5.1.
[169] S 1. See Van Heerden par 11.5.1.
[170] Coetzee 2018 *THRHR* 594.
[171] Coetzee and Roestoff 2020 *Int Insolv Rev.* 2. See also Coetzee 2018 *THRHR* 594, who argues that the exclusion of NINA debtors from the current existing statutory debt alleviation measures amounts to unjustifiable and unconstitutional discrimination on the basis of socio-economic status. Coetzee further states that such discrimination fosters the entrenchment of a dual economy in South Africa by trapping the indigent in an endless

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In terms of the Preamble of the Memorandum on the objects of the National Credit Amendment Bill 2018[172] it is expressly stated that the main target of debt intervention is consumers who have no access to the current statutory debt alleviation measures and have no suitable alternatives to cater for their over-indebtedness plight as they have neither (sufficient) income nor assets.[173] However, Coetzee and Roestoff argue that despite the noble objectives in the Memorandum, the chances of success for debt intervention are not guaranteed as this process is not the first or only government attempt to address the plight of NINA debtors.[174] Nonetheless, the authors welcome the debt intervention process especially because of the provision for a possible discharge of debts.[175]

The provision for a discharge of debts has been met with mixed reactions, with some applauding and some criticising it. Most criticism stem from the contention that the discharge provision amounts to an unconstitutional deprivation of the credit provider's rights which are protected by section 25 of the Constitution of the Republic of South Africa.[176] Coetzee and Brits explored the impact of section 25 on the discharge provision contemplated in terms of section 87A,[177] followed by their findings in this respect.[178] It suffices to say that they are of the opinion that the chances of a successful constitutional challenge of debt intervention are slim.[179]

If one considers the debt intervention process, it seems to reflect the debt review process in terms of section 86 of the NCA. However, the former process has embedded distinguishing characteristics, such as the possible discharge of the over-indebted consumer's debt or part thereof.[180]

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state of poverty. Coetzee and Roestoff "Consumer debt relief in South Africa; Lessons from America and England; and suggestions for the way forward" 2012 *SA Merc LJ* 55-70 criticise the existing statutory debt relief measures, and point out that these measures remain largely creditor-oriented, with heavy reliance on courts for their successful implementation and enforcement. The processes are outdated and not devised for NINA debtors. Instead, they were devised to benefit creditors.

[172] "2018 Memorandum".

[173] 2018 Memorandum at 40.

[174] Coetzee 2018 *THRHR* 594. See also Coetzee and Roestoff "Debt relief for South African NINA debtors and what can be learned from the European approach" 2018 *CILSA* 251.

[175] Coetzee and Roestoff 2020 *Int Insolv Rev.* 24.

[176] "The Constitution". S 25 concerns the "property clause" in the Ch 2 Bill of Rights.

[177] See par 3.4. below.

[178] Coetzee and Brits 11. See the discussion in par 3.4. below.

[179] Coetzee and Brits 23.

[180] Van Heerden par 11.5.1.

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3.2. Application for debt intervention

It must be reiterated that the debt intervention process has a limited scope of application as it is only applicable to natural person consumers who are citizens or permanent residents of the Republic of South Africa.[181] Although the debt intervention process contains a number of substantive access requirements, insolvency is not one of them.[182] The access requirements for the debt intervention process are mainly contained in the definition of "debt intervention applicant", while the others are deducted from the procedural prescripts of the process.[183]

"debt intervention applicant" is defined as follows:

> [A] natural person or natural persons who own a joint estate, who on the date of submission of the application for debt intervention as contemplated in s 86A–-
>
> (a) is a consumer under unsecured credit agreements, unsecured short term credit transactions agreements or unsecured credit facilities only;
> (b) receives no income, or if he or she, or the joint estate, receives an income or has a right to receive an income, regardless of the source, frequency or regularity of that income, that gross income did not, on an average for the six months preceding the date of the application for debt intervention exceed R7500 or such an amount as may be prescribed in terms of section 171(2A)(a), per month;
> (c) is over-indebted, whether due to a change in personal circumstances or other circumstances; and
> (d) is not sequestrated or subject to an administration order.[184]

Section 86A(1) provides that a debt intervention applicant who is a natural person[185] may apply in the prescribed manner and form to the NCR for an order declaring such an applicant to be over-indebted, provided that the total unsecured debt[186] of the applicant does not exceed the R50 000 threshold or the amount prescribed by the Minister in terms of section 171(2A)(b).[187] It is important to note that the provisions in respect of debt intervention form part of the

[181] See Coetzee 2018 *THRHR* 599.
[182] It must be noted that the best international principles and guidelines prefer the liquidity test for insolvency as an access requirement to debt relief and that an assessment should be conducted into the debtor's current inability to satisfy his debts. See Coetzee 2018 *THRHR* 598 and 2011 World Bank insolvency and creditor/debtor regimes task force working group report on the treatment of the insolvency of natural persons.
[183] Coetzee 2018 *THRHR* 599.
[184] S 1. See also Van Heerden par 11.5.1 for an explanation on the definition of "debt intervention applicant".
[185] As explained in par 3.1. above.
[186] S 1 defines "total unsecured debt" as the total of all the debt intervention applicant's principal debts arising from unsecured credit agreements, unsecured short-term credit transactions or unsecured credit facilities to which the applicant is a party. The NCA does not define the concept "unsecured credit". However, reg 39(3) defines "unsecured credit transaction" as "a credit transaction in respect of which the debt is not supported by any pledge or other right in property or suretyship or any other form of personal security". It is assumed that this definition applies with the necessary changes to the other types of credit agreements referred to above.
[187] S 86A(1). According to s 171(2A)(b) the Minister may adjust the amount on an annual basis after considering inflation.

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National Credit Act and that only unsecured credit regulated by the Act thus by implication seems to form part of the process.[188] It is also noteworthy that some credit agreements which form part of the total unsecured debt are excluded from the debt intervention process.[189] These include developmental credit agreements[190] and any credit agreement where the credit provider, at the time of the debt intervention application, has already proceeded with debt enforcement steps in terms of section 130.[191]

Some general observations on the access requirements for debt intervention follows:[192] The process clearly involves unsecured debt (subject to the National Credit Act)[193] only, which implies that a consumer who is party to secured credit is ineligible to apply for debt intervention.[194] According to Coetzee and Roestoff the reference to unsecured credit "only" in the definition of debt intervention applicant is indicative of the fact that secured credit agreements are not only excluded, but also disqualified from the debt intervention process.[195] This distinction between the users of secured versus unsecured credit may in future result in litigation, but as the statute reads at present, it appears that only natural persons party to an unsecured credit agreement are eligible to apply for the new process.[196]

The cap of R50 000 placed on the debt intervention applicant's "total unsecured debt" is criticised by Coetzee and Roestoff as arbitrary and uninformed.[197] The authors submit further that this "unsecured-debt ceiling" will exclude a number of debtors from access to the newly introduced debt alleviation process.[198]

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[188] Coetzee and Brits 13.
[189] S 86A(2). See Van Heerden par 11.5.2.1.
[190] S 10(1) defines a developmental credit agreement. In terms of the definition the credit provider must hold a supplementary registration certificate in order to conclude such agreements, which is issued pursuant to a s 41 application. Developmental credit agreements may take on a number of forms, eg loans for educational purposes, the acquisition or expansion of low-income housing or the development of small businesses.
[191] S 86A(2)(a) and (b) respectively. S 86A(2)(b) is subject to the newly inserted s 85(c), which means that even where the credit provider has commenced with steps to enforce the particular credit agreement, the consumer may allege in the enforcement court that he is over-indebted. Alternatively, the court may also *suo motu* take cognisance of the latter. The court must subsequently ask the consumer whether he wants to undergo debt intervention and if affirmative, refer the matter to the NCR. The court may also directly deal with the matter itself.
[192] See in general Coetzee and Roestoff 2020 *Int Insolv Rev.* 6ff.
[193] See above.
[194] See the definition of "debt intervention applicant" above. See also Coetzee and Roestoff 2020 *Int Insolv Rev.* 7 and 13; and Van Heerden par 11.5.2.1.
[195] *Ibid.*
[196] *Ibid.*
[197] Coetzee and Roestoff 2020 *Int Insolv Rev.* 7.
[198] *Ibid.*

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Debt intervention is restricted to consumers earning a gross monthly income of R7 500 individually or jointly. Coetzee and Roestoff accept this substantial hurdle to access debt intervention. According to them the R7 500 income limit exceeds the asset and income restrictions to qualify for a social grant in South Africa by far and as a consequence the benefit of payment received under such a social grant is outweighed.[199] The R7 500 income limit will ensure that those consumers who do not qualify for the debt review process gain access to debt intervention, provided that an applicant satisfies the other access requirements for the latter.

The next requirement to qualify for debt intervention is that the applicant must be over-indebted. The section 79(1) definition of over-indebtedness discussed above[200] accordingly applies. Finally, in terms of the definition of debt intervention applicant the latter must neither be sequestrated nor be subject to an administration order in terms of the Magistrates' Courts Act. However, an interesting observation is that consumers who are subject to debt review are not excluded.[201] It is suggested that the reason for this is because the legislature realised that there are over-indebted consumers who use debt review due a lack of suitable alternatives.

3.3. Evaluation of application by NCR

It has already been remarked[202] that some of the procedural aspects involved in the performance of the NCR's functions in relation to a debt intervention application are akin to that of the debt counsellor in respect of the debt review process. Section 86A(3) of the National Credit Act requires the NCR upon receiving the application for debt intervention to comply with section 86(4) and (6)[203] of the debt review process.[204] This means that the NCR must furnish the applicant with proof of receipt of the application and thereafter notify all credit providers which have been listed in the application and all registered credit bureaux that an application for debt intervention has been made.[205] Should the NCR decide to accept the consumer's application, it must subsequently make a determination whether the consumer appears to be over-indebted and examine if reckless lending is involved in any of the consumer's credit agreements.[206] In terms of section 86A(4) read with section 86(5) the debt intervention applicant and all affected

[199] Coetzee and Roestoff 2020 *Int Insolv Rev.* 7.
[200] Par 2.1.
[201] Van Heerden par 11.5.2.1.
[202] Par 3.1.
[203] With the required changes.
[204] Van Heerden par 11.5.2.1.
[205] S 86A(3) read with s 86(4). Van Heerden par 11.5.2.1.
[206] S 86A(3) read with s 86(6). See Van Heerden par 11.5.2.1 and Form 17.2.

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credit providers have a duty of compliance with the NCR's reasonable requests in its effort to evaluate the extent of the consumer's over-indebtedness and the prospect of a feasible debt re-arrangement plan.[207] Moreover, the debt intervention applicant and all affected credit providers also have a duty to participate in good faith when negotiating for a possible debt re-arrangement plan.[208] To effect change in the borrowing habits and expenditure of the over-indebted consumer, the NCR must provide the applicant with counselling intended to improve their financial literacy.[209]

The steps which the NCR must take are stipulated in section 86A(6) and they are dependent on the outcome of evaluating the application. If the NCR reasonably concludes that the applicant does not qualify for debt intervention, such an application must be rejected outright,[210] in which instance the applicant may approach the Magistrate's Court for leave to apply to that Court directly to be admitted into debt intervention.[211] However, if it happens that the applicant does not qualify for debt intervention but according to his financial situation is likely to, or is currently experiencing difficulties in his efforts to satisfy all obligations due under credit agreements in a timely manner, the NCR must propose that the applicant and all his credit providers consider and make a voluntary debt re-arrangement plan.[212] Furthermore, if any credit agreements which are part of the debt intervention application appear to be reckless, unlawful[213] or prohibited, the NCR must refer such a credit agreement to the National Consumer Tribunal ("NCT") for an appropriate determination.[214]

The NCR may as an alternative to the aforementioned options determine that the applicant qualifies for the debt intervention process and that the obligations of such an applicant can be re-arranged within a five year period, in which case the NCR must refer the matter with its recommendation to the NCT for an order stipulated in section 87(1A).[215] This applicant

[207] See Van Heerden par 11.5.2.2.
[208] Van Heerden par 11.5.2.2.
[209] S 86A(5). The applicant must also be provided with access to training in respect of financial training. Van Heerden par 11.5.2.1.
[210] S 86A(6)(a). See Van Heerden par 11.5.2.2.
[211] S 86A(7).
[212] S 86A(6)(b). If the NCR's proposal is accepted by all the parties involved, the proposal must be recorded in the form of an order, which eventually may be filed as a consent order, if consented to by the consumer and each credit provider. S 86A(8)(a) read with s 86(8)(a), with the necessary changes. For a discussion of the latter sub-s, see par 2.3. above. However, if any of the credit providers concerned did not accept the proposal, the NCR must refer the recommendation to the NCT. S 86A(8)(b).
[213] In terms of s 89 of the Act.
[214] S 86A(6)(c); Van Heerden par 11.5.2.2.
[215] S 86A(6)(d); Van Heerden par 11.5.2.2.

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naturally has income or disposable assets which warrant the section 87(1A) re-arrangement order.[216]

On the other hand, if the over-indebted consumer qualifies for the debt intervention process in accordance with its access requirements but neither has sufficient income nor assets to render the re-arrangement of his obligations within the aforementioned period of five years viable, the NCR must refer the matter to the NCT with recommendations for a section 87A order.[217] The applicant's credit providers must be informed of the NCR's section 86A(6)(e) referral to the NCT and have to opportunity to make written representations to the latter.[218]

Section 86A(10)(a), with the necessary changes, provides for the termination of debt intervention by a credit provider. The period within which this could be done must still be prescribed and thus it is not certain whether the period will correspond with the 60 business days period applicable to the termination of debt review. Similarly to debt review, once the debt intervention application has been filed in the NCT, it may no longer be terminated by the credit provider.[219] Section 86A(11), also with the required changes, allows for the resumption of a terminated debt intervention by a court or the NCT.

Coetzee and Roestoff commend the involvement of the NCR in the debt intervention process, due to its wealth of experience in relation to credit related matters. They further assert that the endeavour to involve the NCR is in line with the best international standards, as the NCR will be rendering specialised and administrative services to facilitate the debt intervention process.[220] However, the authors are concerned about the involvement of credit providers at the application stage of the debt intervention process.[221] This contradicts best international standards which favour credit provider involvement only in instances where the value of the estates concerned is substantial.[222]

[216] Van Heerden par 11.5.2.2.
[217] S 86A(6)(e). This sub-s will only be effective for 48 months since the date it becomes operational whereafter it will be revised. See s 86A(12)(a) and (b). S 87A orders are discussed in par 3.4. below.
[218] S 86A(9)(a) and (b).
[219] S 86A(10)(b). See par 2.5. above for the termination of debt review.
[220] Coetzee and Roestoff 2020 *Int Insolv Rev*. 17.
[221] *Ibid.*
[222] *Ibid.*

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3.4. Orders related to debt intervention

A distinction must be made between orders in terms of sections 87(1A) and 87A. Section 87(1A) applies in the case of section 86A(6)(d) where the NCR made a determination that the debt intervention applicant is over-indebted and that his obligations can be re-arranged within the stipulated period of five years. These NCT orders are similar to those available to a Magistrate's Court where debt review is pertinent.[223] The NCT may accordingly reject the NCR's recommendation or the consumer's direct application,[224] declare any credit agreement forming part of the application reckless and make the reckless credit orders in terms of section 83(2) or (3), or re-arrange one or more of the applicant's obligations by extending the period of the agreement or postponing the payment dates (or both)[225] or making both the latter orders.[226] However, and this is important, the NCT may also determine the maximum interest, fees or charges[227] under a credit agreement, which maximum may even be determined at zero. The proviso is that this determination may be made for any period that the NCT deems fair and reasonable, but may not exceed the section 86A(6)(d) period of five years.[228] A NCT reduction of the maximum interest, fees and charges in terms of a credit agreement is accordingly only valid for a maximum period of five years. The NCR must inform the applicant of the order and serve a copy thereof on his credit providers and all registered credit bureaux.[229]

Next follows section 87A, which applies where a section 86A(6)(e) referral was done to the NCT.[230] To reiterate, the latter referrals must be done by the NCR if it was determined that the debt intervention applicant qualifies for debt intervention, but that due to insufficient income and assets his obligations cannot be re-arranged within the aforementioned five-year period. The NCT may first of all make an order that the applicant does not qualify for debt intervention, and reject the application.[231] Alternatively, the NCT may suspend "all of the qualifying credit agreements, in part or in full", for 12 months, which period may be extended for a further 12

[223] See pars 2.4.2. and 2.4.3. above.
[224] S 87(1A)(a).
[225] S 87(1A)(b)(ii)(aa)-(cc). In terms of s 87(1A)(b)(ii)(ee) obligations may be re-calculated under certain circumstances.
[226] S 87(1A)(b)(i)-(iii).
[227] With the exception of the cost of credit insurance in terms of s 101(1)(e).
[228] S 87(1A)(b)(ii)(dd).
[229] S 87(1B).
[230] A single member of the NCT is empowered in terms of s 87A(1) to adjudicate these referrals, taking into consideration the NCR's documents and any representations in terms of s 86A(9), mentioned in par 3.3. above.
[231] S 87A(2)(a). Van Heerden par 11.5.2.4.

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months. The normal consequences of suspension as per section 84 of the NCA apply.[232] The suspension or part suspension of a credit agreement, or an extension or alteration of a suspension must be done taking factors mentioned in section 87A(3) into consideration.[233] These factors[234] must also be considered before extinguishing the consumer's debt in full or partially and *inter alia* include the applicant's status or personal circumstances,[235] debt history,[236] circumstances or an act or omission contributing to insufficient assets or income, or attempts to increase the latter[237] and acts and omissions of each affected credit provider.[238] In addition to suspension, the NCT may order that the applicant must attend a financial literacy programme, probably intended to improve the applicant's financial habits.[239]

In accordance with section 87A(5)(a), the NCR must after a period of eight months into the 12 month period of the suspension order, conduct a review into the financial circumstances of the debt intervention applicant.[240] The purpose of this review is to ascertain whether the applicant, at that point in time, has sufficient income and assets to merit the re-arrangement of his obligations within the stipulated period of five years in terms of section 86A(6)(d). If affirmative, the matter must be referred to the NCT for a section 87(1A) order, discussed earlier.[241] If the answer is still no, the matter must be referred to the NCT for the possibility of the aforementioned second 12-month suspension.[242] Where a second suspension is ordered, the abovementioned process must be repeated by the NCR, within the same time periods. However, if it is now determined, during the eight-month review, that the applicant still does not have sufficient income or assets for a viable re-arrangement of his debt, the matter must be referred to the NCT to consider extinguishing the applicant's qualifying credit agreement debt fully or

[232] S 87A(4(a). During the period of suspension, no payments have to be effected by the consumer, and the credit provider may neither charge interest, fees or charges nor enforce its rights under the credit agreement. See s 84.
[233] S 87A(2)(b)(i). Van Heerden par 11.5.2.4.
[234] See also Coetzee and Brits 15.
[235] Disability, a minor or women in charge of a household, old age. S 87A(3)(a)(i).
[236] Whether the applicant applied for sequestration, administration or debt review before, or enjoyed any discharge of debt in terms of a court or NCT order. S 87A(3)(a)(ii) and (iii).
[237] S 87A(3)(b).
[238] S 87A(3)(c).
[239] S 87A(2)(b)(iii); Van Heerden par 11.5.2.4.
[240] S 87A(5)(a); Van Heerden par 11.5.2.4.
[241] S 87A(5)(b)(i).
[242] S 87A(5)(b)(ii).

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partially.[243] Affected credit providers must be informed by the NCR of section 87A(5)(b)(ii) or (c)(ii) referrals, with an invitation to make representations to the NCT.[244]

Section 87A(6) deals with the extinguishment of a debt intervention applicant's debt, which is notably the first time in the history of South African credit legislation that over-indebted consumers are provided with a discharge from debts previously owed.[245] Section 87A(6) empowers the NCT to "declare the total of the amounts contemplated in section 101(1)[246] under the qualifying credit agreements as extinguished", having regard to the NCR's referral, the applicant's lack of sufficient income and assets and the section 87A(3) factors mentioned above. Importantly, since the debt intervention process is an NCA mechanism this automatically means that it is only limited to qualifying credit agreements subject to the Act.[247] This further means that unsecured credit within the ambit of the NCA's field of application must be pertinent.

Extinguishment may only be a certain percentage of the total amount of debt stipulated in section 101(1) under each credit agreement, and may thus be done partially. However, this percentage must be applied equally to all the credit agreements concerned, which makes sense.[248] The applicant's credit providers should receive equal treatment.

Section 60 of the National Credit Act is entitled "Right to apply for credit" and provides the right to every natural and juristic person to apply for credit. However, when making an order extinguishing the debt intervention applicant's debt or part thereof, the NCT must also make an order limiting the applicant's section 60 right to apply for credit for a period of at least six months. This period may be extended for a further period which seems fair and reasonable to the NCT, considering the section 27A(3) factors and factors mentioned in section 27A(9), but may not exceed a maximum period of 12 months.[249] The section 27A(9) factors are the total unsecured debt, the number of credit agreements submitted for debt intervention, the period of each of these agreements and the applicant's credit record. The NCR must inform the applicant, his credit providers and registered credit bureaux of any order in terms of section 87A.[250]

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[243] See s 87A(5)(c)(i) and (ii). See also Van Heerden par 11.5.2.4.
[244] S 87A(5)(d).
[245] Van Heerden par 11.5.2.4. See also Coetzee and Brits 16.
[246] S 101 deals with the cost of credit, including the principal or main debt.
[247] Van Heerden par 11.5.2.4.
[248] S 87A(7)(a) and (b); Van Heerden par 11.5.2.4.
[249] S 87A(9).
[250] S 87A(10).

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According to section 87A(11), if the NCT is presented with any information showing that the debt intervention applicant was dishonest in the application or failed "to comply with the conditions of the debt intervention order" the NCT may rescind or change a debt intervention order. The latter aspect will probably be addressed in the regulations giving effect to the Act's debt intervention provisions.

3.5. Effect of debt intervention

The effects of debt review have already been mentioned.[251] The effects of debt intervention are similar and will not be discussed here to avoid unnecessary repetition,[252] except to mention that the prohibition on incurring further charges in terms of a credit facility is not provided for in section 88A.

3.6. Application for rehabilitation[253]

One of the consequences of a section 87A(6) order, extinguishing the debt intervention applicant's credit debts or part thereof, is that the applicant is barred from applying for credit for a determined period of time.[254] However, section 88B affords a debt intervention applicant the opportunity to apply for rehabilitation under certain circumstances, meaning in the context of section 88B that the bar against applying for new credit is lifted. The concept "rehabilitation" is not defined in the National Credit Act, but it seems logical to ascribe its normal meaning to it, which is "the action of restoring someone to former privileges or reputation after a period of disfavour".[255]

An application for a rehabilitation order, which will eventually be granted by the NCT, must be lodged with the NCR.[256] However, in order to succeed with the application, the applicant must submit proof that the amounts contemplated in section 101(1) that were due in respect of each credit agreement affected by the extinguishment order up to the date of the order were paid, or that a settlement agreement was reached with a particular credit provider, to the effect that an amount has been resolved to the credit provider's satisfaction.[257] Proof must also be

[251] Par 2.7. above.
[252] See s 88A. See also Coetzee and Brits 16-17 and Van Heerden par 11.5.3.
[253] See in general Van Heerden par 11.5.4.
[254] See par 3.4. above.
[255] Van Heerden par 11.5.4.
[256] S 88B(1).
[257] S 88B(2).

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submitted that the applicant's financial situation or joint financial situation has improved to such an extent that the applicant can once again be a successful participant in the credit market and that the applicant completed the financial literacy programme[258] with success.[259] All the affected credit providers and registered credit bureaux must be informed by the NCR of the application, which the NCR must submit to the NCT.[260] If the NCR rejects the application, the applicant may approach the NCT directly with the NCT's leave to be heard.[261] The NCT must inform each affected credit provider of the date of the hearing and, after the consideration of submissions in support of and against the application, grant the order for rehabilitation if the aforementioned requirements have been complied with.[262] The crux is section 88B(8), which makes it clear that the effect of rehabilitation is to end the prohibition on the applicant's right to apply for credit in terms of section 60 from the date of the order. The NCR must inform the applicant of the order and serve a copy thereof on each affected credit provider and all registered credit bureaux.[263]

3.7. Preliminary observations

The purpose of this chapter was to investigate the newly introduced debt intervention process in terms of the NCA Amendment Act 2019. The stated purpose of this new process is to render access to debt alleviation possible to NINA debtors, who are excluded from the traditional sequestration procedures.[264] Obvious characteristics of the new process, which will be elaborated on in the final chapter, and which are different from the original debt review process, are its access requirements,[265] the power afforded to the NCT to alter the maxim interest, fees and charges in terms of a credit agreement and to eventually extinguish a debt intervention applicant's debt or part thereof[266] and the latter's right to apply for rehabilitation (if certain requirements are met), which in the context does not mean a discharge of pre-agreement debt, but only the right to be able to apply for credit again.[267]

[258] See par 3.4. above.
[259] S 88B(3).
[260] S 88B(4).
[261] S 88B(5).
[262] S 88B(7).
[263] S 88B(9).
[264] Par 3.1. above.
[265] Par 3.2. above.
[266] Par 3.4.
[267] Par 3.6.

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CHAPTER 4

CONCLUSIONS AND FINAL REMARKS

4.1. Conclusions

The legislature deemed it appropriate to introduce debt review in the National Credit Act and into the broader South African insolvency framework, serving as an alternative debt alleviation measure to sequestration and administration orders for credit consumers who are subject to the NCA. The purpose of debt review is to afford credit consumers who are over-indebted and thus unable to pay their obligations in terms of their credit agreements in a timely manner the opportunity to apply to a debt counsellor to have their debt reviewed, with the ultimate aim to get debt alleviation via the Magistrates' Courts.[268] However, the debt review process did not cater for the plight of over-indebted NINA debtors, who could either not access the process or, if the process could be accessed, obtain debt relief orders from the courts due to insufficient income and/or assets.[269] The courts made it clear that only economically feasible, rational and reasonable debt review referrals by debt counsellors to the courts would be accommodated.[270]

Even if debt review and the eventual debt relief orders by the courts could successfully be accessed by NINA debtors, the process does not provide for a discharge of debt, but is in contrast "based on the principle of satisfaction by the consumer of all responsible financial obligations".[271] This is in my opinion a major *lacuna* in the NCA. The powers of the Magistrates' Courts after a successful referral by the debt counsellor expose another shortfall in the Act's provisions. The Magistrate's Court, which is a creature of statute, is not empowered in the NCA to reduce the interest or other costs in terms of a credit agreement, and the question therefore arises as to the rand and cent effectiveness of the section 87 read with section 86(7)(c)(ii) debt alleviation orders.[272] Finally, as far as the debt review process is concerned, the termination and resumption provisions in the NCA[273] could be revisited to clear up any uncertainties, and in particular the question whether 60 business days are sufficient for the completion of debt review by the debt counsellor.[274] However, the legislature passed up the

[268] Ch 2.
[269] Pars 1.1., 2.4.4. and 2.8.
[270] Par 2.4.4.
[271] Pars 1.1., 2.4.3. and 2.8.
[272] Par 2.4.
[273] S 86(10) and (11) respectively.
[274] Pars 2.5., 2.6. and 2.8.

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opportunity in the NCA Amendment Acts of 2014 and 2019 to effect changes to sections 86(10) and (11).

Chapter 3 of my dissertation outlined the most recent addition to the South African insolvency landscape, debt intervention, introduced by the NCA Amendment Act 2019. Although the latter is law it must still be put into operation, which also holds true for the regulations to give effect to the new provisions.[275] Be that as it may, debt intervention was specifically designed to cater for NINA debtors and their need for an accessible debt alleviation process,[276] which is to be welcomed. Debt intervention takes into consideration that these debtors, in spite of their lack of sufficient income and/or assets, enter into credit agreements, in particular unsecured credit. The latter is naturally to be ascribed to the lack of security NINA debtors have to offer, which theoretically, but not necessarily, excludes members of this group from secured credit.

The access requirements for debt intervention[277] must be endorsed. Due to the fact that NINA debtors and unsecured debt only are pertinent, the R50 000 cap should not pose a problem. Coetzee's and Roestoff's reasons for finding the average gross income-requirement of R7 500 acceptable,[278] make sense and are supported.

In my view the outstanding feature of debt intervention is the discharge of debt that may eventually be granted to a debt intervention applicant who complies with the Act's requirements.[279] A discharge from all qualifying credit debts or part thereof should constitute real and effective debt relief to consumers whose unsecured credit obligations cannot be re-arranged within the realistic time period of five years, prolonged by 12 months and an additional 12 months, if necessary.[280] The two suspensions of obligations of 12 months each should also assist to applicant, who *inter alia* do not have to effect any payments during the period/s of suspension, to improve his financial situation. Thus, it must be welcomed that a blanket extinguishment of debt is not granted, but that the consumer first gets the opportunity to salvage his over-indebtedness. The link between a NCT order that extinguishes debt or part thereof and the applicant's successful completion of a financial literacy programme is commendable, but only research will show whether the completion of such programmes has

[275] Pars 1.1. and 1.3.
[276] Pars 1.1., 3.1. and 3.2.
[277] Par 3.2.
[278] Par 3.2.
[279] Par 3.4.
[280] Par 3.4.

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the desired outcome, which is surely to financially educate debt intervention applicants in order to prevent their future over-indebtedness.

The NCT's section 87(1A) re-arrangement power to reduce the interest, fees and charges under a credit agreement, even to zero, under circumstances where the applicant's financial situation merits the re-arrangement of the latter's obligations,[281] is also a positive development and affords the power to the NCT to effect true debt alleviation to NINA debtors.

I am of the opinion that the debt intervention process is balanced, does not cater for the interests of the consumer only, and is in line with the objective of the National Credit Act to promote "equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers".[282] An example is the credit provider's rights to participate in the process and to make representations to the NCR and NCT. Another example is the bar against applying for new credit, which must be ordered by the NCT when ordering debt extinguished, but then the opportunity afforded to the applicant to apply for rehabilitation which allows him, if successful, to re-enter the credit market.[283]

4.2. Final remarks

It is naturally too early to evaluate the debt intervention procedure and whether it will successfully achieve its aim, to afford access to and effective debt alleviation to NINA debtors. The latter can only truly be done after the implementation of the process, by observing facts, the need for judicial interpretation and intervention, etcetera. Debt review seemed like a good idea, but the debt review provisions in the Act lead to numerous court decisions, and in practice are just not that effective. The probability is that the Act will have to be amended again in future to render debt intervention more effective, for instance by revisiting the access requirements to the process. However, as a final remark, debt intervention is without doubt a step in the right direction to address the plight of over-indebted NINA debtors to access debt alleviation, and to once again be able to partake in the credit market, despite the fact that they were once over-indebted.

[281] Par 3.4.
[282] S 3(d).
[283] Pars 3.4. and 3.6.

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BIBLIOGRAPHY

Books

Coetzee H & Brits R "Extinguishing of debt in terms of the debt intervention procedure: some remarks on 'arbitrariness'" Chapter 2: *Magister Essays vir/for Jannie Otto* (2020) LexisNexis: Durban

Otto JM & Otto R-L *The National Credit Act Explained* 4th ed (2016) LexisNexis: Durban

Van Heerden CM in Scholtz JW (ed), "Commentary" *Guide to the National Credit Act et seq,* (2008) with updates (last update 2020) LexisNexis: Durban

Journal Publications

Borraine A & Van Heerden CM "A comparison between formal debt administration and debt review" 2012 *De Jure*

Coetzee H "A comparative reappraisal of debt relief measures for natural person debtors in South Africa" (LLD thesis University of Pretoria 2015)

Coetzee H "An opportunity for no asset no income (NINA) debtors to get out of check? – An evaluation of the proposed debt intervention measure" 2018 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*

Coetzee H & Roestoff M "Debt relief for South African NINA debtors and what can be learned from the European approach" 2018 *Comparative International Law Journal of South Africa*

Coetzee H & Roestoff M "Consumer debt relief in South Africa; Lessons from America and England; and suggestions for the way forward" 2012 *South African Mercantile Law Journal*

Coetzee H & Roestoff M "Rectifying an unconstitutional dispensation? A consideration of proposed reforms relating to no income no asset (NINA) debtors in the South African Insolvency Law system" 2020 *International Insolvency Review*

Legislation

Consumer Protection Act 68 of 2008

Credit Agreements Act 75 of 1980

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Exemption Notice to the Usury Act of 1999

National Credit Act 34 of 2005

National Credit Amendment Act 19 of 2014

National Credit Amendment Act 7 of 2019

Usury Act of 73 1968

Government Papers

Department of Trade and Industry South Africa ("the DTI) Consumer Credit Law Reform; Policy Framework for Consumer Credit Law (2004)

Debt Counselling Regulations 2012 published in *GG* 35327 of 10 May 2012

GG 35876 of November 2012

Government Notice No.713 of 1 June 1999

National Credit Regulations (GN R489, *GG* 28864, 2006-05-31)

National Credit Regulator Circular No. 2 January 2015

Memorandum on the objects of the National Credit Amendment Bill

Proclamation 22, 2006 in GG 28824 of 2006-05-09

Case Law

Bornman v National Credit Regulator 2015 JDR 1614 (GP)

Collett v Firstrand Bank Ltd 2011 (4) SA 508 (SCA) at 517 G

Driskel v Maseko and Others [2017] ZAFSHC 150 (24 August 2017)

First National Bank a Division of Firstrand Bank Ltd v Da Silva [2019] ZAGPJHC 79 (7 February 2019)

Firstrand Bank Ltd v Martin Unreported WLD case no 24208/2008

Motor Finance Corporation (Pty Ltd v Jan Joubert 2013 JDR 1912 (GNP)

© University of Pretoria

National Credit Regulator v Joy Victoria Minnies and Others [2016] ZANCT 22 (13 March 2018)

National Credit Regulator v Nedbank Ltd 2009 (6) SA 295 (GNP)

Nedbank Ltd v Norris 2016 JDR 0355 (ECP)

Sansom v Mars and others [2017] JOL 38810 (WCC)

Taxi Securitisation (Pty) Ltd v Dick Lennard 2012 (2) SA 456 (ECG); *SA Taxi Securitisation (Pty) Ltd v Mongezi Manu* [2011] ZAECGHC 11 (28 April 2011), 266/2011 and 267/2010

International Papers

2011 World Bank Insolvency and Creditor/Debtor Regimes Task Force Working Group Report on the treatment of the insolvency of natural persons

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