

Purpose of the Act

“The purposes of this 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, by-

- (c) promoting responsibility in the credit market by-
 - (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and*
 - (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;**
- (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;*
- (g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;*
- (h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and*
- (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.”*

Section 3(c)(d)(g)(h)(i)

“A consumer who applies to a debt counsellor, and each credit provider ... must participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement”

Section 86(5)(b)

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Introduction

The National Credit Act, Act 34 of 2005 (hereinafter called “the Act”) came into full force and effect on 1 June 2007 and with it came the inception of debt review and debt restructuring. Since its inception, debt review and debt restructuring have posed operational and procedural challenges for the credit providers, debt counsellors and consumers alike. In order to solve some of these challenges major credit providers, in consultation with established debt counsellors and the National Credit Regulator (hereinafter called “the NCR”), at various work stream sessions, arrived at a set of suggested rules and procedures which should be employed in order to streamline the debt review and restructuring process. In order to share the outcomes of the work streams with all debt counsellors and to address the operational difficulties of the Act, the credit industry and the NCR have agreed to fund and facilitate this supplementary training to registered debt counsellors.

Drawing on the deliberations and/or outcomes of the work streams the course material was developed by a team consisting of:

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Franciscus Haupt was admitted as an attorney in 1981 and practiced in private practice for 21 years before becoming director of the Law Clinic at the University of Pretoria. He headed the first debt counseling pilot project for the DTI in 2001 and 2002 and has published, lectured and presented papers on the NCA both nationally and internationally.

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The team wishes to acknowledge the contributions made by **members of the work stream sub-committees**. They are:

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Anton Viljoen - DCM

Module 1

Professionalism

Learning outcomes

At the end of this module you should:

- Understand how to conduct oneself in a professional manner

Introduction

Professionalism concerns itself with the standards of right and honourable conduct which should be observed by all debt counsellors in dealing with credit providers, the NCR and when handling the affairs of the consumer. There are a number of principles concerning professionalism, such as high ethical code, honest practice, protecting and acting in the best interest of the consumer whilst still upholding basic principles and ethical conduct of debt counselling.

Debt counsellor-consumer relationship

The client (consumer) is the most important person in the debt review procedure. The debt counsellor and the consumer are interdependent. Without the consumer there would be no use for a debt counsellor. The consumer pays the debt counsellor for the services and thus it is important to treat the consumer with respect and to promptly respond to reasonable requests. A debt counsellor that has a good reputation of being honourable and trustworthy will flourish in his business as his client will then refer other struggling consumers to him.

A debt counsellor should keep his client up to date with regard to their debt review procedure and inform the client immediately with any important developments in the process.

Accepting a client

It is of great importance that before accepting a client certain considerations are taken into account, such as:

Ensuring that no conflict of interest exists between debt counsellor and the prospective client, the debt counsellor has sufficient time at his disposal to assist the client and to ensure that specific time periods are adhered to. The debt counsellor should further ensure that he has sufficient knowledge to assist the client.

- **Conflict of interest**

Conflict of interest arises when a debt counsellor is placed in a position to choose to serve either his own interest or that of his client, and is usually to the detriment of his client. When such a conflict arises it is important that the debt counsellor withdraws immediately and refers the consumer to another debt counsellor.

In terms of section 46(4)(c) of the Act a person who is employed or acting as an agent for a person engaged in debt collection, operation of a credit bureau, a credit provider or any other activity prescribed by the Minister on grounds of conflict of interest, may not be registered as a debt counsellor. This provision was specifically inserted to prevent conflict of interest between a person's duty to act in the best interest of a consumer as a debt counsellor and a person's duty to act in the best interest of a credit provider or as a debt collector. A debt counsellor cannot ride two horses with one saddle.

- **Time restraints**

It is important that a debt counsellor does not take on more clients than can reasonably be managed. Throughout the debt review process there are various time frames that must be adhered to, failing to do so may result in the termination of a client's debt review. Thus, if a debt counsellor takes on too many clients, causing an overload of work and backlog on files and consequently termination of a client's debt review, the reputation of the debt counsellor is put to question. This situation can also be seen as a conflict of interest as the debt counsellor's interest in increasing his income by increasing his client intake may well impact negatively on the time and dedication that must be given to his already existing clients.

The Act naturally does not set out any limitation on the number of clients a debt counsellor may assist. It is the debt counsellor's responsibility to ensure that he does not bite off more than he can chew.

- **Sufficient knowledge**

A debt counsellor must have sufficient knowledge in order to best protect their client's interest.

Regulation 10 sets out the requirements to be met in order to be registered as a debt counsellor. These requirements deal mainly with a person's education, work experience and working abilities. A debt counsellor must ensure that he is competent to assist a consumer, or refer him to another debt counsellor.

A debt counsellor cannot give advice to a consumer regarding investments, insurance, and purchasing or variation of financial products unless the debt counsellor is registered with the Financial Services Board to give advice as is required by the Financial Advice and Intermediary Services Act (FAIS), Act 32 of 2002.

First consultation and taking instructions

Upon first consultation the debt counsellor must properly inform the client of the debt review procedure, what costs are involved, the consequences of debt review and what is expected from the client. The client must also be informed clearly that they are not to use any further credit and that they may not apply for further credit. If a client acts outside these instructions his debt review may be terminated.

Once a client has been properly informed of the procedure and obligations it is important to obtain instructions from the client. The information required for form 16 forms the basis of this instruction. It is also vital that a debt counsellor ensures that the client provides him with the correct information and that the client discloses full detail of all his credit agreements. Under no circumstance must a debt counsellor accept instructions from a client that is fraudulent, illegal, improper or aimed at abusing the process. It must be made clear to the client that the debt counsellor will act in the best interest of the client, but will not act outside the provisions of the Act or withhold necessary information from

the credit providers.

The debt counsellor must discuss the costs implications with the client as to ensure that the client understands and will not later dispute the cost on the basis that he was ill-informed. A recommended cost and fees structure was drafted by the Debt Counselling Association of South Africa (DCASA) and endorsed by the NCR. The NCR takes a dim view of debt counsellors that overcharge consumers. The purpose of a debt counsellor is to assist a consumer and to eventually relieve him from his financial strain. By overcharging a consumer a debt counsellor is only contributing towards a consumer's over-indebtedness and not fulfilling his purpose.

The fee structure is attached hereto marked **Annexure A**.

Withdrawal by the debt counsellor from the debt review

The Act only provides for the termination of a client's debt review by the credit provider. However, in certain instances the duty may rest on the debt counsellor to withdraw from the debt review. If a client is dishonest or acts in bad faith in the debt review the debt counsellor must opt to withdraw from the debt review. Refer to step 11 of module 2 on further discussion with regard to the termination of and withdrawal from the debt review.

Relationship with the credit provider

When it comes to the debt counsellor's relationship with the credit providers the most important principle is honesty. A dishonest debt counsellor is easily discovered and "black listed" as such. As stated above, a debt counsellor must always act in his client's best interest. This entails fearlessly stating his client's case and not be intimidated or unduly influenced by credit providers or their agents. However, this does not denote that a debt counsellor can hide information from the credit providers that are unfavourable to his client.

When drafting and sending a proposal to the credit providers the debt counsellor must ensure that the relevant information is made available to enable the credit provider to make a reasonable and informed decision. It is dishonest and unethical to mask living expenses. The practice of "hiding" money from credit providers when drafting a

restructuring proposal in order to make room to manoeuvring when a counter proposal is received is unethical and unprofessional. It creates the wrong assumption in the minds of credit providers that the first proposal is only a basis to start negotiations and not a serious and honest depiction of the consumer's financial situation.

A debt counsellor should respond to all requests from the credit providers, failing to do so hamper the debt review procedure, leaving the consumer to suffer the consequences. By co-operating with credit providers a debt counsellor creates a healthy business relationship with them, ultimately assisting in streamlining the process.

The debt counsellor and the NCR

The NCR is the regulatory body of all debt counsellors. Any complaints or queries concerning debt counselling must be lodged with them. In terms of regulation 6 a debt counsellor has a duty to adhere to the guidelines as set by the NCR and to respond to any request.

In terms of section 14 of the Act, if a complaint is lodged against a debt counsellor, the NCR may, after thorough investigation, issue the debt counsellor with a compliance notice. In the event that a debt counsellor fails to remedy the default, the NCR may apply to the National Consumer Tribunal to have the debt counsellor de-registered.

The debt counsellor also has a duty to complete and submit statutory returns to the NCR timeously. These returns are:

- Form 41 – Annual NCR Compliance Return
- Form 42 – Quarterly Statistical Return

When applying to be registered as a debt counsellor the NCR provides proposed conditions for the registrations of an application which must be signed by the applicant before registration will be effected. These conditions, *inter alia*, states that:

- a debt counsellor must perform his duties in a manner that is consistent with the purpose and the requirements of the Act,
- the debt counsellor must act professionally and reasonably in providing debt counselling services and provide these services in a manner that is fair, non-discriminatory and that does not bring the NCR or the debt counselling practice into disrepute,

- the debt counsellor must not take part in activities that are in conflict with the interests of the consumer, or that may lead to such a conflict,
- the debt counsellor may not charge or recover fees from the consumer other than as provided for in terms of the Act and Regulations,
- the debt counsellor may not disclose any information pertaining to the consumer to a third party without the written consent of the consumer to whom such information relates.

The debt counsellor and the community

There is a great need in our society for financial education. People are often trapped by credit agreements due to misunderstanding of the conditions and provisions of a credit agreement. When an over-indebted consumer approaches a debt counsellor it is the debt counsellor's not only to rehabilitate the consumer but also to provide the consumer with the necessary information and skill to properly manage his finances.

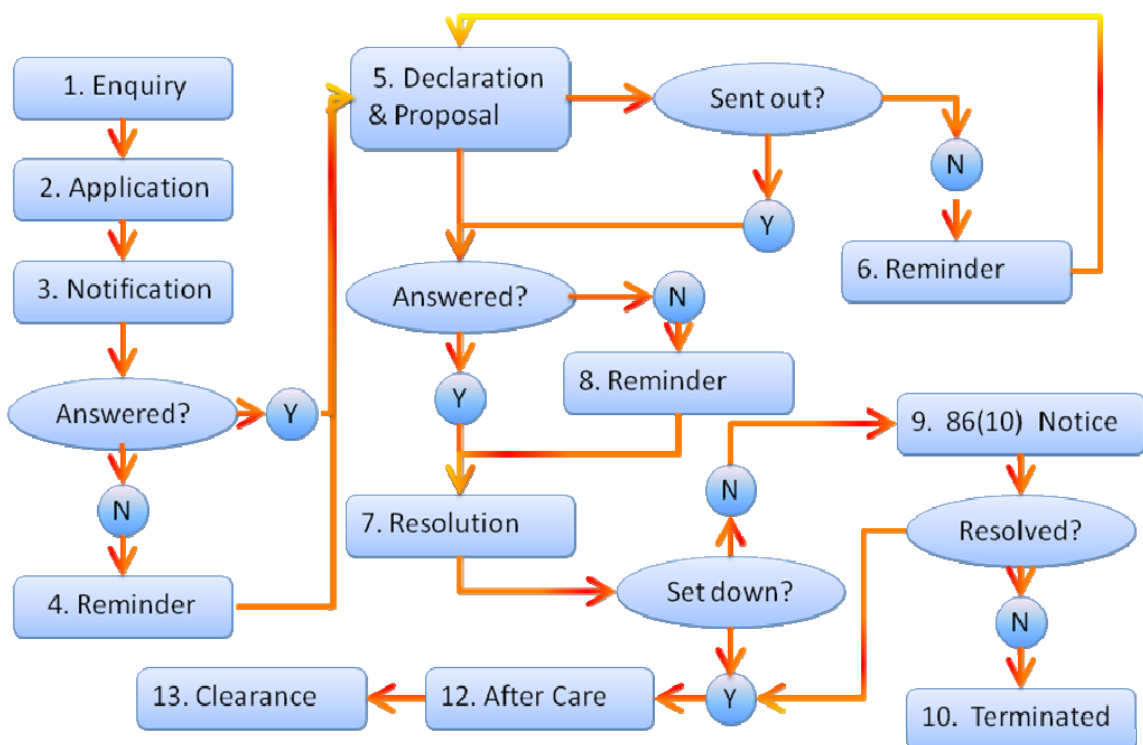
The role of the debt counsellor is to provide a specific service to the community. A professional debt counsellor conducts himself in a proper manner within the community. A debt counsellor that is often seen spending large amounts of money in a casino will not easily be trusted by a consumer to assist him with his financial problems. Regulation 10(b)(ii) provides that a person that wants to be registered as a debt counsellor must demonstrate the ability to manage his own finances and provide training and transfer skills. A debt counsellor must provide positive input into his community concerning financial health.

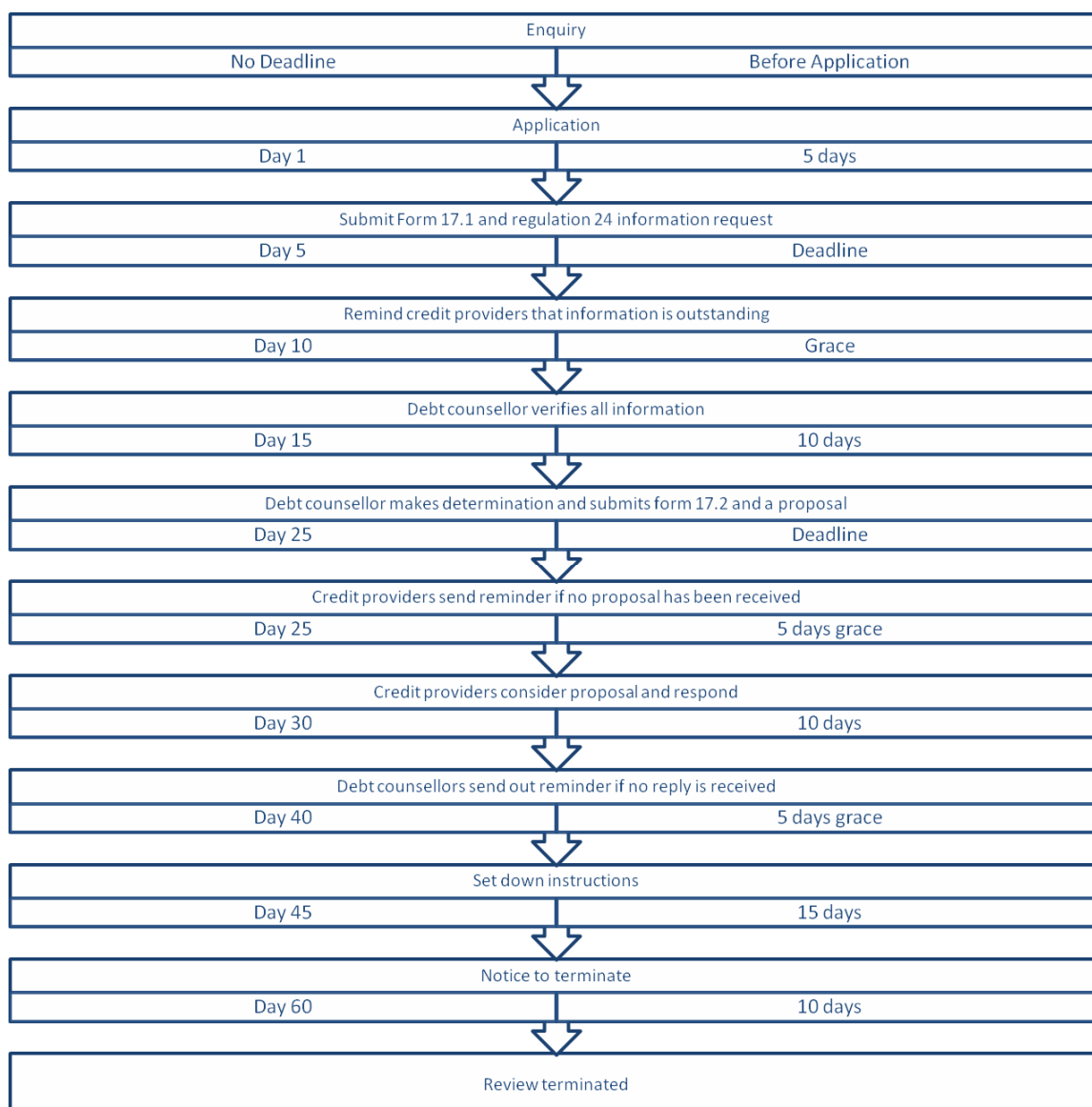
Conclusion

If a debt counsellor wants to thrive in his business professionalism must form the foundation thereof. A debt counsellor that conducts his business in an unethical and dishonest manner will soon reap the consequences thereof. Such debt counsellors are quickly labelled and credit providers as well as consumers are reluctant to do business with them.

Module 2 Overview of the debt counselling process

The debt counselling process





The following process has been developed taking cognisance of the requirements of the Act and the Regulations.

Step 1 - A consumer is unable to satisfy in a timely manner all obligations under all credit agreements

A consumer, who cannot meet his monthly obligations under all credit agreements, after basic living expenses have been paid, can apply to be placed under debt review.

In terms of section 86(2) an application for debt review may not be made in respect of a particular credit agreement if the credit provider took steps to enforce the agreement.

(Remember: enforcement procedure commences upon issuing and service of a summons) (Section 130).

It is important that the debt counsellor informs the consumer of the consequences of section 86(2) at this stage.

The debt counsellor must fully and truthfully answer all questions and provide advice to the consumer. This may be done either telephonically or in person. The debt counsellor must make sure that the consumer knows in advance which documentation should be provided at the first consultation.

At this stage the following information needs to be conveyed to the consumer:

- What debt review means
- How the process works
- Information and documentation required
- Consequences of debt review
 - Consumer may not enter into any credit agreements while under debt review
 - Consumer may not use any credit facilities while under debt review
 - Credit cards/ store cards/ garage cards must be destroyed
- Time constraints should be reiterated
- Rights of the consumer and the credit provider during the debt review process
- Implication of debt review on the joint household (refer to the module on legal procedure for an explanation on marriage in or out of community of property)
- Implication of debt review on the standard of living as well as living expenses
- Listing on the credit bureaus
- Responsibility to continue with interim payments until a court or the tribunal order has been made. Reiterate that insurance premiums should be paid in full.
- Full disclosure of the fees charged by the debt counsellor up until a clearance certificate is issued
- Legal fees charged by attorneys for bringing the application to the court.
- All credit agreements must be included

Enforcement of credit agreements

In terms of section 86(2) of the Act, an application for debt review may not be made and does not apply to a credit agreement where the credit provider, at the time of application

for debt review, has already taken legal steps as contemplated in section 129 to enforce that agreement.

It is submitted that enforcement (legal action) commences upon the issuing and service of a summons after the credit provider adhered to both the requirements set out in section 129 and section 130.

Please note that a section 129 notice delivered to a consumer by a credit provider does not constitute enforcement (legal action). If a consumer is in possession of such a notice, that agreement may be included in the debt review, provided that no summons has been issued and served on the consumer.

In the event that a summons have been issued and served before Form 16 was signed by the consumer, that specific credit agreement **cannot** be included in the debt review. However, if a Form 16 was signed prior to the issuing and service of a summons, then that specific agreement **must be** included in the debt review.

The two prerequisites that should be in place before a credit provider can commence with enforcement proceedings (issuing and service of a summons) are found in section 129(1) read with section 130(1).

- A section 129 notice should have been delivered to the consumer at least 10 business days prior to enforcement proceedings, **and**
- The consumer has been in default for at least 20 business days

It is important to remember that these two periods may run concurrently.

On a strict interpretation of the Act, a credit provider that instructed an attorney to proceed with legal action needs to instruct the attorney to stop the process as the consumer applied for debt review before legal proceedings have commenced.

In the event that a consumer has received correspondence (but not a summons) from an attorney in respect of a credit agreement, the debt counsellor must notify the attorney (representing the credit provider) that the consumer applied for debt review (using Form 17.1) as well as to the credit provider concerned.

Step 2 - Application for debt review: completion & signing of Form 16

- Should the consumer be interested in applying for debt review after all the items in step 1 have been explained to the consumer, the debt counsellor should assist the consumer in completing Form 16. The declaration contained in Form 16 should be explained to the consumer in clear and simple language
- Consumer pays the application fee of R50 if required by the debt counsellor
- The debt counsellor provides the consumer with a receipt as proof of application for debt review as contemplated in section 86(4)(a) attached hereto **Annexure B**
- The consumer must be provided with a copy of Form16
- The consumer must provide the debt counsellor with all requested documentation.

Step 3 - Debt counsellor advises credit providers and credit bureaus of application for debt review

Regulation 24(2) states that the debt counsellor should inform both credit providers and credit bureaus of the application for debt review within 5 business days as from signature of the Form 16.

Notification of credit bureaus: debt counsellor captures the consumer's details onto www.ncrdebthelp.co.za programme which will pull the consumer's information through to the credit bureau.

Notification of credit providers:

- Debt counsellor completes Form 17.1 (manually or electronically), signs it personally and send it either by fax or electronic mail to the relevant credit providers. The suggested format for form 17.1 is annexed as **Annexure C**.
- The debt counsellor may provide the consumer's address and contact details on Form 17.1, provided that the debt counsellor has obtained the consumer's written consent. The address provided will not be deemed as change of the consumer's domicilium address.
- The debt counsellor may also request financial information needed from the credit providers in order to make a determination of over-indebtedness at this stage. This may be requested on Form 17.1.
- Ensuring that notifications are completed and delivered in the correct manner will reduce gaps in communication between credit providers and debt counsellors which will ultimately benefit the consumer. Regulation 24 (5) requires that all

documents can be delivered by fax, registered mail or e-mail.

Each credit provider has their preferred delivery methods and address for service of these documents and debt counsellors should maintain their list at all times. To assist in this process a list of some of the credit providers preferred details at time of publication of this document is included as **Annexure D**. Debt counsellors who deliver proposals to the credit providers using this guide have a much better chance of a speedy response.

Remember to keep proof of all correspondence sent (regulation 24(4)).

Credit providers must provide the debt counsellor with financial information within five business days from the date such information was requested. The credit provider will use this opportunity to inform the debt counsellor of any accounts with credit balances (i.e. investments, savings etc).

In the event that a credit provider fails to provide the requested information, the debt counsellor may accept the information provided by the consumer.

Step 4 – Reminder

If five days have lapsed and no response has been received from a credit provider in respect of information requested in step 3, the debt counsellor should send a reminder to the credit provider that the information is outstanding. Once again proof of delivery must be retained on the consumer's file.

Step 5 – Declaration and proposal

Within ten days after the expiry of the five days grace given in step 4, the debt counsellor must make a determination whether the consumer is over-indebted in terms of regulation 24(7). This is within the 30 days allowed by the regulations. Having made the determination the debt counsellor must inform the credit bureaus and the credit providers on a form 17.2 in the normal way.

In order to make such a determination the debt counsellor must make use of the information provided by the credit providers. If the consumer is over-indebted the debt counsellor must prepare and send a debt restructuring proposal to the credit providers.

The proposal must be sent within 25 days from date of application. This proposal must be submitted to all the credit providers who will then in turn have 10 days to respond.

Wherever possible the collection and distribution of the monthly payments should be handled by a register payment distribution agency. It is important that debt counsellors familiarise themselves with the processes and procedures particular to their PDA of choice. The following should always be noted regardless of the PDA chosen:

- Credit provider bank details and account numbers must be meticulously recorded
- The details of how the money must be collected must be checked and provided to the PDA
- The details of the repayment must be correctly given to the PDA vis:- Capital, payments and interest rate.

It is suggested that a debt counsellor makes a provision on the proposal for the credit provider to provide the banking details in which payment must be made in order to enable the debt counsellor to provide the correct information to the PDA.

Step 6 – Reminder from credit providers

If the debt counsellor fails to send a proposal after the ten days have elapsed, the work stream agreed that credit providers should send a reminder that the proposal and declaration is outstanding. The debt counsellor must submit the proposal within five days of this notice.

Step 7 – Reminder from debt counsellor

If the credit providers have not responded within ten days of submission of the proposal, it was agreed that the debt counsellor would submit a reminder to them. The credit provider must provide an answer within five days of the reminder. If after this period the debt counsellor has still not received a reply he must notify the credit provider that he will proceed as if the proposal had been declined.

Step 8 – Formalise

The debt counsellor must now formalise the rearrangement, either by setting the matter down for a hearing or by obtaining a consent order. This must be done before 60 days have lapsed from the date that the Form 16 was signed.

Step 9 - Credit providers give notice to terminate

If the debt counsellor has not made arrangements for the matter to be heard within the 60 days allowed, it was agreed that the credit providers would issue a notice that they will terminate the debt review within ten days.

Step 10 – Termination

Unless the matter has been resolved, or unless the matter was set down within the ten days grace, the credit provider may send out a termination notice as contemplated in section 86 (10) of the Act.

This may only be done if the agreement is in default.

- Note: a credit provider may terminate a debt review even if a consumer has been making payments and a proposal has been sent. A debt counsellor must proceed to court to obtain a consent order when possible or bring an application to court if the matter cannot be resolved through negotiations.

Step 11 - Withdrawal

In addition to a debt counsellor rejecting an application as contemplated in s 86 (7) (a), there are a number of circumstances, other than contemplated in S86 (10) that may require the termination of the debt review.

The consumer may withdraw from the process at any time. Likewise the debt counsellor may withdraw from the process up to the point of setting down, and thereafter transfer the consumer to another debt counsellor. The consumer may also initiate a transfer to another debt counsellor at any time.

The process is as follows:

- If the consumer wishes to withdraw from the debt review, written notice must be given to the debt counsellors informing the debt counsellor that he is withdrawing and informing the reason why.

The debt counsellor must inform the consumer that:

- Credit providers may take legal action on agreements that are in default
- The consumer's credit record will reflect "voluntary withdrawal from debt review program" for a period of six months
- The consumer is still liable for debt counselling charges to date
- The consumer may re-apply for debt counselling

The credit providers must be notified of the voluntary withdrawal within five days on a form 17.4 (**Annexure E**):

- Type C must be stated if the consumer is satisfied with the debt counsellor's service
- Type D must be stated if the consumer is dissatisfied with the debt counsellor's service

The debt counsellor may not refuse to withdraw the review because the consumer has not paid his fees has not paid his fees in full.

The NCR debt help website must be updated.

- A debt counsellor may withdraw from the debt review if a consumer is dishonest or is not co-operating. The consumer must be informed in writing of the withdrawal and the reason for withdrawal.

The debt counsellor must inform the consumer that:

- Credit providers may take legal action on agreements that are in default
- The credit record will reflect "review terminated by debt counsellor" for a period of six months
- The consumer is still liable for debt counselling charges to date
- The consumer may re-apply for debt counselling

The consumer must be given ten business days to respond to the debt counsellor, failing which he may withdraw

The credit providers must be notified of the withdrawal within five days on a form 17.4 (**Annexure E**):

- Type 'A' must be stated if the consumer is not co-operating with the Debt Counsellor
- Type 'B' must be stated if the consumer is not paying the fees

The NCR debt help website must be updated.

- Transferred to another debt counsellor.

Consumers have the right to change debt counsellors at any point. Likewise it may be necessary for a debt counsellor to transfer one or more consumers to another debt counsellor. In either event the procedure is the same:

The party initiating the transfer should notify the other party (consumer notifies “old” debt counsellor or “old” debt counsellor notifies consumer) that they intend to transfer the debt review to a new debt counsellor.

The “old” debt counsellor must transfer the file on the NCR debt help system and the “new” debt counsellor must accept the file on the system. Transfer will only have happened after this has taken place.

Step 12 - After care

The debt counsellor must monitor the consumer throughout the debt review period for verify regular payments. It is suggested that a follow up consultation take place at least once a year. Where a change has occurred in the consumer’s situation (example a death in the family) then the debt counsellor must advise the credit providers on a form 17.3. **(Annexure F)**

Step 13 - Clearance certificate

After all of the consumer’s debt has been repaid, the debt counsellor, having verified that there are no outstanding balances, must issue a clearance certificate.

Module 3

Affordability Assessment

Learning outcomes

At the end of this module you should:

- Understand the purpose and importance of making an effective assessment leading to an accurate determination of over-indebtedness
- Be able to determine a debt review assessment for married persons (spouses)
- Know how to deal with various types of income
- Be able to identify various expenses as essential, non-essential and luxurious, and know how to deal with these categories of expenses
- Have the ability to recognise addictive behaviours and have a strategy to help consumers deal with those behaviours
- Know when expenses need to be revised
- Determine the level of affordability
- Know when consumers are in difficulty because of mismanagement of finances and not because of over-indebtedness.

Introduction

The assessment process must be properly done in order to make sure that a consumer who applies for debt counselling is over-indebted and that the amount available to repay debt is maximised after taking into account the consumer's living expenses, which must be fair, reasonable and sustainable considering circumstances.

This process also recognises that there are valid reasons for consumers being given or having taken too much credit and that the need exists to counsel consumers to manage their financial affairs, which in many cases may require a reduction in standard of living.

Choosing the appropriate treatment for life partners/spouses

If consumer is married in COP, the spouse's income must be included and a joint application made.

If the consumers are married ANC or are living together it is recommended that a joint view of income should be included. The reason for this is that:

- Both parties enjoy the benefits of joint income
- The acquired finance (e.g. bond over a fixed property) may be approved on a joint income
- To ensure that not all debt is being passed to one of the parties whilst the couple continues to live well off of a substantial surplus from the other partner
- It is in accordance with section 78 (3) of NCA.....

“In this part, ‘financial means, prospects and obligations’, 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.”*

Should a spouse or partner be reluctant to provide this information, it is suggested that expenses be split proportionately, if deemed necessary, where spouse's income is relied upon. Debt counsellor to indicate this to credit providers in comments.

Understanding the importance of precise determination and thorough counselling processes

On making an effective assessment it is important to ensure that the consumer's NET income is properly assessed. Net income is determined by taking the gross income, adjusted for irregular income, less statutory deductions, less mandatory employer deductions. To this must be added income not derived from main employment:-

- Gross pay is the total of all pay plus the total of employer benefits. Weekly wages are to be converted to a monthly income figure for calculation purposes (to submit a monthly income & expenditure statement).
- Deductions for irregular income:
 - Overtime must be deducted unless it is a permanent feature on the payslip, in which case 75% of the average of the previous 6 consecutive months must be calculated, but never exceeding 5% of gross income. (Average is calculated by adding the amount for each month together and then dividing it by the number of months added). E.g. 6 months overtime divided by 6 x 75% = average overtime to be added to gross income.
 - Commission earners can provide an IRP5 or the debt counsellor may work on the average earnings over the previous six consecutive months payslips or bank statements. Where commissions is subject to seasonality it should be calculated over a 12 month period e.g. life insurance is sold around tax dates, cars are sold around year-end bonus time; fertiliser/seed is sold around agricultural seasons etc.
 - Any other allowance must be deducted unless it is of a regular nature, in which case the lowest of three months must be used.
- Statutory deductions are all of those deductions that an employer must make as ordered by a court or an act of parliament. These include:
 - PAYE and SITE
 - UIF
 - Emolument attachment orders
 - Garnishee orders

NB! Salary stop orders where a service provider or employer has an arrangement to deduct a payment from an employees salary must be excluded from deductions

and treated either as debt (in the case of loan payments) or the expense type that has been deducted for (eg. insurance). This includes services provided by the employer.

- Employer deductions are deductions made by an employer for services that the employee must subscribe to as a condition of employment. This would include things like pension, group life and sometimes medical aid.
- Use the following guidelines in respect of other income:
 - Self-employed individuals are to provide proof to verify their drawings (by way of bank statements, financial statements or spreadsheet). If there has been a deterioration in the business, resulting in reduced drawings by the owner, the reason/s for this downward trend is to be provided
 - Properties being rented out seasonally (e.g. holiday flat) cannot be included as fixed monthly income (ideally property is un-bonded and supplements income)
 - Maintenance received must be reflected here. If the consumer is a single parent and the other parent is alive and the consumer is not receiving maintenance, the debt counsellor should refer the consumer to an appropriate body for assistance for obtaining maintenance
 - Fixed monthly rentals from properties (Use 65% of gross rental amount as per lease agreement to cater for void periods and taxable portion)
 - Monthly subsidies
 - Interest from investments (except where the investment is to be realised to reduce the level of debt)
 - Interests in businesses (where regular income is received)
 - Any other regular source of monthly income must be included

Credit providers may request verification of income if it differs from information that the consumer provided to the credit provider when he applied for the loan facility.

Example:

Mr Introuble's payslips follow. In addition the debt counsellor notes on his bank statements that he receives R2 000 from a lessee on the 5th or 6th of every month. Mr Introuble tells the debt counsellor: "I always get some overtime but last month was bad".

| | | | | | |
|---------------------------|----------------|------------------|-----------------|-------------------|----------------|
| COOL EMPLOYERS LTD | | EMP CODE: | INTROUBLE | PERIOD END DATE: | 2008/03/31 |
| P O BOX 9999 | | EMP NAME: | MR IM INTROUBLE | DT ENGAGED: | 2002/10/01 |
| SMALLVILLE | 9999 | KNOWN AS: | IM | ID NUMBER: | 99999999999999 |
| DEPT: TRAIN | PAYPOINT TRAIN | JOB TITLE: | EMPLOYEE | | |
| HOURS / DAYS | | EARNINGS: | | DEDUCTIONS | |
| NORMAL HOURS: | 0.00 | BASIC SALARY: | 8572.50 | PAYE | 2478.64 |
| O/TIME 1.5 HOURS: | 15.00 | TRAVEL ALLOW | 2725.00 | UIF | 88.36 |
| O/TIME 2.0 HOURS: | 0.00 | RETIREMENT ANN | 337.50 | REIREMENT ANN | 241.72 |
| | | COMMISSION | 1376.73 | RCS LOAN | 1500.00 |
| | | OVERTIME | 1205.51 | PETROL CARD | 1683.88 |
| LEAVE DAYS DUE: | 31.26 | | | | |
| <u>COST TO EMPLOYER:</u> | | | | | |
| ** OXYGEN** | 2676.00 | | | | |
| MED SCHEME RISK | 2676.00 | | | | |
| FB VALUE | 476.00 | | | | |
| YEAR TO DATE TOTALS | | | | | |
| TAXABLE EARNINGS | 12517.24 | | | | |
| PERKS | 476.00 | | | | |
| TAX | 2478.64 | | | | |
| <u>CURRENT PERIOD</u> | | | | | |
| TOTAL PERKS | 476.00 | TOTAL EARNINGS | 14217.24 | TOTAL DEDUCTIONS | 5992.60 |
| CO CONTRIBUTIONS | 2676.00 | | | | |
| | | | | NETT PAY | 8224.64 |

National Credit Act : Work Stream Study Material

| | | | | | | |
|---------------------------|----------------|------------------|-----------------|-------------------|-----------------|----------------|
| COOL EMPLOYERS LTD | | EMP CODE: | INTROUBLE | PERIOD END DATE: | 2008/04/30 | |
| P O BOX 9999 | | EMP NAME: | MR.IM INTROUBLE | DT ENGAGED: | 2002/10/01 | |
| SMALLVILLE | 9999 | KNOWN AS: | IM | ID NUMBER: | 99999999999999 | |
| DEPT: TRAIN | PAYPOINT TRAIN | JOB TITLE: | EMPLOYEE | | | |
| HOURS / DAYS | | EARNINGS: | | DEDUCTIONS | | |
| NORMAL HOURS: | 0.00 | BASIC SALARY: | 8572.50 | PAYE | 2375.64 | |
| O/TIME 1.5 HOURS: | 15.00 | TRAVEL ALLOW | 2725.00 | UIF | 88.36 | |
| O/TIME 2.0 HOURS: | 0.00 | RETIREMENT ANN | 337.50 | REIREMENT ANN | 241.72 | |
| | | COMMISSION | 1376.73 | RCS LOAN | 1500.00 | |
| | | OVERTIME | 705.51 | PETROL CARD | 1683.88 | |
| LEAVE DAYS DUE: | 31.26 | | | | | |
| <u>COST TO EMPLOYER:</u> | | | | | | |
| ** OXYGEN** | 2676.00 | | | | | |
| MED SCHEME RISK | 2676.00 | | | | | |
| FB VALUE | 476.00 | | | | | |
| YEAR TO DATE TOTALS | | | | | | |
| TAXABLE EARNINGS | 24534.48 | | | | | |
| PERKS | 952.00 | | | | | |
| TAX | 4854.28 | | | | | |
| CURRENT PERIOD | | | | | | |
| TOTAL PERKS | 476.00 | TOTAL EARNINGS | 13717.24 | TOTAL DEDUCTIONS | 5889.60 | |
| CO CONTRIBUTIONS | 2676.00 | | | | | |
| | | | | | NETT PAY | 7827.64 |

| | | | | | | |
|---------------------------|----------------|------------------|-----------------|-------------------|-----------------|----------------|
| COOL EMPLOYERS LTD | | EMP CODE: | INTROUBLE | PERIOD END DATE: | 2008/05/31 | |
| P O BOX 9999 | | EMP NAME: | MR.IM INTROUBLE | DT ENGAGED: | 2002/10/01 | |
| SMALLVILLE | 9999 | KNOWN AS: | IM | ID NUMBER: | 99999999999999 | |
| DEPT: TRAIN | PAYPOINT TRAIN | JOB TITLE: | EMPLOYEE | | | |
| HOURS / DAYS | | EARNINGS: | | DEDUCTIONS | | |
| NORMAL HOURS: | 0.00 | BASIC SALARY: | 8572.50 | PAYE | 2581.64 | |
| O/TIME 1.5 HOURS: | 15.00 | TRAVEL ALLOW | 2725.00 | UIF | 88.36 | |
| O/TIME 2.0 HOURS: | 0.00 | RETIREMENT ANN | 337.50 | REIREMENT ANN | 241.72 | |
| | | COMMISSION | 1376.73 | RCS LOAN | 1500.00 | |
| | | OVERTIME | 205.51 | PETROL CARD | 1683.88 | |
| LEAVE DAYS DUE: | 31.26 | | | | | |
| <u>COST TO EMPLOYER:</u> | | | | | | |
| ** OXYGEN** | 2676.00 | | | | | |
| MED SCHEME RISK | 2676.00 | | | | | |
| FB VALUE | 476.00 | | | | | |
| YEAR TO DATE TOTALS | | | | | | |
| TAXABLE EARNINGS | 36051.72 | | | | | |
| PERKS | 1428.00 | | | | | |
| TAX | 7435.92 | | | | | |
| CURRENT PERIOD | | | | | | |
| TOTAL PERKS | 476.00 | TOTAL EARNINGS | 13217.24 | TOTAL DEDUCTIONS | 6095.60 | |
| CO CONTRIBUTIONS | 2676.00 | | | | | |
| | | | | | NETT PAY | 7121.64 |

| Calulation: | | | | |
|---|------------------|------------------|------------------|--------------------|
| 1. Gross Income (from May Pay Slip): | | | | R13 717.24 |
| 2. Adjust for irregular income: | | | | |
| Overtime March: | R1 205.51 | | | |
| Overtime April: | R 705.51 | | | |
| Overtime May: | <u>R 205.51</u> | | | |
| | R2 116.53 | | | |
| Get Average | ÷ 3 | | | |
| Accepted Overtime BUT LIMITED TO 5% OF 13 717.24 | R 705.51 | R 685.86 | | |
| Less Overtime on May Payslip | | <u>R 205.51</u> | | |
| Adjustment | | | +R480.35 | |
| Commission March: | R1 376.73 | | | |
| Commission April: | R1 376.73 | | | |
| Commission May: | <u>R1 376.73</u> | | | |
| | R4 130.19 | | | |
| Get Average | ÷ 3 | | | |
| Accepted Commission | | R1 376.73 | | |
| Less Commission on May Payslip | | <u>R 205.51</u> | | |
| Adjustment | | | -R 000 | +R 480.35 |
| | | | | R14 197.59 |
| 3. Statutory duductions (from May Payslip): | | | | |
| PAYE | | | R2 518.64 | |
| UIF | | | <u>R 88.36</u> | |
| | | | | -R 2 607.00 |
| | | | | R11 590.59 |
| 4. Employer deductions | | | | |
| Retirement annuity | | | R 241.72 | |
| | | | | -R 241.72 |
| Deemed Net Pay | | | | R11 348.87 |
| 5. Plus other income: | | | | |
| Monthly rent | | R2 000.00 | | |
| Times 65% | | <u>x 65%</u> | | |
| | | | <u>R1 300.00</u> | R1 300.00 |
| NET INCOME | | | | R12 648.87 |

Identifying various expenses as essential, non-essential and luxurious, and how to deal with each of these categories

Essential expenses are those expenses that a consumer has little or no control over – they are necessary for him to conduct his daily life. Expenses falling into this category are:

- Rental (if no bond) – to be reasonable considering the consumer's circumstances:

- Is it possible to obtain cheaper rented accommodation?
- Can affordable accommodation be found closer to work to reduce rental expenses as well as fuel costs? The cost of moving has to be taken in to consideration.
- Groceries (food, toiletries, cleaning materials) - groceries to be in line with size of the family and dietary requirements
- Water & Lights (if not part of rental)
- Rates & Taxes (if consumer is liable)
- Body corporate levies
- Domestic workers depending on circumstances, e.g. child care
- Education (if there are children, include day care, crèche, public / Model C schools or tertiary education in SA)
- Existing tertiary education should be allowed to continue – even if student obtains part time income to supplement his own studies. New courses of study are not to be included in the debt counselling process.
- Private schooling should not be provided for unless the fees are within the Model C school rates. If need be, switch to public / Model C school. Consumers may apply for subsidised school fees or exemption of school fees from the school's Governing Body when in need. This is normally done before 28 February annually
- Transport (public transport and/or reasonable running expenses of vehicle including fuel & maintenance)
- Telkom phone or cellular phones within reasonable amount.
 - Multiple cellular phones are not essential (indicate if contracts)
 - Encourage consumer to set limits on cellular phone contracts
 - Usage of instruments to be restricted to affordable and realistic amounts
- Security / armed response
- Maintenance of property
- Maintenance that should be paid over to dependants
- Utilities
- Clothing and shoes within reason – higher amount for growing children
- Chronic medication (obtain proof that not covered by medical aid / see whether generics are available at a reduced cost)
- Support of relatives with valid reasons
- Financial Services. Debt counsellors may not recommend any reductions in medical aid, insurance or assurance. Where an expense appears exorbitant the debt counsellor should refer the consumer to a FAIS approved financial planner. If

the debt counsellor gives advice in this regard without being appropriately registered with the Financial Services Board, he may face prosecution for contravening FAIS:

- Medical Aid – the consumer should be appropriately covered in relation to his income and family needs.
- Life Assurance – should be reasonable. Sometimes an insurance policy can be suspended for a period.
- Credit Life - money that a consumer pays to an insurance company that will pay certain outstanding debts in the case of the account holder's disability or death. If payment is stopped the cover will lapse. This expense is usually linked to consumer's debt payment. Be sure to separate it from the installment amount when perusing the debt.
- Insurance - money paid to insurance company to protect a person against the risk of their property being damaged or destroyed. If payment is stopped the protection will lapse. As a consumer under debt counselling will most likely be unable to replace their assets in the event of their loss, adequate insurance should be provided for.
- Anything else that can be regarded as essential under the consumer's unique circumstances.

The debt counsellor must make sure that all essential expenses are, in the first instance essential and in the second instance reasonable.

Non essential expenses are those expenses that consumers have that are not absolutely necessary, but that are none the less an important part of daily existence.

These will include:

- Domestic worker/s (unless this is the substitute for day care / crèche / after care facilities)
- Garden service
- Alcoholic beverages
- Tobacco / cigarettes
- Entertainment
- Recreation / club memberships
- Children's pocket money
- Tithes / donations
- Cosmetic services / beautician / pampering sessions

Some allowance must be made for this class of expenditure, so long as the amount allocated is reasonable considering the circumstances that the consumer is in.

Luxurious items are those items that the consumer does not need and that the average person probably does not have. They include:

- Multiple properties
 - If a property is being rented out, reflect the income generated as described above and all expenses associated with maintaining the property. Consider option of selling property.
- Boat, jet ski, sun bed
- Vehicles (value and number) – explore the options, depending on circumstances and minimum requirements of household:
 - Consider value of vehicle/s
 - If need be dispose of non-core vehicles and / or down-size to more affordable vehicle (only if financially viable). Even if re-sale price is less than the settlement amount the fact that overall debt is reduced assists debt servicing
 - Consider value of vehicle vs. outstanding amount on vehicle finance
- M-Net, DSTV (indicate if rentals – arrange cancellation at end of contract if necessary)
- Appropriate internet access (non contracts)
- Holiday clubs
- Gambling

Knowing when expenses need to be revised

Establish the expenses that the consumer has, taking into account their unique circumstances, living arrangements, dependants and income group. Include all essential expenses and apply careful consideration to non-essential and luxurious items.

The debt counsellor must assist the consumer in re-working the income & expenditure and reach mutual agreement on where expenses can be reduced / controlled.

- Establish whether there is any equity in assets and see whether any assets can be sold to reduce / repay some of the debt.

- Any available cash resources, bonuses or thirteenth cheques can also be applied in reduction of debts.
- Should it be necessary to downsize from an expensive luxurious vehicle. Credit providers can be approached with a request to “consolidate down”.
- If a fixed property (house) is to be sold to ease financial burden, the existing bond should form part of the initial repayment proposal, with details of the offer to purchase and approved buyer confirmation as and when this is available. When the transaction is complete, a revised proposal is required. Consumers are to be encouraged to take the best offer because the cost of interest while the consumer waits for a better offer is most often more than the extra money realised from the better offer. If there is a shortfall on the home loan after the property has been sold, then this shortfall must be included in the proposal. In such instances bond holders may waive the early termination fee.
- Consider whether consumer is able to find part time income or some other means to supplement income, if expenses cannot be reduced.
- Ensure that all expenditure is realistic in terms of size of household, number of dependants and income bracket.
- If revised living expenses exceed income then the consumer cannot be helped by the debt counsellor. Expenditure must be further revised or the debt counsellor may reject the application.
- If the consumer’s revised living expenses are greater than his income and his assets are less than his liabilities, he is insolvent and could consider applying for sequestration, providing that the assets owned could assure advantage to concurrent creditors. Refer the consumer for professional advice to an attorney.

Recognising and dealing with addictive behaviours

- Addictive behaviours are habits that a consumer has where they indulge in expenditures that they cannot afford but nonetheless cannot stop for one reason or another. Addiction falls into two types, physical and psychological. Very often a person may have both types pertaining to a specific addiction. Furthermore when there is one addiction there is often another.
- Debt counsellors should always be on the lookout for addictive behaviours and when identified refer the consumer for professional assistance.

Gambling may be one such addiction. It is important to understand gambling. Gamblers

can be classified in 3 broad groups:

Recreational gamblers gamble on social occasions with friends or colleagues. They have pre-determined acceptable losses and by and large their gambling activities cause little harm and their behaviour is associated with minimal guilt. They simply require information and education on gambling behaviour in order to make sensible decisions.

Problem gamblers spend too much time and money gambling. Their behaviour causes harm both to themselves and others and is associated with much guilt. Normally problem gamblers draw money on a regular basis at casinos or use their credit card for online gambling. These individuals require treatment to change this lifestyle.

Compulsive and pathological gamblers have a psychiatric disorder diagnosable by strict clinical criteria. It is regarded as a disorder of impulse control and has a very poor prognosis. Such gamblers have an inability to control their gambling, with consequent significant damage to themselves and others. They are often very difficult to treat. They constitute less than 1% of gamblers.

Should a consumer be involved in gambling they should be encouraged to contact the NRGF counselling line at **0800 006 008** where they can obtain free and confidential assistance.

Debt counsellors should build up a list of local support groups for other addictions such as alcohol and drugs, as well as other support groups such as marriage counselling and depression.

Conclusion

Consumers are over-indebted if too much credit has been extended/taken or there is a change in personal circumstances beyond their control (e.g. unemployment, retrenchment, divorce, serious illness resulting in unusually high medical expenses, and death of spouse etc), resulting in the consumer being unable to fulfil his debt obligations in a timely manner.

However, if the consumer can afford to pay his instalments but rather spends on excessive entertainment, holidays and other luxuries then there is no case for debt counselling. In this instance the consumer needs to be educated on how to manage budget and prioritise debt repayments. Debt counsellors are not required to provide this service to consumers who are not under debt review.

Module 4

Verification and Rearrangement Proposals

Learning outcomes

At the end of this module you should:

- Understand the information that credit providers supply in response to a regulation 24 (3) request
- Be able to use a standardised format for assessing over-indebtedness
- Recognise and deal with reckless credit
- Know the purpose of the rearrangement proposal
- Be able to deliver proposals that will reach the credit provider
- Be aware of the deadlines for the submission of proposals
- Understand what must be disclosed when submitting a proposal
- Have a comprehension of what a fair methodology for distributing the money available for debt repayments entails
- Know when it is appropriate to reduce interest rates, and also understand how the reductions should happen
- Understand the concept of cascading affordability
- Understand the purpose and content of counter proposals
- Understand the reasons for declined proposals
- Know what notices should be sent out and when
- Recognise consent and decline documentation from credit providers
- Have a plan for dealing with emergency credit requirements of consumers

Financial information (regulation 24(3) - (4))

Format

Regulation 24(3) of the Act states that a debt counsellor must verify the information provided by the consumer by requesting documentary proof thereof from the credit providers. Further, the debt counsellor must contact the credit providers or the consumer's employer or any other method needed for verification. Regulation 24(4)

requires that the credit providers must provide the debt counsellor with the required financial information within five business days of date of request. In the event that a credit provider fails to provide the debt counsellor with correct information the debt counsellor may accept the information provided by the consumer as correct (note the five days grace period agreed to and dealt with in module 2).

The credit providers have undertaken to provide the following information as per **Annexure G** (rule 24 reply).

Account Number

The account number for each of the consumer's credit agreements must be provided by the credit provider on the form as well as in all correspondence to the debt counsellor. In turn debt counsellors must quote this account number on all correspondence relating to that particular credit agreement.

Account Type

This information is important to debt counsellors as it is required for the statistical returns. Product types are defined as follows on Form 42 in the Regulations:

| Type | Code |
|--------------------------|------|
| Microlender | ML |
| Bank – Credit Card | BC |
| Bank - Bond | BB |
| Bank - Vehicle | BV |
| Bank - Overdraft | BO |
| Retailer - Clothing | RC |
| Retailer - Furniture | RF |
| Retailer - Other | RO |
| Legal Firm / Collections | L |
| Other | O |

Opening Date

The opening date is the date on which the loan or finance was granted or, in the case of a facility, the date on which the facility was last reviewed upwards.

This information is important for two reasons:

- If the agreement or facility increase pre-dates 1 June 2007 then the debt counsellor need not look for reckless lending
- In the case of vehicle and asset finance, the start date is used as part of the proposal structuring.

Expiry date

This is the date on which the credit agreement should be paid off by, or, in the event of certain facilities such as overdrafts, the date by which the review should take place.

Registered bond amount

In the instance of a home loan, the registered bond amount is shown. This helps the debt counsellor to recommend to the consumer that his obligations may be restructured without a debt review in certain circumstances.

Goods description

In instances where an asset has been financed, the description of the goods is included. This helps the debt counsellor to make recommendations to the consumer based on the suitability of the goods.

Credit limit

A credit limit is the amount available to a consumer under a credit facility.

It is useful for the debt counsellor to know what the credit limit on a credit facility is so that he can establish if the consumer is abusing his credit facilities.

Outstanding balance (Including arrears)

The balance as on the date that the certificate of balance was issued includes the capital amount, interest up to a specific date and charges, but excludes future interest and/or charges.

Arrears amount

This amount will include arrear interest and payments that are overdue.

Monthly instalment

The amount that the customer is liable to pay each month towards the repayment of the amount loaned in terms of the credit agreement, excluding fees and charges. Where there is no contractual instalment (e.g. an overdraft) then the instalment will be deemed to be the outstanding amount, at the agreed upon interest rate over 12 months.

Credit card instalments being equal to the contractual monthly repayments on both the straight and budget facility account added together for the outstanding balances on the total facility.

Monthly charges

These are monthly fees that may be charged in terms of Section 101 of the Act.

Insurance / assurance premiums

These are third party contracts that the credit provider collects in conjunction with the monthly instalment.

Method of payment

This refers to the method in which the monthly instalment is being paid by the consumer. A debt counsellor must take note of the method of payment in order to make arrangements for a reduced instalment, especially if the instalment is paid by way of stop order or debit order.

Interest rate

The rate at which the money is been lent, quoted as a percentage per annum on a net annual compounded monthly basis. When formulating a proposal the debt counsellor will include interest on the agreement as part of the proposal.

Type of interest rate

The interest rate can either be fixed or variable as stated in the credit agreement. The debt counsellor needs this information to verify whether the interest rate in terms of the agreement rate complies with regulation 42 (1) TABLE A.

Status of account

The status of the account is important. If summons based on the agreement has been issued and served then the debt counsellor must exclude the agreement from the debt review (section 86 (2)). The debt counsellor may, however include a “Legal” agreement with the consent of the credit provider concerned. These accounts are referred to in banking terminology as ‘in legal’. The only statuses that will be provided by credit providers are UP TO DATE, ARREARS and LEGAL.

Determination

Having verified all of the consumer’s information, the debt counsellor is now in a position to determine whether the consumer is over indebted.

The next step is to establish what the deemed contractual debt repayments are. When doing this note the following exclusions, which should be shown with the expenses:

- an insurance policy or credit extended by an insurer for payment of premiums.
- a lease of immovable property
- a transaction within a stokvel
- a non debt related agreement (e.g. gym, cell phone, rentals)

If the credit provider’s exposure increases after issue of the certificate as a result of the consumer using a card and / or any other facility after applying for debt review, he will be in breach as he may not incur further debt whilst under debt counselling. For this reason it is best to have the consumer destroy their credit cards at the time of application.

List all debt obligations, initially from the information available and later from regulation 24 statement (**Annexure G**).

It is important to establish what percentage of the current required instalment, as per

contract, the consumer has available to service debt obligations each month. Divide the amount available to pay debts (distributable income) by the total of current instalments to determine percentage available to pay debt. This is known as the over indebtedness ratio. If the percentage is greater than 100%, then the consumer is not over indebted.

Introduction to preparing proposals

This module seeks to lay down a set of guidelines that, when used by debt counsellors, will ensure a smooth, quick and consistent response from credit providers.

Purpose of the rearrangement work stream agreement

The purpose of the agreement covered in this module is hence to establish:

- Consistent treatment of consumers in respect of marital status and joint applications
- Consistent allocation of available funds on a basis that is fair
- Consistent extension of terms and reduction of rates on a fair and accepted basis
- Consistent and adequate disclosure of information

If all credit providers and all debt counsellors abide by the guidelines, the number of cases requiring a hearing because of parties frustrating the process will be reduced.

Disclosure

To enable a credit provider to properly assess a proposal, he should have as much information as possible at his disposal. The following is a guide to items that should be included in a proposal, but need not be limited to these items:

- | |
|---|
| <ul style="list-style-type: none">• Generic Information<ul style="list-style-type: none">○ The consumer's name and ID number○ The credit provider's name and account number○ The debt counsellor's name and contact details |
| <ul style="list-style-type: none">• Debt obligations<ul style="list-style-type: none">○ All debts must be shown (if a consumer has signed a contract of |

suretyship this account must be disclosed but need not be restructured, unless the surety has been called up by time of entry into the debt review)

- The type of debt must be indicated
- Financial details for each debt:
 - Current and proposed:
 - Capital
 - Interest rate
 - Payment
 - Term
- A detailed plan showing the amounts to be paid to the credit provider in each month of the re-arrangement
- Escalations for salary increases must be shown where such increases have been approved
- Indication of when and how the payments will be made, and how payments will proceed pending an application

- Financial situation

- Monthly income
 - From salary(ies)
 - From other sources and details of those sources
- Monthly expenditure
 - Give a high level of detail
 - Show all expenses
- Debt counsellors fees
 - Professional (up front) fee
 - Monthly fee
- Estimated legal costs
- Payment distribution
 - Method that will be used (eg. EAO, PDA etc)
 - Cost of distribution
- Money for contingencies
- A summary showing income, expenditure, fees and costs as well as amount available for distribution

- Motivation

- Describe how the consumer became over-indebted
- Explain the reasons for any expenditure items that are higher than what

would be expected

An indication that the consumer has made lifestyle sacrifices if this is appropriate

Distribution of available funds

As previously stated, there are many different methods that can be used to build a proposal. These include by capital outstanding, highest rate, or a combination, arbitrary “thumb sucks” or by instalment. It has been agreed that the Instalment method will be the norm for distribution. The following details how this is done:

- First calculate the distribution amount
 - Net Income
 - Expenses
 - An amount for contingencies (max 10% of the collectable amount)
 - = The collectable amount
 - Collection costs (Garnishee and / or PDA)
 - DC after care fees
 - = The Distribution Amount
- The distribution amount is allocated to the various credit agreements in proportion to their original instalment -
 - If the agreement has no contractual instalment, such as an overdraft or incidental credit agreement, then you must calculate a deemed instalment by taking the outstanding balance over twelve months at the applicable interest rate.
 - The agreements are amortised over time and the principle of cascading affordability – that is to say as one debt falls off the available money that no longer has to be paid is cascaded to all of the remaining debts
- Interest may be reduced if:
 - Home loans don't solve within 240 months from date of proposal, with a maximum term of 360 months from original contract date
 - Vehicle loans do not solve within the original contract term x 1,5 or a maximum term of 84 months from the contract date
 - Short terms loans, loans repayable in less than 12 months, don't solve within the original contract term x 3 from the contract date.

- Other agreements do not solve within 60 months from the proposal date.
- The interest rate reduction is done by taking the agreement with the highest rate and reducing it to the same rate as the next highest agreement
- If a solution is found then the reduction stops there, if not then both of those agreements are reduced to the next highest and so on
- If no resolution is reached at this point the debt counsellor may formulate the proposal in any way that is appropriate.

Example:

Mr Introuble has four credit agreements –

| <i>Credit Provider</i> | <i>Type of Account</i> | <i>Outstanding Balance</i> | <i>Monthly Payment</i> | <i>Rate</i> |
|---------------------------|---------------------------|----------------------------|------------------------|--------------|
| <i>Nedbank</i> | <i>Bank – Bond</i> | <i>400,000</i> | <i>4,500</i> | <i>14.0%</i> |
| <i>Standard Bank Card</i> | <i>Bank - Credit Card</i> | <i>10,000</i> | <i>1,000</i> | <i>20.0%</i> |
| <i>RCS Personal Loan</i> | <i>Microlender</i> | <i>8,500</i> | <i>1,500</i> | <i>36.0%</i> |
| <i>Wesbank</i> | <i>Bank - Vehicle</i> | <i>56,500</i> | <i>3,000</i> | <i>19.0%</i> |

He has R6 000 per month available, after PDA and debt counsellor costs, to pay off his debt.

Step 1 – Calculate how much of the R6000 each credit provider must get:

- Add up the monthly payments: $4,500+1,000+1,500+3,000=10,000$
- Divide the credit agreement's payment by the total and multiply by 100 to get a percentage:
 - Nedbank $4,500 \div 10,000 \times 100 = 45$
 - Standard $1,000 \div 10,000 \times 100 = 10$
 - RCS $1,500 \div 10,000 \times 100 = 15$
 - Wesbank $3,000 \div 10,000 \times 100 = 30$
- Check that the percentages all add up to 100:

- $45 + 10 + 15 + 30 = 100$.

If 100 is not reached then you have made a mistake!

- *Multiply the available amount (R6,000) by the percentage for that credit agreement:*

- *Nedbank $6\ 000 \times 45\% = R2,700$*

- *Standard $6\ 000 \times 10\% = R\ 600$*

- *RCS $6\ 000 \times 15\% = R\ 900$*

- *Wesbank $6\ 000 \times 30\% = R1,800$*

- *Add up the amounts calculated for each credit provider and check that they add up to the amount he has available. If it does not add up then you have made a mistake: $2,700+600+900+1,800 = R6000$*

- *Now that the monthly payment has been established a repayment plan must be tested. The determined payments must be applied to the agreements until the agreements are paid off. If one agreement is paid off then the money used for that agreement must be allocated to the remaining agreements proportionately in the same way that the original available amount was allocated, but now using the remaining agreements to reach the total, using the recalculated payments. Supposing the R900.00 instalment for RCS was sufficient to pay the outstanding balance + interest off over four months. From month five the money would have to be distributed by:*

- *Add up the monthly payments: $2,700 + 600 + 1,800 = R5,100$*

- *Divide the credit agreement's payment by the total and multiply by 100 to get a percentage:*

- *Nedbank $2,700 \div 5,100 \times 100 = 53$*

- *Standard $600 \div 5,100 \times 100 = 12$*

- *RCS is paid off*

- *Wesbank $1,800 \div 5,100 \times 100 = 35$*

- *Check that the percentages all add up to 100:*

- $53+12+35 = 100$

If 100 is not reached then you have made a mistake!

- *Multiply the available amount (R6,000) by the percentage for that credit*

agreement to get the new instalments payable from month 5

- Nedbank 6 000 X 53% = R3,176
 - Standard 6 000 X 12% = R 706
 - RCS Is paid off
 - Wesbank 6 000 X 35% = R2,118
- Add up the amounts calculated for each credit provider and check that they add up to the amount he has available. If it does not then you have made a mistake. $3,176+706+2,118 = R6,000$
 - If the agreements solve within the specified time then this is the plan to submit. Supposing that this is not the case then:

| Credit provider | Original rate |
|--------------------|---------------|
| Nedbank | 14.0% |
| Standard Bank Card | 20.0% |
| RCS Personal Loan | 36.0% |
| Wesbank | 19.0% |

- Reduce the agreement with the highest rate to be equal to the agreement with the second highest rate:

| Credit provider | Original rate | New rate |
|--------------------|---------------|----------|
| Nedbank | 14.0% | 14% |
| Standard Bank Card | 20.0% | 20% |
| RCS Personal Loan | 36.0% | 20% |
| Wesbank | 19.0% | 19% |

- Test to see if the plan works now. If it still does not work, reduce the value to the next level:

| Credit provider | Previous rate | New rate |
|--------------------|---------------|----------|
| Nedbank | 14% | 14% |
| Standard Bank Card | 20% | 19% |
| RCS Personal Loan | 20% | 19% |
| Wesbank | 19% | 19% |

- If it does not work then reduce the two agreements above to the same as the next (third) highest interest rate and test.. Supposing that prime is 14%, prime + 3 is $14+3 = 17%$, so we can only reduce to that level for now:

| <i>Credit Provider</i> | <i>Previous Rate</i> | <i>New rate</i> |
|---------------------------|----------------------|-----------------|
| <i>Nedbank</i> | <i>14%</i> | <i>14%</i> |
| <i>Standard Bank Card</i> | <i>19%</i> | <i>17%</i> |
| <i>RCS Personal Loan</i> | <i>19%</i> | <i>17%</i> |
| <i>Wesbank</i> | <i>19%</i> | <i>17%</i> |

Counter proposals

Where a credit provider disagrees with the assessment and proposal that has been done by the debt counsellor, the credit provider may make a counter proposal requesting the reduction in one or more of the items of expenditure of the consumer. In this instance the debt counsellor should carefully consider the credit provider's request and make a decision accordingly. If extra funds are made available in this manner then those funds must be distributed to all credit providers in accordance with the method already outlined.

Declined proposals

Credit providers may decline a proposal that does not comply with the guidelines. It must also be remembered that not all credit providers are a party to these guidelines and even where a proposal is submitted that complies with the suggested guidelines, it may still be rejected.

When a credit provider declines a proposal, fails to respond to a proposal or where the debt counsellor does not accept a counter proposal, then the debt counsellor must refer the matter to the Magistrate's Court.

Module 5

Application to the Magistrate's Courts In terms of section 86 of the National Credit Act

Learning Outcomes

At the end of this module you should:

- Have a background to civil procedure
- Know the legal requirements for debt counselling
- Understand Rule 55 applications
- Know how to serve an application

Introduction

Ultimately, a debt review will end in court, whether the court is approached for a hearing as contemplated in section 87 or merely to issue a consent order (section 138(1) read with section 86(8)(a)). The latter is not without its interpretation problems.

The aim of the work stream was to deliberate the debt review referrals to the Magistrate's Court and to provide some guidelines or, at the very least, examples of such referrals. The Act does not provide for a detailed procedure in referring matters to the court and therefore the Act needs to be read together with the Magistrate's Court Act and the Rules of the Court to ensure that these applications are not unnecessarily opposed or bogged down by objections of technical nature and fancy legal footwork.

Some thoughts on civil procedure

In civil procedure there are two basic types of processes that can be followed, the action procedure or the motion (application) procedure. The action procedure is generally used either because it is so prescribed or where a substantial factual dispute needs to be

determined. This involves a hearing, where witnesses testify.

However, if the dispute is of such a nature that the presiding officer can come to a decision on the papers filed by the parties the application procedure is recommended as it is a quicker and cheaper route to follow.

The most important differences between the two procedures are:

| | Action procedure | Application procedure |
|------------------------|--|---|
| Parties | Plaintiff and Defendant | Applicant and Respondent |
| Dispute | Substantive factual dispute which cannot be determined on the papers (affidavits) alone Thus, fundamental dispute regarding facts | Factual dispute that can be determined on the papers alone. Thus, no fundamental dispute regarding facts |
| Court documents | Summons, particulars of claim, etc. | Notice of motion and affidavits. These affidavits may include: <ul style="list-style-type: none"> ○ Applicant's founding affidavit ○ Respondent's opposing affidavit ○ Applicant's replying affidavit Other affidavits such as <ul style="list-style-type: none"> • Supporting affidavits • Confirmatory affidavits • Supplementary affidavits |
| Court | Trial court where evidence is heard orally and where parties can cross-examine the witnesses | Motion court where no oral evidence is heard, the legal representatives only argue on the papers (affidavits) before the court |
| Example | Motor vehicle accidents | Interdict |

It should at this stage be clear that the correct procedure to follow when referring a debt review to court will be the motion (application) procedure. The matter will be heard by the motion court and the procedure commences with the issuing and service of the notice of motion together with the founding and supporting affidavits.

A notice of motion is a specific document used by the applicant to inform the court and the respondents that the court will be approached and requested to grant relief as set out in the notice on a specific date and time. In the Magistrate's Court the Notice of Motion should be in the format as set out in Form 1 of **Annexure H** to the Magistrate's Court Act.

The founding affidavit of the applicant (the consumer *in casu*) should be attached to the notice of motion. The founding affidavit serves to place facts on record under oath. It is written as a narrative but parties should not include irrelevant or unnecessary facts. The deponent's case stands or falls by his affidavit. Not only must all the necessary averments be made in the affidavit, but they should be proved as far as is possible (this can be done by way of documentary evidence, supporting and/or confirmatory affidavits. Should a party refer to documentation in his affidavit it should be clearly marked and attached as an annexure to the affidavit.

A confirmatory affidavit may also be used. This type of affidavit will be used by a person who merely wishes to confirm the facts as set out in the founding affidavit in as far as it applies to him. Typically, a debt counsellor will submit a supporting affidavit stating that he has read the founding affidavit and confirms the truth thereof as far as it is applicable to the debt counsellor himself.

Should a third party wish to support the application and provide additional information such party should file a supporting affidavit.

Supplementary affidavits may also be filed in case of new evidence becoming available.

As affidavits are written statements made under oath (or confirmation) great care should be taken in the correctness of the statements made.

An affidavit may only be "amended" by deposing a further affidavit – setting out the reasons for the amendment. Conflicting statements under oath constitute perjury.

Requirements in terms of the National Credit Act

As mentioned above the work streams have envisaged that the Magistrate's Court will be approached under two circumstances. The debt counsellor may file a proposal as a consent order in the event that the consumer and all relevant credit providers have consented thereto (**Annexure I**). If, however, consensus cannot be reached between the

consumer and the all credit providers, the debt counsellor should refer the matter to an attorney to launch an application to court. This application will consist of a notice of motion, a founding affidavit with or without supporting affidavits and the debt counsellor's recommendation.

In terms of section 86(7)(c) the debt counsellor may issue a proposal recommending the Magistrate's Court to make certain orders if the consumer is found to be over-indebted. The orders that a magistrate may award is set out in the said section.

In terms of section 86

"(7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that –

(a)

(b)

(c) The consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders –

(i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and

(ii) that one or more of the consumer's obligations be re-arranged by –

(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;

(bb) postponing during a specified period the dates on which payments are due under the agreement

(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part C of Chapter 6

Further, in terms of the Act, a consumer may only take part in statutory debt review if that person is over-indebted. Therefore it is suggested that one of the orders that the consumer would request from the court, is an order declaring the consumer over-indebted as envisaged in section 79 of the Act.

In terms of section 79

“(1) A consumer is over-indebted if on a preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, 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.”

Procedure in the Magistrate Court (Rule 55 application)

In an application towards the Magistrate’s Court in terms of section 86 of the Act, relief will be sought against the credit providers and therefore they will be cited as respondents in the notice of motion. Rule 55 of the Magistrate’s Court Rules make provision for such applications.

Rule 55 provides as follow:

Applications.—

(1) Except where otherwise provided, an application to the court for an order affecting any other person shall be on notice, in which shall be stated shortly the terms of the order applied for and the time when the application will be made to the court. Delivery of such notice shall be effected in the case where the State is the respondent, not less than 20 days and in any other case not less than 10 days before the date of hearing.

(2) Except where otherwise provided an application need not be supported by affidavit but in the event of any dispute arising as to the facts, the court may—

(a)

receive evidence either viva voce or by affidavit and try the issues in dispute in a summary manner; or

(b)

order that the issue shall be tried by way of action, that the applicant shall be plaintiff and the respondent be defendant and that the notice of application shall stand as summons or that the applicant shall deliver such particulars of his claim as are prescribed in rule 6 within 10 days or such shorter time as the court may appoint.

(3) For the purposes of the action, appearance to defend shall be deemed, when the notice of application is ordered to stand as summons, to have been entered on the day on which such order is made, and when the applicant is ordered under this rule to file particulars, to have been entered on the day on which such particulars are delivered.

(4) Unless the court shall otherwise order, minutes, other than the minutes of the record, shall not be drawn up of orders on application on notice; and notice or service of such an order to or on any person who has had notice of the application shall not be necessary.

(5) Except where otherwise provided, an ex parte application shall be made in writing stating shortly the terms of the order applied for and the grounds on which the application is made and shall be signed by the party making the application.

(6) Except where otherwise provided, an ex parte application shall not, unless required by the court in any case, be supported by affidavit or other evidence.

(7) Any person affected by an order made ex parte or by an interdict notice in a summons for rent under [section 31](#) of the Act may apply to discharge it with costs on not less than 12 hours' notice.

(8) In every application the person substantially interested shall be made respondent.

(9) All interlocutory matters may be dealt with upon application, and any application which may be made ex parte at the applicant's election be made on notice.

(10) All opposed applications shall be heard in open court.

The work stream agreed on certain minimum items/issues (relating to the merits of the matter) that should be addressed in the founding affidavit of the consumer:

- Particulars of the consumer:
 - Full names, id number, residential and work address as well as occupation.
 - Disclose whether the consumer is married in or out of community of property. Should the consumer be married in community of property, both spouses will be under debt review and one application will be brought before court. If the consumer is married out of community of property, the other spouse's income will only be considered as far as a pro rata calculation of the living expenses will be made, unless both partners choose to apply for debt review.

- Jurisdiction:

The affidavit should contain an allegation that the court has jurisdiction to entertain the matter.

The work streams agreed to jurisdiction over the person of the applicant rather than the respondent. It is submitted, that even in the absence of such agreement section 28(1)(d) of the Magistrate's Court Act clearly states that a Magistrate's Court may entertain matters where the whole cause of action arose within its area of jurisdiction. As the application of the debt review in terms of section 86(1) of the Act is the reason why the courts are approached and not disputes arising out of the individual agreements, the Magistrate's Court in whose jurisdiction the debt review took place will have jurisdiction to entertain the matter.

During the work stream meetings the credit providers agreed not to oppose the monetary jurisdiction of the Magistrate's Courts. It is submitted that even in the absence of an agreement on the monetary jurisdiction the court would still have such jurisdiction. Section 86 of the Act clearly states that Magistrate's Courts should hear the matters. Further authority for this argument can be found in section 29(1)(e) of the Magistrate's Court Act stating that actions based on or arising from credit agreements as described in section 1 of the National Credit Act may be heard by Magistrate's Courts. No monetary jurisdiction was placed on this matters what so ever. It is submitted that the legislature never intended any other court to entertain debt review applications.

- An allegation that the consumer is over-indebted, supported by:
 - Proof of income
 - Form 17.1
 - Date delivered
 - Form 17.1 and the proof of receipt should be attached to the founding affidavit as an annexure, alternatively it should be mentioned in the affidavit that it will be available at the hearing.
 - Certificate of balance
 - Which credit providers provided same
 - A summary of the content of certificates of balances received from credit providers (principal debt, interest rate etc.)
 - Listing of credit providers that did not provide certificates of balance and the amounts received from consumer on accounts with no certificate of balance
 - The certificate of balances should be attached to the founding affidavit as an annexure, alternatively the affidavit should indicate that same will be available at the hearing
- Total exposure of consumer:
 - Breakdown of the total exposure must be attached to the application to ensure that the Court can establish reasonability of the “possible unreasonable” offer originally received. Explanation must be given of the process followed by the debt counsellor to establish that the consumer is over-indebted together with an explanation of the process, information and evidence (income, expenditures etc.)
- Restructuring Proposal:
 - Copy of the proposal as provided to the credit providers must be attached to the application to ensure transparency
 - Explanation must be provided of how the restructuring proposal was drawn up with specific reference to the breakdown and reapportionment of debt and instalments as from date of inception until date of final payment
- Response/Answers to Restructure proposals:
 - Which credit providers accepted the proposals with an indication of the

outstanding balance, terms, interest rate and first payment date

- Specific circumstances of the consumer which will make the proposal reasonable in the circumstances

A paragraph containing the relief sought as set out in the notice of motion.

Attestation clause

The affidavit must be deposed of before a commissioner of oaths who must then enter his attestation clause. The debt counsellor should ensure that every page of the affidavit is initialled by both the deponent (the consumer) and the commissioner. The latter's full names, capacity/rank and address should appear on the document.

Service

Generally all applications should be served by the sheriff. During the work stream, credit providers consented to service by fax (or e-mail accompanied by an acknowledgement of receipt) on their debt review departments. Please note that this is a courtesy arrangement and the applicant should make sure that they are in possession of a consent letter from the relevant credit providers to this effect for each case.

It is further reiterated that not all credit providers formed part of the work streams and therefore cannot be bound by decisions made during the work streams.

To ensure that this arrangement works, make sure that the credit providers' complete and correct reference/account numbers appear on the notice of motion. Debt counsellors should further ensure that they have proof of service on the credit provider.

Right of appearance

In terms of the Magistrates Court Act only an admitted attorney or the applicant himself may appear before the court. The attorney or applicant may call on the debt counsellor to give oral evidence.

Conclusion

It is strongly suggested that the services of a legal practitioner be obtained when launching the application.

Module 6 Default Process

Learning Outcomes

At the end of this module you should know:

- What procedure to follow when a consumer is in default
- Methods for delivering default and termination notices and the relevant time periods
- Various consequences of default

Introduction

The purpose of this work stream was to set down key principles as to the procedures and guidelines to be followed and the consequences of a consumer in default, either in terms of the original credit agreement or the debt re-arrangement agreement. The work stream also discussed the consequences of a debt counsellor not sending a consumer's debt restructuring proposal to the credit providers within the agreed deadlines.

We distinguish between default of a consumer before application for debt review on the one hand and default whilst under debt review on the other.

Default before debt review

When a consumer fails to fulfil his obligations in terms of a credit agreement, ie failure to make proper payments, the consumer is then in default. In terms of section 129(1)(a) of the Act a notice may be sent to the consumer informing him of his default and must propose that the consumer refer the matter to a debt counsellor, an alternative dispute resolution agent, consumer court or an ombud with jurisdiction with the intent of assisting the consumer and the credit provider to settle any dispute or come to a suitable repayment agreement. Section 130 of the Act prohibits a credit provider from taking legal action against a consumer if this notice has not been sent to the consumer.

In terms of section 130 the notice provides the consumer with ten business days to respond. If the consumer does not respond or rejects the proposal and the consumer has been in default for twenty business days, the credit provider may issue summons against the consumer for the outstanding debt. Note that these time periods may run concurrently. "Business days" excludes Sunday, Saturdays and public holidays, notwithstanding the fact that the credit provider may conduct business on such days. It is of great importance that the consumer responds in time.

Delivery of notices, orders or other documentations are dealt with in section 65 and in section 168 of the Act. Delivery is also defined in regulation 1.

"65. (1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.

(2) If no method has been prescribed for the delivery of a particular document, to a consumer, the person required to deliver that document must –

(a) make the document available to the consumer through one or more of the following mechanisms –

(i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or ordinary mail;

(ii) by fax;

(iii) by e-mail;

(iv) by printable web-page; and

(b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a)."

"168. Unless otherwise provided in the Act, a notice, order or other document that, in terms of the Act, must be served on a person will have been properly served when it has been either –

(a) delivered to that person; or

(b) sent by registered mail to that person's last known address."

“1. “delivered” unless otherwise provided for, means sending a document by hand, by fax, by e-mail, or registered mail to an address chosen in the agreement by the proposed recipient, if no such address is available, the recipient’s registered address. Where notices or applications are required to be delivered to the National Consumer Tribunal, such delivery shall be done in terms of the Tribunal’s Rules. Where notices or applications are required to be delivered to the National Credit Regulator, such delivery shall be done by way of hand, fax, e-mail or registered mail to the registered address of the National Credit Regulator;”

There is some confusion that is created by these different sections when it comes to delivery of notices. The work stream provided no clarity on this matter. However, it has become practice for a 129 notice to be sent to the consumer by registered mail.

Delivery of notices

Due to the confusion surrounding mail room delays it was agreed by the work streams that when a notice is sent one must refer to the postmark date.

- A notice will be deemed delivered five business days from date of postmark
- When counting days the first day will be excluded and the last day included
- Note that notice or letters sent by fax or e-mail will be deemed delivered four business days after the date on which the notice or letter was sent

Default during debt review

Once a consumer has applied for debt review his credit providers are prevented from taking any further legal action against him. In terms of section 86(10) of the Act, if a consumer is in default with the original contractual instalment under a credit agreement that is subject to debt review, the credit provider concerned, may then give notice of termination of the debt review at least 60 business days after the application was made. This termination will not effect the other credit agreements in the review. This notice may be sent to the consumer and debt counsellor by fax, e-mail or mail. The delivery time allocated for a 129 notice does not apply to a section 86(10) notice. The notice will be deemed delivered on date sent to the debt counsellor.

In the work streams it was agreed that the credit provider will provide the debt counsellor and consumer with a ten days grace period to amend the default. Failing to do so, the debt review will be terminated without further notice. If a proposal has been sent and the credit provider has consented to the proposal, the debt counsellor must obtain a consent order from the courts or, if all the credit providers subject to the debt review have not accepted the proposal, set the matter down within the ten days.

In order to prevent final termination the consumer must bring all his payments up to date in terms of the debt rearrangements agreement. If no proposal was send, the consumer must cover the arrears in term of the original contract. Once payments have commenced the termination notice will then no longer be enforceable and the credit provider will have to send a new notice should they wish to terminate the debt review.

Conclusion

It is important that consumers make payments during the review process in terms of the proposal, even if not all of the credit providers agree to the proposal.

The grace periods granted to a consumer and debt counsellor should not be regarded as general practice as debt counsellors are once again reminded that not all credit providers are party to the work stream agreement.