THE DEBT COUNSELLING PROCESS – CLOSING THE LOOPHOLES IN THE NATIONAL CREDIT ACT 34 OF 2005

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Summary

Statistics showing that only 3.8% of consumers who have applied for debt review in terms of the National Credit Act 34 of 2005 (NCA) have succeeded to have their cases adjudicated by the court, indicate that the process is not functioning effectively. In January 2009, the Law Clinic of the University of Pretoria was commissioned by the National Credit Regulator (NCR) to conduct an assessment on the reasons for the ineffectiveness of the debt counselling process. The research report indicated that credit providers not co-operating in the process and not-complying with the NCA and Regulations and the so-called work stream agreement reached between major credit providers, established debt counsellors and the National Credit Regulator, were the main reasons for the ineffectiveness of the debt counselling process. Second on the list of so-called major obstacles were the vagueness and insufficiency of the NCA and Regulations.

The main purpose of this article, which is based on chapter 2 of the research report mentioned above, is to identify the loopholes in the NCA which cause the lack of legal certainty and which contribute to the ineffectiveness of the debt counselling process. Although the work stream guidelines are to be welcomed because they attempt to find a solution for the vagueness and insufficiency of the NCA and Regulations, it is submitted that the situation is still not desirable.

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1 This article is based on ch 2 of a research report submitted by the University of Pretoria Law Clinic to the National Credit Regulator.
Many credit providers and debt counsellors did not form part of the work stream processes and therefore cannot be bound by these agreements. The NCR's application to the High Court for a declaratory order in terms of section 16(1)(b)(ii) may shed some light on the problems currently experienced, however, it is submitted that the best solution is for the legislator to address these shortcomings in order to bring about a proper and effective debt counselling process. By also taking the Draft Debt Counselling Regulations into consideration, certain issues which, in our view, should be addressed by the legislator are identified and proposals for the amendment of provisions of the NCA are made.

Ultimately, the effectiveness of the NCA's provisions to provide debt relief to the over-indebted consumer depends on the co-operation of the different role players and compliance with the spirit of the Act in terms of section 86(5)(b) to participate in good faith in the review and in the negotiations for debt rearrangement. It is submitted that in theses negotiations the purpose of the Act, namely to protect consumers, should constantly be kept in mind. Credit providers will have to change their attitudes and appreciate the fact that they will have to take greater responsibility for the negative consequences of credit granting. It is furthermore submitted that more should still be done to prevent over-indebtedness and to reduce the need for consumers to resort to the debt relief mechanisms of the Act. The apparent need for consumer education at both the adult and school level should therefore be addressed.

**Keywords**
Debt counselling; debt review; debt rearrangement; debt counsellor; consumer; over-indebtedness; clearance certificate; work stream agreement