

# A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (Part 1)

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## OPSOMMING

### **'n Vergelyking tussen formele skuldadministrasie en skuldher siening – die voor- en nadele van hierdie maatreëls en voorstelle vir regshervorming**

Ongeveer 'n dekade gelede het die Departement van Justisie en Konstitusionele Ontwikkeling, na aanleiding van klagtes deur verbruikers oor die misbruik van die administrasieprosedure, 'n projek ter hervorming van hierdie prosedure van stapel gestuur. Hierdie projek is egter opgeskort vanweë 'n onafhanklike inisiatief van die Departement Handel en Nywerheid om verbruikerswetgewing, wat in 2007 op die Nasionale Kredietwet 34 van 2005<sup>1</sup> uitgeloop het, te hervorm. Ongelukkig het die wetgewer met die invoering van die skuldher sieningsprosedure ingevolge die Nasionale Kredietwet 34 van 2005 'n gulde geleentheid laat verbygaan om die reg insake skuldverligtingsmaatreëls behoorlik en volledig te hersien. Daarbenewens het die wetgewer ook nie die verhouding tussen skuldher siening en ander bestaande skuldverligtingsmaatreëls, in die besonder administrasiebevele, behoorlik oorweeg nie. Die doel van hierdie eerste gedeelte van die artikel is dus om administrasie ingevolge die Wet op Landdroshowe 32 van 1944 en skuldher siening ingevolge die Nasionale Kredietwet 34 van 2005 te ontleed en sodoende sekere positiewe en negatiewe aspekte rakende hierdie twee prosedures te identifiseer. In die tweede gedeelte van die artikel word 'n vergelyking tussen administrasie en skuldher siening gedoen en voorstelle ter regshervorming gemaak. Die skrywers doen aan die hand dat Suid-Afrika 'n volledige hersiening van sy huidige skuldher skeduleringsmaatreëls benodig en dat die wetgewer vir een enkele maatreël wat op alle skuldher skeduleringsgevalle van toepassing is, voorsiening moet maak. Na aanleiding van die vergelyking tussen administrasie en skuldher siening belig die skrywers die hoofpunte wat die wetgewer na hul mening in ag moet neem wanneer so 'n nuwe prosedure ontwerp word.

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<sup>1</sup> 'n Nie-amptelike vertaling van die Nasionale Kredietwet 34 van 2005 is beskikbaar by [www.vra.co.za/index.php?option=com\\_content&view=category&layout=blog&id=3&Itemid=3](http://www.vra.co.za/index.php?option=com_content&view=category&layout=blog&id=3&Itemid=3) (red).

## 1 Introduction

In a consumer credit-driven society like ours, over-indebtedness of money lenders will always manifest itself. At present it is also fair to say that the financial situation of many South Africans is dire.<sup>2</sup>

With this in mind, it always remains a question as to how a specific legal system responds and how it should respond to the problem of over-indebtedness by providing debt relief measures that a consumer debtor may use in order to address his or her debt situation.

For the purposes of this article it is important to note that consumer debtors may use an informal creditor work-out that may amount to a voluntary debt rearrangement that is based on the contractual principle of consent. It is clear that some creditors will not be prepared to cooperate in such a voluntary system. The question then arises as to what formal procedures are provided for by the law. In terms of section 74 of the Magistrates' Courts Act<sup>3</sup> (MCA) consumer debtors may apply to a magistrate's court for an administration order that would, if successful, in effect compel the creditors to accept a rearrangement of their debts.

Where the debtor is insolvent he or she may apply for the ultimate debt relief measure in terms of the Insolvency Act,<sup>4</sup> namely, voluntary surrender<sup>5</sup> that would bring about a *concursum creditorum* and eventually a rehabilitation of the insolvent debtor. From the debtor's point of view rehabilitation will usually discharge unpaid pre-sequestration debt,<sup>6</sup> but the applicant-debtor must, amongst other requirements, also prove an advantage for creditors<sup>7</sup> before he or she will succeed with such an application. Sequestration is thus not readily available as a debt relief measure and it remains a drastic procedure.

It is well documented that the administration order procedure has been subject to bad press for many years and that the Department of Justice and Constitutional Development, following complaints by

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2 Since June 2007 there has been an on-going deterioration of the number of consumers in "good standing". At the end of December 2011, credit bureaux had records of 19.34 million credit active consumers, of whom 8.93 million had "impaired credit records". Thus, at present only 53.8% of credit-active consumers are in "good standing". A consumer is regarded to be in "good standing" where he or she has not missed more than 1 or 2 instalments and his or her record does not reflect a judgment or administration order or any "adverse listings" such as accounts which has been "handed over" and/or "written off" – National Credit Regulator *Credit Bureaux Monitor* Fourth Quarter (Dec 2011) – available at [www.ncr.org.za](http://www.ncr.org.za).

3 32 of 1944 (hereafter the MCA). For sake of being complete, the possibility of a repayment plan following an offer by a debtor ito ss 57 & 58 MCA must also be noted, but these procedures are not discussed for the purposes of this article.

4 24 of 1936.

5 Ss 3–7 Insolvency Act 24 of 1936 (hereafter IA).

6 See s 129(1)(b) IA.

7 See ss 6, 10 & 12 IA.

consumers regarding the abuse of the administration order and related debt relief procedures, initially introduced a reform project regarding this procedure.<sup>8</sup> However, this project was suspended in view of an independent initiative by the Department of Trade and Industry to reform consumer legislation that culminated in the promulgation of the National Credit Act<sup>9</sup> (NCA), which is of full force and effect as from June 2007. The NCA deals with a wide range of issues regarding the regulation of credit agreements as defined in the NCA and, amongst other matters, purports to protect consumers against unfair business practices regarding consumer credit.

The preamble to the NCA states that the NCA must:

promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; *to provide for debt re-organisation in cases of over-indebtedness*;<sup>10</sup> to regulate credit information; to provide for registration of credit bureaux, credit providers and debt counselling services, to establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit; to establish the National Credit Regulator and the National Consumer Tribunal, to repeal the Usury Act, 1968, and the Credit Agreements Act, 1980 and to provide for related incidental matters.

In order to deal with over-indebtedness as such, the NCA introduced debt review as a formal procedure that could be used by over-indebted consumers to bring about a debt rearrangement regarding credit agreements regulated by the NCA.<sup>11</sup>

However, in spite of initiatives and arguments in favour of a comprehensive review of debt relief measures, the legislature did not follow such an approach when it introduced the procedure of debt review.<sup>12</sup> Its relationship with other existing debt relief measures, in

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8 For more detail see Boraine "Some thoughts on the reform of administration orders and related issues" 2003 *De Jure* 217.

9 34 of 2005 (hereafter the NCA). For a discussion of the NCA, see in general Otto & Otto *The National Credit Act Explained* (2010).

10 Own emphasis. See also s 3(g) NCA providing for the "addressing and preventing of 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" as one of the purposes of the NCA.

11 See ss 86–88 NCA.

12 See further as background Roestoff 'n *Kritiese evaluasie van skuldverligtingsmaatreëls vir individue in die Suid-Afrikaanse insolvensiereg* (LLD thesis UP 2002); Roestoff & Jacobs "Statutêre akkoord voor likwidasie: 'n toereikende skuldenaarremedie?" 1997 *De Jure* 189; Boraine 2003 *De Jure* 217.

particular administration orders in terms of section 74 of the MCA was, it is submitted, also not considered properly.

The aim of this article is thus to compare administration with debt review with a view to identify certain positive and negative aspects pertaining to these two procedures and to consider problem areas regarding the co-existence of these two procedures in South African legal practice. Within the ambit of this pertinent discussion, some suggestions are made regarding law reform.<sup>13</sup>

## 2 Administration Orders in Terms of the MCA

### 2.1 General

The administration order procedure, which has been described as a modified form of insolvency proceedings<sup>14</sup> provides debt relief for natural person debtors whose debts amount to not more than R50 000.<sup>15</sup>

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13 Although the South African Law Reform Commission proposed another alternative formal debt relief measure in the form of a pre-liquidation composition, this process is not discussed as such for the purposes of this article, since the focus is on possible reform measures for debt administration and debt review, being the current procedures to be used for debt restructuring. See iro the Law Commission's proposal, *Report on the Review of the Law of Insolvency* (Project 63) Vol 1 (Explanatory Memorandum) and Vol 2 (Draft Bill) (February 2000) schedule 4. This proposal has also been included in the latest version of the Insolvency Bill contained in a working document of the Department of Justice dated 2010-06-30 – see clause 118 of the unofficial working copy, on file with the authors. In this document it is envisaged that the proposed measure be included in the proposed unified Insolvency Act and not in the MCA. The proposed measure is supposed to afford debt relief to debtors who are unable to show an advantage to creditors and are therefore excluded from the liquidation process (2000 Explanatory Memorandum 5). Where the composition is not accepted by the required majority of creditors, the court must, iro the latest proposal, declare that the proceedings have ceased and that the debtor is in the position that he was in prior to the commencement thereof. Alternatively the court must determine whether or not s 74 can be applied to the debtor and, if so, apply the provisions accordingly and within the discretion of the presiding officer (cl 118(22)(a) & (b)).

14 See *Madari v Cassim* 1950 2 SA 35 (D) 38; *Barlow's (Eastern Province) Ltd v Bouwer* 1950 4 SA 385 (E) 393; *Volkscas Bank v Pietersen* 1993 1 SA 312 (C) 315; *Weiner NO v Broekhuysen* 2003 4 SA 301 (SCA) 305; *Fortuin v Various Creditors* 2004 2 SA 570 (C) 573; *Ex Parte August* 2004 3 SA 268 (W) 271; *African Bank Ltd v Weiner* 2004 6 SA 570 (C) 575 (hereafter *African Bank v Weiner* (C)).

15 See s 74(1)(b) MCA. The amount is determined by the Minister from time to time. See GN R1411 in GG 19435 of 1998-10-30 for the current provision. The order will not be invalid if the amount at some point in time exceeded the R50,000 limit – see s 74(2) MCA and *Di Mata v Firstrand Bank Ltd* 2002 6 SA 506 (W). The full amount of the judgment obtained and not merely the monthly instalment iro an emoluments attachment order should be included when determining what the total amount of all the debtor's debt due iro s 74(1)(b) MCA is – *Jacobs v African Bank Bpk* 2006 5 SA 21 (T) 24, 25 & 27.

Administration orders are best suited to deal with relatively small estates where the costs of sequestration would exhaust the estate. However, administration proceedings offer limited facilities for the investigation of a debtor's affairs and it may therefore be unsuitable where the debtor's affairs are complex.<sup>16</sup>

In principle the procedure provides for a rescheduling of a debtor's debt without sequestrating the debtor's estate. In terms of an administration order a court will assist the debtor by appointing an administrator to take control of the debtor's financial affairs and to manage the payment of debts due to creditors. The debtor has an obligation to make regular payments to the administrator.<sup>17</sup> The administrator, after deducting necessary expenses and a specified remuneration determined by tariff, will in turn make a regular distribution out of such received payments to all creditors.<sup>18</sup>

## 2 2 Application for an Administration Order

Administration appears to be a viable debt relief measure for debtors who have a regular income and whose debt burden does not exceed R50 000 – a debt situation which is therefore deemed to be reasonably manageable. In terms of section 74(1) of the MCA a debtor may obtain an administration order from the court of the district in which he or she resides, carries on business or is employed, where:

- (a) the debtor is unable to pay the amount of any judgment obtained against him or her in court; or
- (b) the debtor has insufficient funds or assets at hand to meet his or her financial obligations, even where no judgment has as yet been granted.

Additionally, in terms of section 65I of the MCA,<sup>19</sup> an administration order may also be granted in favour of a judgment debtor during a section 65 *in camera* inquiry into the debtor's financial position. The application for an administration order enjoys preference and the court will suspend the section 65 *in camera* hearing until the application for an administration order has been disposed of.

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16 See Harms *Civil Procedure in Magistrates' Courts* (2011 update) par 48.2.

17 Should the debtor fail to make the payments as required by the administration order, the provisions of ss 65A–65L MCA shall *mutatis mutandis* apply. Where the court has in addition to the administration order authorised the issue of an emoluments attachment or a garnishee order and has suspended such authorisation conditionally and the debtor fails to comply with the conditions, the administrator may lodge a certificate to this effect with the clerk of the court and the clerk must thereupon issue the emoluments attachment order or garnishee order – cf s 74I(2) & (3) MCA.

18 See ss 74L & 74J MCA.

19 See s 74(1) MCA.

The procedure for applying for an administration order is based on an application<sup>20</sup> together with a prescribed statement of affairs<sup>21</sup> in which the debtor affirms on oath that the names of the creditors and the amounts owed to them and all other statements or declarations made in the statement are true.<sup>22</sup> The application is lodged with the clerk of the magistrate's court where the debtor resides or carries on business or is employed,<sup>23</sup> and is delivered personally or by registered post to the creditors at least three calendar days before the hearing.<sup>24</sup> The clerk of the court must, in accordance with the Act, assist an illiterate debtor in preparing the application.<sup>25</sup> In practice it is usual for an attorney to assist the debtor in preparing the application.

The true basis for the application is the fact that the debtor is unable to pay his or her debts as they become due. The amount of the outstanding debt coupled with the period it will take to pay it off is, according to case law,<sup>26</sup> not a factor, or not the only factor<sup>27</sup> to be taken into account when the court considers an application for administration. Section 74 of the MCA does not require that there should be a benefit to creditors<sup>28</sup> and the fact that creditors may have to wait many years for their money should therefore not play a decisive role in adjudicating an application for administration.<sup>29</sup> Moreover, section 74 does not make provision for any period within which any debt has to be paid and there is thus no basis in law for the inference that the legislator intended a

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20 See Annex 1 Form 44 Magistrates' Courts Rules (hereafter MCR).

21 Ss 74A(1) and (2) MCA. For the sake of convenience Annex 1 Form 45 MCR may be used to set out all the required particulars. Form 45 may also be used where the application is made in terms of s 65I(2) MCA. The required particulars are briefly, the name and address of the debtor's employer; a list of the debtor's assets; the debtor's trade or occupation and income; a list of debtor's and his dependants' living expenses; a list of creditors and amounts owing to them; rights of security which creditors may have; full particulars of goods purchased under a credit agreement iro the NCA; mortgage bonds on immovable property; assets purchased under a written agreement other than a credit agreement iro the NCA; particulars iro previous administration orders; particulars iro the persons dependent on the debtor and particulars iro instalments which the debtor offers to pay towards settlement of his or her debts. Prescription with regard to any debt mentioned in the statement of affairs is interrupted on the date on which such statement is lodged, or where the debt is not mentioned in the statement, on the date when the claim is lodged with the court or the administrator – s 74V(1) MCA. Ito s 74V(2) MCA a debt cannot become prescribed until at least one year has elapsed since the date on which an administration order ceases to be of force and effect.

22 S 74A(3) MCA.

23 S 74(1)(b) MCA.

24 S 74A(5) MCA.

25 S 74A(4) MCA.

26 *Ex Parte August supra* 273.

27 See *Fortuin v Various Creditors supra* 575.

28 *Ex Parte August supra* 272. It is also not a pre-requisite for the granting of an administration order that the debtor should not be the cause of his or her own financial embarrassment – *Ex Parte August supra* 271.

29 *Ex Parte August supra* 272; *Fortuin v Various Creditors supra* 575.

reasonable time,<sup>30</sup> or a certain time<sup>31</sup> within which a debtor should be assisted to get out of his or her financial embarrassment.

### 2 3 Hearing of Application for Administration

The application is heard before a magistrate in a so-called section 65 court and in the presence of the debtor or an appointed legal representative, as well as creditors and their respective legal representatives.<sup>32</sup> All the debts listed in the statement of affairs are deemed to be proved, subject to any amendments the court may make, except where a creditor objects to a listed debt or the court rejects or requires the debt to be substantiated by evidence.<sup>33</sup> Similarly, when the debtor objects to a creditor's claim, the court will require the creditor to prove the claim.<sup>34</sup> The court, or any creditor or legal representative may question the debtor with regard to his or her assets and liabilities, present and future income (including the income of a spouse), standard of living and possibilities of economising and any other relevant matter.<sup>35</sup> It is to be noted that this is a limited enquiry that may take place, but the application is clearly *sui generis* in that it allows oral argument. If it appears to the court that any debt is a matter of contention between the debtor and creditor or between the creditor and any other creditor, the court may, upon inquiry into the objection, allow or reject the debt or a part thereof.<sup>36</sup>

### 2 4 Contents of Administration Order

The contents of an administration order take a prescribed form and must set out that the debtor's estate has been placed under administration, that an administrator has been appointed, and the amount that the debtor is obliged to pay.<sup>37</sup>

The order must specifically state a weekly or monthly amount to be paid over to the administrator by the debtor.<sup>38</sup> In terms of section 74C(2) of the MCA this amount is calculated by taking into account the

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30 *Ex Parte August supra* 272. But see *African Bank Ltd v Weiner (C) supra* 575 where Griesel J observed that "it was never the intention of the Legislature that a debtor should be bound up in an administration order indefinitely, where there is no reasonable prospect of such order being discharged within a reasonable period of time. On the contrary, I am of the view that the mechanism of an administration order is intended to provide a debtor with a relatively short *moratorium* to assist in the payment of his or her debts in full and to ward off legal action and execution proceedings during such period".

31 *Fortuin v Various Creditors supra* 575.

32 S 74B(1) MCA.

33 S 74B(1)(b) MCA.

34 S 74B(1)(c) MCA.

35 S 74B(1)(e) MCA.

36 S 74B(2) MCA.

37 The content is regulated by s 74C MCA and the form by Annex 1 Form 51 MCR.

38 S 74C(1)(a) MCA.

difference between the future income of the debtor and the sum of the debtor's and his dependants' "necessary expenses",<sup>39</sup> certain prescribed "periodical payments"<sup>40</sup> which the debtor is obliged to make and other payment obligations due *in futuro*.<sup>41</sup>

*In futuro* debts, being debts that become due and payable in the future,<sup>42</sup> are clearly excluded from the administration order<sup>43</sup> and the court will exclude a certain amount of money from the weekly or monthly payments made to the administrator for the purpose of allowing the debtor to make periodical payments in terms of a credit instalment agreement or existing maintenance or mortgage bond obligations.<sup>44</sup>

Where the administration order provides for the payment of instalments out of future income, the court shall authorise the issue of an emoluments attachment or garnishee order to facilitate payments by the debtor.<sup>45</sup>

The order may stipulate such conditions as the court may deem fit with regard to security, preservation or disposal of assets, realisation of movables subject to hypothec, or otherwise.<sup>46</sup> It may also authorise the administrator to realise some of the assets of the debtor for the purpose of distributing the proceeds among creditors, but no assets subject to any credit agreement in terms of the NCA may so be realised without the written permission of the seller.<sup>47</sup> Where the court authorises the administrator to realise any asset, it may amend the payments to be made in terms of the administration order accordingly.<sup>48</sup> Hence, in contrast with debt review in terms of the NCA, administration in terms of the MCA may be regarded as a hybrid form of debt relief as it provides for the possibility that assets may be liquidated in addition to a rescheduling of debts.

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39 S 74C(2)(a) MCA. When determining the "necessary expenses" it is s 74C(2)(a) MCA the income of the debtor's spouse may be taken into account. Where the debtor is married in community of property it may also be taken into account in determining the debtor's income – s 74C(3) MCA.

40 They are periodical payments which the debtor is obliged to make under a credit agreement ito the NCA or a mortgage bond or other written agreement for the purchase of an asset and periodical payments to be made ito an existing maintenance order – s 74C(2)(b)–(d) MCA.

41 See s 74C(2)(e) MCA.

42 Eg interest which has yet to accrue on a debt – *Fortuin v Various Creditors supra* 574.

43 See s 74C(2)(b)–(e) MCA.

44 The court may, however, in its discretion and in certain prescribed circumstances refuse to take into consideration the periodical payments with regard to a credit agreement or mortgage bond, eg where the goods ito the credit agreement are not exempt from execution ito s 67 MCA or where the court is not of the opinion that it is desirable to safeguard mortgaged property – see s 74C(2)(b) & (d) MCA.

45 S 74D MCA.

46 S 74(1)(b) MCA and see also s 74C(1)(b) MCA iro aspects which may be specified in the administration order.

47 See s 74C(1)(b)(i) and also s 74K(1) and (2) MCA.

48 S 74K(4).



## 2 5 Execution of Administration Order by Administrator

The court must appoint an administrator to give effect to the order.<sup>49</sup> The court exercises an independent discretion when appointing an administrator, but any person may in principle be appointed as an administrator and there are no prescribed qualifications for an administrator as such.<sup>50</sup> Under given circumstances a government official may also be appointed as administrator. The appointment becomes effective only when the administrator receives a copy of the order or, where he or she is required to give security, after he or she has given such security.<sup>51</sup> Security must be given where the administrator is not a legal practitioner or an officer of the court.<sup>52</sup> The giving of security by the administrator to the satisfaction of the court is meant to serve as a guarantee for moneys received and paid into the trust account of the administrator, but the practices surrounding the giving of such security is sometimes doubted.<sup>53</sup>

The clerk of the court is required to provide the debtor and the administrator with a copy of the administration order whereupon the administrator must send a copy by registered post to each creditor who proved a debt or was mentioned by the debtor in the statement of affairs.<sup>54</sup>

The administrator has a host of statutory duties<sup>55</sup> but the main duty is to draw up a list of creditors and to distribute moneys collected from the

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49 If such a person is to be relieved of his or her appointment, it is the court, and not the appointed administrator, that must sanction it and the new appointment or substitution should also be done by the court – *Stander v Erasmus* 2011 2 SA 320 (GNP) 324. The court in *Stander* also referred to the practice of appointed administrators establishing juristic persons through which files under administration are administered without the approval of the court. According to the court this practice raises serious concerns as the said juristic persons have not been appointed by the court and if payments are received by persons not appointed by the court the interests of the debtors and creditors will be compromised.

50 See *Oosthuizen v Landdros, Senekal* 2003 4 SA 450 (O).

51 S 74E(1) MCA.

52 S 74E(3) MCA.

53 See *Boraine* 2003 *De Jure* 231.

54 S 74F(1) & (2) MCA.

55 See eg s 74J MCA. Ito s 74M MCA the administrator is obliged, upon payment of the fees prescribed in the rules, to furnish any creditor on request by him or her with information regarding the progress made iro the administration. The administrator must also furnish any person applying therefore with a copy of the application iro s 74 MCA and a statement of affairs iro s 74A(1) or 65I(2) MCA or with a list of creditors or distribution account iro s 74G(1) or 74J MCA. Within the ambit of his or her duties, the administrator may in terms of section 74J(2) MCA where any debt or the balance thereof, amounts to less than R10 pay it in full if such a payment will facilitate the distribution of funds in his or her possession. Out of the moneys received, the administrator may also pay any urgent or extraordinary medical, dental or hospital expenses incurred by the debtor after the date of the administration order – s 74J(4) MCA.

debtor amongst them.<sup>56</sup> In terms of section 74J of the MCA the administrator must,<sup>57</sup> subject to section 74L,<sup>58</sup> distribute such payments *pro rata* among the creditors at least once every three months. Claims that enjoy preference under insolvency law must be paid out in the prescribed order of preference.<sup>59</sup>

The list of creditors is lodged with the clerk and is open for inspection by creditors during office hours. A creditor may object to the list and must do so within 15 days<sup>60</sup> of having received a copy of the administration order.<sup>61</sup>

Where a particular creditor wishes to prove a debt before the completion of an administration order and which is unlikely to be included in the order, a claim must be lodged with the administrator. The administrator in turn notifies the debtor of the additional claim. Where the debtor admits the claim, and subject to the right of any other creditor who have not received notice of the claim to object to the debt, the administrator will lodge a notice with the clerk, adding the creditor's claim to the list.<sup>62</sup> Where the debtor denies the claim, the administrator must notify the creditor. The creditor may then approach the court for a hearing on the disputed claim. The court may refuse the claim or allow it in part or in whole. Alternatively the court may also require that the claim be supported by evidence, or postpone the hearing on such conditions as it may deem fit. Where the claim is allowed by the court, it is added to the list.<sup>63</sup>

A creditor who has sold and delivered goods to a debtor under a credit agreement in terms of the NCA before the administration order was granted and who becomes entitled to demand immediate payment of the outstanding purchase price will, after he has notified the administrator that he elects to do so, obtain a hypothec over the goods in terms of which the outstanding amount will be secured. However, any term of the agreement with regard to the creditor's right of termination of the agreement or with regard to his right to return the goods shall not in consequence of the debtor's non-compliance with the agreement be enforceable.<sup>64</sup> In terms of section 74G(8) of the MCA the court may order that the seller take possession of the goods and sell them by public auction, or, if the seller, buyer and administrator so agree, to sell them by private treaty. The creditor must then pay to the administrator the

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56 See s 74G, H & J MCA; Annex I Forms 47–50 MCR.

57 Deviation is only allowed in two circumstances: where the creditors all agree, or where the court otherwise orders – s 74J(1) MCA and *Weiner v Broekhuysen supra* 309.

58 Providing for a deduction of the remuneration and expenses of the administrator.

59 S 74J(3) MCA.

60 R 48(2) MCR.

61 See s 74G(1) & (10) MCA.

62 S 74G(2) & (3) MCA.

63 S 74G(4)–(6) MCA.

64 S 74G(7) MCA.

amount of the proceeds of the sale in excess of the amount of his debt and the costs connected with the sale, or, if the net proceeds of the sale are insufficient to pay his debt in full, he may lodge a claim for the outstanding balance for inclusion in the list of creditors.<sup>65</sup>

Where a person becomes a creditor after the granting of an administration order, or where a person sold and delivered goods to the debtor under a credit agreement in terms of the NCA after the granting of the order<sup>66</sup> such a person may lodge a claim with the administrator, whereafter the administrator shall inform the debtor of the new claim.<sup>67</sup> The debtor may then either accept or deny the claim,<sup>68</sup> Where the debtor admits the claim or where he denies the claim and the court allows the claim, the debt will be added to the list in terms of section 74G(1),<sup>69</sup> but the creditor will not be entitled to a dividend in terms of the administration order until all other creditors who were creditors on the date of granting of the order have been paid in full.<sup>70</sup>

## 2 6 Cost of Administration

As part of his or her duties, the administrator must pay the cost of the application for the administration order as a first claim against the moneys received by him or her, unless the court orders otherwise.<sup>71</sup>

The administrator is entitled to be reimbursed for expenses and remuneration<sup>72</sup> but such costs may not exceed 12,5% of the total amount of moneys received as part of the administration order.<sup>73</sup> Such expenses and remuneration are subject to taxation by the clerk of the court and subject to review by any judicial officer.<sup>74</sup> In order to provide for unforeseen costs that the administrator may incur when the debtor defaults on the payments to be made in terms of the administration order, or disappears, the administrator may retain a maximum of 25% of the amount collected, but such an amount in the possession of the

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65 S 74G(9) MCA.

66 In such a case the provisions of s 74G(7)–(9) MCA explained above also apply. The creditor wishing to demand immediate payment will thus obtain a hypothec over the goods sold into the credit agreement and may approach the court for an order authorising him to attach and sell the goods.

67 S 74H(1) & (4) MCA.

68 S 74H(2)–(4) MCA.

69 The procedure into 74G(3), (4), (5) & (6) MCA explained above applies.

70 S 75H(2)–(4) MCA.

71 S 74O MCA.

72 S 74L(1)(a) MCA.

73 S 74L(2) MCA; and see *Weiner v Broekhuysen supra* 312 *et seq* and *African Bank Ltd v Weiner* 2005 4 SA 363 (SCA) 369 (hereafter *African Bank v Weiner* (SCA)). Prior to these judgments, many administrators assumed free reign as regards the cost and remuneration they charged for managing an administration – see *Boraine* 2003 *De Jure* 217 231 and 233. Where a state official is appointed as an administrator, the remuneration accrues to the state – r 48(5) MCR.

74 S 74L(2) MCA.

administrator may at no stage exceed R600.<sup>75</sup> In such an event the administrator may for instance instruct an attorney to follow up and to collect the due and payable amounts from the defaulting debtor. Such collection will be subject to the normal rules and fees relating to debt collection.

## 2 7 Other Consequences of Administration Order

Although the estate of a person under administration may still be sequestrated in terms of section 74R of the MCA, section 74P prevents individual creditors from continuing with their individual remedies against the debtor or his property after the administration order has been granted.<sup>76</sup> However, remedies with regard to any mortgage bond or any debt in terms of section 74B(3)<sup>77</sup> are not restricted by an administration order. The court may also grant leave to institute enforcement proceedings.<sup>78</sup> Where proceedings have already been instituted against a debtor in respect of any debt<sup>79</sup> the court must, upon receiving notice of the administration order, suspend such proceedings. However, the court may grant costs already incurred by the creditor, which may also be added to the judgment debt.<sup>80</sup>

In terms of section 74S of the MCA, a debtor who incurs additional debts during the currency of an administration order and does not disclose the existence of the order commits an offence. Additionally, the court may upon application by any interested person, set aside the administration order.<sup>81</sup>

## 2 8 Suspension, Amendment, Rescission and Lapsing of Administration Order

The court under whose supervision an administration order is being executed, may upon application by the debtor or any interested party reopen the proceedings and call upon the debtor to appear for such further examination as the court may deem fit. The court may then on good

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75 S 74L(1)(b) MCA read with r 48(4) MCR. The 12.5% cap in s 74L(2) MCA does not cover the "costs" in s 74L(1)(b) MCA and they can be recovered separately – see *African Bank v Weiner* (SCA) 371 and 378.

76 S 74P(1) MCA.

77 I.e. a debt which has been rejected in terms of s 74B(2) MCA. Such creditor may, notwithstanding the provisions of s 74P MCA, institute proceedings or proceed with an action already instituted in respect of such debt – s 74B(3) MCA. If judgment is obtained the amount of the judgment debt shall be added to the list of debts – s 74B(4) MCA.

78 S 74P(1) MCA.

79 Except a debt due under a mortgage bond or a debt in terms of s 74B(3) MCA.

80 S 74P(2) MCA.

81 S 74S(1) MCA.

cause shown suspend,<sup>82</sup> amend<sup>83</sup> or rescind the administration order.<sup>84</sup> Upon an application for rescission the court may, *inter alia*, if it appears that the debtor is unable to pay any instalment, suspend the order for such a period and on such condition as the court deems fit. The court may also amend the instalments to be paid and make the necessary amendments to any emoluments attachment order or garnishee order issued so as to ensure payment in terms of the administration order.<sup>85</sup>

As soon as the costs of the administration and all the listed creditors have been paid in full, the administrator must lodge a certificate indicating payment in full with the clerk of the court and send copies of the certificate to the creditors, whereupon the administration order lapses.<sup>86</sup>

## 2 9 General Remarks

The administration procedure brings about a limited *concursum creditorum*<sup>87</sup> in the sense that creditors are in principle prevented from continuing with their individual debt enforcement remedies and they receive repayment of the debt on an equal basis in the form of distributions made to them by the administrator. However, the debtor must still repay the full amount of the claims plus costs and interest.<sup>88</sup> The repayment period is not limited and there is no provision for a discharge of any portion of the debt as is the case with sequestration followed by rehabilitation. It thus frequently happens that the administration order allows the debt to balloon and may theoretically keep the debtor in debt and “locked into” the process indefinitely.<sup>89</sup> As a result, debtors often default in terms of the order and it can therefore not be viewed as a lasting debt relief measure.

In view of the monetary cap of R50 000, debtors who owe more than this amount are also excluded from this remedy. However, despite shortcomings and problems associated with administration it must be conceded that it may offer some relief in given circumstances. However, if the monetary cap was higher it could also have included those who are currently excluded from the relief offered by rehabilitation following sequestration since they cannot prove an advantage to creditors as

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82 When the court suspends the order, it may impose such conditions as it may deem just and reasonable – s 74Q(1) MCA.

83 An administration order may also be amended at the request of the administrator in writing and with the written consent of the debtor – s 74Q(2) MCA.

84 S 74Q MCA and Annex I Form 52A MCR.

85 S 74Q(3)(b) MCA.

86 S 74U MCA.

87 See *Madari v Cassim supra* 38; *Ex Parte Fortuin v Various Creditors supra* 574; *Ex Parte August supra* 272.

88 See s 74U MCA discussed above.

89 See Borraine 2003 *De Jure* 217 249; Greig “Administration orders as shark nets” 2000 *SALJ* 622.

required by the Insolvency Act.<sup>90</sup> Within this context the effect of debt review in terms of the NCA will next be considered.

### 3 Debt Review in Terms of the NCA

#### 3 1 General

The NCA attempts to address the problem of over-indebtedness by providing a procedure in terms of which a debtor's credit agreement debt may be reviewed by a debt counsellor<sup>91</sup> with a view to possibly obtaining debt relief by means of a consensual or court ordered debt restructuring.<sup>92</sup> At the outset it is important to note that these debt relief measures apply only to credit agreement debt<sup>93</sup> entered into by natural persons.<sup>94</sup> In the process of debt review the debt counsellor is also tasked with investigating whether credit was granted recklessly.<sup>95</sup> During the period in which a debt review is being conducted, the consumer is protected by a moratorium on enforcement by the credit provider of the rights under the credit agreement.<sup>96</sup> Once a consensual debt rearrangement agreement has been filed as a consent order or the court, in the absence of a consensual agreement, grants a court-ordered rearrangement, enforcement of the credit provider's rights under the credit agreement is further stayed pending compliance by the debtor with the rearrangement agreement or restructuring order.<sup>97</sup> Where credit has been granted recklessly, debt relief is afforded in the form of completely or partially setting aside the relevant reckless credit agreement or suspending it or by suspending that particular credit agreement and restructuring the debtor's obligations under any other credit agreements.<sup>98</sup> It should further be noted that a debtor can access the process voluntarily in accordance with section 86 but that section 85 of the NCA also provides that a court has the discretion to refer a credit agreement for debt review in instances where legal proceedings have already commenced.<sup>99</sup>

#### 3 2 Debt Counsellor

The NCA has specifically created the office of the debt counsellor, being the designated person to offer and conduct the service of debt counselling (also referred to as "debt review"). In accordance with the

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90 24 of 1936.

91 See s 86(1) NCA.

92 See ss 86(7), 86(8) & 87 NCA.

93 See s 8 read with s 1 NCA for the definitions of the different credit agreements in the NCA. See also Otto & Otto 17 *et seq* for a discussion of the scope of application of the NCA.

94 See s 6 read with s 78(1) NCA.

95 See s 86(6)(b) NCA.

96 S 88(3) NCA.

97 S 88(3)(b)(ii) NCA.

98 S 83 NCA.

99 See par 3 3 3 below.

regulations to the NCA, a debt counsellor should be a neutral person<sup>100</sup> and it is required that debt counsellors be registered with the National Credit Regulator (NCR) for purposes of efficient regulation.<sup>101</sup>

During the debt review process the debt counsellor is obliged to review the debtor's credit agreements in order to determine whether the debtor is over-indebted and, if so required, whether reckless credit was extended.<sup>102</sup> The debt counsellor does not receive and distribute payments on behalf of the debtor as such function is assigned to independent Payment Distribution Agents (PDAs).<sup>103</sup> No provision is made in the NCA for the debt counsellor to realise the debtor's assets or to make such a recommendation to court. However, when the debt counsellor has to determine whether the consumer is over-indebted in terms of section 79(1) of the NCA, he or she should take into consideration the consumer's "financial means, prospects and obligations".<sup>104</sup> In *Standard Bank of South Africa Ltd v Panayiotts*<sup>105</sup> it was held that "financial means" also includes assets and liabilities and that "prospects" includes prospects of improving the consumer's financial position, such as increases and liquidation of assets. In the case of credit agreements which involve goods as the subject matter of the agreement, the consumer's financial means and prospects must therefore include the prospect of selling the goods in order to reduce the consumer's indebtedness.<sup>106</sup> It would therefore appear that our courts will probably not be willing to allow consumers to include a credit agreement in the eventual re-arrangement order and to retain the subject matter of the agreement if it is of the opinion that such goods are luxurious and unnecessary for the maintenance of the consumer and his or her dependants.<sup>107</sup> It is submitted that the court will in such a case be obliged to reject the proposal.<sup>108</sup>

### 3 3 Debt Review Process

Debt review in the wide sense encompasses two distinct stages. The first stage takes place before the debt counsellor, when the review of the debtor's credit agreements is conducted and a determination with regard to over-indebtedness and reckless credit is made. The second stage occurs when a voluntary repayment plan is filed at court as a consent

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100 R 1 Regulations made to the NCA (GN R 489 of 2006-05-31) (hereafter CR).

101 For the registration requirements in respect of debt counsellors see reg 44 and 45 CR.

102 S 86(6) NCA.

103 See Van Zyl in Scholtz (ed) *Guide to the National Credit Act* (2008) par 5 2 5.

104 S 79(1)(a) NCA.

105 2009 3 SA 363 (W) par 47.

106 *Standard Bank v Panayiotts supra* par 77.

107 In this regard compare iro the administration order procedure s 74C(2)(b) and (d) MCA.

108 See s 87(1)(a) NCA and the discussion in par 4 7 3 below. The magistrate's court is a creature of statute and is limited to exercise the powers iro s 87 NCA. The court will therefore not be entitled to order that the relevant credit agreement be excluded from the debt re-arrangement order.

order in terms of section 138 of the NCA or the court is approached to restructure the debtor's credit agreement debt.

### 3 3 1 Process Before Debt Counsellor

Section 86 of the NCA read with regulation 24 provides detail on the debt review process before the debt counsellor.<sup>109</sup> The regulations to the NCA define "debt counselling" as "performing the functions contemplated in section 86 of the Act".<sup>110</sup>

In accordance with section 86 a consumer may apply to a debt counsellor to have the consumer declared over-indebted. It should be pointed out that the word "declared" is unfortunate, as the debt counsellor has no powers to actually declare a consumer over-indebted: this is a power that only a court can exercise.<sup>111</sup>

With regard to agreements where the credit provider has already proceeded to take steps in order to enforce the agreement,<sup>112</sup> the Supreme Court of Appeal in *Nedbank Ltd v National Credit Regulator*<sup>113</sup> has recently held that the provisions of section 86(2)<sup>114</sup> would bar the consumer from including that specific agreement in the debt review procedure as soon as a section 129(1)(a) notice<sup>115</sup> has been delivered in respect of that specific agreement.<sup>116</sup> The court indicated that in such event the specific credit agreement in respect of which the section 129(1)(a) notice was delivered can not be subjected to debt review but a comprehensive debt review may still proceed in respect of the debtor's other credit agreement debt in respect of which a section 129(1)(a) notice had not yet been delivered.<sup>117</sup>

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109 See Van Heerden in Scholtz ch 11 and 14 for a detailed discussion of the debt review process.

110 R 1 CR.

111 See s 85 NCA, as discussed hereinafter.

112 See s 86(2) NCA.

113 2011 3 SA 581 (SCA) 590 par 9.

114 S 86(2) NCA provides that an application for debt review may not be made in respect of a particular credit agreement if, at the time of the application the credit provider under that credit agreement has proceeded to take the steps contemplated in s 129 NCA to enforce that agreement.

115 The s 129(1)(a) NCA notice is a letter which a credit provider must send to a defaulting consumer before such credit provider may commence legal proceedings to enforce the agreement.

116 Commentators interpret s 86(2) NCA differently. See eg Boraine & Renke "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005" 2008 *De Jure* 1 9 n186; Van Loggerenberg, Dicker & Malan "Aspects of debt enforcement under the National Credit Act" (Jan/Feb 2008) *De Rebus* 40; Roestoff *et al* "The debt counselling process – closing the loopholes in the National Credit Act 34 of 2005" 2009 *PER* 247 260; Coetzee *The impact of the NCA on civil procedural aspects relating to debt enforcement* (LLM dissertation, UP (2010)) 86. For a detailed discussion of s 86(2) NCA and its interrelation with s 129 NCA, see Van Heerden in Scholtz par 11 3 3 2.

117 *Nedbank v National Credit Regulator supra* par 14.



The application for debt review entails that a completed Form 16 is submitted to the debt counsellor.<sup>118</sup> In addition, all the documents specified in Form 16 must be submitted to the debt counsellor and the debt counsellors prescribed fee of R50.00 must be paid.<sup>119</sup>

After the application for debt review is received by the debt counsellor, he or she must provide the consumer with proof of receipt of the application and deliver a completed Form 17.1 to all credit providers listed in the application and to every registered credit bureau within five business days after receiving the application.<sup>120</sup> The debt counsellor must verify the information as provided by requesting documentary proof from the consumer, contacting the relevant credit provider or employer or any other method of verification.<sup>121</sup>

The consumer who applies for debt review as well as each credit provider listed in the application for debt review has distinct obligations to:<sup>122</sup>

- (a) comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement, and
- (b) participate in good faith<sup>123</sup> in the review and in any negotiations designed to result in responsible debt rearrangement.

Where a credit provider fails to provide a debt counsellor with corrected information within five business days after verification is requested, the debt counsellor may accept the information provided by the consumer as being correct.<sup>124</sup>

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118 R 24(1)(a) & (b) CR. Alternatively, the following information must be provided to the debt counsellor: (a) Personal details, including name, initials, surname, identity number or passport number and date of birth, postal address, physical address and contact details. (b) All income, inclusive of employment income and other sources of income to be specified by the debtor. (c) Monthly expenses, inclusive of but not limited to taxes, unemployment insurance, pension, medical aid, insurance, court orders and others to be specified by the debtor. (d) List of all debts (not only credit agreement debt) disclosing monthly commitment, total balance outstanding, original amount and amount in arrears (if applicable) inclusive of but not limited to home loans, furniture retail, clothing retail, personal loans, credit card, overdraft, educational loans, business loans, car finances and leases, sureties signed and others to be specified by the debtor. (e) Living expenses, inclusive of but not limited to groceries. The aforesaid information must be accompanied by a declaration and undertaking to commit to the debt restructuring, a consent that a credit bureau check may be done and a confirmation that the information is true and correct – r 24(1)(b)(vi)–(viii) CR.

119 S 86(3) NCA read with r 24(1)(c) and (d) CR.

120 S 86(4) NCA and r 24(2)–24(5) CR.

121 R 24(3) CR.

122 S 86(5)(a) and (b) NCA.

123 For a discussion of the good faith requirement see *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 1 SA 374 (WCC).

124 R 24(4) CR.

Within thirty business days after receiving an application for debt review, a debt counsellor is obliged to determine whether the consumer appears to be over-indebted and, if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.<sup>125</sup>

After completion of the assessment the debt counsellor must submit a Form 17.2 to all the affected credit providers and all registered credit bureaux within five business days.<sup>126</sup>

### **3 3 2 Determination**

The assessment by the debt counsellor may lead to the conclusion that:<sup>127</sup>

- (a) the consumer is not over-indebted, or
- (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; or
- (c) the consumer is over-indebted.

#### *3 3 2 1 Determination that Consumer is not Over-Indebted*

If the debt counsellor reasonably concludes that the consumer is not over-indebted, the counsellor must reject the application for debt review.<sup>128</sup> In such instance the consumer, with leave of the magistrate's court, may in terms of section 86(9) apply directly to the magistrate's court for a debt restructuring order contemplated in section 86(7)(c). Such application must be submitted to court on Form 18 within 20 business days after the debt counsellor has provided the consumer with a letter of rejection.<sup>129</sup> The opinion of a debt counsellor as to whether a consumer is over-indebted is thus not decisive and a consumer who differs in opinion on this aspect from a debt counsellor is able to approach a court for a final authoritative determination on the issue.

#### *3 3 2 2 Debtor not yet Over-Indebted but Likely to Experience Problems*

In this instance the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement.<sup>130</sup> If the consumer and each credit provider concerned accept the proposal, the debt counsellor must record the proposal in the form of an order, and if is consented to by the consumer

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125 S 86(6) NCA read with r 24(6) CR.

126 R 24(10) CR.

127 S 86(7) NCA.

128 S 86(7)(a) NCA. This is the situation even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into. The debt counsellor must provide the consumer with a letter of rejection, containing the information prescribed by r 25 CR.

129 R 26 CR.

130 S 86(7)(b) NCA.

and each credit provider concerned, file it as a section 138 consent order.<sup>131</sup>

If no such agreement can be reached the debt counsellor must refer the matter to the magistrate's court with the recommendation regarding debt-restructuring.<sup>132</sup> The magistrate's court must then conduct a hearing and may exercise the powers contained in section 87 of the NCA.<sup>133</sup>

It should be noted that it is only in this specific instance that the NCA provides explicitly for the parties to voluntarily agree on a debt repayment plan which can then, if all credit providers agree, be filed at court as a section 138 consent order. Where a consumer is found to be over-indebted and the debt counsellor approaches the relevant credit providers with suggestions for purposes of reaching a voluntary debt repayment agreement, such negotiations are not statutorily mandated and are viewed as ordinary settlement negotiations outside the ambit of the NCA.<sup>134</sup>

### *3 3 2 3 Consumer is Over-Indebted*

In this instance the debt counsellor may issue a proposal recommending that the magistrate's court make an order rearranging the consumer's (credit agreement) obligations and/or declaring one or more of the consumer's credit agreements reckless as set out in section 86(7)(c) discussed hereinafter.<sup>135</sup>

### ***3 3 3 Court Ordered Debt Rearrangement***

Section 87 of the NCA provides that in those instances where a consumer approaches a court after his application for debt review has been rejected, or in those instances where a debt counsellor refers a recommendation that a debtor be declared over-indebted to court, the magistrate's court is obliged to conduct a hearing.<sup>136</sup>

Having regard to the proposal and information before it and the consumer's financial means, prospects and obligations, the court may then:

- (a) reject the recommendation or application as the case may be; or
- (b) make an order declaring any credit agreement to be reckless and an order contemplated in section 82(2) or (3); or
- (c) an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii); or

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131 S 86(8)(a) NCA.

132 S 86(8)(b) NCA.

133 See the discussion in par 3 3 3 below.

134 See *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) 317 (hereafter *National Credit Regulator v Nedbank* (GNP)).

135 S 86(7)(c) NCA.

136 S 87(1) NCA.

- (d) both orders contemplated above relating to reckless credit and debt rearrangement.<sup>137</sup>

The methods of restructuring or rearranging of the consumer's obligations that may be employed by the court are:<sup>138</sup>

- (a) extending the period of the agreement and reducing the amount of each payment due accordingly;
- (b) postponing during a specified period the dates on which payments are due under the agreement;
- (c) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
- (d) recalculating the consumer's obligations because of contraventions of Part A (unlawful agreements and provisions) or B (disclosure, form and effect) of Chapter 5 or Part A (collection and repayment practices) of Chapter 6.

It thus appears that a court is not empowered by section 86(7)(c)(ii)(aa) to (cc) of the NCA to write off interest.<sup>139</sup> The power of the court to recalculate the consumer's obligations in accordance with section 86(7)(c)(ii)(dd) may, however, have the effect of reducing the amount owed.

Consumers may also raise the issue of over-indebtedness in court after a credit provider has taken steps to enforce a credit agreement in respect of which the consumer is in default. Section 85 provides that despite any provision of law or agreement to the contrary, in any proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may:

- (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or
- (b) declare that the consumer is over-indebted, as determined in accordance with Part D of Chapter 4 of the NCA, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

### **3 3 4 Termination of Debt Review**

No provision is made for the automatic lapsing of debt review proceedings. Consequently, it can only be terminated in accordance with the provisions of section 86(10) of the NCA which provides that if a consumer is in default under a credit agreement that is being reviewed in terms of section 86, the credit provider in respect of that agreement

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<sup>137</sup> S 87(1) NCA.

<sup>138</sup> S 86(7)(c)(ii)(aa)–(dd) NCA.

<sup>139</sup> Van Heerden in Scholtz par 11. See further *SA Taxi Securitisation (Pty) Ltd v Lennard* 2012 2 SA 456 (ECG).

may give notice to terminate the review in the prescribed manner.<sup>140</sup> Such notice must be given to the consumer, the debt counsellor and the NCR at any time at least 60 business days after the date on which the consumer applied for the debt review.

A number of divergent decisions were recently given on the question as to whether a debt review can be terminated once a debt counsellor (having made a determination that a consumer is indeed over-indebted) has referred the matter to a magistrate's court, but before the matter is heard by the court in terms of section 87.<sup>141</sup> The Supreme Court of Appeal finally clarified the issue in *Collett v Firstrand Bank Ltd*.<sup>142</sup> It was held that a referral of a debt review to the magistrate's court does not bar a credit provider from terminating the debt review. A credit provider may therefore terminate the process in respect of a specific agreement as soon as 60 business days have lapsed, irrespective of whether the matter is pending in court.<sup>143</sup>

However, this does not necessarily mean that the debtor will not have a further opportunity at debt review in the same matter. The reason is that section 86(11) of the NCA provides that if a credit provider who has given notice to terminate a debt review as aforesaid, proceeds to enforce that agreement in terms of Part C of Chapter 6 of the NCA, the magistrate's court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances. It has been held that the appropriate court to approach for a resumption order in terms of section 86(11) is the enforcement court and that section 86(11) should be read to refer to both high courts and magistrates' courts.<sup>144</sup> Case law also makes it clear that a lack of good faith cooperation in the debt review process is a factor to be considered during an application for a resumption order in terms of section 86(11) of the NCA.<sup>145</sup>

### **3 3 5 Clearance Certificate**

A debt counsellor must issue a clearance certificate in Form 19 if the consumer has fully satisfied all the debt obligations under every credit agreement that was subject to the debt rearrangement order or agreement in accordance with that order or agreement.<sup>146</sup>

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140 No form has as yet been prescribed in the regulations to the NCA.

141 See Van Heerden & Coetzee "Perspectives on the termination of debt review in terms of section 86(10) of the National Credit Act 34 of 2005" 2011 *PER* 37 for a discussion of cases decided prior to *Collett v Firstrand Bank Ltd* 2011 4 SA 508 (SCA). See also Van Heerden & Coetzee "Wesbank v Deon Winston Papier and the National Credit Regulator" 2011 *De Jure* 463.

142 Par 6 and 14.

143 *Ibid*.

144 *Idem* par 17.

145 *Ibid*. See also *Mercedes Benz v Dunga supra*.

146 R 27 CR.

### **3 3 6 Effect of (Pending) Debt Review, Debt Rearrangement Order or Debt Rearrangement Agreement**

#### *3 3 6 1 Effect on Consumer*

A consumer who has filed an application for debt review in terms of section 86(1) of the NCA or who has alleged in court that he or she is over-indebted, is prohibited from incurring any further charges under a credit facility or entering into any further credit agreement with any credit provider.<sup>147</sup> This prohibition applies until:

- (a) the debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) has expired without the consumer having so applied;<sup>148</sup>
- (b) the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application;<sup>149</sup> or
- (c) a court having made an order or the consumer and the credit providers having made an agreement re-arranging the consumer's obligations; all the consumer's obligations under the credit agreements as re-arranged are fulfilled unless the consumer fulfilled the obligations by way of a consolidation agreement.<sup>150</sup>

It is thus possible that a consumer may effectively be removed from the credit market for a considerable period of time. If a consumer applies for or enters into a credit agreement contrary to this section, the provisions of Part D of Chapter 4<sup>151</sup> of the NCA will never apply to that agreement.<sup>152</sup> The implication of this provision appears to be that a consumer who, it is submitted, on own initiative enters into such an agreement will not be able to raise the issues of over-indebtedness or reckless credit and will thus not be able to access the debt relief measures afforded in respect thereof.

#### *3 3 6 2 Effect on Credit Provider*

Debt review of the consumer's credit agreement obligations as well as the subsequent debt re-arrangement order or agreement filed as a section 138 consent order have severe implications for a credit provider. Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85 or notice in terms of section 86(4)(b)(i) of the NCA, may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement. This prohibition applies until:<sup>153</sup>

- (a) the consumer is in default under the credit agreement, and

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147 S 88(1) NCA.

148 S 88(1)(a) NCA.

149 S 88(1)(b) NCA.

150 S 88(1)(c) NCA.

151 Thus, the provisions relating to over-indebtedness and reckless credit.

152 S 88(5) NCA.

153 S 88(3)(a) & (b)(i) & (ii) NCA.

- (b) one of the following has occurred:
  - (i) an event contemplated in section 88(1)(a) to (c) as indicated above; or
  - (ii) the consumer defaults on any obligations in terms of re-arrangement agreed between the consumer and credit providers or ordered by the court or the Tribunal.

If a credit provider enters into a credit agreement, other than a consolidation agreement<sup>154</sup> contemplated in section 88, with a consumer who has applied for debt re-arrangement and that re-arrangement still subsists, all or part of that new credit agreement may be declared to be reckless credit irrespective of whether the circumstances for reckless credit as set out in section 80 apply.<sup>155</sup> Therefore, it appears that in those instances where the initiative to enter into a credit agreement contrary to the provisions of section 88 emanated from the credit provider, the specific agreement will be deemed to be reckless *per se*.

It should further be noted that it has been held that compulsory sequestration proceedings are not enforcement proceedings as envisaged by section 88(3) of the NCA and thus it will still be open to a creditor to apply for sequestration of a debtor even if the debtor is subject to a debt restructuring order.<sup>156</sup> It has further been held that where a debtor defaults on a debt restructuring order in terms of section 86(7)(c) of the NCA, the creditor may immediately proceed with enforcement.<sup>157</sup>

### 3 4 General Remarks

Although one of the aims of the NCA is to “to provide debt relief through debt re-organisation in cases of over-indebtedness”, this aim is still subject to the principle of “satisfaction by the consumer of *all* responsible financial obligations”.<sup>158</sup> The debt review procedure therefore does not offer the consumer the opportunity to obtain a discharge from pre-existing indebtedness. Moreover, no time limit is prescribed in respect of the payment plan and a consumer can be bound to the plan for an excessively long period as opposed to sequestration where definite time periods are set.<sup>159</sup>

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154 “Consolidation agreement” is not defined in the NCA.

155 S 88(4) NCA.

156 *Naidoo v ABSA Bank Ltd* 2010 4 SA 597 (SCA). See further the discussion in par 4 10 below.

157 *Firststrand Bank Ltd v Fillis* 2010 6 SA 565 (ECP).

158 See the preamble to the NCA and s 3(g) NCA. In this regard the Supreme Court of Appeal in *Collett v Firststrand Bank Ltd supra* par 10 recently stated that “the purpose of the debt review is not to relieve the consumer of his obligations but to achieve either a voluntary debt re-arrangement or a debt re-arrangement by the Magistrate’s Court”.

159 In this regard Johnson & Meyerman *Insolvency Systems in South Africa – Strengthening the Regulatory Framework* (a publication produced for review by the United States Agency for International Development for Chemonics International Inc – December 2010) 25 state that the NCA, despite its aim to assist over-indebted consumers, only “perpetuates the over-indebtedness by not providing a simple debtor discharge mechanism”.

The debt review procedure places no monetary limitation on the total outstanding debt of the consumer, but the NCA only applies to credit agreements as defined in section 8 and debt that does not qualify as such will thus be excluded from the debt review procedure.<sup>160</sup> Secured credit agreements<sup>161</sup> are included in the review, but the NCA does not provide any preference as to the repayment thereof.

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160 These may include delictual claims, clothing accounts, professional services and municipal accounts where no interest is charged.

161 Secured credit agreements would include pawn transactions, instalment agreements, mortgage agreements and secured loans – see s 1 NCA for the definitions of these credit agreements.