

Short notes on:

THE NATIONAL CREDIT ACT AND YOUR DEBT REVIEW HOW DOES IT REALLY WORK

Introduction

The subject of credit and over-indebtedness remains an important and deeply concerning topic in the current economic climate in South Africa.

Over the years we have seen consumers incurring debt, not only to live exorbitant lifestyles above their means, but to actually for day to day financial survival. On the flip side of the coin – credit providers continue to benefit as the interest charged on credit is their main source of income.

In order to balance the interests of both parties, credit agreements and preventing over – indebtedness is legislatively regulated in South Africa. This entails that credit providers have to do the necessary credit checks and assessments before providing credit to the consumer. This is in order to ensure that the credit is not a reckless credit agreement in terms of the National Credit Act, 34 of 2005 as amended from time to time (hereafter the “Act”).

Notwithstanding the above, sometimes, even after obtaining credit by way of a credit agreement with the credit provider (following an assessment), the consumer’s personal or financial circumstances change and the consumer starts to struggle to meet the instalment deadlines, becomes overwhelmed by the debt and eventually may become over-indebted. Few consumers are completely aware of how to avoid, handle, or recover from these circumstances.

As a result many of them fall victim to unscrupulous counsellors and advisors. So, what should they do?

Over-indebtedness and Debt Review

Over-indebtedness is when the consumer is unable to meet all of his or her credit payments on a monthly basis. In other words, a cash flow problem results and the consumer’s monthly expenses often exceed their income, and the consumer is not always able to rectify the situation. In this situation, a consumer will then be declared to be over-indebted.

The process of being declared as over-indebted is handled a Debt Counsellor which is duly registered with the National Credit Regulator. The consumer, in effect, approaches the Debt

Counsellor to have him or her declared over-indebted. The Debt Counsellor will assess the consumer's financial situation and all its credit responsibilities, and will then make a recommendation that the consumer is to be declared over-indebted. This process will protect both the consumer from possible legal action by a credit provider and assist the consumer with negotiations with the credit providers to ultimately rectify the customer's over-indebtedness.

Once the Debt Counsellor has determined that the consumer is over-indebted, it will issue a 17.2 form to serve as notification to all the consumer's credit providers that the consumer's application for debt review was successful, and that the Debt Counsellor will now begin a restructuring proposal for the consumer's debt obligations, which will be sent to the credit providers.

After the recommendation and arrangements as mentioned above has been made, the Debt Counsellor will arrange to apply to court for an order to have the consumer placed under debt review. This application is usually, in practice, obtained by having the consent of the consumer to be declared over-indebted and placed under debt review in terms of Chapter 4, Part D, and more specific, Section 86 of the Act. It does however happen that there is never a court order obtained, due to various reasons. This does not have an effect on the debt review status of the consumer at the Credit Bureaus.

The credit providers, in the majority of cases do not object to the recommendation, and will accept the restructuring proposal by the Debt Counsellor. This will mean that all the consumer's debit orders are to be cancelled and a monthly payment will occur through the National Payment Distribution Agency (hereafter NDPA), arranged by the Debt Counsellor. The consumer will make a monthly payment into an account created by the Debt Counsellor, and he or she will distribute the amount between the credit providers as per the prior arrangements.

When this is done, the consumer's credit provider will stop liaising with the consumer, and direct all future communications to the Debt Counsellor during the course of the debt review process. The consumer's credit status will be updated at the Credit Bureaus as being under debt review and under debt counselling. The listing of all credit will indicate that it is subject to debt restructuring. The consumer will not be allowed to get any new credit for as long as the consumer is under debt counselling. The debt review process is only terminated once the consumer is issued with a clearance certificate, after all the debt obligations has been satisfied, i.e. all debt has been repaid.

Withdrawing or Terminating the Debt Review/Debt Counselling Process

There are various ways in which the debt review process can be terminated and in which the consumer may have the status of under debt review removed from his or her credit record. This is done in terms of Section 71 of the Act. The consumer has satisfied all the obligations under every credit agreement that was subject to that debt re-arrangement order or agreement. Alternatively, the consumer has demonstrated his or her financial ability to satisfy future obligations where the consumer still has a long term credit agreement, such as a mortgage agreement, and has shown that he or she is no longer in arrears on the re-arranged agreements. It might be that the mortgage agreement was never part of the re-arrangement agreement, and then once all other short-term agreement obligations has been satisfied, a Clearance Certificate may be issued.

In the event that a court order has been obtained placing the consumer under debt review, the consumer must bring an application to court for the rescission of the granted debt review Court Order requesting that the consumer be declared no longer over-indebted. This is a formal application to court, wherein the consumer will need to seek the assistance of an attorney.

If a Court Order was not obtained (ie that declared the consumer over-indebted), there are two other ways in which the debt review process can be terminated:

1. Prior to declaration of over-indebtedness:

The consumer can voluntarily withdraw before the Debt Counsellor issues a 17.2 form and declares the consumer over-indebted. The Debt Counsellor will issue a 17W form and update the Debt Help Service status which will now indicate that process has been withdrawn by the consumer.

2. Post declaration of over-indebtedness:

The Debt Counsellor only has the statutory powers to recommend that consumer is declared to be over-indebted. The Magistrate's Court will have the powers in terms of Sections 85(b), 87(1) and/or 88(1)(b) of the Act, to declare the consumer over-indebted or not over-indebted. If the Debt Counsellor has made the recommendation and issued a 17.2 form, the consumer must approach the relevant Magistrate's Court to be declared not over-indebted and no longer under debt review.

The application to court must be made in terms of Section 87(1)(a) of the Act requesting that the Court reject the Debt Counsellor's recommendation that the consumer be found over-indebted; and also declare that the consumer is no longer over-indebted. This formal court application will need to be substantiated with the necessary proof setting out the reasons for declaration of over-indebtedness, and how his or her circumstances and financial position have changed etc.

Conclusion

It is clear that by being declared over-indebted will have invasive consequences and it is therefore advised that the consumer always does comprehensive research prior to having themselves declared over-indebted. It is necessary to seek professional assistance with regard to all situations which may involve the National Credit Act, in order to avoid adverse or unforeseen consequences to the consumer.

