MAGISTRATES' COURTS JUDICIARY

JOHANNESBURG

PRACTICE GUIDELINES (PART B) - THE NATIONAL CREDIT ACT 34 OF 2005 READ WITH THE DEBT REVIEW COURT APPLICATION GUIDELINES MARCH 2016

Johannesburg Magistrates' Court, Civil Section

These Practice Guidelines highlights the timelines for the filing of the Debt Review Applications in the Magistrates' Court Johannesburg

With effect from 8 July 2022

1. Definitions

In terms of this legislation the "Act" means the National Credit Act 34 of 2005 as amended;

"Clerk of the Court" means a Clerk of the Court appointed in terms of Section 13 of the Magistrates' Courts At, 1944 (Act 32 of 1944) and includes assistant Clerk of the Court so appointed;

"Court" means a Magistrates' Court established in terms of the Magistrates' Courts Act 32 of 1944 having jurisdiction over a Consumer by virtue of such Consumer's residence or place of business or where he or she is employed irrespective of the monetary value involved;

"Court days" means that a Saturday, Sunday or official public holiday, unless the contrary appears, shall not, be reckoned or calculated as part of any period calculated in the debt review process, and this applies to any period declared *dies non* which means a day on which no legal business can be done, or which does not count for legal purposes;

"Court order" means an order by the Magistrate's Court as contemplated in Section 87(1) of the Act;

"Credit provider" means a credit provider as defined in Section 1 of the Act;

"Days" – (a) means business days as defined in the Act;

(b) means Court days as defined in the Magistrates' Court Act 32 of 1944 where reference is made to the Magistrates' Court Act;

"Debt Review" means the debt rescheduling applications referred to Court in one of the following ways:

(a) a consent order in terms of Section 86(7)(b) of the Act read with Section 86(8)(a) of the Act, Regulation 24(9) and Section 138(1) of the Act; or

(b) an application in terms of Section 86(7)(b) of the Act read with Section 86(8((b) and Section 87(1) of the Act; or

(c) an application in terms of Section 86(7)(c) of the Act read with Sections 86(8)(b) and 87(1) of the Act;

"Deliver" means, in respect of all debt review documents, proposals, notices and written submissions to hand deliver or by registered post, facsimile or e-mail when so agreed in writing between the respective parties and "delivered" and "delivering" has a corresponding meaning;

"Deliver to credit bureau by debt counsellor" means submitting the required information to the National Credit Regulator's Debt Help System as required in the condition of registration of debt counsellors by the National Credit Regulator;

"Founding Affidavit" means a written statement made by the debt counsellor under oath or affirmation for use as evidence in an application by a debt counsellor in terms of Rule 55 of the Magistrates' Court Rules in which relief is sought against the credit providers – who are cited as respondents – in terms of Section 86 of the Act;

"Confirmatory Affidavit" means a written statement made by the consumer under oath or affirmation which confirms all the details that fall within the personal knowledge of the consumer as contemplated in Regulation 2(2)(a) of Government Notice No. R362 of 10 May 2012. "Consumer Confirmatory Affidavit" has a corresponding meaning.

2. PURPOSE OF THIS DOCUMENT

Although the Debt Review process is governed by the National Credit Act it is silent on the legal process to be followed. This was evident in Declaratory Order granted in *National Credit Regulator v Nedbank and others.*[1] This has opened the doors for Debt Counsellors, Credit Providers and Magistrates to have different and often opposing views and practices on how Debt Review Applications should be made. These different interpretations very often lead to

[1] *National Credit Regulator v Nedbank and others* 2010 (6) SA 298 (GNP).

process delays, extra legal costs for the Consumer, and a delay in providing the much needed assistance required by Consumers.

While this document cannot create, take away or alter any of the Consumer, Credit Provider or Debt Counsellor's rights and obligations as determined by the law, it does, however, seek to facilitate uniformity of the Debt Review Applications, expedite the restructuring of debt, and reduce end balance differences where possible, as envisaged by the National Credit Regulator in its 2016 Debt Review Court Application's Guidelines.[2]

3. DEBT REVIEW TIMELINES

(a) In terms of the Act, a Consumer will only continue to enjoy the protection of the Act if the application for Debt Review is filed in a Court or National Consumer Tribunal within SIXY (60) days after the Consumer has applied for Debt Review. In terms of the Act, Credit Providers may terminate a credit agreement after the expiry of SIXY (60) days unless the matter has been filed at Court. Although the Consumer remains protected if he or she is not in arrears in terms of the credit agreement, a Credit Provider may, after the expiry of SIXTY (60) days, terminate a credit agreement from Debt Review unless the Debt Counsellors has filed the Debt Review matter in a Court. The effect of this is that the timeline for Debt Counsellors to finalise the Debt Review Application is constantly under pressure. This right (Credit Providers' right to terminate a credit agreement) is, however, also balanced in Section 86(11) of the Act where the Court may order the Debt Review to resume (i.e. the credit agreement is unlawfully terminated and then again included in the Debt Review).

(b) Section 86 requires the Debt Counsellors to approach the Court within a SIXTY (60) day period **but** it is important to note that no time limit is specified in the Act within which the Debt Counsellor must make an application to the Magistrates' Court. The Act also does not require the process of debt restructuring to be completed within the period of SIXTY (60) days after the application for Debt Review was made. In other words, the Act effectively sets a SIXTY (60) day period deadline for Debt Counsellors to file Debt Review Applications at Court. All parties are, however, required to cooperate to complete the process within a reasonable time period.

(c) In terms of the amendment of the Act a Credit Provider may, after the expiry of SIXTY (60) days, terminate a credit agreement from Debt Review unless the Debt Counsellor has filed the Debt Review matter with the Court as stated above.

[2] National Credit Regulator *Debt Review Court Applications Guidelines* 001/2016 at 4.

(d) Where a Credit Provider did not comply with its obligations in terms of Section 86(5) to enable the Debt Counsellor to file the matter with Court timeously but proceeded to terminate a credit agreement, after the expiry of SIXTY (60) days from Debt Review the Court in which the terminated credit agreement is being enforced has the power to reinstate the credit agreement in the Debt Review.

(e) Where the process is delayed by the Consumer, the protection envisaged by Section 86(10) of the Act lapses after the expiry of SIXTY (60) days unless the Debt Counsellor has filed the Debt Review Application with the Court. This prevents Consumers from delaying the Debt Review process.

(f) Although in the normal course of the application process a respondent cannot be obliged to file an Affidavit, it is necessary for the Consumer to file a Confirmatory Affidavit in Debt Review Applications as the information contained in the Founding Affidavit relating to the Consumer's financial affairs does not fall within the Debt Counsellor's personal knowledge. Consumers should be encouraged to file their Confirmatory Affidavits as soon as possible.

(g) Proper construction of the Act, the Regulations and the NCR Guidelines suggests that in terms of the Act the Debt Counsellor or Consumer under paragraph 24 of the Regulations has to carry out certain activities in preparation for Debt Review Application and remarks that "(9) If the process is not delayed by late responses by Credit Providers, the Debt Counsellor or Consumer represented by their attorney (where applicable) is left with TEN (10) to FIFTEEN (15) days **to prepare the Debt Review Application, sign the application, commission the Affidavit (Founding Affidavit) and to serve and file the application before the SIXTY (60) day deadline in order to ensure that the Consumer remains protected**."[3]

4. BREAK-DOWN OF THE 60 DAY PERIOD DEADLINE - TIMELINES TO BE COMPLIED WITH BEFORE APPLICATION IS FILED

The following timelines, as provided for by the National Credit Regulator's Guidelines (Debt Review Court Applications)[4] as well as National Credit Act Regulations paragraph 24 must be taken into account:

4.1 Within FIVE (5) days of acceptance of application notify all Credit Providers and request a Certificate of Balance ("COB") by sending a Form 17.1.

[3] National Credit Regulator's *Guidelines* 001/2016 at 10.
[4] National Credit Regulator's *Guidelines* 001/2026 at 9 – 10.

4.2 The Credit Providers must provide the COB to the DEBT Counsellor within FIVE (5) days of receipt of Form 17.1. ["In the event that a Credit Provider fails to provide a Debt Counsellor with corrected information within five business days of such verification being requested, the Debt Counsellor may accept the information provided by the consumer as being correct." National Credit Act Regulations paragraph 24(4)].

4.3 On receipt of the COB the Debt Counsellor has to update the balances on his or her system.

4.4 Within THIRTY (30) days after the signing of the Form 16, the Debt Counsellor must make a determination in terms of Section 86 of the Act and notify all Credit Providers by sending a Form 17.2(b). If all COB's are received on time the Form 17.2(b) can be submitted FIFTEEN (15) days after date of Form 17.1.

4.5 FIFTEEN (15) days after the Form 17.1 date the Debt Counsellor submits repayment proposals to Credit Providers and they have TEN (10) days to reply.

4.6 Credit Providers can reply by either accepting the proposal, declining the proposal, requesting a rework of the proposal or issuing a counter proposal.

4.7 If all responses are received on time from all Credit Providers the Debt Counsellor may be in position on day THIRTY (30) to submit revised proposals to all Credit Providers and request a reply within SEVEN (7) days. Credit Providers may –

(a) not respond;

(b) accept;

(c) reject, with reasons; or

(d) submit a counter-proposal which may lead to a repeat of the process.

4.8 If all Credit Providers reply within SEVEN (7) days then the Debt Counsellor may be in position on day FORTY FIVE (45) to commence with the preparation of the Debt Review Court Application.

4.9 If the process is not delayed by late responses by Credit Providers, the Debt Counsellor or Consumer represented by their attorney (where applicable) is left with TEN (10) to FIFTEEN (15) days **to prepare the Debt Review Application, sign the application, commission the Affidavit (Founding Affidavit) and to serve and file the application before the SITXY (60) day deadline in order to ensure that the Consumer remains protected**.

NB: The National Credit Act does not authorise Debt Counsellor(s) to instruct the Consumer to effect some payment arrangements on their own without a Court or while the Debt Review

Application is still appearing on the Court roll and the Court has not yet made any debt re-structuring order or any other order as required by the Act and while some documents and including the Confirmatory Affidavit remain outstanding.