

MA du Plessis

The *National Credit Act*: Debt counselling may prove to be a risky enterprise

Summary

Debt counselling, and debt counsellors, have been introduced in the *National Credit Act*. The Act assists consumers in controlling debt, but the viability for an individual to register as a debt counsellor is questioned. The requirements (and exclusions) to qualify as debt counsellors, their necessity in identifying reckless lending transactions and their functions in the processes of debt review and debt rearrangement are discussed. Certain categories of persons who may normally incorporate debt counselling as part of their practices and who do not qualify in terms of the Act, is indicated. Debt counsellors' responsibilities and accompanying risks, at a prescribed fee tariff, are indicated when the debt review processes, from applications by consumers who are not over-indebted, voluntary and involuntary debt rearrangement, until the issuing of clearance certificates, are assessed. An inevitable deduction is that practice as a debt counsellor may be impossible when the financial layout required is assessed. Individuals who, due to their training and experience in the positions they hold, would have been well placed to practice as debt counsellors is shown to be unable to practice as such in terms of the Act. These individuals will be compelled to establish private enterprises to enable them to practise as debt counsellors, which will be impossible at the current prescribed fee tariff.

Die *Nasionale Kredietwet*: Skuldberading blyk 'n riskante onderneming te wees

Skuldberading en skuldberaders is in die *Nasionale Kredietwet* (die Wet) bekend gestel. Die Wet sal daarin slaag om verbruikers te help met skuldbeheer, maar die lewensvatbaarheid vir 'n individu om as skuldberader te registreer word bevraagteken. Die vereistes (en uitsluitings) om as skuldberader te kwalifiseer, hul noodsaaklikheid in die identifisering van roekelose uitleentransaksies en hul funksies in die prosesse van skuldher siening en -reorganisasie word bespreek. Sekere kategorieë van persone wat normaalweg skuldberading as deel van bestaande praktyke sou kon inkorporeer en nie ingevolge die Wet kwalifiseer nie, word aangedui. Die skuldberader se verskeie take en meegaande risiko's, teen 'n voorgeskrewe vergoedingstarief, word uitgelig wanneer die skuldher sieningsprosesse, vanaf die die aansoek deur verbruikers wat nie oorbelaai is nie en vrywillige en onvrywillige skuld herorganisasie, tot en met die uitreiking van klaringsertifikate, ondersoek word. 'n Ondersoek na die finansiële uitlegkoste van 'n skuldberader, teen die vergoedingstarief, het die noodwendige gevolg aangedui dat dit onmoontlik mag wees om as sodanig te praktiseer. Individue wat goed geplaas sou wees om as skuldberaders te praktiseer vanweë opleiding en ondervinding opgedoen in die betrekkings wat hul bekleed, sal nie as sodanig kan optree ingevolge die Wet nie. Sodanige individue sal dus genoop word om private ondernemings op die been te bring om as skuldberaders te praktiseer, wat teen die huidige vergoedingstarief onmoontlik sal wees.

1. Introduction

Debt counselling, and debt counsellors, have been introduced in the *National Credit Act* (the Act).¹ A debt counsellor has to provide guidance to both credit providers and consumers, ensuring that a consumer budgets his/her income effectively and efficiently, which should result in the eventual payment of debts. A debt counsellor therefore has to strike a balance between the needs of the (indebted) consumer and the credit provider, each of whom represent a section of the country's economy. The Act fails to define debt counselling but the regulations define it as "performing the functions contemplated in section 86 of the Act," which refers to the debt review process. Purposes of the Act include the provision for debt re-organisation in cases of over-indebtedness and debt counselling services. There is no disputing that the Act assists the indebted consumer. The viability of registering as a debt counsellor to render the debt counselling services will be questioned. The debt counsellors referred to herein are not those individuals and organizations, like law clinics, churches, financial advisors and non-governmental organizations performing debt counselling, but debt counsellors as envisaged by the Act.

2. Who will qualify as a debt counsellor in the light of the requirements that have been set?

Only a natural person may register as a debt counsellor and only if such person meets certain requirements.² These prohibitions are intended to avoid corruption, including the acceptance of bribes in order to persuade a debt counsellor to decide a matter in a particular way. A debt counsellor is forbidden from accepting any fee from a credit provider in respect of a specific application.³ A person may also be prevented from registration as a debt counsellor if such person is engaged in, employed by or acting as an agent for a person that is engaged in the operation of a credit bureau, debt collection or credit provision.⁴ In terms

1 *National Credit Act* 34/2005.

2 *National Credit Act* 34/2005 section 46: he/she may not be — under 18 years of age, an excluded person by court order in terms of section 14 of the *National Gambling Act* No 7 of 2004, declared by a court as mentally unfit or disordered, removed from an office of trust relating to fraud or misappropriation of money and other convictions relating to fraud, theft and forgery, disregarding of consumer rights and bringing the consumer industry into disrepute as a director or member of a governing body or an entity, under financial administration or subject to debt re-arrangement.

3 *National Credit Act* 34/2005 section 86(3).

4 *National Credit Act* 34/2005 section 46(4)(c). Therefore, if a prospective debt counsellor is employed by, or act as an agent for or holds a position as described herein, registration may be denied:

- a) the operation of a credit bureau;
- b) debt collection — which will disqualify a sizeable number of attorneys and paralegals and it raises the question whether this exclusion will apply to non-governmental organizations assisting the indigent and law clinics whose main function is not debt collection, but attend to a few such cases at any given time; and

of section 47(1) no juristic person or an association of persons may be registered as a debt counsellor.⁵

Regulation 10 prescribes the criteria for registration as a debt counsellor with the National Credit Regulator (NCR).⁶ Grade 12 is required as the minimum educational qualification. In addition, a minimum of two years' experience in any one of the fields being consumer protection, complaints resolution or consumer advisory service; legal or para-legal services, accounting or financial services, education or training of individuals, counselling of individuals, or in the general business environment. The prospective debt counsellor should also display the ability, or provide counselling or transfer skills and demonstrate an ability, to manage such person's own finances.

The scope of criteria for exclusion is so extensive that it will include individuals who worked on the fringes of the prescribed professions or fields.⁷ One can only speculate whether the demonstration of an individual's ability to manage his or her own affairs is measured merely by the fact that such person is not registered (for bad debt) with a credit bureau. The regulation is also silent on the measuring of an ability to transfer skills or provide counselling. The criteria were also criticized for: "[requiring] no higher education or technical expertise from a debt counsellor which means that pretty much anybody who wants to be a debt counsellor can register with the NCR".⁸

Finally, to qualify as a debt counsellor, an applicant is required to attend a training programme, approved by the NCR, against payment of the programme fees. On completion the applicant will be eligible to write a set examination. After passing, the person may apply for registration with the NCR as a debt counsellor,⁹ after payment of the registration fees.¹⁰ Once a debt counsellor is registered such person can operate throughout the Republic of South Africa.¹¹

c) credit provision. This exclusion disqualifies all banks, insurance companies and most business enterprises. Financial institutions and the like typically have divisions that assist consumers with indebtedness — these staff members are therefore automatically disqualified. These exclusions are clearly aimed at avoiding a conflict of interests.

5 This exclusion, however, also excludes such entities that are well placed in rendering assistance, like the Consumer Profile Bureau, which is South Africa's most comprehensive source of credit information. The Bureau's managing director has already indicated that the company is swamped by calls from consumers, but "because debt counsellors must be individuals with no company affiliations, [the Consumer Profile Bureau] will not be able to offer debt counselling but judging by the number of telephone calls [it] receive daily, this is going to become a major issue." See *Debtors gear up for 'salvation'*. 13 February 2007 <http://www.fin24.co.za>. A possible solution may be for individual members of such an organization to register as debt counsellors and to fulfill that function.

6 Regulations made in terms of the *National Credit Act 24/2005*.

7 A possible solution may be for a group of persons who are all qualified debt counsellors to share facilities and specified administrative responsibilities and staff.

8 *National Credit Act 34/2005* section 47(1).

9 *National Credit Act 34/2005* section 44(3)(a).

10 *National Credit Act 34/2005* section 51 and regulation 4(c).

11 *National Credit Act 34/2005* section 50.

3. Why the need for debt counsellors?

Consumers with debt for amounts up to R50 000 could prior to the implementation of the Act only be assisted in terms of section 74 of the *Magistrate's Court Act*.¹² The debtor-consumer's estate is not completely dissolved, but the court appoints an administrator to manage the financial affairs of the consumer while creditors may not deal directly with the consumer. The disadvantage of this to the consumer is this person's inability to access further credit and for the creditor, the inability to collect directly. The administrators are entitled to commission of 12,5 percent of funds collected from the consumer. As it is not compulsory to appoint an attorney as an administrator, this position is not regulated in any way.

It was established, in a study conducted by Dr Penelope Hawkins,¹³ that credit extended to South African households in 2002 came to more than R350 billion. The average rate of the cost of credit was 26 percent per annum. More recent statistics indicate that South African household debt came to R680 billion by September 2006, while the debt to disposable income ratio had risen to 75 percent, raising the risk of default, even if interest rates increase marginally.¹⁴ Low-income consumers were affected mostly by high rates, mainly as a result of micro-loans and other short-term loans that bore an average interest rate of 360 percent per annum. During 2001 Ebony Consulting International (Pty) Ltd and the Development Policy Research Unit at the University of Cape Town conducted research into indebtedness in South Africa.¹⁵ It was found that higher income groups were more indebted than lower income groups. All the income groups had shown negative liquidity rates for the direct disposable income variable. Negative liquidity proved acceptable for the high income groups, as most individuals were using their income to buy investment assets. Concerns were raised regarding the negative liquidity of the lower income groups, as they were obtaining credit to finance their income to expenditure deficit (consumer credit). The effect of this is that some individuals will not be able to pay off their debts. The report further indicated that debt incurred by the lower income groups was often involuntary. It was consequently necessary to cover the immediate consumer needs of the debtor.¹⁶ According to a survey done by FinScope 2005, only 6 percent of South Africans borrow money to start a business, while 13 percent borrow to buy food.¹⁷

Figures released by Statistics SA reveal that the total number of civil summonses issued for debt for the three months ended November 2006 increased by 12,8 percent compared with the three months ended November

12 *Magistrate's Court Act* 32/1944.

13 Of Feasibility (Pty) Ltd for the Credit Review Committee (The Cost, Volume and Allocation of Consumer Credit in South Africa). See Debt counsellor training programme: 70.

14 *Black Sash slams legal eagles over debt advice*. 13 May 2007 <http://www.fin24.co.za>.

15 Debt counsellor training programme: 70-71.

16 Debt counsellor training programme: 71.

17 *Loan sharks bare teeth*. 02 January 2006 <http://www.fin24.co.za>.

2005.¹⁸ About 75 000 default judgments (for debt) are issued every month¹⁹ and about 4 million South Africans have been blacklisted by credit bureaux.²⁰

4. Relief through debt counselling

The debt review procedure detailed in section 86 of the Act allows an over-indebted consumer to seek assistance from a debt counsellor who has to assess the application made by the consumer to determine whether or not he is over-indebted. Section 79 states that a consumer may be described as over-indebted if the debt counsellor is of the opinion that a consumer will probably not be able to meet his financial commitments at the end of a month. The debt counsellor must attempt to create a restructuring agreement acceptable to all credit providers. Alternatively such person must make recommendations to the Magistrates' Court on how the individual can be helped. The role of debt counsellors is primarily to assist consumers who are over-indebted.

An objective test is applied when assessing over-indebtedness. The limitations of a reasonable man as stated in *S v Burger*:²¹

one does not expect ... [the reasonable man] to possess any extremes such as Solomonic wisdom, prophet foresight, chameleonic caution, head long haste, nervous timidity, or the trained reflexes of a racing driver. In short, a ... [reasonable man] treads life's pathway with moderation and prudent common sense,

must be applied.

The debt counsellor should consider the "financial means, prospect and obligations" of the consumer. These include, as a minimum, the frequency and regularity of the consumer's income. Excluded from this determination, will be income held in trust for the benefit of someone else, as well as the income and expenditure of dependants in the same household.²²

5. Reckless lending: the role of the debt counsellor

A consumer can apply to a debt counsellor for a declaration of reckless lending and a magistrate may refer a matter to a debt counsellor for investigation regarding reckless lending in terms of section 85.²³ The debt counsellor must consider all the requirements of reckless lending prescribed in section 80.²⁴

18 *More debt blues for S Africans*. 19 January 2007 <http://www.fin24.co.za>.

19 *Black Sash slams legal eagles over debt advice*. 13 May 2007 <http://www.fin24.co.za>.

20 *Blacklisting amnesty could trigger a credit crunch*. 11 November 2006 <http://www.fin24.co.za>.

21 1975(4) SA 879 D-E.

22 *National Credit Act 34/2005* section 78(3).

23 *National Credit Act 34/2005* section 86(6).

24 They include the following: "The level of indebtedness of the consumer after that particular agreement was entered into; whether, when that particular credit agreement was entered into, the total debt obligations including the new agreement exceeded the net income reduced by minimum living expenses; the consumer's bank statement,

The only time when a debt counsellor can make a recommendation to the magistrate, is if the consumer is over-indebted. The debt counsellor can request the court to declare a credit agreement reckless and suggest, *inter alia*, that the obligations of the consumer be set aside or suspended.²⁵

6. The debt rearrangement process

As will be indicated, the functions of a debt counsellor are extensive and important for, not only the consumer and the credit provider, but also the consistent application of these functions which may have an influence on the economy of the country. Particularly in view of these important functions, together with the responsibilities, the question that needs answering is who will be willing to act as a debt counsellor for the pitifully small fee of R50.

6.1 The functions of a debt counsellor

The debt counsellor has a limited statutory function, detailed in section 86 of the Act, dealing with over-indebtedness and restructuring. Because the duty of a debt counsellor is prescribed, interference in the affairs of a consumer is not allowed. The debt counsellor cannot provide financial advice unless registered with the financial Services Board as a financial advisor in terms of the *Financial Advisory and Intermediary Services Act* (FAIS).²⁶

The FAIS defines financial advice as "...any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients" concerning the purchase of financial products, investments of any kind, any loan linked to an investment or financial product, the termination, replacement or variation of financial products.

Although not stated, it is not unlawful to consult with a consumer without providing financial advice. A consumer who has applied for a debt review must

... comply with any reasonable request by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and prospects for responsible debt rearrangement.²⁷

This does not preclude a debt counsellor from expressing views concerning a debtor's investments in the recommendation made to the Magistrate.²⁸ The matter of the dismal fee structure allowed for the debt counsellor will be probed throughout, which leaves one to ponder on what would prevent a debt counsellor from being registered as a financial advisor under FAIS as well. This will entail the wearing of two hats, namely that of the debt counsellor who charges the

salary or wage advice and records obtained from a credit bureau; and any guidelines published by the NCR proposing evaluative mechanisms, models and procedures in terms of s 82 of the Act."

25 *National Credit Act* 34/2005 section 86(7).

26 *Financial Advisory and Intermediary Services Act* 37/2002.

27 *National Credit Act* 34/2005 section 86(5).

28 *National Credit Act* 34/2005 section 86(7).

mentioned fee for debt counselling while also charging the consumer for financial counselling.

Research has proved that in higher income groups, individuals use their income to buy investment assets,²⁹ which may make restructuring of investment assets a viable proposition for such a debt counsellor. The debt counsellor does not have the power to deal with self appointment to manage the affairs of a debtor, unless agreed to by the creditors and the debtor agree in the debt rearrangement agreement. The Magistrate's Court may stipulate that the debt counsellor will carry out this function.

6.2 The debt review process

A consumer can enter the debt review process in four ways. It can be by way of a referral by court,³⁰ a referral by the NCR,³¹ a referral by a credit provider³² or a voluntary application by a consumer,³³ who is prepared to pay the prescribed fee.

Debt counsellors are required to attend to all debt review applications that are received by them.³⁴ All credit agreements are subject to the debt review procedure except if the credit provider has proceeded with legal action against the consumer.³⁵ The debt review process will also apply to pre-existing credit transactions.³⁶

The applicant is required to pay the application fee of R50, stipulated in schedule 2 of the regulations.³⁷ For the mentioned fee, the debt counsellor must provide the consumer with proof or receipt of the application and a copy of the regulations.³⁸

In terms of section 86(4)(b)(i)(ii), the debt counsellor must individually address all the credit providers listed in the application.³⁹

29 Debt counsellor training programme: 70.

30 *National Credit Act 34/2005* section 85(a).

31 *National Credit Act 34/2005* section 139 1)(b).

32 *National Credit Act 34/2005* section 129.

33 *National Credit Act 34/2005* section 86(1).

34 *National Credit Act 34/2005* section 86.

35 *National Credit Act 34/2005* section 129.

36 except if they refer to reckless lending item 4, schedule 3.

37 *National Credit Act 34/2005* section 86(3).

38 *National Credit Act 34/2005* section 86(4)(a). The consumer has to complete form 16 of the regulations, which consists of a number of pages. This form has to be accompanied by a list of all the credit providers, as well as copies of all documents requested. It is presumed that the debt counsellor is required to make all the copies of e.g. salary slip, proof of school fees, medical expenses, all debts (accounts), bank statements at his/her own cost. (The full list of what is required to be copied can be found in regulation 24.) The debt counsellor must verify all this information by contacting the relevant credit provider or employer or any other method of verification (regulation 24(3)). The cost of such verification is for the account of the debt counsellor.

39 The notification, which must be printed on the debt counsellor's letterhead in accordance with Form 17.1, must be to all credit providers and all registered credit

The debt counsellor must, in terms of section 86(6), determine whether the consumer appears to be over-indebted,⁴⁰ and whether any of the consumer's credit agreements appear to be reckless.⁴¹

Regulation 24(9) requires the debt counsellor to, upon completion of the above, reduce any arrangements made with credit providers to writing. This needs to be signed by the debt counsellor, the credit providers and the consumer.⁴²

6.2.1 Rejection (consumer not over-indebted)

If a debt counsellor finds that the consumer is not over-indebted, such person must provide the consumer with a letter of rejection,⁴³ containing the prescribed details.⁴⁴ The consumer has to be furnished with a statement advising that

bureaux. This notification must be sent by fax, registered mail or e-mail and the debt counsellor must keep a record of the date, time and manner of delivery of the notice (regulation 24(5)). The cost of the opening of the file and the notification is for the account of the debt counsellor. Form 17.1 must be dispatched within 5 business days after receiving an application for debt review (regulation 24(2)). The credit provider must verify the information within 5 days, failing which the debt counsellor may accept the information provided by the consumer as correct (regulation 24(4)).

40 *National Credit Act 34/2005* section 86(6)(a). Regulation 24(6) required this determination to be completed within 30 days after receiving an application. When assessing the consumer's application in terms of section 86(6)(a), the debt counsellor must refer to section 79 (Over-indebtedness) and consider the following in terms of regulation 24(7): the consumer's over-indebtedness by using the formula prescribed in regulation 24(7)(a), the calculation of net income by using the formula prescribed in regulation 24(7)(b). In terms of regulation 24(7)(c) the consumer has to provide the debt counsellor with a budget. The debt counsellor has to adjust the consumer's budget with reference to guidelines issued by the NCR.

41 *National Credit Act 34/2005* section 86(6)(b). This determination has to be completed within 30 days. When assessing the consumer's application, the debt counsellor must refer to section 80 and consider the following in terms of regulation 24(8): subsections (a) and (b) require the debt counsellor to make calculations to determine the level of indebtedness of the consumer after that particular agreement was entered into. The debt counsellor must further determine whether that particular agreement when entered into resulted in the total debt obligations to exceed the net income, as reduced by the minimum living expenses. Subsection (c) requires of the debt counsellor to consider the consumer's bank statement, salary or wage advice (and presumably income from other sources) and records obtained from a credit bureau. Subsection (d) compels the debt counsellor to consider the guidelines as published by the NCR in terms of section 82.

42 When the assessment is completed the debt counsellor must complete form 17.2 which has to be reproduced on such person's own letterhead and be submitted, as an individually addressed notification, to the credit department of each credit provider listed in the application for debt review and to each registered credit bureau. This must be done at the cost of the debt counsellor within 5 business days. The above procedure has to be followed regardless of the outcome.

43 *National Credit Act 34/2005* section 86(7)(a).

44 *National Credit Act 34/2005* regulation 25 (1) and (2). Such details would include the basis for finding the consumer not to be over-indebted, containing details of the calculations as set out above and a copy of the assessment form. Section

the application for debt review will be removed from all registered credit bureaux within five business days. This will result in credit providers being entitled to take legal steps against the consumer.⁴⁵ A debt counsellor may come to the conclusion that a consumer is not over-indebted, even if the granting of credit in a particular agreement was reckless at the time it was entered into.

6.2.2 Voluntary debt rearrangement (consumer not yet over-indebted)

If the debt counsellor finds that the consumer is not over-indebted, but is nevertheless experiencing, or is likely to experience, difficulty satisfying all his/her obligations under credit agreements in a timely manner, the debt counsellor may recommend voluntary debt re-arrangement.⁴⁶ The process as described for voluntary debt rearrangement has to be followed by the debt counsellor, for the prescribed fee. In this instance, the debt counsellor must use discretion in deciding whether a consumer meets the debt re-arrangement requirements. As the Act does not prescribe an application procedure for this remedy, an objective decision must be made based on the application for over-indebtedness that does not meet the necessary criteria. The implication of this section for the debt counsellor is that anyone, even if they do not experience a problem yet, but they foresee that the situation may change at some later stage, are entitled to the services of the debt counsellor against payment of the prescribed fee. There is no indication that the debt counsellor may refuse to assist.

Voluntary debt rearrangement, also referred to as informal debt rearrangement, deals with a contractual arrangement, concluded between the consumer and the creditors on the way in which payments will be made. The debt counsellor, without imposing any conditions, facilitates the conclusion of the written agreement.⁴⁷ Should the parties agree, the debt counsellor may redraft the agreement as a consent order.⁴⁸

The debt counsellor is required to apply to the Tribunal or a court, where such consent order will be confirmed as an order of the Tribunal or court.⁴⁹ In this instance, the services of an attorney may be required for the court/Tribunal appearance. It is accepted that this fee will not be for the account of the debt counsellor. This raises the question whether the debt counsellor, should such person be an attorney, will be allowed to charge the normal fees for such an appearance, as such fee would have had to be paid in the event of the debt counsellor not being an attorney.

Should all parties be in agreement, the debt counsellor's functions may now be extended to include the collection of funds from the debtor, payment

86(9) requires the debt counsellor to hand the consumer a statement, setting out the details of how to approach the court within 20 days. All of the above are to be made by and at the cost of the debt counsellor.

45 *National Credit Act 34/2005* regulation 25 (3)-(6).

46 *National Credit Act 34/2005* section 86(7)(b).

47 *National Credit Act 34/2005* regulation 24(9).

48 *National Credit Act 34/2005* section 86(8).

49 *National Credit Act 34/2005* section 138.

of living expenses of the debtor, prioritizing the payment of debts (which may be based on the duration of the debt) and monitoring of payments.⁵⁰ Should this arrangement be made the debt counsellor does not act in such capacity any longer, but effectively becomes an administrator. The question is whether such person will be entitled to the fees of an administrator, as this arrangement is not provided for in section 74 of the *Magistrate's Court Act*.⁵¹

6.2.3 Voluntary debt rearrangement (consumer over-indebted)

A debt counsellor must determine the over-indebtedness of the consumer as detailed in regulation 24(7),⁵² whilst considering the definition of over-indebtedness in section 79(1).⁵³ Section 79(1)(a) requires the debt counsellor to have regard to the consumer's "financial means, prospects and obligations", which is further defined in section 78(3). This means that the debt counsellor should not only limit the enquiry to the income of the debtor-consumer, but also that of family or household members that share financial responsibility with the consumer. In practice this means that the debt counsellor is placed at risk for possible legal retribution, should any "household or family member" fail to divulge their financial means, prospects and obligations completely.

Should the debt counsellor find the consumer to be over-indebted such person may recommend that the Magistrate's Court make either or both of the following orders:⁵⁴ that one or more of the credit agreements be declared to be reckless credit; and that one or more of the consumer's obligations be re-arranged as indicated in the Act.⁵⁵

The debt counsellor has 60 days from receipt of the application for debt review to provide a restructuring, which may be by way of an agreement between the credit providers and the consumer, or alternatively by court order.⁵⁶ If the debt counsellor fails to effect the above within the 60 days, a credit provider may, after notifying the consumer, NCR and the debt counsellor, proceed with legal action against the consumer. Although the rationale for this is an attempt to avoid consumers from "hiding" in the debt review process,⁵⁷ the burden falls on the debt counsellor, who has to ensure that matters are expedited, as such person bears the risk of legal retribution by a disgruntled consumer. The Act does not afford the debt counsellor any legal recourse.

50 Debt counsellor training programme:133.

51 *Magistrate's Court Act* 32/1944.

52 24(7) "When ... (a) A consumer is over-indebted if his/her total monthly debt payments exceed the balance derived by deducting his/her minimum living expenses from his/her net income; (b) Net income is calculated by deducting from the gross income, statutory deductions and other deductions that are made as a condition of employment; (c) Minimum living expenses are based upon a budget provided by the consumer, adjusted by the debt counsellor with reference to guideline issued by the National Credit Regulator".

53 *National Credit Act* 34/2005 section 86(6).

54 *National Credit Act* 34/2005 section 86(7)(c).

55 *National Credit Act* 34/2005 section 86(7)(c)(ii)(aa)-(dd).

56 *National Credit Act* 34/2005 section 86(10).

57 Debt counsellor training programme: 138.

6.2.4 Involuntary debt rearrangement

When parties are unable to agree to voluntary debt rearrangement, the debt counsellor must make a recommendation to the Magistrate's court.⁵⁸ Unless the debt counsellor is also an attorney, such person cannot appear in court and an attorney has to be appointed. The question of whether the debt counsellor will be entitled to fees for such a court appearance if also an attorney, remains.

6.2.5 Caution against abuse

The possibility of consumers abusing section 86 to obtain an unjustified moratorium or "credit holiday" from valid obligations contained in a credit agreement was raised.⁵⁹ This argument was extended to the possibility of unscrupulous debt counsellors holding themselves out as being "experts" in obtaining such credit holidays.⁶⁰ This was seen as a possible burgeoning of a new industry for debt counsellors.⁶¹ In view of the fees debt counsellors are entitled to charge, this argument seems implausible.⁶² A "credit holiday" should not be possible in view of the time limits prescribed by the Act.⁶³

7. Issuing of a clearance certificate

A debt counsellor *must* issue a clearance certificate when the consumer has fully satisfied all the debt obligations.⁶⁴ A consumer who wants to be rehabilitated must apply to (any) debt counsellor for a clearance certificate. The debt counsellor may not refuse such a request as the wording of the regulation is mandatory ("must") and the Tribunal can on application by the consumer compel a debt counsellor to issue a clearance certificate if the debt counsellor incorrectly refuses. The debt counsellor must investigate the circumstances of the debt rearrangement.⁶⁵

58 *National Credit Act 34/2005* section 86(8)(b).

59 Levenstein 2007: 22.

60 For example by alleging that a particular chain store provides reckless credit on an ongoing basis and to the alleged prejudice of the consumers. "The message then given to consumers is that if you allow these debt counsellors to assist you in the debt review process, you will obtain a declaration of reckless credit and be able to sit back while the credit provider and the debt counsellor negotiate a plan of rearrangement." See Levenstein 2007: 22.

61 Levenstein 2007: 22.

62 It can however be expected of a debt counsellor who operates in this fashion to disregard the fee prescriptions. Section 46 makes provision for deregistration of debt counsellors should they not comply with the expected standard. Debt counsellors may also be subjected to civil claims.

63 Levenstein however correctly addresses the problem of delays that may occur at the Magistrates' courts in processing section 86 orders due to expected backlogs. Levenstein 2007: 22.

64 The clearance certificate must be in the format of the prescribed form 19 (regulation 27).

65 *National Credit Act 34/2005* section 71(2) and (3).

Upon finding that the consumer correctly satisfied “all the debt obligations under every credit agreement that was subject to the debt re-arrangement order or agreement”, the debt counsellor *must* issue a clearance certificate. A credit bureau must expunge certain records when presented with such a certificate.⁶⁶

No indication is given of the fee the debt collector is allowed to charge and it is presumed that, because this forms part of the debt counselling process, the mentioned fee of R50 will also cover this function. Once again, the debt counsellor may be exposed to legal action.

8. Synopsis of the duties of the debt counsellor

In an effort to simplify the explanation of the importance of the debt counsellor’s role in the debt review process, the following illustration is offered.⁶⁷

8.1 The role of the debt counsellor in informal/”non-statutory” debt counselling

After the consumer applied for the debt counselling service, the debt counsellor must meet with the consumer, explain the procedure and assist with completion of the application form. The debt counsellor will then make an assessment based on information as provided by the consumer without validation with third parties. Provisional case acceptance rules are applied and a decision is made whether to accept or reject the case.

Should the case be accepted, an “informal review case” is registered after payment of the R50 fee by the consumer. The application form data and the supporting documentary information are validated with third parties, explaining that the mandatory credit freeze is not applicable, it being an informal review.

The debt counsellor must assess the financial situation of the consumer.⁶⁸ Debt restructuring rules are applied to generate a restructured debt repayment plan. Terms of informal debt restructuring are negotiated with the consumer and all the creditors and unanimous acceptance of proposed terms are sought. Upon such acceptance, a legal agreement is drafted or a consent order from the tribunal/court is obtained.

When the above is finalized, the debt counsellor must hand over copies of all related documentation to a payment distribution agency and review the case periodically, providing counsel as required.

66 *National Credit Act* 34/2005 section 71(5).

67 Debt counsellor training programme: 140.

68 When the collection of information is complete, the debt counsellor does the assessment by capturing and updating validated consumer and creditor data in the debt counselling model. The following calculation is done: gross income, statutory deductions, non-statutory deductions, take-home salary excluding debt, current living expenses and adjusted minimum living expenses and money available to pay debt.

When the debt is cleared, the debt counsellor must inform the creditors and credit bureaux and close the case.

Should the consumer however default, the debt counsellor must cancel the informal debt restructuring agreement, inform the creditors and credit bureaux and close the case.

8.2 The role of the debt counsellor in formal/“statutory” debt counselling

This process is prescribed by the Act and makes provision for debt freezing and reporting to the credit bureaux.

The debt counsellor must, within five days, inform all the creditors and registered credit bureaux of the accepted formal debt counselling application and complete and dispatch form 17.1.⁶⁹ Validated consumer and creditor data are captured or updated and the financial situation of the consumer is assessed.⁷⁰

The debt counsellor must now apply the rules of indebtedness and review the results. Within 30 days of receipt of the application form,⁷¹ the debt counsellor must make an assessment, and classify the consumer in one of the following cases.⁷²

Case A: The consumer is not over-indebted and likely to pay the debts. The debt counsellor must inform the consumer, all the creditors and credit bureaux,⁷³ within five days of completing the assessment, that the case is rejected. Close the case.

Case B: The consumer is not over-indebted but likely to experience difficulty with repayment. The debt counsellor must apply standard debt restructuring rules to create a debt repayment schedule. Unanimous consumer and creditor agreement to the proposed debt repayments must be sought. Upon agreement the debt counsellor must submit a recommendation or obtain a judgment order from court. Should the parties disagree the debt counsellor must obtain a consent order from a court/tribunal. All the creditors and credit bureaux must,⁷⁴ within five days of completing the assessment, be informed. The debt counsellor must set up debt repayments via a payment distribution agency and hand them copies of all related documentation. The case must be reviewed periodically and counsel provided as required. When all the debt is cleared, the debt counsellor must issue a debt clearance certificate⁷⁵ and inform all the creditors and registered credit bureaux and close the case.

69 The debt counsellor obtains the fee of R50 from the consumer, if not paid previously.

70 The same calculation method is used as described for informal debt counselling.

71 No 16.

72 The Act does not use classification as cases A, B and C. This is merely used by way of example.

73 Form 17.2

74 Form 17.2.

75 Form 19.

Case C: The consumer is over-indebted, with the possibility of reckless credit being granted. The debt counsellor must declare the consumer to be over-indebted, declare instances of reckless credit and inform the creditors and credit bureaux. Where credit is reckless, the debt counsellor must recommend suspension or cancellation of debts and/or the interest, and/or recommend a refund to the consumer. The debt counsellor must apply standard debt restructuring rules to create a debt repayment schedule. Unanimous consumer and creditor agreement to the proposed debt repayments must be sought. Upon agreement the debt counsellor must submit a recommendation or obtain a judgment order from court after a hearing. Should the parties disagree the debt counsellor must obtain a consent order from a court/tribunal. All the creditors and credit bureaux must,⁷⁶ within five days of completing the assessment, be informed. The debt counsellor must set up debt repayments via a payment distribution agency and hand them copies of all related documentation. The case must be reviewed periodically and counsel provided as required. When all the debt is cleared the debt counsellor must issue a debt clearance certificate,⁷⁷ inform all the creditors and registered credit bureaux and close the case. If the consumer defaults the debt counsellor must cancel the debt restructuring agreement, inform the creditors and credit bureaux and close the case.

9. Record keeping and compliance reports

The debt counsellor must keep a list of records in a register that may be in electronic format.⁷⁸ The debt counsellor also has to retain the application for debt review, copies of all documents submitted by the consumer, a copy of the rejection letter, the debt restructuring proposal, a copy of any order made by the Tribunal and/or the court and a copy of the clearance certificate for each consumer.⁷⁹ These records must be kept for a period of three years, from the earlier of the date on which the records were created, signed or received. If a record is kept in electronic format, it must be reproduced in paper form within a period of five business days after request by the NCR. The costs pertaining hereto, will be for the account of the debt counsellor.

76 Form 17.2.

77 Form 19.

78 Each consumer's full names and surname, identity number, date of application for debt review, date of rejection letter, status of the case, date of clearance certificate issued and if the consumer exits the debt restructuring prior to the debt being settled in full and the reasons for doing so (Regulation 60(1)).

79 *National Credit Act* 34/2005 regulation 55(1).

10. Compliance reports and statistical data

A compliance report⁸⁰ must be submitted to the NCR by the 15th February each year⁸¹ and registered debt counsellors must complete and submit the statistical return⁸² to the NCR every quarter.⁸³

11. Compliance requirements, deregistration and risk

The consequences for debt counsellors can be severe should they not comply with the expected standard. The individual can be deregistered by the Regulator,⁸⁴ and there is a possibility that the debt counsellor may be sued for damages by disgruntled credit providers and consumers. It has been suggested that debt counsellors, like members of other professions, should consider taking out indemnity insurance.⁸⁵

As part of the compliance requirements, a debt counsellor must display a registration certificate at the premises from which business is conducted. Such person's registration number and status must be stated in all communications with a consumer.⁸⁶ Annual renewal fees must be paid.⁸⁷

12. Public funds

Should the consumer, credit provider and debt counsellor, in cases of voluntary debt rearrangement, agree to extend the debt counsellor's functions to include the collection of money from the debtor and the monitoring of payments, costs will be regulated.⁸⁸ The debt counsellor will be handling money collected from the public. Regulation 11 prescribes the "receiving of funds by a debt counsellor", but only demands that such person must "comply with the required legislation", without defining such legislation.⁸⁹ It is presumed that the legislation will refer to the *Public Finance Management Act*⁹⁰ and the Treasury Regulations.

The Act fails to make provision for consumers who may find themselves in an unenviable situation, should funds go missing. Provision for a compulsory fidelity fund for debt counsellors is recommended.

80 Form 41.

81 *National Credit Act 34/2005* regulation 69(1).

82 Form 42.

83 *National Credit Act 34/2005* regulation 69(2).

84 *National Credit Act 34/2005* section 46(5).

85 Debt counsellor training programme:117-119.

86 *National Credit Act 34/2005* section 52.

87 *National Credit Act 34/2005* section 51.

88 Regulation 47 regulates collection costs.

89 "This provision intimates that the debt counsellor may indeed take up a position as a distributor of the funds amongst creditors — thus a position akin to that of an administrator." See Boraine 2007: 54.

90 *National Credit Act 1/1999*.

13. Cost estimate for debt counselling

The prescribed debt counsellors' fee of R50 for the work described above, seems to be pitiful. Financially it may prove to be impossible to practise as a debt counsellor. During May 2007, the Debt Counsellors Association of South Africa (DCASA) released a cost estimate for operating as a debt counsellor.⁹¹ In the same month, the NCR indicated its willingness to amend the regulations. It proposed a revised pricing model, allowing for an upfront fee by the consumer to the debt counsellor of R50 for performing the full debt counselling service, to the stage where a proposal is accepted by the parties followed by a fee of R350 payable to the debt counsellor by the payment distribution agency, from the first payment made by the consumer. Should a proposal be rejected by the parties and the matter proceeds to court, a fee of R450 may be collected. Any service provided thereafter will be at a fee of R15 per month and it was suggested that these costs should be borne by the credit provider. These proposals were not accepted by the DCASA who found them not to be viable for the provision of the required services. The NCR advised the DCASA to present their proposal for a revised fee schedule to the Department of Trade and Industry (DTI).⁹² At the same time, the NCR advised that it was in the process of negotiating with the DTI, who administers the Act, to ensure that tariffs are re-determined that will not exploit consumers.⁹³ To date, the regulations remain unchanged.

Despite the foregoing, the chairman of the National Consumer Forum, said that "it was unrealistic to expect that heavily indebted people looking for help to sort out their financial problems could afford extra fee[s]."⁹⁴

91 The following findings were *inter alia* made: the minimum fixed costs to make an office available were R19 000 (provision was made for a computer and software, office furniture, fax, scanner, copier and printer. The interest rate on acquiring these was estimated at 18 percent over a period of 36 months). Monthly costs, excluding costs associated with the actual work of conducting debt counselling, were estimated at a conservative minimum of R8 600 (personal indemnity, cleaning of the office, renting of office space, debt counselling software, e-mail and internet, telephone rental (excluding call charges), insurance, marketing, bookkeeping, bank charges, postage, travel and fees payable to the NCR and DCASA). A prospective debt counsellor requires capital of approximately R60 000 before considering opening a debt counselling practice. All of the above exclude provision (salary, office space and equipment) for administrative staff that may assist the debt counsellor. Additional staff may prove to be a necessary requirement, in view of the expected numbers of consumers requiring debt counselling and the shortage of registered debt counsellors.

92 Document available from author.

93 *Naweek Beeld* 2007: 27.

94 *Black Sash slams legal eagles over debt advice. 13 May 2007* <http://www.fin24.co.za>.

14. Conclusion

Reports indicate that South Africa's consumer debt crisis costs the country an estimated R500 million a month directly with a further R500 million a month in productivity losses. This debt crisis totals around R12 billion annually.⁹⁵

Many consumers voiced their intention of making use of debt counselling services, even though the credit providers acted in good faith.⁹⁶ This type of consumer behaviour will undoubtedly burden the few debt counsellors registered to date. Debt counselling received wide media coverage prior to the Act taking effect on 1 June 2007. This may cause a flood of applications for debt counselling services, whether warranted or not.⁹⁷

There is undoubtedly a huge burden on the debt counsellor with regard to the complexity and paperwork per case. By first June 2007 only 27 debt counsellors have been registered.⁹⁸ Even the projection of the NCR to eventually have 300 debt counsellors seems completely inadequate when the stranglehold of debt in South Africa is considered.⁹⁹ The fee structure proposed in the Act cannot compensate for the financial burden and responsibilities the debt counsellor has to carry. The set criteria for a debt counsellor to operate in, together with the experience required, raises the question of why an individual would leave a salaried position where experience was gained,¹⁰⁰ to operate an enterprise where the fee structure is so dismal.¹⁰¹

It is suggested that not all individuals who registered as debt counsellors may be aware of, or considered the possibility, that they will not be able to render the required services in the positions they currently hold, e.g. being in full-time employment of an employer that renders the services excluded in terms of section 46(4)(c).¹⁰² Should such an individual be approached for debt counselling, he/she will be compelled to either deregister as a debt counsellor,

95 Levenstein 2007: 34.

96 A view expressed by Fred Steffers, managing director of the Consumer Profile Bureau. See *Debtors gear up for 'salvation'*. 13 February 2007 <http://www.fin24.co.za>.

97 Boraine opines that "the non-statutory voluntary distribution of repayments to creditors is not that popular in practice but the newly adopted formal debt review in terms of [the Act] has now provided a statutory alternative to this kind of work-out with regard to credit agreements in terms of the Act." Boraine 2007: 58.

98 www.ncr.org.za/register_of_registrants/index.php (accessed on 3 and 10 June 2007).

99 *Beeld* 2007: 27.

100 As set out in regulation 10.

101 Some debt counsellor candidates, who completed the debt counselling course and passed the prescribed examination, refrain from registering as debt counsellors, until the practice of a debt counsellor is proven to be sustainable.

102 *National Credit Act* 34/2005 section 46(4)(c) ... "a natural person may not be registered as a debt counsellor is that person is — engaged in, employed by or acting as a agent for a person that is engaged in debt collection, the operation of a credit bureau, credit provision or any other activity prescribed by the Minister on the grounds that there is an inherent conflict of interest between that activity and debt counselling.

or resign from employment and work as a debt counsellor for the prescribed fees. An individual who elected to qualify, register and practise as a debt counsellor, aspiring to create a new career, may realize that debt counselling in the present format provides for neither a sustainable nor a viable option. The risk of the debt counsellor finding himself/herself in a financially compromising position upon realizing the effect of sustaining such an office on the prescribed fee structure, poses serious concern.

Opinions were expressed that the government should intervene to increase the accessibility of debt counselling.¹⁰³ It was suggested that poor consumers could be subsidized or counselling services could be made available within social services departments of the government. A further suggestion was that credit providers could bear some of the debt counselling costs,¹⁰⁴ since the restructuring of consumer debt would have a positive effect by enabling them to recover their money.¹⁰⁵ Although important related issues like consumer education, reckless credit and the regulation of credit bureaux are regulated in the Act, it is submitted that effective and viable debt counselling will remain controversial. This will remain until the fee allowance structures are adapted, government introduces amendments to allow accessibility to debt counselling in another format,¹⁰⁶ or the status quo proves against expectation to be successful.

103 Xolela May, paralegal adviser at Black Sash and Thami Bolani of the National Consumer Forum.

104 By Mpho Thekiso, the manager for the NCR's debt relief programme.

105 *Black Sash slams legal eagles over debt advice. 13 May 2007* <http://www.fin24.co.za>.

106 As indicated in the opinions stated earlier in this paragraph. It is furthermore not compulsory for the debt counsellor to oversee the distribution of the payments to the credit providers. Regulation 11 allows for the arrangement of this function by a debt counsellor, who will then act as a kind of administrator. As a result of this Act, the South African Law Commission suspended the reform process regarding administration orders. This Act does not provide for an alternative discharge provision and it was suggested that the reform of administration orders must proceed. See Boraine 2007: 58.

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