

GUIDELINES FOR JOINT BONDS/ MORTGAGE AGREEMENTS



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INTRODUCTION

The Credit Industry Forum (CIF) identified a concern with the operational handling of joint bonds/mortgage agreements (a mortgage agreement in terms of which more than one consumer is jointly and severally liable) when SOME of the parties to the joint bond/mortgage agreement apply for debt review in terms of Section 86 of the National Credit Act 34 of 2005 (NCA).

Following an intensive review process of the implementation difficulties of the joint bonds/mortgage agreement in the debt review process and consideration of various factual scenarios regarding the handling of the joint bonds/mortgage agreements, the National Credit Regulator ("the NCR) is pleased to announce that the paper developed by the CIF with proposed operational solutions has been signed off and issued as guidelines to be applied by all industry participants effective immediately.

Please note that the amendments to the NCA, its regulations or case law supersede provisions made in this guidelines and will when necessary be amended.

GUIDELINES

1. IS A MORTGAGE AGREEMENT A CREDIT AGREEMENT?

- Section 8(1) of the NCA provides that an agreement constitutes a credit agreement for the purpose of the NCA if it is a credit transaction described in section 8(4) (d) of the NCA. Section 8(4) of the NCA provides that an agreement, irrespective of its form constitutes a credit agreement if it is a mortgage agreement or secured loan.
- Section 9 of the NCA further provides that every agreement is characterised either as a small agreement, intermediate agreement or large agreement.
- Therefore, in terms of section 9(4) of the NCA, a credit agreement is a large agreement if it is a mortgage agreement.

2. IS A MORTGAGE AGREEMENT A CREDIT AGREEMENT?

The application for debt review includes all credit agreement UNLESS the credit agreement has been excluded as set out in section 86(2) of the NCA.

3. IMPACT ON A PRIMARY PAYER OF THE JOINT BOND/MORTGAGE AGREEMENT

- The joint bond/mortgage agreement payment is normally made by one party. Without impacting on the credit providers contractual rights to hold the consumers jointly and severally liable and the joint bond holders' rights, a determination and view on who is making the payment on a regular basis may assist. To establish the primary payer of a joint bond/mortgage agreement, the payment history can be used for this purpose.
- In a case where the joint bond holders are married in Community of Property (COP), the determination of a primary payer has no relevance due to the fact that a joint debt review application is required.
- In a case where a voluntary joint debt review application is made by joint bond holders, the determination of the primary payer also has no relevance.
- In a case where separate debt review applications are made by joint bond holders, the joint bond/mortgage agreement is included in the primary payer's debt review application.
- In a case where the primary payer is not the debt review applicant and the primary payer is able to continue to service the full joint bond/mortgage agreement, as a practical process, the joint bond/mortgage agreement is not included in the debt review application.

- In a case where the primary payer is the debt review applicant, as a practical process, the joint bond/mortgage agreement is included in the debt review application.

4. IMPACT ON A PRIMARY PAYER OF THE JOINT BOND/MORTGAGE AGREEMENT

- Regulation 24(7) of the NCA obliges a debt counsellor to determine if a consumer is over-indebted in terms of Section 79(1) of the NCA. However, when a debt counsellor has to determine whether the consumer is over-indebted in terms of Section 79(1) he or she should take into account the consumer's financial means, prospects and obligations.
- Financial means, prospects and obligations in terms of Section 78(3) of the NCA include all income received by the consumer and any other adult person within the consumer's immediate family or household, to the extent that the other person shares his/her financial means and mutually bear their financial obligations.
- Although financial means, prospects and obligations are important in all debt review applications, it is important to understand the impact where a joint bond/mortgage agreement is included in the debt review application.
- In cases where the debt review applicant is party to a joint bond/mortgage agreement and the other party resides in the same property, irrespective of their marital status, the household income and expenses should be taken into account.
- In cases where the debt review applicant is party to a joint bond/mortgage agreement and the other party does not reside in the same property and they are not married COP, the NCA provides no guidelines on how to deal with the financial means, prospects and obligations.
- In dealing with this complex issue some guidance has been provided in *Standard Bank of South Africa v Panayiotts*, where the court pointed out that a consumer who raises the defense of over-indebtedness must prove that he is indeed over-indebted as contemplated in section 79 of the NCA by properly disclosing details of his/her financial means, prospects and obligations.
- Where a joint bond/mortgage agreement is included in the debt review application, it is important for the debt review applicant to provide full and detailed disclosure of his or her financial position. Due to the fact that a joint bond/mortgage agreement has been included, it should be reasonable to expect from the consumer to provide details of the financial contribution from the joint bond holder to enable the debt review applicant to make a reasonable proposal to the credit provider.
- The Debt Counsellor does not in any way have access to the non-debt review party of the joint bond/mortgage agreement; therefore the task to provide details is in the hands of the debt review applicant. The joint bond holders' details and motivation of the possible financial contribution provided by the debt review applicant should be included in the repayment proposal to the credit provider and debt review court application.
- In a joint bond/mortgage agreement, the joint owners are obliged to account to each other in terms of the payment of the joint bond/mortgage agreement, payment of maintenance, rates and taxes, etc. When a party applies for debt review he/she is obliged to inform the other party and to discuss the financial implications and to provide the debt counsellor with the required details to include in the motivation for restructure.

5. VARIOUS SCENARIOS AND PROPOSED SOLUTIONS

SCENARIO A

Facts:

- More than one consumer is party to a joint bond/mortgage agreement. These parties are jointly and severally liable in terms of a joint bond/mortgage agreement.

- Both consumers voluntarily apply for debt review and they are either married in community of property or out of community of property.

Solution:

- The joint bond/mortgage agreement is included in the debt review application.
- The debt re-arrangement proposal considers both consumers' income and expenses to determine the affordability amount which can be used to make payment of the debt obligations.
- The debt re-arrangement proposal will include the joint bond/mortgage agreement.
- The debt re-arrangement proposal restructures the debt obligations (credit agreements) of both consumers.
- The joint bond/mortgage agreement is included in the debt review court / Tribunal application for restructuring.
- Both consumers are party (respondents) to the debt review court / Tribunal application and are cited and served.
- The credit provider's right under the joint bond/mortgage agreement to hold both consumers jointly and severally liable remains in effect and in full force. The debt review cannot amend the contractual, waive or abandon the credit provider's right already in existence.

SCENARIO B

Facts:

- More than one consumer is party to a joint bond/mortgage agreement. These parties are jointly and severally liable in terms of a joint bond/mortgage agreement.
- The consumers live together in the same household and the consumers customarily share their income and mutually bear obligations.
- The consumers are married out of community of property and apply individually for debt review OR the consumers are married out of community of property and only one consumer applies for debt review OR the consumers are not married and only one consumer applies for debt review.
- The primary payer of the joint bond/mortgage agreement applies for debt review OR the primary payer of the joint mortgage agreement does not apply for debt review.

SCENARIO B.1	DEBT REVIEW APPLICATION	THE PROCESS	COURT/TRIBUNAL APPLICATION	CREDIT PROVIDER ROLE
Married out of community of property.	Both consumers individually apply for debt review.	Joint bond/mortgage agreement** is only included in one of the debt re-arrangement proposals – however household income and expenses are considered and both consumers contribute towards the payment of the joint bond/mortgage agreement**.	Joint bond/mortgage agreement** only included in one of the debt review court / Tribunal applications	The credit provider's contractual right to hold the consumers jointly and severally liable is not altered by the court / Tribunal application. [The credit provider will incorporate the right to hold the consumers jointly and severally liable in the debt re-arrangement proposal acceptance letter.]

		Both consumers must contribute towards the repayment of the joint bond/mortgage agreement and the debt re-arrangement proposal should reflect this obligation.		
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SCENARIO B.2	DEBT REVIEW APPLICATION	THE PROCESS	COURT/TRIBUNAL APPLICATION	CREDIT PROVIDER ROLE
Married out of community of property. OR Not married.	Only one consumer who is the primary payer* of the joint bond/mortgage agreement applies for debt review.	Joint bond/mortgage agreement** is included in the debt re-arrangement proposals – however household income and expenses are considered and both consumers contribute towards the payment of the joint bond/mortgage agreement**. Both consumers must contribute towards the repayment of the joint bond/mortgage agreement and the debt re-arrangement proposal should reflect this obligation.	Joint bond/mortgage agreement** is included in the debt review court / Tribunal applications	The credit provider's contractual right to hold the consumers jointly and severally liable is not altered by the court / Tribunal application. [The credit provider will incorporate the right to hold the consumers jointly and severally liable in the debt re-arrangement proposal acceptance letter.]

SCENARIO B.3	DEBT REVIEW APPLICATION	THE PROCESS	COURT/TRIBUNAL APPLICATION	CREDIT PROVIDER ROLE
Married out of community of property. OR Not married.	Only one consumer who is NOT the primary payer* of the joint bond/mortgage agreement applies for debt review.	The joint bond/mortgage agreement** is excluded from the debt review application.	Joint bond/mortgage agreement** is excluded from the debt review court / Tribunal application for restructuring.	The credit provider's contractual right to hold the consumers jointly and severally liable is not altered by the court / Tribunal application.

SCENARIO C

Facts:

- More than one consumer is party to a joint bond/mortgage agreement. These parties are jointly and severally liable in terms of a joint bond/mortgage agreement.
- The consumers do not live together in the same household.
- The consumers are married out of community of property and only one consumer applies for debt review OR the consumers are not married and only one consumer applies for debt review.
- The primary payer of the joint bond/mortgage agreement applies for debt review OR the primary payer of the joint bond/mortgage agreement does not apply for debt review.

Solution:

SCENARIO C.1	DEBT REVIEW APPLICATION	THE PROCESS	COURT/TRIBUNAL APPLICATION	CREDIT PROVIDER ROLE
Married out of community of property. OR Not married.	Only one consumer who is the primary payer* of the joint bond/mortgage agreement** applies for debt review.	Joint bond/mortgage agreement** is included in the debt re-arrangement proposals. Both consumers must contribute towards the repayment of the joint bond/mortgage agreement and the debt re-arrangement proposal should reflect this obligation.	Joint bond/mortgage agreement** is included in the debt review court / Tribunal applications.	The credit provider's contractual right to hold the consumers jointly and severally liable is not altered by the court / Tribunal application. [The credit provider will incorporate the right to hold the consumers jointly and severally liable in the debt re-arrangement proposal acceptance letter.]

SCENARIO C.2	DEBT REVIEW APPLICATION	THE PROCESS	COURT/TRIBUNAL APPLICATION	CREDIT PROVIDER ROLE
Married out of community of property. OR Not married.	Only one consumer who is NOT the primary payer* of the joint bond/mortgage agreement applies for debt review.	Joint bond/mortgage agreement** is excluded in the debt re-arrangement proposals.	Joint bond/mortgage agreement** is excluded from the debt review court / Tribunal application for restructuring.	The credit provider's contractual right to hold the consumers jointly and severally liable is not altered by the court / Tribunal application.

6. DEFINITIONS:

* The usage of the term "primary payer" is merely for operational purposes. The term is not used or defined in the National Credit Act 34 of 2005. The debt counsellor will determine after consultation with the consumer(s), who the primary payer of the joint mortgage agreement** is.

** The term "mortgage agreement" bears the meaning contained in section 1 of the National Credit Act 34 of 2005, which states that it means a credit agreement that is secured by the registration of a mortgage bond by the registrar of deeds over immovable property. A joint mortgage agreement is a mortgage agreement where more than one consumer is jointly and severally liable for the repayment of the debt obligation.