

Unintentionally Trapped by Debt Review: Procedural Inadequacies in the *National Credit Act 34* of 2005 Relating to Withdrawal from the Debt Review Process

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Abstract

The debt review procedure in terms of the *National Credit Act 34* of 2005 is functioning relatively well and benefits both consumers and credit providers. This is despite its somewhat scarce procedural prescriptions, which result in difficulties from time to time. In this respect, a recent procedural challenge has appeared, namely that of consumers who voluntarily enter the debt procedure, but who later want to withdraw therefrom – thus, before the procedure has reached its ordinary conclusion, on the basis that their financial situation has improved to the extent that they are no longer over-indebted. The fact that the *National Credit Act* does not provide for such an exit has led to procedural uncertainty and diverging court decisions. In this article, the relevant legislative provisions (or lack thereof), court and National Consumer Tribunal judgements, regulations, forms, guidelines and explanatory notes are considered to determine whether it is competent for consumers to withdraw from the debt review procedure before it has reached its normal conclusion. Not only provisions in the *National Credit Act* are considered, but also general civil procedure to contemplate all possibilities in searching for an answer to this procedural difficulty.

Keywords

Debt review; withdrawal from debt review; withdrawal guidelines; explanatory note to withdrawal guidelines.

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1 Introduction

One of the hallmarks of the *National Credit Act*¹ is the dedicated debt relief measures it has introduced for South African consumers. Notably, the Act has become the first piece of credit legislation that has introduced comprehensive provisions (in Part D of Chapter 4) aimed at preventing the extension of reckless credit and alleviating consumer over-indebtedness. A consumer is over-indebted for the purposes of the NCA,²

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

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

Specifically in the context of assisting over-indebted natural person consumers, the NCA has introduced the novel procedure of debt review, which is a process aimed at reviewing the consumer's financial situation conducted by a person registered as a debt-counsellor under the Act.³ The purpose of such debt review is, briefly put, to determine whether the consumer is indeed over-indebted and to have his credit agreement debt restructured by a court with the aim of providing debt alleviation, while also

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¹ *National Credit Act* 34 of 2005 (hereafter the NCA or the Act).

² Section 79 of the NCA. S 78(3) provides that "financial means, prospects and obligations" for the purposes of Part D of Chapter 4 "with respect to a consumer or prospective consumer, includes – (a) income, or any right to receive income, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective consumer receives, has a right to receive, or holds in trust for another person; (b) the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily- (i) share their respective financial means: and (ii) mutually bear their respective financial obligations; and (c) if the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the reasonably estimated future revenue flow from that business purpose."

³ See ss 85, 86, 87 and 88 of the Act regarding debt review and ss 43 and 44 regarding the office of debt counsellor.

generally ensuring that the consumer attends to the eventual satisfaction of his credit agreement debt.⁴

While there was initial scepticism about the viability and soundness of the debt review process and although (from a procedural perspective) there were various challenges in streamlining the process, it can be concluded that the debt review process in general seems to be working relatively well, has assisted many consumers in addressing their debt burden, and has led to sizeable collections on behalf of creditors every month.⁵ However, a new procedural challenge has surfaced in recent times, namely that of over-indebted consumers who enter the debt review process to obtain debt relief only to find, after some time, that they are actually shackled by some of the constraints of the process and want to exit the process but are unable to do so.

The purpose of this contribution is to briefly consider the debt review process and the effect of debt review on the consumer. Specific consideration is given to the processes the NCA avails to consumers to exit the debt review process. Recent case law that reveals challenges experienced by consumers in exiting the debt review process, particularly those consumers who allege that their financial position has improved and that they are no longer over-indebted, is considered and recommendations are made regarding how to address the problem at hand. It is to be noted that this discussion deals only with voluntary debt review in terms of section 86 of the NCA and not with court-ordered debt review in terms of section 85 or with the debt intervention procedure introduced by the 2019 *National Credit Amendment Act*.⁶ Also, it does not deal with the withdrawal by a debt counsellor from debt review or with the termination of debt review by a credit

⁴ Sections 85-87 read with s 3(d) of the Act. Also see *Standard Bank of South Africa Ltd v Newman* (WC) (unreported) case number 27771/2010 of 15 April 2011 para 11; *Standard Bank of SA Ltd v Jikeka* (WCC) (unreported) case number 3430/2010 of 9 June 2011 paras 3-4; *Absa Bank Ltd v Walker* (WC) (unreported) case number 2307/14 of 17 June 2014.

⁵ See Van Heerden "Over-indebtedness and Reckless Lending" para 11.3.3.2(m) for an overview of the initial procedural challenges posed by the debt review process. Also see *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) (hereafter the *National Credit Regulator v Nedbank* (GNP) case); *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) (hereafter the *Nedbank v National Credit Regulator* (SCA) case). In NCR 2017/2018 <https://ncr.org.za/documents/pages/Annual%20Reports/NCR%20Annual%20Report%202017-18.pdf> the National Credit Regulator (NCR) indicated that there were 1 325 registered debt counsellors and that in the period under review (2017/2018) R10.16 billion were collected for credit providers via debt counselling bringing the total amount collected, since the inception of the debt counselling process in 2007, to R44.28 billion.

⁶ *National Credit Amendment Act 7 of 2019* (hereafter 2019 Amendment Act).

provider, save to mention these measures where necessary for the purposes of context.

2 Overview of the debt review process

2.1 Background

To contextualise the discussion that follows, some observations regarding the voluntary debt review process, in terms of section 86 read with regulation 24,⁷ is necessary. At the outset, it is important to bear in mind what the legislature sought to achieve with the introduction of voluntary debt review as this, interpreted against the purposes of the NCA, will serve as the prism through which to view the main question of whether consumers should be allowed to exit a debt review *before* the debt review process has been finalised and they have complied with the requirements for a clearance certificate as discussed below.

Section 3 of the *NCA* states that the purposes of the Act

... are 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.

This is done by means of various measures listed in section 3, which among others include⁸

... promoting the development of a credit market that is accessible to all South Africans,⁹ ... promoting responsibility in the credit market by (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers;¹⁰ ... promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers ...

and¹¹

... addressing and resolving 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.

In the *Memorandum on the Objects on the National Credit Bill 2005* it was indicated that the focus of the legislation should be shifted from price control to protection against over-indebtedness and to the regulation of predatory

⁷ GN R489 in GG 28864 of 31 May 2006 as amended (hereinafter the regulations).

⁸ Section 3(d) of the Act.

⁹ Section 3(a) of the Act.

¹⁰ Section 3(c)(i) of the Act.

¹¹ Section 3(g) of the Act.

lending practices.¹² To give effect to the NCA's consumer protection purpose of addressing and resolving over-indebtedness, as stated in section 3(g), the debt review process was introduced, which provides for debt re-organisation in cases of over-indebtedness.¹³ However, the Act does not strive to address over-indebtedness by providing a discharge of debt to over-indebted consumers. In this regard the Supreme Court of Appeal in *Collett v FirstRand Bank Ltd* stated that:¹⁴

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 magistrates' (sic) court.

2.2 Debt review in terms of section 86

In terms of section 86 of the NCA, a natural person consumer who is experiencing difficulty or inability in paying his credit agreement debt can *voluntarily* apply to a debt counsellor for debt review.¹⁵ All parties to the debt review process (consumer, credit provider and debt counsellor) must participate in the process in good faith.¹⁶ The debt counsellor is obliged¹⁷ to make a determination of whether the consumer is over-indebted or likely to become over-indebted or not over-indebted.¹⁸ If the debt counsellor finds the consumer not to be over-indebted (which is highly unlikely) the consumer is at liberty to approach a court on application to pronounce on whether the consumer is over-indebted or not.¹⁹ If the debt counsellor determines that the consumer is not over-indebted but likely to become over-indebted, the debt counsellor may submit a debt restructuring proposal to the consumer's credit providers.²⁰ If all the credit providers agree to the

¹² *Memorandum on the Objects of the National Credit Bill*, 2005 3.

¹³ See the preamble to the NCA. Also see *FirstRand Bank Ltd v Olivier* 2009 3 SA 353 (SE) 357 and *Otto* 2009 SA *Merc LJ* 272 for a discussion of the case. See further *Standard Bank of SA Ltd v Panayiotts* 2009 3 SA 363 (W) 375.

¹⁴ *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) 514. Also see *Ex parte Ford* 2009 3 SA 376 (WCC) 383.

¹⁵ Section 86(1) of the Act.

¹⁶ Section 86(5) of the Act. Also see the discussion on good faith in debt review proceedings by Van Heerden "Over-indebtedness and Reckless Lending" para 11.3 and the cases cited there.

¹⁷ Section 86(7)(a) and s 86(9) of the Act read with reg 25 and reg 26 and s 88(1)(a) and (b).

¹⁸ Section 86(6) of the Act.

¹⁹ Section 86(9) of the Act read with reg 26 and Form 18. Also see s 88(1)(a) and (b). Notably the court, in terms of s 88(1)(b), can make an order declaring a consumer not over-indebted where the consumer approaches a court for a declaration of over-indebtedness or where the debt counsellor after making a determination in terms of s 86(6) refers a matter to court for a declaration of over-indebtedness and debt restructuring.

²⁰ Although s 86(6) of the Act indicates that the debt counsellor can approach the creditors with such a proposal, if the consumer is not yet over-indebted but

proposal it is referred to court to be made a consent order.²¹ If not all the credit providers agree, the proposal has to be referred to court with a "recommendation" that the court formally declare the consumer over-indebted and restructure his debt in accordance with the repayment proposal.²² In practice, such a debt restructuring proposal is also made to the credit providers of a consumer where the debt counsellor determines that the consumer is indeed over-indebted and, if not agreed to by all the credit providers, the proposal must be referred to court in accordance with section 86(7)(c).

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

It is important to note that the debt counsellor does not have any power to "declare" a consumer over-indebted, but is merely obliged to make a "determination" regarding the consumer's over-indebtedness and to refer it to the court with a recommendation (a proposal) on how the debt should be restructured. It is then the task of the court to conduct a hearing and formally declare the consumer over-indebted and afford him debt relief by restructuring his credit agreement debt (unless a debt rearrangement order is made by consent as contemplated in section 86(8)(a) read with section 138, in which event a full hearing is not conducted).²³ The court that is approached for such debt restructuring will be a Magistrate's Court and it is to be noted that the court is not obliged to declare the consumer over-indebted and make a restructuring order, but that it has a discretion – to be

nevertheless experiencing or likely to experience problems in future to repay his credit agreement debt, it has become practice for debt counsellors to always first present the debt restructuring proposal to the consumer's credit providers with the aim of reaching agreement thereon.

²¹ Section 86(8)(b) read with s 87 of the Act and s 138. Reg 24(9) stipulates that any arrangement made by the debt counsellor with credit providers must be reduced to writing and signed by all credit providers mentioned, as well as by the debt counsellor and the consumer. Also see *Nedbank Ltd v National Credit Regulator* (SCA) para 29.

²² Section 86(7)(c) of the Act.

²³ Section 87 of the Act. For a detailed discussion of all aspects of the debt review process and applicable case law see Van Heerden "Over-indebtedness and Reckless Lending" paras 11.3-11.5.

exercised judicially – to do so.²⁴ Section 88(1)(b) confirms that a court is not obliged to declare a consumer over-indebted and can also declare a consumer "not over-indebted" if it appears from the facts presented to the court (either by the consumer himself in terms of section 86(9) or via a restructuring application in terms of section 86(7)(c)) that the consumer is indeed not over-indebted as contemplated by section 79 of the NCA. The Magistrate's Court's jurisdiction in the context of debt restructuring further entails that even where, after a hearing, a court is satisfied that the consumer is indeed over-indebted, it still has the discretion as to whether to grant a debt restructuring on the terms proposed by the debt counsellor or on other (more appropriate) terms, or the court may even reject the proposal if it is not financially viable.²⁵

It is to be noted that the Act does not prescribe a specific time period within which the debt review process, comprising the three stages referred to above, must be finalised. Generally, the initial process before the debt counsellor should be finished within 60 days from the date of the debt review application, at which stage the matter should be referred to court – either for a consent order or for the court to consider and grant a debt restructuring order.²⁶ Depending on the nature and amount of the credit agreement debt, the court can declare the consumer over-indebted and a debt restructuring order (either by consent or pursuant to a recommendation in terms of section 86(7)) as alluded to above can be issued for the repayment of the debt over a period as agreed between the consumer and his credit providers or as otherwise ordered by the court. This period can range from a couple of months to a couple of years.²⁷

In *Nedbank v National Credit Regulator*²⁸ it was held that a debt counsellor as a statutory functionary is obliged, consequent to reviewing a consumer's debt in terms of section 86, to refer a proposal to the Magistrate's Court to make certain orders, failing which he has not complied with his duty as a debt counsellor. However, in practice it appears that some debt counsellors enter into voluntary debt rearrangement agreements on behalf of the

²⁴ *National Credit Regulator v Nedbank* (GNP) case.

²⁵ Section 86(7)(c) read with s 88(1)(b) of the Act.

²⁶ Where a debt review application before a debt counsellor exceeds such a time period, without having been referred to court, a credit provider may terminate the debt review process in accordance with s 86(10) of the Act. Provision is also made in s 86(11) for a terminated debt review to resume on any conditions that an enforcement court deems just.

²⁷ See the "Repayment Term Extension Limits" in Annexure D to NCR 2015 <https://ncr.org.za/documents/pages/circulars/jan2015/Debt%20Review%20Task%20Team%20Agreements.pdf>.

²⁸ *Nedbank Ltd v National Credit Regulator* (SCA).

consumer without referring the matter to court for a consent order, and that the consumer then continues to pay in terms of that informal voluntary arrangement.²⁹

Applying for debt review in terms of section 86 has a number of consequences: a Form 17.1³⁰ must be sent out, which informs the credit providers of the application for debt review, and the consumer's name gets listed with credit bureaus when the debt counsellor accepts his debt review application.³¹ After the determination regarding the consumer's state of indebtedness is completed, a Form 17.2 is sent out to credit providers and credit bureaus, updating them on the progress with the debt review.³² Once the consumer's initial application for debt review is received by the debt counsellor, a moratorium on the enforcement of the agreement through a judicial process kicks in by virtue of the provisions of section 88(3) read with section 86(4)(b)(i) and Form 17.1 of the Act.³³ This moratorium continues to apply when the debt counsellor, as he is supposed to do, refers a debt rearrangement proposal to court and the court subsequently makes a restructuring/rearrangement order. When such an order is made, the moratorium remains in place as long as the consumer continues to pay in

²⁹ See the cases discussed in 7 below for examples.

³⁰ Form 17.1 advises the credit providers that the consumer has applied for debt review and requires the credit providers, within 5 days of receipt of the said form, to list the consumer as having applied for debt review.

³¹ Section 86(4)(b) of the Act provides that "on receipt of an application for debt review the debt counsellor must- (a) provide the consumer with proof of receipt of the application; (b) notify, in the prescribed manner and form- (i) all credit providers that are listed in the application; and (ii) every registered credit bureau."

³² Form 17.2 is a form that advises the credit providers and credit bureaus that

- a. the consumer's debt review application was rejected; or
- b. the consumer's application for debt review was successful and his debt obligations are in the process of being restructured; or
- c. his debt obligations have been restructured and a court/Tribunal order has been issued in a specific magistrates court.

³³ Section 88(3) of the Act provides that "[s]ubject 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), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until- (a) the consumer is in default under the credit agreement; and (b) one of the following has occurred: (i) An event contemplated in subsection (1)(a) through (c); or (ii) the consumer defaults on any obligation in terms of a debt re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal" (Emphasis added). It should be noted that at first glance, s 88(3)(b)(ii) appears to create the impression that a debt rearrangement between the consumer and his credit providers need not be formalised by a court order. However, it is clear from s 86(7)(b) read with s 138 of the Act that such an agreement has to be formalised as a consent order and that this is the interpretation that should also be afforded to s 88(3)(b)(ii). The legislature probably wants only to distinguish between voluntary debt rearrangements as per s 86(7)(b) and court ordered rearrangements as per s 86(7)(c).

accordance with the debt restructuring order.³⁴ The idea is that the over-indebted consumer is afforded some "breathing space" to repay his credit agreement debt over a longer period and on other terms than originally dictated by the credit agreement between the parties, without having to worry that his credit providers will institute debt enforcement proceedings. However, the debt review process does not offer any discharge of the consumer's credit agreement debt, because it is a measure that seeks to enable him to eventually repay all such credit agreement debt.³⁵

The fact that credit providers are notified when a consumer applies to a debt counsellor ensures that the credit providers observe the moratorium on enforcement imposed by section 88(3) and the consumer is protected against debt enforcement pertaining to the agreements that are being reviewed. However, the purpose of debt review will be frustrated if the consumer is allowed to carry on concluding new (reckless) credit agreements that can aggravate his over-indebtedness. Consequently, while the consumer is under debt review before the debt counsellor and also later when he is subject to a debt restructuring order, section 88(1) forbids him from entering into any new credit agreements.³⁶ This bar against taking up new credit kicks in when the consumer "has filed an application in terms of section 86(1)", which can be construed to mean that it applies from the moment that the consumer files his application for debt review with the debt counsellor and thus even before the Form 17.1 notice is sent out to the credit providers and credit bureaus.

The NCA further provides that a consumer who entered the debt review process and whose debts have been successfully "re-arranged"

³⁴ Section 88(1) and (3) of the Act.

³⁵ Section 3(g) of the Act. Also see Otto 2010 *TSAR* 399; Borraine, Van Heerden and Roestoff 2012 *De Jure* 102.

³⁶ Section 88(1) of the Act provides that "[a] consumer who has filed an application in terms of section 86(1), or who has alleged in a court that the consumer is over-indebted, must not incur any further charges under a credit facility or enter into any further credit agreement, other than a consolidation agreement, with any credit provider until one of the following events has occurred: (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; (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; or (c) a court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreement as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement". If the consumer does manage to enter into such new credit agreement whilst being under debt review, s 88(4) provides that he will not be able to later raise the argument that the new credit was extended to him recklessly.

(restructured) in terms of Part D of Chapter 4 can be granted a clearance certificate in certain circumstances as discussed below. Such a certificate then serves to facilitate the consumer's exit from the "completed" debt review process.

3 Clearance certificate

3.1 Provisions of section 71 prior to amendment by the National Credit Amendment Act 19 of 2014

Initially, section 71(1) provided that a consumer whose debts had been rearranged under Part D of Chapter 4 of the NCA could apply to a debt counsellor for a "clearance certificate".³⁷ It was required that a debt counsellor who received an application for a clearance certificate had to investigate the circumstances of the particular debt rearrangement. The debt counsellor was then required to issue a clearance certificate in the prescribed form³⁸ if the consumer had *fully satisfied* all the obligations under every credit agreement that was subject to the debt rearrangement order or agreement, in accordance with that order or agreement.³⁹ If this condition was not met, the debt counsellor was obliged to refuse to issue a clearance certificate.⁴⁰

If the debt counsellor refused to issue a clearance certificate, where the conditions for such a certificate had been met, the consumer could apply to the National Consumer Tribunal⁴¹ to review the debt counsellor's decision. If satisfied that the consumer was entitled to such an order, the Tribunal could order the debt counsellor to issue a clearance certificate to the consumer.⁴² The consumer who obtained a clearance certificate could then file a certified copy of such a certificate with the national credit register⁴³ or

³⁷ The concept "clearance certificate" is not defined in the Act or Regulations.

³⁸ Form 19 as prescribed in the Regulations. Form 19 is a standard form certifying that the consumer has discharged all his obligations in terms of the debt re-arrangement order granted by the court and listing the specific debts that were included under the rearrangement order and which have been settled in full.

³⁹ Section 71(2)(b)(i) of the Act. Reg 27 provides that a debt counsellor, not the court, "must issue a clearance certificate as per Form 19 if the consumer has fully satisfied *all* the debt obligations under every credit agreement that was subject to the debt re-arrangement order or agreement, in accordance with that order or agreement" [Emphasis added].

⁴⁰ Section 71(2)(b)(ii) of the Act.

⁴¹ Hereafter the Tribunal.

⁴² Section 73(3) of the Act.

⁴³ Section 69 of the NCA provides for the establishment of a national credit register. To date no such register has been established.

a credit bureau.⁴⁴ Upon receipt of the clearance certificate, the national credit register or credit bureau was obliged to expunge certain information regarding the debt rearrangement from its records.⁴⁵

3.2 Provisions of section 71 after amendment by the National Credit Amendment Act 19 of 2014

The *National Credit Amendment Act*,⁴⁶ however, effected significant amendments to section 71(1), (2), (3) and (4).⁴⁷ The amended subsections now provide that a consumer whose debt has been re-arranged in terms of Part D of Chapter 4 *must* be issued with a clearance certificate by a debt counsellor within seven days after the consumer has—

- (a) satisfied all the obligations under every credit agreement that was subject to that debt re-arrangement order or agreement, in accordance with that order or agreement; or
- (b) demonstrated –
 - (i) financial ability to satisfy the future obligations in terms of the rearrangement order or agreement under –
 - (aa) a mortgage agreement which secures a credit agreement for the purchase or improvement of immovable property; or
 - (bb) any long term agreement⁴⁸ as may be prescribed;

⁴⁴ Section 71(4) of the Act.

⁴⁵ Section 71(5) of the Act. The information that had to be expunged related to the fact that the consumer was subject to the relevant debt re-arrangement order or agreement; any information relating to any default by the consumer that may have precipitated the debt arrangement; or been considered in making the debt re-arrangement order or agreement; and any record that a particular credit agreement was subject to the relevant debt rearrangement order or agreement. In terms of s 71(6), expungement also had to occur upon receipt of a court order rescinding any judgment against the consumer. According to s 71(7), failure by a credit bureau to comply with a compliance notice issued by the NCR in terms of s 55, in relation to s 71, constituted an offence.

⁴⁶ *National Credit Amendment Act* 19 of 2014 in GN 389 in GG 37665 of 19 May 2014 (hereafter 2014 Amendment Act).

⁴⁷ As per s 21 of the 2014 Amendment Act.

⁴⁸ The Act does not define the concept "long term agreement". It is submitted that it should be interpreted as an agreement that runs over a 20 year period (as is usually the case with mortgage agreements) or at least over a longer term than one would ordinarily expect a consumer to be locked into a debt restructuring order. In *Phaladi v Lamara* 2018 3 SA 265 (WCC) (hereafter the *Phaladi*-case) fn 14 the court indicated that the expression "long term agreement" is not defined, "but it would appear from the context that it refers to credit agreements of the sort in which the originally agreed period for the redemption of the debt extends over several years. They fall to be identified ('prescribed') in regulations, which ... have yet to be made".

- (ii) that there are no arrears in the re-arranged agreements contemplated in subparagraph (i); and
- (iii) that all obligations under every credit agreement included in the re-arrangement order or agreement, other than those contemplated in subparagraph (i), have been settled in full.

For the purposes of the demonstration envisaged in the new section 71(1)(b), a debt counsellor may apply such measures as may be prescribed.⁴⁹

The amended section 71(3) provides that if a debt counsellor "decides not to issue or fails" to issue a clearance certificate as contemplated in section 71(1), the consumer may apply to the Tribunal to review that decision. If the Tribunal is satisfied that the consumer is entitled to the clearance certificate it may order the debt counsellor to provide it. Section 71(4), as amended, now has two subsections and provides that a debt counsellor *must* within seven days after the issuance of a clearance certificate file a certified copy thereof with the national credit register and all registered credit bureaus.⁵⁰ If the debt counsellor fails to do so, the consumer may file a certified copy of the clearance certificate with the NCR and lodge a complaint with the Regulator against the debt counsellor.⁵¹

Upon receiving a copy of a clearance certificate, a credit bureau or the national credit register must expunge from its records the information contemplated in section 71(5), as indicated in par 3.1 above. Section 71(6) that requires a credit bureau, upon receiving a copy of a court order rescinding⁵² any judgment, to expunge from its records all information relating to that judgment, was not amended by the 2014 Amendment Act. Neither was section 71(7), which makes it an offence for a credit bureau to fail to comply with a compliance notice relating to the obligation to expunge information. A section 71A was also introduced by the 2014 Amendment Act regarding automatic removal of adverse consumer credit information.⁵³

⁴⁹ Section 71(2) as amended by the 2014 Amendment Act.

⁵⁰ Section 71(4)(a) of the Act.

⁵¹ Section 71(4)(b) of the Act.

⁵² See s 36 of the *Magistrates' Courts Act* 32 of 1944 read with reg 49 of the *Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa* in GN R740 in GG 33487 of 23 August 2010 (hereafter the *Magistrates' Court Rules*) and reg 42 of the *Uniform Rules of Court* in GN R48 in GG 999 of 12 January 1965.

⁵³ See Kelly-Louw 2015 *De Jure* 92.

In March 2017 the NCR indicated in a circular⁵⁴ that the amended section 71 posed interpretation and implementation challenges and recorded the following "explanations" regarding the interpretation of the amended section 71: The word "agreement" refers to the debt counselling proposal and not to the contractual agreement; a vehicle finance agreement is not a "long-term agreement"; and a debt counselling order need not be rescinded before a clearance certificate can be issued. It stated that the phrase "measures as may be prescribed" in section 71(2) merely affords the Minister of Trade and Industry the discretion to prescribe additional measures in future should he deem it necessary. Until such time, debt counsellors must employ the measures currently used for assessing over-indebtedness when assessing the consumer's financial ability to satisfy future obligations in terms of section 71. In the event that a credit provider, in response to a paid-up letter from a debt counsellor, advises that the debt has not been settled in full, both parties must apply the industry agreed-upon process, still to be issued, as guidelines for end balance difference. The NCR further stated in the circular that it could not have been the intention of the legislature for the credit provider to receive payments on the mortgage agreement in terms of the debt counselling proposal until the entire agreement is settled in full. Instead, the consumer would benefit from the concessions in section 71 only for the remaining repayment term as specified in the debt restructuring agreement. Thereafter, the contractual obligations would apply.

3.3 Observations regarding section 71 as amended

From the aforesaid, it is thus clear that the amendments to section 71 were effected to prevent a consumer, who is subject to a debt rearrangement or restructuring order, being "locked into" the debt review process for years to come, although he has actually repaid all his restructured short-term debts and only his mortgage debt or other long term credit debt still has to be repaid under the restructuring order.⁵⁵ Obviously, the legislature realised that consumers who paid off their restructured short-term credit debt would then generally, by doing so, free up money that they can use to repay their mortgage or other long-term debt – it may even put them in a position where

⁵⁴ NCR 2017 <https://ncr.org.za/documents/Circulars/Circular%20of%202017-%20Section%2071.pdf> paras 1-6. It is also stated that Form 19 is currently not aligned to the amended s 71(1)(b) of the Act and that it can be amended only through regulation.

⁵⁵ Also see NCR 2015 <https://www.ncr.org.za/documents/pages/circulars/feb2015/Withdrawal%20from%20debt%20review%20guidelines.pdf> 3 (hereinafter NCR *Withdrawal Guidelines* or *Guidelines*) as discussed in 4 below.

they are able to pay larger instalments than the restructured instalments and they might even be in a position to pay instalments as per the original long-term contractual agreement or in excess thereof. However, this may not always be the case – hence the requirement that the consumer demonstrate an "ability to repay" the mortgage or long-term credit agreement debt before being released from the debt review process and given a clearance certificate. Also, consumers who have successfully repaid their restructured short-term debt would not want to be shackled by the inability to enter into new credit agreements for years into the future due to the fact that they still have to repay mortgage debt or other long-term credit debts that were included in the debt restructuring order.

For example, a consumer might need to buy a new vehicle on credit, but if he remains locked into the debt restructuring process for a number of years to come, because he still has to repay his mortgage debt in accordance with a restructuring order, he will be unable to do so. Essentially, section 71 envisages that a consumer who has paid up all his restructured short-term credit obligations should be able to demonstrate that he is no longer over-indebted as contemplated in section 79, and thus that he is now able to timeously repay his credit agreement debts. Alternatively, he should at least be able to prove that even if he is still a bit over-indebted, after having paid off his short-term debt, his financial position is nevertheless such that he will have the "ability to repay" his long-term credit obligations as restructured, and once the restructuring term has expired that he will be able to effect repayments in accordance with the original contractual terms. Thus, the consumer will of necessity have to provide proof of his financial means, prospects and obligations as envisaged by section 78(3), which should demonstrate to be sufficient to cover his long-term credit agreement instalments (for the remaining restructured term where applicable, and thereafter as per the original terms of the credit agreement).

The 2014-amendments to section 71 also serve to relieve the consumer of the obligation to take the initiative to obtain a clearance certificate and to have his name cleared at the credit bureaus, which is a welcome intervention from a consumer protection perspective. These responsibilities have now been imposed on the debt counsellor, who is paid for his debt counselling services⁵⁶ and who is obliged to provide a clearance certificate swiftly, namely within 7 days⁵⁷ after the conditions in section 71(1) are met.

⁵⁶ NCR 2018 <https://www.ncr.org.za/documents/debt%20counselling%20fee%20structure%20guideline.pdf>.

⁵⁷ These days appear to be calendar days, as no reference is made here to business days as provided for in s 2(5).

The debt counsellor must apparently do so without being requested as such by the consumer, which means the debt counsellor will have to keep abreast of the status of repayments by the consumer in terms of the debt restructuring order. It is also now the debt counsellor's obligation to attend to the removal of the consumer's name from credit bureau records.

4 The *Withdrawal Guidelines* and *Explanatory Note to the Withdrawal Guidelines*

As indicated in paragraph 2 above, provision is made in section 86(10)(a) and (b) of the NCA for a credit provider to terminate a pending debt review prior to the filing of a debt restructuring application at the Magistrate's Court in certain circumstances, for example where no progress is made with the debt review and/or the restructuring proposal is not viable.⁵⁸ However, the NCA does not contain any specific provision that allows a consumer or a debt counsellor to terminate the debt review process or to withdraw from it.⁵⁹ Notably, section 71 appears to cater for the situation where the debt review process has basically run its course insofar as restructured short-term credit debt is concerned. Nevertheless, situations have over the years arisen where either consumers or debt counsellors wanted to withdraw from an ongoing debt review at various stages before having paid up the restructured debt in accordance with section 71 (as it originally read). To facilitate such exit, an industry practice developed that led to the use of a Form 17.4, which was not initially prescribed in the Act or regulations, but that was crafted by the credit industry itself to facilitate voluntary withdrawal from debt review.⁶⁰

However, in *Rougier v Nedbank Ltd*⁶¹ it was held that a debt counsellor who attempted to "withdraw" a debt review in accordance with Form 17.4 acted

⁵⁸ For a detailed discussion of the process of the termination of debt review in accordance with s 86(10) of the Act, see Van Heerden "Over-indebtedness and Reckless Lending" para 11.3. Also see Van Heerden and Coetzee 2011 *PELJ* 37; and Van Heerden and Coetzee 2011 *De Jure* 463.

⁵⁹ Generally, a debt review can be terminated only in accordance with s 86(10) of the Act. However, Roestoff and Smit 2011 *THRHR* 501 also validly argue that a debt review which is not taken to completion should lapse after a reasonable period of time. Such a situation is not the focus of this contribution, which particularly deals with the situation of a consumer who wishes to exit the debt review process because his financial position has improved and he is factually not over-indebted anymore.

⁶⁰ NCR *Withdrawal Guidelines* 3. Form 17.4 was addressed to all relevant credit providers and indicated that the application for debt counselling had been voluntarily withdrawn by the consumer. It also stated that the credit bureaus had been updated via the Debt Help System and that the NCR had been advised of the withdrawal.

⁶¹ *Rougier v Nedbank Ltd* (GPJ) (unreported) case number 27333/2010 of 28 May 2013. This matter concerned an application for the rescission of a default judgment.

ultra vires the NCA. Although the *Rougier* judgment did not specifically deal with the situation where a *consumer* wanted to withdraw from debt review, for whatever reasons, the decision nevertheless practically put an end to the use of Form 17.4.

As a result of the decision in *Rougier v Nedbank Ltd*, the NCR issued *Withdrawal Guidelines* on 19 February 2015 (that is, after the 2014 Amendment Act (which among other things amended section 71) was signed, but before the said amendment Act came into effect). These *Withdrawal Guidelines* were required to be applied by all industry participants with immediate effect and were intended to replace the use of the Form 17.4. The *Withdrawal Guidelines* also pertinently confirm, in line with the *Rougier* judgment, that a debt counsellor does not have the statutory powers to terminate or withdraw from the debt review process and therefore that a debt counsellor can no longer issue a Form 17.4 for such a (purported) purpose.

The 2015 *Withdrawal Guidelines* further state that section 71 as amended, will provide the basis on which a consumer may withdraw from debt review. It states that a consumer can "withdraw" from or "terminate" the debt review process only prior to a "declaration" of over-indebtedness in accordance with section 86(7) (thus, by a court) and (prior to) the issuing of a Form 17.2, subject to payment of debt counselling fees.⁶² It also rather confusingly states: "[I]f a *determination* is made and no court order is in place, the consumer will remain under debt review."⁶³ This reference to a "determination" appears to pertain to the situation where the debt counsellor has made a determination as required by section 86(6).⁶⁴ The *Withdrawal Guidelines* further indicate that once a debt restructuring order by a court has been obtained, a consumer can "withdraw" therefrom by applying to

The consumer among others alleged (para 3) that she was under debt review at the time that the credit provider issued summons and she further alleged that the credit provider did not send her a s 129(1)(a)-notice prior to enforcement. The credit provider alleged (para 4) that it was not necessary to comply with s 129(1)(a) or s 86(10) of the Act, because the debt counsellor had "withdrawn" the debt review prior to the institution of the enforcement action. The court stated that the debt counsellor fulfilled a statutory function. Because there was no provision in the NCA that empowers the debt counsellor to "withdraw" the debt review "instituted" in terms of s 86(1), the court found that the purported withdrawal by the debt counsellor was *ultra vires* with the effect that the debt review was thus still pending at the time that the credit provider instituted action.

⁶² NCR *Withdrawal Guidelines* 4.

⁶³ NCR *Withdrawal Guidelines* 4. Emphasis added.

⁶⁴ See the discussion in 2 above.

have the order rescinded "or" by applying for an order declaring that the consumer is no longer over-indebted.⁶⁵

The aforesaid *Withdrawal Guidelines* have to be read with the *Explanatory Note to the Withdrawal Guidelines*,⁶⁶ which was subsequently issued to aid the interpretation of the *Guidelines*.⁶⁷ The *Explanatory Note* is drafted in a slightly confusing and somewhat repetitive manner. It again confirms that debt counsellors can no longer withdraw from the debt review process and that the use of Form 17.4 is not valid.⁶⁸ It deals in more depth with the question whether a consumer can withdraw from the debt review process after a court order (declaring the consumer over-indebted and restructuring his credit agreement debt) has been granted. According to the *Explanatory Note*, it is indeed possible for a consumer to withdraw from the debt review process in such an instance by bringing an application to the Magistrate's Court with jurisdiction⁶⁹ for the rescission of the restructuring order, requesting that the consumer be declared no longer over-indebted.⁷⁰ The application must indicate that the consumer has been found over-indebted (previously) by the Magistrate's Court and a copy of the restructuring order must be attached as an annexure. The application must further advise the court that the consumer is no longer over-indebted and must include the consumer's financial circumstances at the time, in motivation of the request for the rescission of the restructuring order. The court must also be advised that the consumer no longer needs to be under debt review.⁷¹

Upon receipt of the granted rescission order, the debt counsellor must:

- (a) notify all the credit providers of the same by means of the Form 17.W and attach a copy of the granted rescission Court Order;⁷²

⁶⁵ NCR *Withdrawal Guidelines* 4.

⁶⁶ NCR 2015 https://www.ncr.org.za/documents/Withdrawal_guidelines/Explanatory%20Note%20to%20the%20Withdrawal%20Guidelines.pdf (hereinafter NCR *Explanatory Note*).

⁶⁷ See the introduction to the *Explanatory Note* where it is indicated that the reason for the issuing of the *Explanatory Note* was challenges experienced by industry regarding the implementation of certain aspects of the *Guidelines*.

⁶⁸ *Explanatory Note* para 2.

⁶⁹ In other words, the Magistrate's Court that gave the restructuring order.

⁷⁰ Thus, the *Explanatory Note* differs from the NCR *Withdrawal Guidelines* in this respect as the NCR *Withdrawal Guidelines* appear to indicate that the consumer can either apply for rescission or for a declaration to be "not over-indebted".

⁷¹ *Explanatory Note* para 3.

⁷² Form 17.W is attached to the NCR *Withdrawal Guidelines*. It serves to notify credit providers of the following options:

- (b) remove the consumer's debt review flag on the credit bureaux by updating the DHS⁷³ with the relevant status code.⁷⁴

The *Explanatory Note* indicates further that it is possible, as stated in the *Withdrawal Guidelines*, for a consumer to withdraw from the debt review process *prior* to obtaining a "debt review court order" (in other words, a debt restructuring order). The *Explanatory Note* then distinguishes between the situation where the consumer wishes to withdraw prior to the "*declaration of over-indebtedness*" and "*post the declaration of over-indebtedness*".⁷⁵

Withdrawal by the consumer *prior to the "declaration" of over-indebtedness* can, in terms of the *Explanatory Note*, occur *before the "declaration of over-indebtedness and issuance of Form 17.2 to credit providers"*, in which instance the debt counsellor must issue Form 17.W and update the DHS with status code "G (Withdrawal by consumer)".⁷⁶

As regards withdrawal by the consumer *post a "declaration" of over-indebtedness* the *Explanatory Note* states as follows:⁷⁷

- The debt counsellor has the statutory power to recommend that the consumer be declared over-indebted, however, the Magistrates Court in terms of Section 85(b), Section 87(1) and/or Section 88(1)(b) of the

-
- a) The consumer has withdrawn from the debt review process prior to the issuance of Form 17.2 and the credit bureaux have been updated accordingly via the NCR Debt Help System.
 - b) The debt counsellor has suspended the provision of service due to non-cooperation by the consumer. The debt counsellor remains the debt counsellor on record.
 - c) The consumer has obtained a court order to rescind the debt review order. Credit bureaux have been updated via the NCR Debt Help System.
 - d) The consumer has obtained a court order declaring the consumer no longer over indebted. Credit bureaux have been updated via the NCR Debt Help System.

⁷³ The NCR created the Debt Help System (DHS) for debt counsellors to register and update records pertaining to consumers subject to debt review, which information, in turn, credit bureaux use to update their records accordingly. Debt counsellors' conditions of registration require of them to regularly maintain and update the system. This is done by recording specific status codes (which the NCR continuously develops to keep abreast of developments in the debt review sphere) to reflect progress. See for instance NCR 2018 <https://ncr.org.za/documents/Circulars/NCR%20Circular%2004%20of%20August%202018.pdf>; NCR 2017 <https://ncr.org.za/documents/Circulars/DHS%20Automated%20transfers%20circular%20.pdf>; and NCR 2016 <https://ncr.org.za/documents/Circulars/Circular%20No7%20DHS.pdf>.

⁷⁴ It is stated that the applicable status code remains G (withdrawal by consumer) and that it is only once all these steps, which culminate in the issuing of a Form 17.W, have been successfully completed that compliance with the *Withdrawal Guidelines* can be said to have taken place.

⁷⁵ Emphasis added.

⁷⁶ *Explanatory Note* para 4.1.

⁷⁷ *Explanatory Note* para 4.2.

Act has powers to declare the consumer over-indebted or not over-indebted.

- If the debt counsellor has recommended that the consumer be declared over-indebted and the Form 17.2 has been issued to credit providers, the *consumer* must approach the Magistrates Court with the relevant jurisdiction to be declared not over-indebted and no longer under debt review.⁷⁸
- A court application in terms of Section 87(1)(a) of the Act must be made to the Magistrates Court with relevant jurisdiction requesting the Court to reject the debt counsellor's recommendation that the consumer be found over-indebted; and declare the consumer no longer over-indebted.
- The application must advise the Court that the consumer had been found over-indebted by the debt counsellor and a copy of the Form 17.2 is to be attached as an annexure.
- The applicant must advise the relevant Magistrates Court that the consumer is no longer over-indebted and must include the consumer's financial circumstances at that time in motivation of the aforesaid.
- The application must further advise the relevant Magistrates Court that the consumer no longer needs to be under debt review.

The gist of the aforementioned paragraph is thus that the NCR is of the view that in the event that the debt counsellor has found (determined or as the *Explanatory Note* incorrectly states "declared") the consumer to be over-indebted; has sent out the Form 17.2; and has filed an application (a recommendation) to have the consumer declared over-indebted and to restructure his debt (but which application is not yet granted by the court), then the consumer can approach the court (apparently in opposition to the aforementioned application) and request the court to reject the recommendation that the consumer is over-indebted and to specifically *declare* the consumer "not over-indebted".

4.1 Further observations regarding section 71, the Withdrawal Guidelines and Explanatory Note to the Withdrawal Guidelines

4.1.1 General

From the above overview it is clear that a consumer can exit a debt review process that has "run its course" upon compliance with section 71, which basically means that, except for mortgage and other long-term debt, he has paid up his other short term credit debts as restructured by the court in accordance with a debt restructuring order (obtained either by consent or

⁷⁸ Emphasis added.

on application in terms of section 86(7)(c) as explained in paragraph 2 above). The NCA does not specifically impose an obligation that the court who made the declaration of over-indebtedness again be approached for an order to declare the consumer "no longer over-indebted" once he has complied with section 71.⁷⁹ It is submitted that the *ex lege* effect of compliance with section 71 is that the consumer is no longer over-indebted and no longer under debt review. As indicated, section 71 also mandates that, upon receipt of the clearance certificate, the detail of such a debt review must be expunged from the credit bureaus' records.

Although the amended section 71 provides an opportunity for consumers who are under debt review to exit the process at an earlier stage, without requiring the full repayment of mortgage and other long-term credit agreements in accordance with the debt restructuring order, its application is limited. Having regard to the tenor of section 71, it is submitted that this section was drafted with a specific type of consumer in mind, namely an over-indebted consumer whose financial position remains such that he has to go through the whole debt review process in all its stages (in other words, let the process run its course) to eventually reach a situation where, as a result of this process, he is "rehabilitated" to such an extent that he has paid off his short-term credit and can exit the process and become a responsible user of credit again. It was not written for a consumer whose financial position changed for the better *after* having entered the debt review process. The legislature simply did not have such a scenario in mind when it drafted section 71. As such, it is submitted that section 71 was drafted with a "completed debt review" process in mind, at least insofar as short-term credit debt is concerned. Therefore, it is clear that section 71 in its current format does not avail consumers whose financial position has improved, since they applied for debt review, but who do *not* meet the requirements for a clearance certificate – namely, that they should have repaid *all* their short-term restructured debt and are able to show that they have the financial ability to make timeous future payments. If a consumer wishes to exit the debt review process because his financial situation has improved, but he has not yet fully repaid *all* his restructured short-term debts in accordance with the debt restructuring order, he will be unable to do so in terms of section 71.

Therefore, it may be asked whether the NCR *Withdrawal Guidelines* and *Explanatory Note* aid the situation of consumers whose financial situation

⁷⁹ As also confirmed in the explanation provided in the circular relating to s 71 of the Act, as discussed in 3.2 above.

has improved and who wish to exit the debt review process, but who do not meet the requirements of section 71. Thus, what is the status of these guidelines, and also, is the approach taken in the *Guidelines* correct?

At the outset, it is important to note that, although section 16⁸⁰ of the NCA permits the NCR to provide guidance to the credit market and industry by issuing explanatory notices (which one could argue also include guidelines, although the Act specifically refers to the NCR issuing "guidelines" in two instances,⁸¹ which are unrelated to the matter under consideration), the purpose of such notices is to outline the NCR's procedures, or its non-binding opinion of any provision of the NCA. Accordingly, these notices are non-binding and do not constitute substantive law and thus, cannot authorise or allow anything that the Act, in terms of which they are issued, does not permit.

It is submitted that, if the NCA itself does not make any specific – or at least implied – provision for withdrawal or exit from the debt review process by consumers, other than in the circumstances provided in section 71, it is not competent for the NCR to devise a procedure to achieve such withdrawal in the absence of a legislative provision catering therefor. Consequently, it has to be considered whether, having regard to the normal course of the debt review process, it may be possible, even in the absence of a specific provision facilitating exit from debt review (other than as contemplated by section 71), by implication to construe certain opportunities for the consumer to exit debt review. If so, it would then be competent for the NCR to bring these opportunities implied by the provisions of the Act to the attention of consumers via guidelines. Before embarking on this investigation, it is again necessary to bear in mind that (a) prior to a court order's being made, the debt review process contemplated in section 86 is a voluntary process and (b) the effects of debt review insofar as the bar against entry into new agreements by the consumer (section 88(1)) and the moratorium against enforcement by credit providers (section 88(3)) are concerned, are triggered already at the moment when the consumer applies

⁸⁰ Section 16 of the Act provides for explanatory notices in general. However, some other sections in the NCA provide for specific powers to issue guidelines.

⁸¹ Prior to its amendment by s 24 of 2014 Amendment Act, s 82(2)(b) provided for the NCR to issue guidelines regarding pre-agreement assessments. At present, s 64(3) determines that the NCR "may publish guidelines" in relation to measures to assess whether a document adheres to s 64(1)(b) prescriptions, the latter of which refers to the requirement that documents should be drafted in plain language. Further, s 93(4) provides that the NCR "may publish guidelines" to assist in the assessment of whether a statement in relation to an intermediate or large agreement adheres to set requirements.

to the debt counsellor for debt review. Against this context one can then consider the following scenarios:

4.1.2 Debt review application with debt counsellor but no forms sent out yet

Where a consumer has applied to a debt counsellor for debt review and if, before any Form 17.1 and/or Form 17.2 has been sent out, such a consumer changes his mind and decides not to pursue the application for debt review, then given the voluntary nature of the process and the lack of any formal declaration of over-indebtedness by a court, the consumer should be able on his own initiative to exit the process. If he has not yet paid the debt counsellor he should do so, but it is submitted that the mere fact that fees may be due to the debt counsellor should not bar the consumer from withdrawing from and exiting the debt review process. The effect of withdrawal at this stage will be that the (very short-lived) bar against entry into new agreements and the moratorium against enforcement, which was triggered when the consumer approached the debt counsellor, will cease to apply.

4.1.3 Debt review application with debt counsellor and Form 17.1 sent

If the consumer decides to exit the debt review process after he lodged his application with the debt counsellor and after a Form 17.1 has been sent out, and before or after the debt counsellor made a determination regarding his over-indebtedness (but before a Form 17.2 has been sent out), it is submitted that it would also be possible for the consumer to exit the debt review process. Notably, the purpose of a Form 17.1 is merely for the debt counsellor to advise the credit providers and credit bureaus of the fact that the consumer has applied for debt review. Once the credit providers receive this notice, they will know that they have to observe the moratorium against debt enforcement, that the consumer is not allowed to take out further credit and that none of them should extend further credit to the consumer. As per section 86(4) read with regulation 24(2), the Form 17.1 has to be sent out by the debt counsellor within 5 business days after receipt of the consumer's application for debt review. The fact that the debt counsellor has (or has not) at that stage made a determination regarding the consumer's state of over-indebtedness should not influence the consumer's ability to withdraw, because such a determination by itself does not bring about any specific effects. Accordingly, if the consumer wishes to withdraw from debt review after the Form 17.1 has been sent out, the debt counsellor will have to inform the credit providers and update the DHS accordingly. If the consumer has

not yet paid the debt counsellor for all his services, he will be liable for such payment, but this should not bar him from withdrawing from and exiting the debt review process at this stage. The effect of such a withdrawal would then also be that the bar against entry into new credit agreements and the moratorium on enforcement will no longer apply.

4.1.4 *Debt review application with debt counsellor and Forms 17.1 and 17.2 sent*

Having regard to the content of Form 17.2 read with regulation 24(10), it appears that this form is intended to be sent out within 5 business days after the debt counsellor has duly assessed the consumer's application and made a determination as contemplated in section 86(6) regarding the consumer's state of over-indebtedness. No mention is made in section 86 or regulation 24 that Form 17.2 has to be sent out *after* a court order in terms of section 87 has actually been made. However, this is contradicted by Form 17.2 itself. Having regard to its wording, Form 17.2 serves to inform the credit providers and credit bureaus that either the consumer's application for debt review was rejected or his application for debt review was successful and his debt obligations are in the process of being restructured or that the consumer's debt obligations "have been restructured and a court/Tribunal order has been issued" (Form 17.2 allows for mentioning of the case number and specific Magistrate's Court that issued the court order). Given their different purposes, it is clear that Form 17.1 and Form 17.2 have to be sent out at different times during the debt review process. Further, it may be argued that the addition of the reference to the granting of a restructuring order in Form 17.2 is wrong and that Form 17.2 should for all practical purposes be construed as facilitating only the notification of the debt counsellor's determination (his assessment) in terms of section 86(6), namely the position *before* a court order is made. It is submitted that, if Form 17.2 is correctly construed, this would mean that it should be sent out within 5 business days after the debt counsellor's *determination*, at which stage a court order restructuring the debt would not yet have been made.⁸² This

⁸² Even in the instance of a consent order, an application for a declaration of over-indebtedness and a restructuring order would generally have to be brought on 10 court days prior notice (Magistrate's Courts Rule 55) and even if opposed, an application for debt restructuring would also require at least 10 court days prior notice, but given the congestion of court rolls it can take a significant amount of time before such a matter is heard, depending on the Magistrate's Court where it serves. The point is, it is unlikely that either of these orders will be made by a court within 5 business days after the debt counsellor's determination. Hence, Form 17.2 cannot be construed by virtue of reg 24(10) to have contemplated both the determination by the debt counsellor as well as the subsequent hearing and court order.

means that at the time that the Form 17.2 notice should, in accordance with regulation 24(10), be sent out (thus, after the debt counsellor has made the determination required by section 86(6), but before a court order is made) the matter has not yet served before court for a formal declaration of over-indebtedness and consequent debt restructuring. Accordingly, it is submitted that, where a Form 17.2 is correctly sent out after the debt counsellor's determination and before any application for debt restructuring is filed at court (and thus before a court has declared the consumer over-indebted and restructured his debt) it would still be open to the consumer to exit the debt review process by own volition, because he has not yet been declared formally over-indebted and he is not subject to any restructuring order. In such an instance, the debt counsellor should advise the credit providers in writing that the consumer has withdrawn from and exited from the debt review process and should update the DHS accordingly. The consumer would be liable for all applicable debt counselling costs he had not yet paid, but this should not bar him from exiting the debt review process at this stage. The effect would then also be that the bar to entry into new credit agreements and the moratorium on enforcement ceases to apply.

4.1.5 Debt review application to debt counsellor, Forms 17.1 and 17.2 sent and restructuring recommendation (proposal) referred to court but not yet heard

In the scenario where a Form 17.1 and a Form 17.2 notice have been sent out and the debt counsellor has referred the recommendation to restructure the consumer's debt to court, in other words the restructuring application has been filed and is pending, but where the matter has not yet been heard by the court, it is submitted that the consumer should also be able to voluntarily withdraw from and exit the debt review process. However, from the NCR *Explanatory Note* it appears that the NCR is of the opinion that in such instance the court has to be requested to formally dismiss the application and declare the consumer not over-indebted. However, it is submitted that the consumer need not go to such lengths because at this stage of the debt review process the court has not yet had any regard to the application and until a court has declared the consumer over-indebted he is not yet formally over-indebted for the purposes of the NCA. Therefore, in the absence of a court order declaring him over-indebted, the consumer should on his own volition and without having to give reasons be able to exit the process without pursuing any court order in this context. Of course, the consumer will be liable for any applicable debt counselling fees and legal costs (including wasted costs of opposition), but this should not bar him from exiting the debt review process at this stage. The debt counsellor will have

to inform the credit providers and credit bureaus accordingly and update the debt help system. The effect of such a withdrawal would also be that the bar against entry into a new credit agreement and the moratorium on enforcement would cease to apply.

4.1.6 A Magistrate's Court has declared consumer over-indebted and granted debt restructuring order

Notably, when a court order formally declaring the consumer over-indebted and restructuring his credit agreement debt (or affirming a voluntary rearrangement agreement by means of a consent order) has been made, additional consequences kick in and section 88(3) of the NCA applies. This means that the consumer is then obliged to comply with the terms of the debt restructuring order, until he has satisfied the requirements of section 71, as discussed in paragraph 3 above, in which event he can then obtain a clearance certificate and exit the debt review process. If he does not comply with his payment obligations in terms of the restructuring order, the credit provider(s) may *ex lege*, and without the need to comply with either section 86(10) or section 129 of the NCA, enforce the original terms of the relevant credit agreement(s).⁸³

As argued above, a consumer is not barred from voluntarily withdrawing from the voluntary debt review process envisaged by section 86 if no court order formalising the process has been made. There is no section in the Act that expressly or by necessary implication prohibits such a withdrawal and the "informal" administrative nature of the review by the debt counsellor, prior to any court involvement, appears to accommodate such a withdrawal. However, the proceedings take on a judicial nature by the granting of a formal declaration of over-indebtedness and accompanying debt restructuring order that compels compliance by the consumer with the terms of such an order, failing which enforcement of the original terms of the credit agreement may follow. It may then be asked whether the guideline by the NCR, to the effect that a consumer who wishes to withdraw from and exit the debt review process at an earlier stage than contemplated in section 71 can apply to the Magistrate's Court to "rescind *or vary*"⁸⁴ such a debt restructuring order and to be declared "no longer over-indebted and no longer under debt review", is correct. Obviously, given that such a restructuring order actually has two parts, as pointed out in paragraph 2 above, namely a declaration of over-indebtedness followed by the terms of

⁸³ *Ferris v Firstrand Bank Ltd* 2014 3 SA 39 (CC) 46; *Firstrand Bank Ltd v Kona* 2015 5 SA 237 (SCA) paras 19-21.

⁸⁴ Emphasis added.

restructuring, any application for rescission, if possible, should contain a prayer requiring an order that the debtor be declared no longer over-indebted *and* a prayer for the restructuring order to be set aside. This would be different from an application for "variation" of the debt restructuring order, which merely seeks to change the terms of the said restructuring order (thus, keeping the restructuring order in place but, for example, only providing for higher instalments). However, the latter situation, if submitted, is not appropriate in the current context, because it is not aimed at doing away with the declaration of over-indebtedness and the restructuring order and thereby facilitating an exit from the debt review process. Thus, it appears that the NCR's view that a consumer who wishes to be declared no longer over-indebted and no longer under debt review can apply for a rescission *or variation* of the debt restructuring order granted by a Magistrate's Court is wrong, and the variation of an order is not applicable in the context under discussion.

To pronounce on whether the NCR is correct in its submission that the Magistrate's Court can be approached by a consumer to "rescind" the debt restructuring order "or"⁸⁵ to be declared no longer over-indebted, regard should be had to the provisions of the *Magistrates' Courts Act* and rules that deal with the power of the Magistrate's Court, if any, to make a declaratory order, and the court's powers in respect of the rescission of judgments. This is because the NCA itself does not provide for the rescission of a debt restructuring order and the process to be followed. As pointed out in paragraph 3 above, there are no specific provisions in either the NCA or the *Magistrates' Courts Act* that deal with a declaration that the consumer is no longer over-indebted and need no longer be under debt review.

It is submitted that a consumer who wishes to withdraw from and exit a debt review, where there is a debt restructuring order in place that has not yet been fully complied with in the sense that at least all the restructured short-term debt obligations are paid up (namely, the situation envisaged by section 71 is not met), will have to direct his application at both parts of the debt restructuring order and (a) apply to be declared no longer over-indebted *and* (b) that the debt restructuring order be rescinded.

It is quite a vexed question whether a Magistrate's Court can make a declaratory order. This question was recently considered again on appeal

⁸⁵ *Explanatory Note.* As pointed out above, given the two components of a debt restructuring order, namely the declaration of over-indebtedness and the restructuring order, if a rescission as contended by the NCR is at all possible the word "and" instead of "or" should have been used.

in *Moyana v Body Corporate of Cottonwood*, in which the court, among other observations, remarked that "[w]hen a party asks a court to declare something, it is by definition seeking a declaratory."⁸⁶ In this case, the court pointed out that Magistrates' Courts are creatures of statute and that their jurisdiction must be deduced from the four corners of the statute under which they are constituted.⁸⁷ It further pointed out that there is no provision in the *Magistrates' Court Act* that grants Magistrate's Courts (general) jurisdiction to grant a declaration of rights. However, the court indicated that it has been held that Magistrate's Courts would have such jurisdiction "if it were granted special jurisdiction by statute".⁸⁸ It referred to the special jurisdiction granted to the Magistrate's Courts with respect to actions in terms of the *Close Corporations Act*.⁸⁹ It further remarked

[t]hat is however a special case and neither section 29 nor any other provision of the Magistrates' Courts Act confers jurisdiction on a magistrate's court to grant any kind of declaration.

Having regard to the provisions of the NCA that relate to debt review, as contemplated in section 86, it is clear that the NCA is a *lex specialis*, which grants the Magistrate's Courts the power in terms of section 85, read with section 86, to declare a consumer over-indebted. Section 87, which deals with the hearing of an application for debt restructuring (containing the debt counsellor's restructuring proposal), does not specifically state that the Magistrate's Court hearing such an application can declare the consumer "not over-indebted", although it indicates that the court may, among other decisions, "reject the recommendation or application, as the case may be". Thus, it may be argued that it is implied by such a rejection that the court has found the consumer to be not over-indebted (although such a rejection can of course also occur in instances where the consumer is over-indebted, but where the debt restructuring proposal is not viable). However, section 88(1)(b) specifically refers to the scenario where a "court has determined that the consumer is not over-indebted".⁹⁰ Such a declaration – that a consumer is "not over-indebted" – will in the normal course of events occur

⁸⁶ *Moyana v Body Corporate of Cottonwood* (GPJ) (unreported) case number A3068/16 of 17 February 2017 (hereafter the *Moyana* case).

⁸⁷ *Moyana* case para 8 with reference to *Ndamase v Functions 4 All* 2004 5 SA 602 (SCA) 605G-H; *Sibiya v Minister of Police* 1979 1 SA 333 (T) 337C.

⁸⁸ *Moyana* case para 18.

⁸⁹ *Close Corporations Act* 69 of 1984. See s 29(1)(fA). See further *Johnson v A Blaikie & Co (Pty) Ltd t/a FT Building Supplies Manaba* 1998 3 SA 251 (N) 259D-260A.

⁹⁰ As indicated in 2 above, s 88(1)(b) of the Act refers to the situation where a consumer who has applied for debt review is barred from entering into new credit agreements until, among other things, a court has determined that the consumer is not over-indebted, or has rejected the debt counsellor's proposal or the consumer's application for debt restructuring.

where the debt counsellor initially refers the matter to the Magistrate's Court *via* a debt restructuring application, which requires the court to declare the consumer over-indebted and to restructure his debt as contemplated in section 86(7)(c) of the NCA.⁹¹ Given that the court has a discretion ("may") to declare a consumer over-indebted, one can thus also argue that this of necessity implies that a court can declare a consumer "not to be over-indebted", where the court finds that the debt counsellor wrongly determined that the consumer was over-indebted. Section 88(1)(b) would also apply where the debt counsellor determines, in accordance with section 86(7)(a), that a consumer is not over-indebted and the consumer himself subsequently approaches a court in accordance with section 86(9) read with regulation 25 and 26 to be declared over-indebted but the court, like the debt counsellor, finds that the consumer is not over-indebted.

The point is that the context in which the court can make such an order – *declaring* the consumer not over-indebted – is clear, namely pursuant to a determination by the debt counsellor that a consumer is over-indebted (as per section 86(6)) and a recommendation (as per section 86(7)(c)) that his debt be restructured. Alternatively, such an order may follow in the situation where the consumer approaches the court directly as envisaged by section 86(9). Section 88(1)(b) does *not* envisage a situation where, after a court has already declared the consumer over-indebted and restructured his debt, the court can again be approached, but this time to declare the consumer not over-indebted. Accordingly, it is submitted that section 88(1)(b) should be construed within its proper context, which is that a court that is approached in the normal course of events, as envisaged by section 86, for a declaration of over-indebtedness and debt restructuring pursuant to a recommendation by a debt counsellor, or directly by a consumer pursuant to section 86(9), may in its discretion, after hearing the matter, decide that the consumer is actually *not* over-indebted.

To construe the power of the court to make a declaration that a consumer is "not over-indebted" as having been intended by the legislature to facilitate withdrawal from debt review by consumers whose financial situation has improved would be to misread the course and context of the debt review process as intended and would amount to an untenable distortion of section 88(1)(b) and the debt review process. The legislature simply, and it is submitted rightly so, did not have this scenario in mind when it drafted

⁹¹ It is arguable whether it would be necessary for a court to make a declaration of over-indebtedness where a voluntary debt rearrangement agreement between the consumer and his credit providers as contemplated in s 86(8)(a) of the Act is made a consent order in terms of s 138.

section 88(1)(b). As there is no special provision in the NCA to provide authority to the Magistrate's Courts to declare a consumer "not over-indebted" where his financial situation improved, since applying for debt review and after having been declared over-indebted and being subjected to a debt restructuring order, the Magistrate's Court, as a creature of its enabling statute, simply cannot assist these consumers.

In any event, even if one would play devil's advocate and argue that the Magistrate's Court could declare the consumer no longer over-indebted, it would also have to deal with the rescission of the debt restructuring order. Declaring the consumer not over-indebted would entail that a court would first have to consider the consumer's current financial means, prospects and obligations to determine whether he is factually no longer over-indebted as envisaged by section 79 of the NCA. Once it is established that the consumer is no longer over-indebted, the issue of the rescission of the debt restructuring order would then have to be considered.

The rescission (and variation) of judgments in the Magistrate's Court is dealt with in section 36 of the *Magistrates' Courts Act*, which, among other things, provides that:⁹²

The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), *suo motu*, -

- (a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;
- (b) rescind or vary any judgment granted by it which was *void ab origine* or was obtained by fraud or by mistake common to the parties;
- (c) correct patent errors in any judgment in respect of which no appeal is pending;
- (d) rescind or vary any judgment in respect of which no appeal lies.

Section 36 of the *Magistrates' Courts Act* makes no mention of rescission of a debt restructuring order that was granted pursuant to a debt review in terms of section 86. Further, it is clear that neither section 36(a) nor section 36(b) or (c) finds application in the matter under discussion. As argued above, the option of "varying" or "correcting" the order of the court is inappropriate to deal with the issue at hand, because it will mean that the court order still remains intact, only with changed terms. Such a situation is

⁹² Section 36(1) of the *Magistrates' Courts Act*. S 36 should be read with Magistrates' Courts Rule 49, which sets out the procedure for bringing a rescission application in the Magistrate's Court.

not what is sought to be achieved when requiring a declaration that a consumer is no longer over-indebted and no longer under debt review. Thus, it may be asked whether the present issue can be addressed by applying section 36(d), in the sense of rescinding "any judgment in respect of which no appeal lies."

Van Loggerenberg comments that the phrase "against which no appeal lies" has a very specific meaning, in that it refers to interlocutory orders, which are orders that cannot be appealed against, since they are not final orders.⁹³ This would mean that a debt restructuring order, which is clearly a final order, does not fit the mould of the orders that can be rescinded in terms of section 36(d).

Another argument (yielding a rather circular answer), which may probably be raised to counteract the problem relating to the rescission of the debt restructuring order, is that once a Magistrate's Court declares a consumer "not over-indebted", the accompanying debt restructuring order should lapse *ex lege*, because the rationale for that order then falls away. However, this argument cannot be entertained. This is because firstly the Magistrate's Court, as pointed out, cannot make such a declaration, because the NCA as *lex specialis* does not support it – the context of section 88(1)(b) is that no restructuring order is yet in place by the time that the court makes the order contemplated in section 88(1)(b). Secondly, if the Magistrate's Court cannot make such a declaratory order, the issue of *ex lege* lapsing of the restructuring order does not arise.

In view of the lack of an enabling provision in the NCA, which would allow a Magistrate's Court to make a declaration to the effect that a consumer who wishes to withdraw from debt review after a restructuring order has been granted, but before compliance with section 71, can be declared to be "not over-indebted" with the result that he no longer needs to be under debt review, it would not be competent for a Magistrate's Court, being a creature of statute, to make such an order.

It may then be asked whether such a declarator can be obtained from the High Court, given that the jurisdiction of the High Courts has been held in

⁹³ Van Loggerenberg *Jones and Buckle: Civil Practice* 254. Regarding interlocutory orders against which no appeal lies, see the *locus classicus Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 1 SA 839 (A). In this case, it was indicated that the test whether an order is of a final nature and can be appealed against hinges on whether the order determines the rights of the parties on the point finally and conclusively so far as the court pronouncing it is concerned, so that it will not come up for reconsideration in the further proceedings in the case.

Nedbank Ltd v Mateman; Nedbank Ltd v Stringer not to have been ousted by the NCA?⁹⁴

The evolution of the power of the High Court to grant declarators can be traced back to the common law, where the High Court did not have the power to grant declaratory orders without consequential relief.⁹⁵ The power to grant such orders was conferred upon the High Court by the legislature, originally in section 102 of the *General Laws Amendment Act 46* of 1935. The power to grant a declaratory order was subsequently captured in section 19(1)(a)(iii) of the *Supreme Court Act 59* of 1959, which has now been repealed by the *Superior Courts Act 10* of 2013. Section 21(1)(c) of the *Superior Courts Act*⁹⁶ currently deals with the High Court's jurisdiction to grant a declaratory order under the heading "[p]owers over and matters in relation to which Divisions have jurisdiction" and provides that the High Court has the power,

... in its discretion, and at the instance of any interested person, to enquire into, and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon a determination.

It was held in a number of cases relating to section 102 of the *General Laws Amendment Act 46* of 1935 that the court will not under that section deal with or pronounce upon abstract or academic points of law and that there must be an "existing and concrete dispute between persons, albeit as to future and contingent rights", before the court will act.⁹⁷ However, Van Loggerenberg points out that the decision in the Supreme Court of Appeal in *Ex parte Nell*⁹⁸ reflects a marked departure from this view. It was held that an existing dispute is *not* a prerequisite to an exercise by the court of jurisdiction under the section; and it is only necessary that there are

⁹⁴ *Nedbank Ltd v Mateman; Nedbank Ltd v Stringer* 2008 4 SA 276 (T). Also see Van Heerden 2008 TSAR 840; Roestoff and Coetzee 2008 THRHR 678; and Otto 2017 THRHR 140. See further *Firstrand Bank Ltd t/a Wesbank v Maboja* (ZAGPPHC) (unreported) case number 59378/2012 of 9 October 2014.

⁹⁵ Van Loggerenberg *Erasmus: Superior Court Practice* A-126. See also *Geldenhuis and Neethling v Beuthin* 1918 AD 426 430-441; *Softex Mattress (Pty) Ltd v Transvaal Mattress and Furnishing Co Ltd* 1979 1 SA 755 (D) 757D (hereafter the *Softex* case); *Preston v Vredendal Co-operative Winery Ltd* 2001 1 SA 244 (E).

⁹⁶ *Superior Courts Act 10* of 2013. This power was previously contained in s 19(1)(a)(iii) of the *Supreme Court Act 59* of 1959.

⁹⁷ Van Loggerenberg *Erasmus: Superior Court Practice* A-126. Also see *Ex parte Ginsberg* 1936 TPD 155; *Maitland Cattle Dealers v Lyons* 1943 WLD 1; *SA Breweries v Registrar of Deeds* 1943 CPD 433; *Ex parte Morris* 1954 3 SA 153 (W); and *Ex parte Velkes* 1963 3 SA 584 (C).

⁹⁸ *Ex parte Nell* 1963 1 SA 754 (A) 760A-C.

interested parties upon whom the declaratory order will be binding.⁹⁹ The necessity of an actual dispute is not expressly required in the section, nor is it to be implied therefrom. In view of this decision of the Supreme Court of Appeal, and of the differences between section 21 of the *Superior Courts Act* 10 of 2013 and section 102 of the *General Laws Amendment Act* 46 of 1935, Van Loggerenberg remarks that earlier decisions relating to the power of the court to grant declaratory orders should be used with circumspection.¹⁰⁰

In conferring the power to make a declaratory order upon the High Court, the legislature has done so without "altering the jurisdiction of the Supreme Court in respect of the subject matter or territory or parties".¹⁰¹ In the *Softex* case, it is pointed out that neither the *General Laws Amendment Act* 1935 nor the repealed *Supreme Court Act* 59 of 1959 contained any indication as to which provincial or local division may grant a declaratory order in a particular case and that the question can be determined only in accordance with common law principles. Van Loggerenberg remarks that section 21(1)(c)¹⁰² of the *Superior Courts Act* is worded materially the same as section 19(1)(a)(iii)¹⁰³ of the repealed *Supreme Court Act* and it would therefore seem that jurisdiction will be established if there is a sufficient connecting factor between the court and the matter before it – to enable the court to deal with the claim and to give a judgment, which will be *res judicata* between the parties.¹⁰⁴

Notably, all interested parties should be joined in an application for a declaration of rights. Although it may be competent for a division of the High

⁹⁹ Van Loggerenberg *Erasmus: Superior Court Practice* A-126.

¹⁰⁰ Van Loggerenberg *Erasmus: Superior Court Practice* A-126.

¹⁰¹ *Graaf-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 2 SA 420 (A) 425, cited with approval in the *Softex* case 757E.

¹⁰² "A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power- (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

¹⁰³ "Persons over whom and matters in relation to which provincial and local divisions have jurisdiction- (1)(a) A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance, and shall, subject to the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law, have power- (iii) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

¹⁰⁴ Van Loggerenberg *Erasmus: Superior Court Practice* A-126.

Court to make a declaratory order in any particular case, Van Loggerenberg emphasises that the granting thereof is dependent upon the judicial exercise by that division of its discretion with due regard to the circumstances of the matter before it. There can be no proper exercise of such discretion if the essential elements for a declaratory are not fulfilled. In *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*¹⁰⁵ the Supreme Court of Appeal held that an application for a declaratory order requires a two stage approach:

- a) firstly, the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; and
- b) secondly, if the court is satisfied that such an interest exists, it must be considered whether or not the order should be granted.

It is also important to note that the availability of another remedy does not render the granting of a declaratory order incompetent. Further, Van Loggerenberg indicates that the words "[A]t the interest of any interested person" have been interpreted to mean that some tangible and justifiable advantage to the applicant must be shown; in other words, a proper case for a declaratory order is not made out if the result is a decision on a matter that is of mere academic interest to the applicant. The right that is the subject of application for a declaratory order under the subsection must attach to the applicant or plaintiff and *not be a declaration of someone else's rights*.¹⁰⁶ Notably, the Gauteng Division of the High Court recently held in *Minister of Finance v Oakbay Investments (Pty) Ltd; Oakbay Investments (Pty) Ltd v Director of the Financial Intelligence Centre*¹⁰⁷ that *Ex Parte Nell* did not render declaratory orders justified in all cases where there is no live dispute. It held that post *Ex Parte Nell*, the absence of a live dispute remains a factor to be considered where the legal position to be determined is uncertain.

However, it is submitted that a request by a consumer to be declared no longer over-indebted and no longer under debt review cannot be accommodated under the High Court's powers to issue declaratory orders, because it does not concern a declaration regarding rights and obligations as envisaged by section 21(1)(c) of the *Superior Courts Act*. Furthermore,

¹⁰⁵ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 6 SA 205 (SCA) 231E-G. Also see Van Loggerenberg *Erasmus: Superior Court Practice* A2-128.

¹⁰⁶ Van Loggerenberg *Erasmus: Superior Court Practice* A2-128.

¹⁰⁷ *Minister of Finance v Oakbay Investments (Pty) Ltd; Oakbay Investments (Pty) Ltd v Director of the Financial Intelligence Centre* 2018 3 SA 515 (GP) para 61.

the general power of the High Court to make a declaratory order, as contemplated in section 21(1)(c), should not be confused with the special jurisdiction bestowed on High Courts to be approached by the NCR in terms of section 16(b)(ii) by applying to a court for a declaratory order "on the interpretation or application of any provision" of the NCA. In the context at hand, there is no specific provision in the Act that facilitates an exit from the debt review process where a debt restructuring order is in place other than under the circumstances provided for in section 71. As explained above, there simply exists no other provision in the Act that can be interpreted to facilitate such an exit – not expressly and also not by necessary implication. A High Court would at most be able to "declare" that there is a *lacuna* in the Act that needs to be addressed by the legislature. That is of course, if the argument can be justified that these type of consumers, whose financial situation has improved but who do not yet meet the requirements of section 71, should indeed be allowed to exit the debt review procedure once it has been formalised by means of a court order but not yet completed as envisaged by section 71.

However, to again take the stance of a devil's advocate, even if a High Court could declare a consumer to be "not over-indebted", the impediment remains that such an order addresses only one part of the problem, given that it may be argued that such a declaration does not automatically imply that the debt restructuring order granted by the Magistrate's Court is rescinded. The next question would then be whether it is possible for the High Court to set aside the restructuring order granted by the Magistrate's Court, because it will clearly not help the consumer out of his predicament if he receives an order by the High Court declaring him to be "not over-indebted", but in reality he remains subject to a debt restructuring order by a Magistrate's Court. In this respect it is important to be reminded that a High Court is not at liberty to tamper with Magistrates' Court judgments and orders and has no general power to set aside such judgments and orders. A High Court can set aside a Magistrate's Court judgment only if such a judgment is taken on appeal¹⁰⁸ or review¹⁰⁹ or arguably if another piece of legislation, as a *lex specialis*, gives the High Court the power to do so. Thus, it would appear that, in the absence of an appeal or a review against a debt restructuring order, the High Court has no general jurisdiction to set aside a Magistrate's Court judgment. Accordingly, it would not be competent for the

¹⁰⁸ Section 83 of the *Magistrates' Courts Act* read with rule 51 of the Magistrates' Courts Rules. Regarding the prosecution of the appeal in the High Court, see Uniform Rules of Court 7 and 50.

¹⁰⁹ Section 21(1)(b) read with s 22 of the *Superior Courts Act*.

High Court to set aside the restructuring order made in respect of a consumer who claims now to be no longer over-indebted. Some may possibly argue that if a High Court can declare a consumer no longer over-indebted it would have the effect that the debt restructuring order lapses *ex lege*, thus obviating the need for formal rescission of that order. However, all these arguments about the rescission of the order or the *ex lege* lapsing thereof are actually of no avail, because the factual position remains that the High Court cannot make a declaratory order to remedy the legislative failure (if one is of opinion that these consumers should be assisted) to provide for exit from debt review between the period since the granting of a debt restructuring order but prior to compliance with section 71.

The NCA is already notorious for containing many drafting errors.¹¹⁰ However, what we are dealing with here is not a drafting error that can be rectified by purposive interpretation or by implying a certain reading of the legislative provisions concerned. The factual context here is that no provisions exist to accommodate the scenario that causes the challenges in practice, and the High Court cannot change this reality by taking on the cloak of the legislature. To use the purpose of the Act to extend greater protection to credit consumers (if one is of the opinion that these consumers must be assisted) to fathom some interpretation that would facilitate an exit from debt review in the above circumstances in the absence of a legislative provision catering therefore would amount to artificial manipulation of the purposes of the Act to absorb legislative failures.

Is there any other basis on which the High Court can grant relief to consumers who wish to withdraw from and exit the debt relief process prior to meeting the requirements of section 71? It may possibly be argued that a debt restructuring order by a Magistrate's Court, which among other things has declared a consumer over-indebted, affects the status of the consumer because his contractual capacity is limited by the bar on entering into further credit agreements and that the High Court may assume jurisdiction based on the fact that it is the forum that generally deals with status issues. But it

¹¹⁰ See for instance Brits, Coetzee and Van Heerden 2017 *THRHR* 177 and Brits 2015 *De Jure* 75, as well as cases referred to therein, in relation to the interpretational difficulties that resulted from lax drafting in respect of reinstatement of credit agreements. Although the 2014 Amendment Act strived to improve the situation, it is still not resolved. Another example of careless drafting is that s 130(4)(a) and s 83(2)(a) still merely refers to "the court" within the context of reckless credit, although the NCA's reckless credit provisions were amended, by the 2014 Amendment Act, to also afford jurisdiction to the Tribunal in such respect. A further example is that of s 130(1)(a) that originally referred to s 86(9), where it ought to have referred to s 86(10). The latter error was rectified by the 2014 Amendment Act.

should further be borne in mind that the High Court's jurisdiction to deal with status matters is generally founded in legislation such as the *Divorce Act*¹¹¹ and the *Insolvency Act*.¹¹² Although the High Court's jurisdiction is not ousted in respect of matters to which the NCA applies, it has been pointed out that there is no specific provision in the NCA that states that the High Court can be approached for an order to declare a consumer "not over-indebted" in the specific context under discussion.

As a last resort, it may be asked whether it would be possible for the High Court to use its inherent jurisdiction to assist consumers who wish to withdraw from debt review. In terms of section 173 of the Constitution,¹¹³ the High Court has the inherent power to protect and regulate its own process and to develop the common law, taking into account the interests of justice.¹¹⁴ Although the High Court possesses inherent jurisdiction,¹¹⁵ such inherent jurisdiction does not extend to a High Court the ability to hear status matters in the absence of enabling legislation. The inherent jurisdiction of the High Court has a very specific scope, namely that it concerns the jurisdiction to prevent the abuse of its processes and to develop the common law.

It is accordingly submitted that, in the absence of any enabling legislation (such as the NCA), which indicates that the High Court may be approached for an order declaring a consumer to be "not over-indebted" and that the consumer is "no longer under debt review", a High Court will not be able to rely on its power to make a declaratory order or on its inherent jurisdiction as a basis for dealing with the types of applications under discussion.

Finding a solution to the problematic situation of consumers who have applied for debt review and whose financial situation has subsequently improved, although not to the extent that they qualify for a clearance certificate as per section 71, appears to be quite a challenge. This is also

¹¹¹ *Divorce Act* 70 of 1979.

¹¹² *Insolvency Act* 24 of 1936.

¹¹³ *Constitution of the Republic of South Africa*, 1996.

¹¹⁴ Van Loggerenberg *Erasmus: Superior Court Practice* A-126. Also see *Du Plessis v De Klerk* 1996 3 SA 850 (CC); *Gardener v Whitaker* 1996 4 SA 337 (CC); *Philips v National Director of Public Prosecutions* 2006 1 SA 505 (CC); *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007 1 SA 523 (CC); and *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape (No 2)* 2009 6 SA 589 (SCA) 606D.

¹¹⁵ See *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 2 SA 734 (A) 754G (hereafter the *Universal City Studios Inc* case), where the Appellate Division (as it then was) remarked: "There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate *its procedures* in the interest of the proper administration of justice" [Emphasis added].

illustrated by the significant number of cases which grappled with this issue on a wide continuum of attempts to exit debt review.

5 The case-maze

The problem relating to consumers who wish to be declared "no longer over-indebted" was thrust into the spotlight in *Magadze v ADCAP, Ndlovu v Koekemoer*.¹¹⁶ In this case the applicants sought an order declaring them to be no longer over-indebted, no longer under debt review, requiring the relevant credit bureau to remove their debt review status from their credit reports and also that the respective debt counsellors provide the form 17.W, confirming that the applicants have been declared no longer over-indebted. The court indicated that the ultimate question was whether the amendment to section 71 by the 2014 Amendment Act would have the same effect as the court granting an order that the applicants are no longer over-indebted and that the credit bureau removes the debt review status from the credit reports. In both applications, the consumers had applied for debt review and Form 17.2 had been sent out. However, debt restructuring orders were not made. The consumers had subsequently paid off two of their creditors and stated that their financial circumstances had improved significantly since their applications to be declared over-indebted and that as a result thereof, they were able to afford to increase the total monthly amount payable to their creditors in terms of the debt restructuring order. The applicants further indicated that all their creditors received notice of the current applications and that none of them objected. Accordingly, they wished to "terminate the debt review process" and pay their creditors directly. However, they were advised that a debt counsellor does not have the power to terminate or withdraw the debt review process.¹¹⁷

The court among other things indicated that a "Form 17.2 was already issued and thus it is too late for applicants to withdraw from the debt review process".¹¹⁸ The court subsequently referred to *Rougier v Nedbank Ltd*, noting that *Rougier* had been decided before the amendment of section 71 by the 2014 Amendment Act. The court dealt briefly with the amendments to section 71, pointing out again that the question was whether a clearance certificate, as contemplated in section 71, has the same effect as the court

¹¹⁶ *Magadze v ADCAP, Ndlovu v Koekemoer* (GP) (unreported) case number 57186/2016 of 2 November 2016 (hereafter the *Magadze* case).

¹¹⁷ *Magadze* case paras 1-5.

¹¹⁸ *Magadze* case para 6.1. Emphasis added.

order envisaged in section 88(1) of the Act.¹¹⁹ The court indicated (and subsequently held) that, in its view, section 71 does not confer any new powers on the debt counsellor to release the consumer from debt review and that all it does is inform the creditors that the consumer is now able to meet his monthly obligations, while the clearance certificate may expunge from the consumer's record any default in respect of a particular credit agreement. It does not appear to expunge from the consumer's record the fact that the consumer (previously) successfully applied to be placed under debt review.¹²⁰ It pointed out that this has adverse implications for all future transactions the consumers seek to enter into. The court further pointed out that section 88(1)¹²¹ does not have a provision similar to section 71(5) regarding the expunging of credit bureaus records. Thus, it would create an anomalous position where a Form 17.W, being a form issued by the NCR titled "Withdrawal from Debt Review", is issued pursuant to a court order and the credit bureau did not expunge the consumer's records *in toto*. The court remarked that to grant an order that falls short of failing to expunge the consumer's credit record *in toto* would effectively mean that section 71 would carry more weight than an order issued by the High Court and such a situation would be untenable. It stated that, in any event, it was of the view that a court has "wide powers" to grant the order sought to expunge the records of the consumer, given the specific facts set out in the applications, indicating that the consumers are no longer over-indebted and are in a position to pay their creditors. Thus, the court declared both applicants to be no longer over-indebted and no longer under debt review. Further, the court ordered that the credit bureaus remove the applicants' debt review status from their credit records and that the debt counsellor provide a Form 17.W to the relevant creditors, to inform them that the applicants had been declared no longer over-indebted and no longer under debt review.¹²²

Subsequently, in *Mokubung v Mamela Consulting*,¹²³ an unopposed application served before the Gauteng High Court also for an order declaring the applicant to be no longer over-indebted. The court stated that neither the Act nor the NCR's *Withdrawal Guidelines* lends authority to the debt counsellor to reverse a commenced debt review process. It further stated that a Magistrate's Court, being a creature of statute, has no authority

¹¹⁹ Although the court spoke of s 88(1) of the Act, it was clear from the underlining in the quoted subsection that she was referring to s 88(1)(b) specifically.

¹²⁰ *Magadze* case paras 8-15.

¹²¹ It appears that the court meant s 88(1)(b) of the Act specifically.

¹²² *Magadze* case paras 16-21.

¹²³ *Mokubung v Mamela Consulting* (GPP) (unreported) case number 87653/2016 of 14 June 2017 (hereafter the *Mokubung* case).

to grant the order envisaged in the *Withdrawal Guidelines*. However, the court held that in line with the *Guidelines* and using its "inherent reservoir of power to regulate procedures in the interest of the proper administration of justice", the High Court has the necessary powers to grant relief in deserving circumstances.¹²⁴ Therefore, the court declared the consumer "to be no longer over-indebted". A similar order was made by the same judge in *Manamela v Du Plessis t/a Debt Safe*.¹²⁵

Thereafter, three unopposed matters dealing with applications to be declared no longer over-indebted were heard in the KZN Division of the High Court in Pietermaritzburg and similar judgments were delivered in all three cases. The facts of these matters differ slightly. In *Less v Vosloo*¹²⁶ the applicant had applied for debt review in March 2013. No proof was furnished to the court regarding the dispatch of a Form 17.1 or a Form 17.2 and apparently no restructuring order was in existence. The applicant alleged that she had paid off certain credit providers, as listed in her affidavit, and was making direct payments to the "outside credit providers", as also listed in her affidavit.¹²⁷ The applicant further alleged that she was being prejudiced, because she could not apply for a "rental agreement, etc."¹²⁸

The court remarked that it was not possible to determine whether the direct payments that had been made were adequate, alternatively how much less they were than they actually should have been, and whether the credit providers had accepted these payments. Accordingly, the court stated that it could not be determined whether the applicant was still over-indebted or not. The court indicated that due to the conclusion it had reached it was not necessary to decide this issue.¹²⁹

This was quite a lengthy judgment, but the gist of the court's reasoning was that the debt restructuring had never been confirmed by any court in terms of section 87(1) of the NCA, nor was any restructuring agreement between all the parties attached to the papers. The court referred to *Nedbank v National Credit Regulator*¹³⁰ where it was held that a debt counsellor, as a statutory functionary, is obliged, consequent to reviewing a consumer's debt

¹²⁴ *Mokubung* case paras 4 and 5 relying on the *Universal City Studios Inc* case.

¹²⁵ *Manamela v Du Plessis t/a Debt Safe* (GPP) (unreported) case number 78244/2016 of 21 June 2017 (hereafter the *Manamela* case).

¹²⁶ *Less v Vosloo* (KZP) (unreported) case number 7520/17P of 22 September 2017 (hereafter the *Less* case).

¹²⁷ *Less* case paras 1 and 2. The paid off creditors were listed in para 7 of her affidavit and the "outside creditors" were listed in para 11 thereof.

¹²⁸ *Less* case para 4. It appears that she was referring to a lease of property.

¹²⁹ *Less* case para 5.

¹³⁰ *Nedbank Ltd v National Credit Regulator* (SCA).

in terms of section 86, to refer a proposal to the Magistrate's Court to make certain orders, failing which he has not complied with his duty as a debt counsellor. Further, the court remarked that it was clear from the *Nedbank*-case that there must be judicial oversight to declaring a person over-indebted and restructuring his debt. It pointed out that, until the Magistrate's Court has made an order approving the over indebtedness and restructuring, "no declaration of over-indebtedness has occurred." The court further stated that¹³¹

Form 17.2 used by the debt counsellor does not reflect the correct position as it fails to incorporate the judicial oversight required and that any application for over indebtedness and restructuring must be approved by the Magistrate's Court. Form 17.2 is also incorrect in stating that the application for debt review was successful.

The court stated that the debt counsellor is obliged to obtain information from the consumer, assess the application, prepare a restructuring of the debt and draft the necessary application to the Magistrate's Court. It remarked as follows:¹³²

In my view a period of 90 days from the date of the application for a declaration of over indebtedness by the consumer to the debt counsellor should be sufficient to do so and to issue and serve the application at the relevant court for its decision. If this is not done, the consumer cannot be prejudiced and wait indefinitely for the debt counsellor to comply. The consumer and credit providers are being prejudiced, as there is no valid debt rescheduling because the magistrates court has not approved such and made no order.

The court indicated that the intention of the NCA is to ensure that consumers who are over-indebted receive the necessary assistance within a reasonable time and indicated that they are in the majority of cases already in a vulnerable position. It further stated that, if the debt counsellor fails to issue and serve the application at the Magistrate's Court within 90 days after receiving the application, the consumer if he so wishes must after the expiry of the 90 days be able to "stop the whole process". It remarked that the consumer can in such a situation, at any time before the application is issued and filed at the Magistrate's Court, inform the debt counsellor that he must not proceed with the application. The debt counsellor must then inform the credit bureau to remove the name of the consumer from all its records.¹³³ However, the court held that, because no application for a declaration of over-indebtedness and restructuring by a Magistrate's Court had been

¹³¹ Less case paras 8.1-8.4. Emphasis added.

¹³² Less case paras 13.3.1 and 13.3.2.

¹³³ Less case para 13.5.

instituted in the matter at hand, there had not been any valid declaration of over-indebtedness. Hence, the applicant's application could not be granted.

Similar applications were heard by the same judge in *Mhlongo v Beatrice De Beer*¹³⁴ and *Ngcongo v Neil Roets trading as Debt Rescue*.¹³⁵ In the *Mhlongo*-case, the applicant had applied for debt review in September 2013. A Form 17.2 was sent out, but no application was made to court for a declaration of over-indebtedness and for a debt restructuring order. The applicant indicated what the amounts of her initial indebtedness were at the time that the Form 17.2 was sent out by the debt counsellor.¹³⁶ She also detailed her current monthly net salary and her current total expenditure, indicating that she was left with a "surplus" of approximately R3 300. She indicated that she had paid off all her debt (11 credit agreements) listed in the agreement, except debt owing to African Bank, which she was repaying at R1 000 per month. She also produced settlement letters for two of these accounts, but not for the eight others. However, the court was not satisfied that sufficient evidence had been presented in support of the consumer's allegation that she was no longer over-indebted.¹³⁷ Subsequently, the court employed the exact same reasoning as in *Less v Vosloo* and its judgment is a verbatim repeat of the aforesaid judgment, resulting in the dismissal of the application.

In the *Ngcongo*-case, the applicant had applied for debt review on 23 April 2016. A Form 17.1 and a Form 17.2 were issued on the same day. However, no application to be declared over-indebted and to have the consumer's debt restructured was submitted to court. The applicant made certain allegations regarding payments to his creditors, but did not provide sufficient information in that respect. Consequently, the court was not satisfied with the evidence presented. The applicant provided neither any indication as to how much was paid to each creditor nor how much was owing. Among other things, the court pointed out that the applicant's affidavit failed to set out how the applicant's payments had been restructured by the debt counsellor. Further, there was no indication as to what the exact amounts were that had to be repaid monthly to each credit provider and whether the applicant was in a position to pay them. Also, if he was not, whether the credit providers

¹³⁴ *Mhlongo v Beatrice De Beer* 2018 JOL 39571 (KZP) (22 September 2017) (hereafter the *Mhlongo* case).

¹³⁵ *Ngcongo v Neil Roets trading as Debt Rescue* 2018 JOL 39572 (KZP) (22 September 2017) (hereafter the *Ngcongo* case).

¹³⁶ *Mhlongo* case para 3. This information indeed corresponded with the information listed in the Form 17.2.

¹³⁷ *Mhlongo* case paras 4-7.

were in agreement to accept any other amount. Also, there was neither an indication that the applicant had in actual fact contacted his credit providers, nor that they had agreed to accept any other payment. Likewise, there was no demonstration that these payments were less than the actual monthly payments.¹³⁸ Thus, the court stated that on this basis alone the application had to fail, but that for the reasons set out later (similar to the reason given in *Less v Vosloo*) it would not be necessary to determine this issue.¹³⁹ The court further pointed out that the procedure by the debt counsellor, to send Form 17.1 and Form 17.2 on the same day, was incorrect.¹⁴⁰ Thereafter, the remainder of the court's reasoning and judgment were basically a verbatim repeat of the judgment in *Less v Vosloo*, with the result that the court eventually dismissed the application.

In *Daniels v Sensational Debt Relief (Pty) Ltd*,¹⁴¹ the applicant was placed under debt review, where after the debt counsellor restructured the applicant's debt. Although the matter was never referred to court to formalise the debt review in the form of an order, it seems that the applicant abided by the plan and paid the bulk of his credit agreement debt. After some time his financial position improved and he wished to exit the debt review procedure. On 3 August 2017 the applicant brought an application to the Western Cape High Court, which was unopposed. The court found no direct ground in the NCA on which the Magistrate's Court can declare a consumer no longer over-indebted where the court has not declared the consumer over-indebted or placed the consumer under debt review. However, the court drew on section 169 of the Constitution to make the following: that the applicant is no longer over-indebted, that the applicant is no longer under debt review, that the debt counsellor issue a clearance certificate and that credit bureaus remove the debt review status from the applicant's record.

In *Du Toit v Sager*¹⁴² the consumer also approached the Western Cape High Court to be declared no longer over-indebted. In this matter the consumer had also applied for debt review, but no debt restructuring order had been

¹³⁸ *Mhlongo* case paras 3.1-3.3.

¹³⁹ *Mhlongo* case paras 3.4-3.7.

¹⁴⁰ *Mhlongo* case para 4. The court referred to reg 24(10) and stated: "Section (sic) 24(10) provides that after completion of an assessment the debt counsellor sends Form 17.2 to the credit bureaus. How could this have been done when the credit providers were not given any opportunity to respond as both Forms 17.1 and 17.2 were sent on the same day?"

¹⁴¹ *Daniels v Sensational Debt Relief (Pty) Ltd* (WC) (unreported) case number 10065/17 of 3 August 2017.

¹⁴² *Du Toit v Sager* (WC) (unreported) case number 16226/17 of 17 November 2017 (hereafter the *Du Toit* case).

applied for at any time thereafter.¹⁴³ The consumer alleged that he had settled all his debts with his credit providers, except his instalment sale agreement with the sixth respondent, and that his financial circumstances had significantly improved. It was argued on behalf of the consumer that the court must use its inherent jurisdiction to make the requested order. This was because there were circumstances where a person has not paid off all his debts, and therefore could not get a clearance certificate, although he was no longer over-indebted. Hence, there was a *lacuna* in the NCA.¹⁴⁴ The court's attention was drawn to the unreported judgment in *Daniels-case*. The court agreed with the judge in the *Daniels-case* that¹⁴⁵

... the NCA does not expressly empower the Magistrate's Court to declare a consumer no longer over-indebted after a section 86(1) application has been filed and a Form 17.2 has been issued, where the consumer has settled liabilities to the point that he or she is no longer over-indebted, in circumstances in which the court has not declared the consumer over-indebted, or placed the consumer under debt review.

The court subsequently stated that, in its view, there are different paths of travel that a person under debt review, who was aggrieved by a report to a credit bureau and the information it held in relation to the debt review, can take. The first path is to obtain a clearance certificate in terms of section 71. The court remarked that refusal by a debt counsellor to provide a consumer with a clearance certificate "is not a matter nor is it circumstances in which the inherent jurisdiction of the High Court should be visited upon". Here, the applicant should apply directly to the Tribunal to review the decision of the debt counsellor. The second path available to the consumer is to challenge the credit information in accordance with section 72(1)(c). The third path is to request the NCR to investigate a complaint regarding disputed information held by a credit bureau. Therefore, the court did not agree with the applicant's counsel that the NCA's silence in respect of a process to have a person declared no longer over-indebted by a Magistrate's Court is a *lacuna* in the Act.¹⁴⁶ It thus dismissed the application, among others indicating that the High Court is not the forum of first instance on matters that both the Tribunal and the Magistrate's Courts should deal with.

¹⁴³ It appears that a Form 17.1 was sent out but it is unclear whether a Form 17.2 was sent out by the debt counsellor.

¹⁴⁴ *Du Toit* case paras 3-6. The debt counsellor did not participate in the proceedings as he alleged that the debt review process had been suspended by virtue of the consumer's non-payment of debt counselling fees.

¹⁴⁵ *Daniels* case para 7. The court's attention was also drawn to the judgment in the *Magadze* case (as discussed above).

¹⁴⁶ *Daniels* case paras 9-22.

Subsequently, in the *Phaladi* case application was made again to the Western Cape High Court for an order that the consumers were no longer over-indebted. The applicants had applied for debt review and a voluntary re-arrangement had been agreed with their credit providers, to which they had adhered. No debt restructuring order had been applied for. The applicants claimed that they were "now financially sound and in a position to demonstrate that they are able to punctiliously fulfil their outstanding obligations".

Thus, they contended that it would be "reasonable" in the circumstances for their records at the credit bureaus to be expunged so that they would be enabled to responsibly incur additional obligations by entering into fresh credit agreements in the ordinary course of events.¹⁴⁷ One of the applicants also alleged that her negative credit status had a potential adverse effect on her job applications and thus on her career advancement.¹⁴⁸

Binns-Ward J remarked that the question that arose was whether it was "at all within the power of the (high) court" to grant the applicants the relief that they sought. He referred to *Du Toit v Sager*, the *Magadze* case, the *Mokubung* case and the *Manamela* case as discussed above. He pointed out that in the *Magadze* case the court failed to indicate the source of the "wide powers" it relied upon to grant the declaration that the consumers were not over-indebted any longer.¹⁴⁹ Disagreeing with the judgments in *Mokubung* and *Manamela*, Binns-Ward J indicated that the inherent jurisdiction of the High Court could not be invoked to grant the relief sought, among other reasons because in the area of law regulated by statute, the High Court is under a duty to interpret and apply legislative enactments in a manner that promotes the spirit, purport and objects of the Bill of Rights. He stated that¹⁵⁰

... in striving to do so it cannot by procrustean construction do violence to the language used by the legislature. Its powers do not extend in improving legislation by providing measures or remedies that the statutory enactments do not afford, merely because the court considers it would [be] just or equitable should they afford it.

Binns-Ward J indicated that to purport to do so would in effect be to assume a legislative function and thereby impinge impermissibly on the domain of

¹⁴⁷ The case does not indicate whether Forms 17.1 and 17.2 were sent out, but given that a voluntary arrangement was in place it can be assumed that the said forms were sent out.

¹⁴⁸ *Phaladi* case para 2.

¹⁴⁹ *Phaladi* case paras 4-7.

¹⁵⁰ *Phaladi* case para 8.

the legislative branch of government. He remarked that the powers exercisable in terms of section 172 of the Constitution, to read down or read in provisions to render legislation constitutionally compatible, or to provide just and equitable interim relief following a declaration of constitutional incompatibility, are quite distinguishable, as is the approach of courts to strictly or narrowly interpret legislation that limits or curbs common law rights. Accordingly, he stated that¹⁵¹

[a]ny contemplation of the width of the superior courts powers that fails to acknowledge and respect these limitations of their bounds is likely to lead to a fundamentally misconceived conception of their actual extent and, if by judges, can result in their being exceeded.

Binns-Ward J further remarked that the notions of over-indebtedness contemplated by section 86(7)(c) and the associated remedy of "debt review" within the auspices of the Act¹⁵²

... have no foundation in the common law. They are statutory creations. How they work is governed entirely by the NCA and, in the absence of a challenge to their constitutionality, the courts' powers in respect of them are delineated by the provisions of the enactment.

Binns-Ward J indicated that the disabilities that follow for an allegedly over-indebted consumer after he has applied to a debt counsellor for debt review are regulated in the first instance by sections 88(1) and (2) of the NCA.¹⁵³ He stated that the effect of section 88 appears to be that consumers are prohibited from entering into any fresh agreements, apart from a consolidation agreement, until they have fulfilled all their obligations under the existing credit agreements as rearranged. He indicated that such an effect is "ameliorated" by the provisions of section 71 as amended. He further stated that it is clear that section 71(2) in its original form was entirely congruent with section 88(1)(c) and 88(2). He remarked that the evident intention in replacing section 71(2)'s original content with the amended wording was to enable consumers who had made debt review applications to achieve the expungement of the record of their debt rearrangement orders or agreements, once they had fulfilled *all* their obligations in respect of those credit agreements that were not mortgage agreements or long-term agreements. However, he indicated that the legislature might have made matters clearer had it also amended section 88 when it made changes to section 71. In his view, the legislature's failure to also amend section 88 had given rise to a tension between the two provisions. Further, he indicated that

¹⁵¹ *Phaladi* case para 8.

¹⁵² *Phaladi* case para 9.

¹⁵³ *Phaladi* case para 12.

if the applicants had fulfilled all their restructured credit agreements and encountered problems in obtaining a clearance certificate, their remedy was to approach the Tribunal, which entailed an administrative process. He remarked that¹⁵⁴

[a]s pointed out by Thulare AJ in the *Du Toit* case, the role of the High Court in the legislative scheme is limited to dealing with judicial reviews of, or appeals from the Tribunal: see section 148(2) of the NCA. The NCA does not afford the High Court jurisdiction to deal at first instance with matters falling within the province of the Tribunal.

Notably, in this case the counsel for the applicants sought to rely on section 88(1)(b)¹⁵⁵ of the NCA and paragraph 4.2 of the NCR *Explanatory Note*. Binns-Ward J remarked that the NCR is obviously bound by the Act and its published opinions, bearing on the interpretation of the Act, are expressly acknowledged in section 16(1)(b) to be non-binding. With regard to counsel's reliance on section 88(1)(b) the court stated that¹⁵⁶

... it is clear, if the provision is read contextually, that it does *not* contemplate an application to the Magistrate's Court for declaring *an already established state of over-indebtedness* to have come to an end, nor does it contemplate *an application to end debt review pursuant to an agreed debt rearrangement* pursuant to a recommendation in terms of section 86(7)(b). Indeed, having regard to the provisions of section 71 such a procedure would be superfluous. As mentioned, the legislative scheme is that the lifting of the consumer's disabilities attendant on debt review occurs by way of an administrative, not a judicial, process. Having regard to what is entailed that seems to me to be entirely fitting. Whilst acknowledging that the separation of powers does not give rise to a hermetic compartmentalisation, it would, in my view, have been an inappropriate allocation of constitutional functions to give the courts a surrogate role in the administrative framework of national credit regulation structures. The appeal/review role accorded to the High Court in terms of section 148(1) is by contrast, constitutionally appropriate.

The court then turned to the NCR's *Explanatory Note* and remarked that it postulated an application's being made in terms of section 87(1)(a) of the NCA. However, the court pointed out that section 87(1)(a) does not make provision for an application, but merely acknowledges the magistrate's power to refuse such an application. Binns-Ward J remarked that section 87(1)(a),¹⁵⁷

¹⁵⁴ *Phaladi* case para 17.

¹⁵⁵ As indicated above, s 88(1)(b) of the Act determines that the consumer may not enter into new credit agreements until "the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumers application".

¹⁵⁶ *Phaladi* case para 20. Emphasis added.

¹⁵⁷ *Phaladi* case para 26.

... provides for a *negative* response by the court to the application before it. It is to that provision that section 88(1)(b) effectively cross-references. The Act most certainly does not contemplate an application to the Magistrate's Court for a declaration that the consumer is *not* over-indebted. Any such declaration would require a *positive* response to an application for which the Act makes no provision. Once a debt review had been confirmed, whether by way of court order in terms of section 87(1)(b) or by voluntary debt rearrangement in terms of section 86(8)(a), the only way to end its effect is in terms of section 71 read with section 88(1)(c). There is no halfway house.

Thus, the court concluded that the NCA "just does not make provision for the sort of application conjured in paragraph 4.2 of the *Explanatory Note*".¹⁵⁸

Binns-Ward J subsequently indicated that, for the interpretation of section 88(1)(b) contended by the applicants' counsel to be able to apply, the phrase "the court had determined that the consumer is not over-indebted" would require to be read as "the court has determined that the consumer is no longer over-indebted", thereby necessitating the deletion of the word "not" and its replacement with "no longer". To deal with the review following on an agreed debt rearrangement, in terms of section 86(7)(b), it would have to contain the wording "has determined that the consumer is no longer subject to the effects of debt review" or other words to that effect. Binns-Ward J stated that¹⁵⁹

[i]t is well established that in this context words cannot be read into a statute unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands.

The court stated that the unambiguous effect of the NCA is that an over-indebted or financially challenged consumer who enters into a debt rearrangement agreement can terminate the debt review only by settling his or her obligations to the extent required in terms of section 71 and demonstrating that he or she has satisfied the other requirements of section 71(1)(b).¹⁶⁰

In a last attempt to obtain some relief for his clients, the applicants' counsel asked only for declaratory relief, "shorn of any direction as to the expungement of the records of the credit bureaux". He argued that the court should come to the applicant's assistance, exercising its power in terms of section 21(1)(c) of the *Superior Courts Act*. However, Binns-Ward J stated that it would be inappropriate to make such a declaration in the environment

¹⁵⁸ *Phaladi* case para 24.

¹⁵⁹ *Phaladi* case para 21.

¹⁶⁰ *Phaladi* case para 21.

regulated by the NCA, while the applicants are still properly recorded in terms of the Act as being the subjects of debt reviews. He remarked that¹⁶¹

[t]he applicants resort to this court was therefore misconceived. They are limited to the relief provided for in terms of section 71 of the NCA, and can seek it only in the manner therein set out. *To the extent that they do not qualify for relief under that provision, they are remediless. The courts are not empowered to craft a remedy that the statute does not allow for.* In my view therefore the orders made in the Gauteng Division judgments mentioned earlier should not have been granted.

In *Eseu v Debtsafe; Shingange v Mare trading as Debt Rescue*,¹⁶² four matters relating to applications to be declared "not over-indebted" served before the Gauteng Provincial Division of the High Court. It was alleged that, subsequent to being placed under debt review, all the applicants had proceeded to settle some of their accounts due to their financial situation's improving. Accordingly, they wished to terminate the debt review process and to pay their credit providers directly, as they alleged that they were financially able to afford an increase in the total monthly amounts payable to the remaining credit providers.¹⁶³ Despite the court finding that the applicants had not complied with the court rules relating to service of their applications and dealing with this issue at length, the court eventually remarked:¹⁶⁴

It would *result in an injustice* if the Court did not assist the applicants as they had made out a proper case for the relief sought. All the applicants have indicated that they wish to repay their creditors as fast as possible so that they can put their debt behind them. I therefore intend granting a rule *nisi* calling upon the respondents [the credit providers] to indicate why a final order should not be granted.

Thus, without going into the issue of whether it was indeed competent for the High Court to grant the relief sought, the court issued the aforesaid rule *nisi* with a return date of 24 July 2018.

In *Botha v Koekemoer t/a The Debt Expert 2; Mafakane v MSA Consultants t/a Consumer Financial Services*,¹⁶⁵ the Limpopo High Court subsequently

¹⁶¹ *Phaladi* case para 29. Emphasis added.

¹⁶² *Eseu v Debtsafe; Shingange v Mare trading as Debt Rescue* (GPP) (unreported) case number 85651/2017; 85650/2017 of 10 April 2018 (hereafter the *Esau v Debt Safe* case).

¹⁶³ *Esau v Debt Safe* case para 1. It is not clear whether Forms 17.1 and 17.2 were sent or whether any court orders were made.

¹⁶⁴ *Esau v Debt Safe* case para 17.

¹⁶⁵ *Botha v Koekemoer t/a The Debt Expert 2; Mafakane v MSA Consultants t/a Consumer Financial Services* (LMPP) (unreported) case number 7723/2017; 750/2018 of 11 May 2018 (hereafter the *Botha* case). The court in this matter was referring to the *Manamela* case.

also had the opportunity to adjudicate on applications to be declared no longer over-indebted. The facts were that each of the applicants applied for debt review and their debt counsellors sent out Form 17.2 (and obviously also Form 17.1). However, no debt restructuring orders had been applied for. Nevertheless, the applicants continued to pay their credit providers without any objection.¹⁶⁶ They alleged that their financial circumstances had improved since applying for debt review, and that they were now able to pay their debts. Hence, they wished to terminate the debt review process instituted by them.¹⁶⁷

In a lengthy judgment the court undertook an analysis of the debt review process. The court in particular remarked that until an order in terms of section 86(7)(c) is made by a Magistrate's Court "a proposal made by a debt counsellor has no legal effect".¹⁶⁸ The court indicated that the NCA neither expressly allows nor prohibits the withdrawal of an application for debt review by the applicant and, among other things, remarked that¹⁶⁹

[t]he fact that no mention is specifically made with regard to the withdrawal of an application does not mean that an applicant is unable to withdraw an application by means of the debt counsellor. A debt counsellor plays a pivotal role in the process once an application is submitted to him/her. The contents of the application need to be scrutinized to determine whether it contains the prescribed information and it then has to be appraised to make an informed decision. If a debt counsellor has made a recommendation such debt counsellor is obliged to refer the application within a reasonable time to a court for an order.

In footnote 20 to the judgment the court further remarked that¹⁷⁰

[a] debt counsellor has no discretion to withhold an application from court after he has made his recommendation. A court may however consider the withdrawal at the hearing.

The court also remarked that it was in agreement that a debt counsellor may not terminate debt review proceedings subsequent to his having made a proposal in terms of section 86(7)(c). However, the court was of the view that¹⁷¹

¹⁶⁶ *Botha* case para 2. It is not clear whether they paid their creditors directly or via the debt counsellor or a payment distribution agent.

¹⁶⁷ *Botha* case para 3.

¹⁶⁸ *Botha* case para 13. The court stated that "the recommendation simply sets in motion a chain of prescribed events which, ultimately may lead to a court determining that (sic) an applicant to be overindebted."

¹⁶⁹ *Botha* case para 18.

¹⁷⁰ *Botha* case para 18.

¹⁷¹ *Botha* case para 19.

... it cannot seriously be contended that a court may not take into account that an applicant wishes to withdraw the application or that the applicant has entered into further credit agreements subsequent to the commencement of the debt review proceedings in contravention of section 88(1). A hearing is central to debt review proceedings. I cannot think of any reason why a debt counsellor cannot place the subsequent wishes of the applicant to withdraw the application before the court. A court after considering the reasons for withdrawal of the application by the applicant may reject the application in terms of section 88(1)(b) for that very reason. The express wording of section 88(1)(b) is wide enough.

The court stated that the debt counsellors should have made recommendations to a court for an order and remarked that it is¹⁷²

... quite unacceptable that debt counsellors who have the responsibility to administer the Act callously flout their responsibilities towards the applicants and creditors alike without any consequences.

Thus, the court held that it was¹⁷³

... not prepared to issue any declaratory orders as prayed. The applicants were at no time declared to be over-indebted by a competent court. In my view the applications must be referred to the respective Magistrate's Courts with jurisdiction for hearing. All the evidence inclusive of the subsequent events must be placed before the court by the debt counsellors with notice to all the parties and every credit bureau.

The court dismissed both applications and ordered that a copy of the judgment had to be made available to the NCR and the debt counsellors concerned.

In *Ntonto v Chris Craven t/a Zero Debt*,¹⁷⁴ the Gauteng Provincial Division of the High Court again had an opportunity to consider an unopposed application by a consumer to be declared no longer over-indebted. The applicant had applied for debt review in September 2017, but his financial position had since improved. It is unclear from the case whether a debt restructuring order was made at any time. The applicant contended that his financial position had improved significantly, that one of the rescheduled accounts had been settled in full and that he was in a position to increase the total monthly amount that he could repay to his creditors. The court referred to the contradictory decisions in the *Magadze* and *Mokubung* and *Manamela* and *Phaladi* cases as discussed above. Van der Schyff AJ indicated that, in accordance with the principle of *stare decisis*, she was bound to follow the decisions in the Gauteng North Division, unless she was

¹⁷² *Botha* case para 27.

¹⁷³ *Botha* case para 28.

¹⁷⁴ *Ntonto v Chris Craven t/a Zero Debt* (GNP) (unreported) case number 24163/2018 of 19 September 2018 (hereafter the *Ntonto* case).

of the opinion that they were wrong. However, she remarked that the application before her was vague and a proper case had not been made out for relief. Hence, she was not going to analyse the NCA, but was going to follow the precedent in Gauteng. As the applicant had not attached a confirmatory affidavit by the debt counsellor and had provided no detail regarding the amounts owed, she held, however, that it was not possible to exercise a discretion and make a ruling as to whether the applicant would be able to satisfy in a timely manner the obligations under the credit agreements to which he was a party. Accordingly, she dismissed the application.

Van der Schyff AJ had another bite at the cherry in *Swanepoel v Roets*,¹⁷⁵ where the applicants sought an order declaring them no longer over-indebted. In this matter, a debt restructuring order had indeed been granted on 23 January 2013 and the applicants alleged that they had never defaulted on the order. They further alleged that they had "voluntarily withdrawn" from the debt review process during February 2018 and had since continued to pay their credit providers in accordance with the "initial agreement" they had had with them prior to applying for the rearrangement of their debt.¹⁷⁶ They alleged that their financial position had improved and they were now able to pay their credit providers, without assistance, as they were no longer over-indebted. A confirmatory affidavit by the debt counsellor was attached to the application.¹⁷⁷ Van Der Schyff AJ referred to the NCR *Withdrawal Guidelines* and to the subsequent *Explanatory Note* and remarked that it was evident that the NCR was of the opinion that a consumer could withdraw from the debt review process after a rearrangement order had been granted. She referred to paragraph 3 of the *Explanatory Note* and indicated that it was evident that the NCR's stance was that the Magistrate's Court is the correct forum to approach for an order rescinding a debt rearrangement order. She was of the view "without deciding this issue" that, if the NCA provided for the voluntary withdrawal from the debt review process after a Magistrate's Court issued a rearrangement order, the correct forum to approach was the Magistrate's Court. She further indicated that the current application before the High Court was not an appeal nor a review application and that she was not aware of any authority stating that the High Court has jurisdiction to rescind

¹⁷⁵ *Swanepoel v Roets* (GNP) (unreported) case of 23 October 2018 (hereafter the *Swanepoel* case).

¹⁷⁶ Thus, it appears that they were paying larger instalments than the debt restructuring order provided for.

¹⁷⁷ *Swanepoel* case paras 1-5.

or set aside an order granted in the Magistrate's Court, unless the Magistrate's Court order was appealed against or reviewed.¹⁷⁸

Van der Schyff AJ indicated that it had been argued on behalf of the applicants that, akin to the *Mokubung* case, the High Court must use its "inherent reservoir of power to regulate the procedures in the interest of proper administration of justice".¹⁷⁹ However, she referred to the *Phaladi* case, where it had been explained that the court's inherent jurisdiction, as referred to in the *Universal City Studios Inc* case,¹⁸⁰ referred to the court's jurisdiction to regulate its own procedures and processes and did not extend to¹⁸¹

... improving legislation by providing measures or remedies that the statutory enactments do not afford merely because the court considers it would be just and equitable should they be afforded.¹⁸²

Van Der Schyff AJ indicated that the court was not in the present matter required to deal with the instance where a debt re-arrangement order had not been made, because *in casu* such a debt rearrangement order existed. She indicated that such an order could have been made only after the Magistrate's Court had conducted a hearing and held that, in the circumstances, she was not convinced that a High Court could rescind an order (namely, the debt restructuring order) made by the Magistrate's Court. Hence, she dismissed the application.¹⁸³

6 Observations regarding the contribution of case law

Although the court indicated (without investigating this issue) that withdrawal from debt review is no longer possible after a Form 17.2 has been sent out, it is respectfully submitted that the court in the *Magadze* case failed to appreciate the unique nature of the problem at hand, namely that section 71 did not find application as the consumers *in casu* did not meet the requirements for a clearance certificate. Also, section 88(1)(b) does not cater for an order declaring a consumer not to be over-indebted at any later stage, where a consumer's financial position may have improved, but is specifically aimed at the situation where a debt counsellor makes his initial recommendation to court or where a consumer who has been found by the debt counsellor to be not over-indebted brings an application to court as

¹⁷⁸ *Swanepoel* case paras 21-25.

¹⁷⁹ *Swanepoel* case paras 26.

¹⁸⁰ *Swanepoel* case para 41.

¹⁸¹ *Swanepoel* case paras 26-27.

¹⁸² *Swanepoel* case paras 26-27.

¹⁸³ *Swanepoel* case paras 28, 29.

envisaged by section 86(9). In fact, the type of order envisaged in section 88(1)(b) and the expungement of information regarding a debt review in which a clearance certificate was obtained have nothing to do with each other. The basis on which the court came to the assistance of the consumers in this matter, namely by using the "wide powers" of the High Court without providing any explanation in this regard, is also questionable. Nevertheless, the *Magadze* case serves to highlight the plight of consumers who require to be declared no longer over-indebted prior to qualifying for a clearance certificate.

The *Mokubung* and *Manamela* cases take no further the solution of the problem relating to consumers whose financial situation has improved since entering the debt review process. This is because the reliance by the court on the High Court's inherent jurisdiction appears to be misplaced.

Less v Vosloo and the similar judgments in the *Mhlongo* and *Ncongo* cases also do not provide solutions to the issue under discussion. However, these cases highlight an important aspect, namely that some debt counsellors fail to comply with their obligation to refer debt reviews to court where a determination of over-indebtedness has been made, with the effect that no formal declaration of over-indebtedness and debt restructuring order is made. This is certainly untenable. The court also recognised that Form 17.2 is incorrectly worded and that it is incorrect to send Form 17.1 and Form 17.2 at the same time. Unfortunately, the court then read its own time limits into the period within which a debt review has to be referred to court and seemed to address the issue of a consumer whose debt review is not referred to court, as envisaged in section 86(7)(c), without considering the exact nature of the challenge at hand. The latter pertains to consumers who want to withdraw from or exit the debt review process – not because their debt counsellors did not refer their matters to court, but because they allege that their financial situation has improved since going under debt review.

The judgment in *Du Toit v Sager*, save for making the point that the High Court should not be approached to deal with matters that fall within the jurisdictional remit of entities like the Tribunal, also brings the issue under discussion no nearer to a solution. Its "three path"-approach is, with respect, not applicable and not appropriate for addressing the problem at hand. It can respectfully also not be agreed with the court in this matter that there is no *lacuna* in the NCA, in the context of the plight of consumers who wish to exit debt review on the basis that their financial situation has improved.

The *Phaladi* case appears to be a well-considered and well-motivated judgment, where the court indeed appreciated the specific nature of the issue at hand, even though the court did not indicate in any particular detail how the problem could be addressed. Binns-Ward J is clearly correct in indicating that the inherent jurisdiction of the High Court cannot be used to address the problem under discussion. His remarks are also correct - that section 88(1)(b) neither contemplates an application to the Magistrate's Court for declaring an already established state of over-indebtedness to have come to an end, nor envisages an application to end debt review pursuant to an agreed debt rearrangement pursuant to a recommendation in terms of section 86(7)(b). One can also agree with his remarks that section 87(1)(a) itself does not make provision for an application, but merely acknowledges the power of the Magistrate's Court to refuse ("reject") such an application. It can be agreed that section 87(1)(a) merely provides for a *negative* response by the court to the application before it, that section 88(1)(b) effectively cross references to section 87(1)(a), and that the NCA does not contemplate an application to the Magistrate's Court for a declaration that the consumer is *not* over-indebted (i.e. that the aim of the applications to the Magistrate's Court that the NCA provides for is actually to try and get the consumer declared over-indebted so that he can be afforded debt relief). There is arguably also merit in his view that a High Court cannot give the necessary declaratory relief, as contended for by the applicants, and that reading-in would not be an appropriate remedy. However, it cannot be agreed that any process catering for withdrawal from debt review by consumers who have entered the debt review process and whose financial circumstances have subsequently improved should be an administrative process only. Although an administrative process to guide such withdrawal *prior* to a formal declaration of over-indebtedness and *prior* to a debt restructuring order's being made by a court may be appropriate, it will no longer suffice once the consumer has entered the judicial realm; namely, where a court has made the aforesaid declaration and order. Once such a declaration and order is made, withdrawal and exit will be possible only on application to court, supported by evidence regarding the fact that the consumer is no longer over-indebted *and* that he will be in a position to repay his credit agreement debt as per the original agreement terms.¹⁸⁴

The *Eseu v Debt Safe* case, given the fact that it fails to engage with the problem at hand at all, brings us nowhere closer to a solution.

¹⁸⁴ If he is only able to show that he will be able to repay under the restructured terms that in itself is an indication that he is still over-indebted.

It appears that the court in the *Botha* case also appreciated the fact that the restructuring proposal by a debt counsellor, absent a restructuring order by a court, has no legal effect (although as pointed out above, an application for debt review to a debt counsellor has the legal effect of barring the over-indebted consumer from entering into new credit agreements and triggering a moratorium on enforcement). The court has also correctly pointed out that a debt counsellor is under an obligation to refer his recommendation to court for an order. However, it appears that the court held the view that withdrawal or exit from debt review, where a consumer's financial position has improved after he applied for debt review, can be granted only by the Magistrate's Court and that the appropriate section of the NCA, authorising such withdrawal, would be section 88(1)(b), which allows for an order that the consumer is "not over-indebted". However, as argued in more detail in paragraph 9 below, it is submitted that consumers whose financial situation has improved should be able to withdraw from debt review and the manner in which they should be able to achieve this should depend on how far the debt review has progressed. Accordingly, some consumers may be able to withdraw without having to approach a court, whereas consumers in respect of whom a restructuring order was granted will be able to do only so by approaching a court for relief.

Although they do not indicate how the conundrum of withdrawal from the debt review process by consumers whose financial position has subsequently improved should be solved, certain important issues were also highlighted in the judgments in the *Ntonto* and *Swanepoel* cases. In the *Ntonto* case, the need for these type of consumers to make out a proper case for relief on the papers was highlighted, making it clear that consumers will need to prove that they are *de facto* no longer over-indebted. In the *Swanepoel* case, the court quite correctly rejected the notion that the High Court's inherent jurisdiction should be used as a basis for relief and also emphasised the problematic aspect relating to the fact that the High Court cannot merely "rescind" a debt restructuring order made by a Magistrate's Court unless on review or appeal.

7 Problems experienced before the Tribunal

Note should also be taken that some consumers whose financial situation had improved attempted to use section 165 of the NCA to obtain rescission orders from the Tribunal, to release them from debt review, in instances

where consensual debt re-arrangements were made consent orders in accordance with section 138 of the Act.¹⁸⁵ Section 165 provides as follows:

The Tribunal, acting of its own accord or on application by a person affected by a decision or order, may vary or rescind its decision or order-

- (a) erroneously sought or granted in the absence of a party affected by it;
- (b) in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or
- (c) made or granted as a result of a mistake common to the parties to the proceedings.

In *Ngubane v Capitec Bank Ltd*,¹⁸⁶ the consumer brought an application to rescind a debt rearrangement agreement that was made a consent order by the Tribunal in 2014. The applicant alleged that he had received a salary increase and that he believed that he could, as a result thereof, afford to liquidate the debt "on his own terms". However, the Tribunal held that the requirements stipulated in section 165 found no application to the consumer's request. Consequently, the debt rearrangement order could not be rescinded based on the grounds advanced by the consumer due to section 165 not providing for the rescission of a Tribunal order in instances where the circumstances of the consumer changes.

In *Langa v Lewis*,¹⁸⁷ the applicant wanted the Tribunal to rescind a debt rearrangement consent order as she alleged (apparently without providing evidence) that her financial situation had "dramatically" improved since the order was made, and that she was now able to pay all her creditors. However, the Tribunal refused the application as it found that none of the requirements of section 165 had been met.

In *Nikiwe v Lewis*,¹⁸⁸ the applicant also applied to have a consent order rescinded so that he could exit the debt review process. The Tribunal stated that it was clear from the evidence presented that the reason the Applicant wanted the consent order rescinded was because he was paying his creditors through a debit order and also because the consent order was preventing the Applicant from being considered for a housing allowance of

¹⁸⁵ Although civil courts also have jurisdiction in terms of s 138 of the Act to grant consent orders, it appears that these orders are as a general rule obtained through the Tribunal.

¹⁸⁶ *Ngubane v Capitec Bank Ltd* 2017 JOL 37651 (NCT).

¹⁸⁷ *Langa v Lewis* (NCT) (unreported Tribunal judgment) case number NCT/84265/2017/165(1) of 11 September 2017.

¹⁸⁸ *Nikiwe v Lewis* (NCT) (unreported Tribunal judgment) case number NCT/86875/2017/165 of 22 December 2017 (hereafter the *Nikiwe* case).

some kind.¹⁸⁹ However, the Tribunal refused to rescind the consent order, because it held that the application did not meet any of the requirements of section 165.

In *Gxarisa v Gardner*,¹⁹⁰ the applicants who wanted a consensual debt rearrangement order rescinded indicated that they were unable to enter into any credit agreement, even though they were financially sound, having settled "some" of their debts. In particular, it was indicated that the first applicant was a member of a taxi association and was experiencing difficulties in purchasing any vehicles and in growing his business due to being under debt review.¹⁹¹ The applicants also submitted that, when they entered into the debt review arrangement, the debt counsellor informed them that they could "opt out" of the process once they were no longer over-indebted. During the hearing the first applicant submitted that the consent order had been granted as a result of a mistake common to all the parties in that the advice that the applicants had received had not been accurate. The first applicant referred the Tribunal to a form that the said debt counsellor asked them to sign, which, among others, contained the following bullet point:¹⁹²

You can choose to voluntarily withdraw from the process before repayment proposals (Form17.2) have been sent out OR if you can prove you are no longer over-indebted.

The Tribunal indicated that the consumer had not tendered any evidence that showed that the debt counsellor made a mistake in applying for the consent order or that the credit providers made a mistake in accepting the debt rearrangement proposal or that the Tribunal committed any mistake by granting the order. It stated that, while the applicants may have misunderstood the debt re-arrangement process or believed that once they were no longer over-indebted they could apply for the consent order to be rescinded, the applicants' misapprehension of the consequences of the debt review process did not constitute a ground for rescinding the order.¹⁹³

8 Conclusion and recommendations

From the aforementioned, it appears that those consumers whose financial position have improved since they entered the debt review process and who

¹⁸⁹ *Nikiwe* case para 24.

¹⁹⁰ *Gxarisa v Gardner* (NCT) (unreported Tribunal judgement) case number NCT/121006/2018/165 of 14 February 2019 (hereafter the *Gxarisa* case).

¹⁹¹ *Gxarisa* case para 11.

¹⁹² *Gxarisa* case para 12.

¹⁹³ *Gxarisa* case paras 24-25.

wish to withdraw from or exit debt review before they have completed the process and qualified for a clearance certificate as envisaged by section 71 are without recourse. It further appears that, although some of the cases that have dealt with the issue provided insight into the scope of the intricacy of the matter at hand (especially the *Phaladi* case), many of them failed to appropriately identify and address the relevant issues. The point is therefore that none of the cases thus far offers a holistic, suitable solution to the issue under discussion. Consequently, it may be asked whether it is necessary that this issue should be resolved at all, and if so, how?

Although this is probably unintended, the reality is that the NCA does not make provision for exit from debt review by consumers whose financial position has improved since they entered the debt review process other than as per section 71. No express provisions exist in this regard and although it may be argued, as in paragraph 6 above, that it would in principle be possible for these consumers to exit the voluntary debt review process before a formal declaration of over-indebtedness and debt restructuring order by the Magistrate's Court, the lack of due process to facilitate such an exit is unfortunate and the cause of much confusion. The same can be said about the lack of process to facilitate a withdrawal and exit from debt review after the granting of a debt restructuring order (including a debt rearrangement consent order in terms of section 138), but prior to meeting the requirements of section 71.

The question is whether, as a matter of principle, these "unfortunate" consumers should be able to withdraw from debt review before they meet the requirements of section 71. Would allowing for such withdrawal and exit erode the mechanism of debt review, which was devised to assist over-indebted consumers with debt relief and to enable credit providers to obtain the eventual satisfaction of (restructured) credit agreement debts? What prejudice would result from allowing consumers, whose financial position has improved since they applied for debt review but before they meet the requirements of section 71, to withdraw from and exit the process?

A number of features of the debt review process may assist in addressing this conundrum. First, as pointed out, the debt review process is a voluntary process – at least until it is formalised by a formal declaration of over-indebtedness and debt restructuring order by the court. Second, as indicated in paragraph 2 above, it is a process that requires good faith participation. Third, it generates effects that serve to protect both consumers (the moratorium against enforcement and the extended repayment period) and credit providers (the bar against entry into further credit agreements,

which may compromise the credit provider's ability to obtain payment, and the creation of a streamlined process for obtaining eventual satisfaction of debt). Of course, the bar against entry into further credit agreements also protects the consumer from falling prey to reckless credit, due to a lack of affordability (as envisaged in section 80(b)(ii)), but it also renders these consumers more vulnerable, because they are unable to access credit to meet certain needs that may inevitably arise in the course of their daily lives. It appears from the case law that the fact that consumers are subject to the debt review procedure even compromises their ability to obtain jobs and enter into lease agreements. Nevertheless, it is submitted that all these measures make perfect sense when applied to try and assist a consumer who is over-indebted. However, the question is whether the mere fact that a consumer was over-indebted at one stage in his life and voluntarily chose to enter into a process devised to assist in managing and overcoming such over-indebtedness should be shackled by this process and its limitations on his contractual capacity, even if he subsequently, prior to the completion of the process, reaches a stage where his financial situation has improved to such an extent that he is *de facto* no longer over-indebted.

Some may be of the opinion that if the financial position of over-indebted consumers who entered debt review improves during the course of a debt review, they must just go ahead and pay up their restructured debts and consequently obtain their clearance certificates. However, one must bear in mind that it may not necessarily be that these consumers' situations have improved to such an extent that they are able to pay their debts in one go, but rather that they are able to resume their original contractual repayments. Bearing in mind that debt review is a procedure devised to provide relief to over-indebted consumers, it could clearly not have been the intention of the legislature to trap into the debt review process consumers whose financial positions have improved, since entering into the process. The legislature was probably so preoccupied with the unfortunate lot of over-indebted consumers that the fact that their position could improve prior to meeting the section 71 requirements did not cross its mind. The absurdity of keeping an over-indebted consumer whose financial situation improved trapped in the debt review process, with its limitation on entering into new credit agreements, is glaringly obvious and goes against the grain of the NCA and its attempts to protect consumers. Allowing consumers whose financial positions have adequately improved to withdraw from and exit the debt review process – if properly regulated – would also not prejudice credit providers. This is because such credit providers would then be able to obtain payments in accordance with the original agreement, which

payments would obviously be larger than those for which the terms of restructuring provide. Also, payments would be made over a shorter period than with the debt restructuring term, without compromising the credit providers' entitlement to interest. At worst, if such consumers default, credit providers will be able to enforce the agreements, because there would be no moratorium on enforcement. Having regard to the cases mentioned above, it is notable that they were apparently all unopposed, which may be construed as pointing to the fact that credit providers do not regard themselves as being unduly prejudiced should a consumer whose financial position has improved be allowed to exit the debt review process.

As submitted in paragraph 6 above, the Act itself poses no impediment to a consumer whose financial position has improved withdrawing from the process *prior* to a formal declaration of over-indebtedness by the court, albeit the lack of an appropriate procedure to cater for this is unsatisfactory. However, once a declaration of over-indebtedness and a debt restructuring order is in place, the voluntary debt review process assumes a compulsory character and, as has been pointed out, neither the NCA nor the *Magistrates' Courts Act* nor the *Superior Courts Act* contains any provisions that could facilitate a withdrawal or exit on the basis of an improved financial position (absent meeting the requirements of section 71).

It is submitted that *bona fide* consumers who can prove that their financial position has *de facto* improved should be assisted by an amendment to the NCA to specifically cater for such a situation. This should be the position, regardless of whether consumers' financial positions improve prior to or after a debt restructuring order was made. In other words, such consumers should be allowed to withdraw from and exit the debt review process on the basis of being able to prove that they are no longer over-indebted and not depending on whether the debt review process has been formalised and acquired a compulsory nature by virtue of a debt restructuring order or not.

What is clearly necessary is a legislative process that facilitates this withdrawal, because the lack of due process only exacerbates the prevailing confusion and, as we have seen, results in wasted high court costs for many consumers. Given the important role that good faith plays in the debt review process, it is submitted that this withdrawal process should also hinge on good faith filters and should require clear proof that the consumer's financial position has indeed improved to such an extent that he is no longer over-indebted and that he can resume his normal payments as originally contractually agreed. It could also contain a provision catering for the payment of debt counselling and legal fees, to the extent that these fees are

not disputed. This will result in only eligible *bona fide* consumers being able to withdraw from debt review and to resume the payment of credit agreement debt in a manner that would be to the advantage of credit providers.

How exactly should the NCA be amended to cater for this intervention? Given that these consumers, although not over-indebted anymore, do not meet the requirements for a clearance certificate, section 71 might not be the correct section to amend. Because section 86 itself provides an opportunity for credit providers to terminate a debt review in certain circumstances, it would arguably be prudent to amend section 86 to also allow consumers to withdraw from debt review in good faith if they can provide proof that their financial position has improved to such an extent that they can repay their debts in accordance with the original contractual terms. Provision can then be made for a specific procedure for withdrawal prior to the granting of a debt restructuring order as well as for a procedure that allows for withdrawal after a debt restructuring order. In the latter respect, the provision should cater for a declaration by the Magistrate's Court that the consumer is not over-indebted and should authorise (as a *lex specialis*) the setting aside of the debt restructuring order. It appears to be settled that where a *lex specialis* provides for the rescission of a court order on grounds other than those mentioned in section 36 of the *Magistrates' Courts Act*, it would not be necessary to amend section 36 to cater specifically for withdrawal in terms of the (suggested) amended section 86 of the NCA. Very importantly, where a debt restructuring or rearrangement order has already been made, it is necessary to keep the withdrawal process in the Magistrate's Courts (and insofar as consent orders are concerned in the Tribunal), because these institutions deal with debt reviews on a daily basis and are particularly suited, also cost-wise, to deal with withdrawals from debt review which occur after debt restructuring orders have been made.

It would then also be necessary to consequentially amend section 88(1) and (3). Section 165 of the Act would also have to be amended to allow for the rescission of a rearrangement order made by consent by the Tribunal to the effect that such an order can be rescinded under the circumstances relating to withdrawal from the debt review process, as set out in the section 86 amendments proposed above.

Another issue that seems to have added to the complications experienced by consumers whose financial positions have improved since entering into debt review can be traced back to the fact that (as pointed out in *Less v*

Vos/oo) in many instances debt counsellors have failed to observe their duty to follow the procedure set out in section 86, and have instead allowed many debt reviews to operate on an informal basis, outside the process mandated by section 86. This lack of conformity by debt counsellors with their statutory duties should be dealt with by the NCR, who should at least send out a circular to debt counsellors indicating that such non-compliance would be investigated and referred to the Tribunal and could result in suspension or cancellation of the debt counsellor's registration. In addition, it appears that the fact that the content of Form 17.2 is not aligned with the provisions of the Act and regulations may have also contributed to the confusion. Hence, it is also necessary to revisit this form.

Finally, it may also be that the Debt Help System operated by the NCR is not adequately designed or rigged to facilitate withdrawal from debt review, as argued for in this contribution. However, if such a problem exists, the way to deal with it is simple: the Debt Help System cannot be allowed to compromise the position of consumers who are no longer over-indebted because their financial position has improved. Thus, the system will need to be tweaked or updated to facilitate the intended group's withdrawal in the circumstances contended for in this contribution.

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List of Abbreviations

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| DHS | Debt Help System |
| NCA | National Credit Act |
| NCR | National Credit Regulator |
| PELJ | Potchefstroom Electronic Law Journal |
| SA Merc LJ | South African Mercantile Law Journal |
| THRHR | Tydskrif vir Hedendaagse Romeins-Hollandse Reg |
| TSAR | Tydskrif van die Suid-Afrikaanse Reg |