



DEBT
REVIEW
COURT
APPLICATION
GUIDELINES
001/2016

DEBT REVIEW COURT
APPLICATION GUIDELINES

MARCH 2016

1. Definitions

“Act” means the National Credit Act 34 of 2005 as amended;

“attorney” means a person admitted to practice as an advocate or attorney or candidate attorney in the Republic of South Africa;

“CIF” means the Credit Industry Forum established by the NCR, and –

(a) the purpose of CIF is to allow the Credit Industry to agree on voluntary measures to improve the Debt Review Process; and

(b) decisions of CIF are sanctioned by the NCR and issued as guidelines by the NCR;

“Clerk of the Court” means a Clerk of the Court appointed in terms of Section 13 of the Magistrates’ Courts Act, 1944 (Act 32 of 1944) and includes an assistant Clerk of the Court so appointed;

“Consumer” means a consumer as defined in Section 1 of the Act;

“Court” means a Magistrates Court established in terms of the Magistrates’ Courts Act 32 of 1944 having jurisdiction over a Consumer by virtue of such Consumer’s residence or place of business or where he or she is employed irrespective of the monetary value involved;

“Court days” means that a Saturday, Sunday or official public holiday, unless the contrary appears, shall not, be reckoned as part of any period calculated in the debt review process, and this applies to any period declared dies non which means a day on which no legal business can be done, or which does not count for legal purposes;

“Confirmatory Affidavit” means a written statement made by the consumer under oath or affirmation which confirms all the details that will fall within the personal knowledge of the consumer as contemplated in Regulation 2(2)(a) of Government Notice No. R362 of 10 May 2012. “Consumer Confirmatory Affidavit” has a corresponding meaning;

“court order” means an order by the Magistrate’s Court as contemplated in Section 87(1) of the Act;

“Credit provider” means a credit provider as defined in Section 1 of the Act;

“Days” –

- (a) means business days as defined in the Act;
- (b) means Court days as defined in the Magistrate’s Court Act 32 of 1944 where reference is made to the Magistrate’s Court Act;

“Debt Counsellor” means a person registered as a debt counsellor in terms of Section 44 of the Act;

“Debt Review” means debt rescheduling applications referred to Court in one of the following ways:

- (a) a consent order in terms of Section 86(7)(b) of the Act read with Section 86(8)(a) of the Act, Regulation 24(9) and Section 138(1) of the Act; or
- (b) an application in terms of Section 86(7)(b) of the Act read with Sections 86(8)(b) and 87(1) of the Act; or
- (c) an application in terms of Section 86(7)(c) of the Act read with Sections 86(8)(b) and 87(1) of the Act;

“deliver” means, in respect of all debt review documents, proposals, notices and written submissions to hand deliver or by registered post, facsimile or e-mail when so agreed in writing between the respective parties and “delivered” and “delivering” has a corresponding meaning;

“deliver to credit bureau by debt counsellor” means submitting the required information to the National Credit Regulator’s Debt Help System as required in the conditions of registration of debt counsellors by the National Credit Regulator;

“Founding Affidavit” means a written statement made by the debt counsellor under oath or affirmation for use as evidence in an application by a debt counsellor in terms of Rule 55 of the Magistrate’s Court Rules in which relief is sought against the credit providers – who are cited as respondents – in terms of Section 86 of the Act;

“filed in a Court” means the application in terms of Section 86 of the Act has been issued by the Court after a case number and date of hearing of the application has been allocated by the Clerk of the Court and the application has been duly served on the affected parties;

“MCA” means the Magistrate’s Court Act 32 of 1944;

“MCR” means the Magistrate’s Court Rules;

“NCR” means the National Credit Regulator as established by Section 12 of the Act;

“Notice of Motion” means the prescribed format, in the long form, as set out in Rule 55 of the MCR, and such notification includes *inter alia* reference to the Court case number, parties, relief sought, date of hearing, instructions regarding opposition, and details of service addresses of both applicant(s) and respondent(s);

“PDA” means a payment distribution agent as defined in Section 44A of the Act;

“proposal” means the proposal contemplated in Section 86(7)(c) and a plan of debt rearrangement contemplated in Section 86(7)(b) of the Act;

“service” means the service of the application as per Rule 9 of the MCR or by fax or e-mail if the parties so agree in writing, and sent to the e-mail address or fax number so agreed.

2. Purpose of Document

Although the Debt Review Process is governed by the Act it is silent on the legal process to be followed. This was the main motivation for the Declaratory Order in *National Credit Regulator v Nedbank & Others 2010 (6) SA 298 (GNP)* where the Court held that the Rule 55 motion procedure is to be used in Debt Review Applications. This has opened the door for Debt Counsellors, Credit Providers and Magistrates to have different and often opposing views and practices on how Debt Review Court Applications should be made. These different interpretations very often lead to process delays, extra legal costs for the Consumer, and a delay in providing the much needed assistance required by Consumers.

The High Court of South Africa (Gauteng Division), has on 26 May 2015, issued a final Declaratory Order to provide clarity pertaining to the adjudication of a Debt Review Application by a Debt Counsellor to a Magistrate in terms of Section 86(6) of the Act read with Rule 55 of the MCR.

This document cannot create, take away or alter any of the Consumer, Credit Provider or Debt Counsellor rights and obligations as determined by the law.

The purpose of this document is to –

- (a) facilitate uniformity for the Debt Review Application process in order to ensure legal compliance and to avoid any unnecessary legal costs or process wastage or timeline wastage to the benefit of the Consumer who has a right to apply for Debt Review;
- (b) expedite the restructure of debt in line with accepted repayment proposals or Court Orders;
- (c) reduce end balance differences where possible; and
- (d) To highlight the effect of the declaratory issued in the High Court of South Africa, Gauteng Division, Pretoria, on 26 May 2015 in *Van Der Hoven Attorneys and The National Credit Regulator, The Department of Justice and Constitutional Development, The Banking Association of South Africa and The Debt Counsellors Association of South Africa, Case Number 10918/2015* on the Debt Review Court Application process.

It is noted that CIF has no authority to change the procedure of the Magistrates' Courts as it appears in the MCA, MCR and Practice Notes, but the aim of this document is to facilitate uniformity without influencing the independence of Courts.

3. Declaratory Orders

3.1. National Credit Regulator v Nedbank

In terms of the declaratory order: *National Credit Regulator v Nedbank & Others 2010 (6) SA 298 (GNP)* Judge B R du Plessis held as follows:

"A referral by a Debt Counsellor to a Magistrate's Court under Section 86(8)(b) (and Section 86(7)(c)) of the National Credit Act, 2005 is an application within the meaning of the Magistrates' Courts Act, 1944 and the Rules of the Magistrates' Courts and falls to be treated as such in terms of Rule 55 of the Rules."

The Court also confirmed that the Debt Counsellor will be cited as the applicant and the Consumer and Creditors will be cited as the respondents.

The Notice of Motion (long form) similar to Form 1A of Annexure 1 of the amended Magistrates' Court Rules should be used for all Debt Review Applications by the Debt Counsellor.

Although in the normal course of the application process a respondent cannot be obliged to file an Affidavit, it is necessary for the Consumer to file a Confirmatory Affidavit in Debt Review Applications as the information contained in the Founding Affidavit relating to the Consumer's financial affairs does not fall within the Debt Counsellor's personal knowledge.

In terms of the Act, a Consumer will only continue to enjoy the protection of the Act if the application for Debt Review is filed in a Court or National Consumer Tribunal within SIXTY (60) days after the Consumer has applied for Debt Review. In terms of the Act, Credit Providers may terminate a credit agreement after the expiry of SIXTY (60) days unless the matter has been filed at Court. The effect of this is that the timeline for Debt Counsellors to finalise the Debt Review Application is constantly under pressure.

3.2. Declaratory Order by Van Der Hoven Attorneys

In the matter of *Van Der Hoven Attorneys and The National Credit Regulator, The Department of Justice and Constitutional Development, The Banking Association of South Africa and The Debt Counsellors Association of South Africa, Case Number 10918/2014*, Justice Jansen has, on 26 May 2015, granted a final Order which provide clarity pertaining to the adjudication of a Debt Review Application by a Debt Counsellor to a Magistrate in terms of Section 86(6) of the Act read with Rule 55 of the MCR.

Magistrate Courts are bound by decisions of the High Court. Where there is a conflict between different decisions of different High Court divisions, a Magistrate must follow the decision of the High Court that has geographical jurisdiction over his or her Court.

The Declaratory Order has provided clarity on the following eight issues:

First Declaratory Order:

The first Declaratory Order deals with the question if the physical presence of a Debt Counsellor or Consumer is required in Court for a Debt Review Application.

In terms of this Declaratory Order Rule 55(1) of the MCR requires that every Affidavit shall be brought on notice of motion supported by an Affidavit as to the facts upon which the applicant relies for relief. For that reason the physical presence of a Debt Counsellor as well as the physical presence of the Consumer is not required at the hearing of the application.

Second Declaratory Order:

The second Declaratory Order deals with the question if a Form 16 should be attached to a Debt Review Application.

The Declaratory Order stated that a Form 16, as required in Regulation 24, is not a required Annexure to the Application for Debt Review as it is not a prerequisite for the Consumer to be declared over-indebted.

Third Declaratory Order:

The third Declaratory Order deals with the question as to whether service by fax or e-mail is admissible.

The Declaratory Order stated that in the event of an agreement between interested parties to a Debt Review application, service of process by way of e-mail, fax, registered post or hand may be effected by the Debt Counsellor or his or her attorney and need not be caused by the Sheriff of Court.

Fourth Declaratory Order:

The fourth Declaratory Order deals with the question of when a Debt Review Application becomes stale or outdated.

In terms of this Declaratory Order the Magistrate shall consider the confirmation of the Debt Counsellor's determination of the Consumers' over-indebtedness on the available information at the Debt Counsellor's disposal at the time of the Debt Counsellor's determination. Should a Magistrate confirm the Debt Counsellor's declaration of over-indebtedness, the Magistrate may require further and/or updated information.

An application for Debt Review shall be considered even in circumstances where the original application was made more than a year ago subject to the Debt Counsellor providing information to prove active negotiations with at least one of the respondents.

Fifth Declaratory Order:

The fifth Declaratory Order deals with the question whether or not a Debt Counsellor is required to provide original documentation.

The Declaratory Order stated that in circumstances where the Debt Counsellor is not in possession of the original documents, but copies thereof, the Debt Counsellor shall explain, under oath, why the original documents are not in his possession or in whose possession he believes the documents may be. Upon a satisfactory explanation, copies of original documents shall be admissible as evidence.

Sixth Declaratory Order:

The sixth Declaratory Order deals with the question whether or not a Debt Counsellor is to annex proof of his registration as a Debt Counsellor, and/or proof of payment of renewal fees to his application for Debt Review.

In terms of this Declaratory Order a Debt Counsellor need not annex proof of registration as a Debt Counsellor, nor proof of payment of renewal fees, subject thereto that the Debt Counsellor attests to valid registration under Oath.

Seventh Declaratory Order:

The seventh Declaratory Order deals with the question if a Magistrate is entitled to amend contractually agreed interest rates when interested parties have agreed to a reduction of interest rates and other terms.

In terms of this Declaratory Order in circumstances where parties reached an agreement in terms of which a Credit Provider consents to an amended interest rate other than provided for in the credit agreement, the Magistrate may make an Order rearranging the Consumer's payment obligations based upon the agreed amended interest rates to give effect to the agreement between the parties.

A practical example is Debt Counselling Rules System ("DCRS") proposals accepted by Credit Providers.

Eighth Declaratory Order:

The eighth Declaratory Order deals with the question if a Debt Counsellor is required to physically transmit a copy of the Form 17.1 Notification to Credit Bureaus.

In terms of this Declaratory Order a Debt Counsellor has substantially complied with Section 86(4)(b)(ii) of the National Credit Act, read with Regulation 24(2) of Government Notice No. R362 of 10 May 2012 promulgated thereunder, once he or she has successfully uploaded the details of a Consumer onto the NCR's Debit Help System.

This Declaratory Order provides much-needed clarity on practical matters faced by Debt Counsellors on a daily basis. The Declaratory Order is applicable to all Debt Review matters currently pending in all Magistrate Courts in South Africa. Debt Counsellors are advised to study the Declaratory Order in detail and to amend Debt Review Applications in consultation with their attorneys.

4. Debt Review Timelines

The basic process for Debt Review is set out in the Act and Regulations and compliance with this defined process and timelines is required by all parties. The Act and Regulations will always be the first source of information and guidance on the Debt Review Process to be followed. Due to the fact that the process and timelines were only defined to some extent, the NCR appointed a Task Team with the aim to create a streamlined and uniformed process to be implemented by all stakeholders in the credit industry in order to reduce the confusion and blockages. It is important to note that the process and timelines in the Act and Regulations were adhered to in the Task Team Agreement and that the Task Team Agreement improved uniformity of the Debt Review Process. The NCR issued the Debt Review Task Team Agreement as guidelines in 2015 and all industry players are requested to comply therewith. The Task Team Guidelines were unanimously approved by the CIF where all credit industry participants are represented by their respective industry bodies. The NCR may include a requirement for compliance with the Task Team Guidelines in the respective conditions of registration of industry players.

It is important to contextualise the Debt Review timeline for all parties involved in the Debt Review Process. The Act effectively sets a SIXTY (60) day deadline for Debt Counsellors to file Debt Review Applications at Court. Although a Consumer remains protected if he or she is not in arrears in terms of the credit agreement, a Credit Provider may, after the expiry of SIXTY (60) days, terminate a credit agreement from Debt Review unless the Debt Counsellors has filed the Debt Review matter in a Court. This right is, however, also balanced in Section 86(11) of the Act where the Court may order the Debt Review to resume (i.e. the credit agreement is unlawfully terminated and then again included in the Debt Review).

Section 86 requires the Debt Counsellors to approach the Court within a SIXTY (60) day period but it is important to note that no time limit is specified in the Act within which the Debt Counsellor must make an application to the Magistrate Court. The Act also does not require the process of debt restructuring to be completed within the period of SIXTY (60) days after the application for Debt Review was made. All parties are, however, required to cooperate to complete the process within a reasonable time period.

In terms of the amendment of the Act a Credit Provider may, after the expiry of SIXTY (60) days, terminate a credit agreement from Debt Review unless the Debt Counsellor has filed the Debt Review matter with the Court as stated above.

In order to comply with the SIXTY (60) day limit the timelines to complete the assessment and prepare the Court Application are tight. In practice there are often delays in the Debt Review Process. Where a Credit Provider did not comply with its obligations in terms of Section 86(5) to enable the Debt Counsellor to file the matter with Court timeously but

proceeded to terminate a credit agreement, after the expiry of SIXTY (60) days from Debt Review the Court in which the terminated credit agreement is being enforced has the power to reinstate the credit agreement in the Debt Review.

Where the process is delayed by the Consumer, the protection envisaged by Section 86(10) of the Act lapses after the expiry of SIXTY (60) days unless the Debt Counsellor has filed the Debt Review Application with the Court. This prevents Consumers from delaying the Debt Review process.

The following timelines, as contained in (1) to (9) above, are set out in the Task Team Agreement issued by the NCR as guidelines:

- (1) Within FIVE (5) days of acceptance of application notify all Credit Providers and request a Certificate of Balance ("COB") by sending a Form 17.1.
- (2) The Credit Provider must provide the COB to the Debt Counsellor within FIVE (5) days of receipt of Form 17.1.
- (3) On receipt of the COBs the Debt Counsellor has to update the balances on his or her system.
- (4) Within THIRTY (30) days after the signing of the Form 16, the Debt Counsellor must make a determination in terms of Section 86 of the Act and notify all Credit Providers by sending a Form 17.2(b). If all COB's are received on time the Form 17.2(b) can be submitted FIFTEEN (15) days after date of Form 17.1.
- (5) FIFTEEN (15) days after the Form 17.1 date the Debt Counsellor submits repayment proposals to Credit Providers and they have TEN (10) days to reply.
- (6) Credit Providers can reply by either accepting the proposal, declining the proposal, requesting a rework of the proposal or issuing a counter proposal.
- (7) If all responses are received on time from all Credit Providers the Debt Counsellor may be in a position on day THIRTY (30) to submit revised proposals to all Credit Providers and request a reply within SEVEN (7) days. Credit Providers may –
 - (a) not respond;
 - (b) accept;

(c) reject, with reasons; or

(d) submit a counter-proposal which may lead to a repeat of the process.

(8) If all Credit Providers reply within SEVEN (7) days then the Debt Counsellor may be in a position on day FORTY FIVE (45) to commence with the preparation of the Debt Review Court Application.

(9) If the process is not delayed by late responses by Credit Providers, the Debt Counsellor or Consumer represented by their attorney (where applicable) is left with TEN (10) to FIFTEEN (15) days to prepare the Debt Review Application, sign the application, commission the Affidavit and to serve and file the application before the SIXTY (60) day deadline in order to ensure that the Consumer remains protected.

5. Application by a Debt Counsellor for orders contemplated in terms of Section 86(7)(c) and Section 86(8)(b) of the Act

(1) In terms of the declaratory order in the matter of *National Credit Regulator v Nedbank & Others 2010(6) SA 298 (GNP)* the Court held that the Rule 55 motion procedure is to be used with debt rescheduling applications and that the time limits as prescribed in the MCR apply.

(2) An application by Debt Counsellor for an Order contemplated in terms of Section 86(7)(c) and Section 86(8)(b) of the Act must therefore be in line with the requirements prescribed by Rule 55 of the MCR.

(3) The Debt Counsellor will be the applicant and the Consumer and Credit Providers will be respondents as confirmed in *NCR v Nedbank supra* (above).

(4) An Order contemplated by Section 86(7)(c) and Section 86(8)(b) of the Act, must be substantiated by a Founding Affidavit and shall be filed in duplicate by the Debt Counsellor with the Clerk of the Court who must allocate a case number and “unopposed” date of hearing before it can be served on the Credit Providers concerned.

(5) An application for Debt Review must be substantiated by a Founding Affidavit deposed to by the Debt Counsellor in which the following is set out:

(a) An exposition of the Debt Counsellor’s assessment conducted in terms of Section 86(6) of the Act, read with Sections 78(3), 79, 80 of the Act and Regulation 24 of the Act;

- (b) The relief claimed in terms of Section 86(7)(c) or Section 86(8) of the Act;
 - (c) Full particulars of each Credit Provider;
 - (d) Full particulars of the Consumer and the Debt Counsellor;
 - (e) A Confirmatory Affidavit from the affected Consumer confirming the application for Debt Review and the appointment of the Debt Counsellor. In instances where there are TWO (2) Debt Review applicants (spouses) a combined affidavit or two separate Confirmatory Affidavits are required. The requirements for the Confirmatory Affidavit are discussed in more detail under Item 6.
- (6) An application for Debt Review should be paginated and indexed in terms of Rule 63(3) of the MCR.
- (7) The Debt Counsellor must collect a copy of the Court Order from the Clerk of the Court and deliver it within FIVE (5) Court days from the date of issue to the affected Consumer and each Credit Provider, as stated in Regulation 2(3) of Government Notice No. R362 of 10 May 2012.
- (8) Each Credit Provider must comply and implement the terms of the Court Order within TEN (10) business days of receipt thereof. In terms of the Task Team Agreement which was issued by the NCR as guidelines, Credit Providers have to implement the repayment proposal at final acceptance stage. This is normally done well before the finalisation of the Court Order. Where repayment proposals comply with the Task Team Agreement Guidelines in terms of eligibility, affordability and are solved within the agreed restructuring rules, acceptance is compulsory and no counter proposal or declines can be submitted by a Credit Provider.
- (9) The application should include the following details:
- (a) The identity of the Debt Counsellor including debt counselling number and practice address, averment as to personal knowledge as well as reference to the Debt Counsellor's statutory obligations in terms of the Act.
 - (b) The identity of the Consumer(s) including sex, residential address (jurisdiction) and a reference to prove these statements as contained in Annexures.
 - (c) The identity, where applicable, of the "juristic person" as defined in the Act, main place of business (registered address) together with full registration details such as trust deed, trustee letter of authority should be supplied to establish jurisdiction.

- (d) The identity of all Credit Providers cited as respondents including the entity description and address for service.
- (e) Purpose of the application. This refers to Section 86(7) read with Section 87 and 79 of the Act aimed at placing the Court in a position to assess the relief sought in the Notice of Motion with a direct bearing on the information contained in the Founding Affidavit.
- (f) Formal requirement in terms of Section 86 of the Act with specific reference to Regulation 24.

The Act provides no guidance or clarity or requirement for interested parties to join the Debt Review Process. However, should any interested person wish to be included in the Debt Review proceedings, such person is entitled to explore the joinder proceedings as set out in the MCA.

(10) Details of proposal and responses

- (a) This Section contains the following:
 - (i) Details whether the Consumer appears to be over-indebted as per Section 86(6) of the Act;
 - (ii) Details regarding the income, expenditures, debt, monthly repayments, interest rates and funds available for distribution by the Consumer(s) to Credit Providers in compliance with the Act and the affordability guidelines embedded in the Task Team Agreement which was issued by the NCR as guidelines;
 - (iii) Details of the method used in generating the proposal, including reference to voluntary restructuring rules contained in the Task Team Agreement – which was issued by the NCR as guidelines – with specific reference to concessions related to reduction of fees, interest rate, extensions of repayment terms and maximum prescribed interest rates and fees as per Regulation 42 of the Act, where applicable.
- (b) Details of the Credit Provider's response to the proposal – if any – with specific reference to acceptance or rejection and/or counter-proposals received by the Debt Counsellor from the Credit Provider. It is important to note that in terms of the Task Team Agreement, repayment proposals that solve in terms of Task Team Agreement Guidelines, which include eligibility and affordability conditions,

have to be accepted by Credit Providers and no counter-proposals/declines on those repayment proposals can be submitted.

- (c) Reference to Section 103(5) of the Act and the Debt Counsellor's compliance with regards to issues relating to *in duplum*.
- (d) Reference to reckless lending, with reference to the Consumer's request for such an investigation if applicable as well as the Debt Counsellor's recommendation to Court regarding the outcome of such investigation, if any.
- (e) Reference to any alleged termination of credit agreements from Debt Review by Credit Providers which could reduce the number of credit agreements included in the Debt Review Application, as well any disputes relating to terminations, should be brought to the attention of the Court in which the terminated agreement is being enforced.
- (f) Details surrounding service addresses and the method of service of the application for Debt Review on affected parties. Details regarding consents or waiver or both to service of the application are to be included. In terms of the Task Team Agreement which was issued by the NCR as guidelines, Credit Providers must include consent to serve on each COB issued. The aforesaid information is presented to the Court in the form of a Service Affidavit.
- (g) Confirmation of the non-existence (*lis pendens*) of similar application in the same or other Courts.
- (h) Reference to the proposed outcome if the relief is granted as prayed for as well as reference to the conduct which a party could generally expect from another litigant.
- (i) The commissioning of such Affidavit would be done under the general rules as set out in Government Notice No. 1258 of 1972.

6. Confirmatory Affidavit

The purpose of the Confirmatory Affidavit is to confirm all the details that will fall within the personal knowledge of the Consumer, including the fact that he or she has applied for Debt Review with the Debt Counsellor.

Due to the fact that the Debt Counsellor's Founding Affidavit and the Confirmatory Affidavit contain information that falls within personal knowledge of the Consumer only, no hearsay evidence can be placed before the Court.

This Confirmatory Affidavit states all the facts that the Consumer would have personal knowledge of, such as confirmation of the following:

- (1) Knowledge of the application and appointment of the Debt Counsellor;
- (2) Knowledge of legal fees, after-care fees and PDA fees;
- (3) The correctness and accurateness of any information regarding debts, income, expenditure and surplus available for distribution;
- (4) Waiver of service;
- (5) If on receipt of a Section 129 notice the Consumer has applied for Debt Review (within the allowable 10 days) this should be stated, as well as whether the Consumer received a summons from one or more of the credit providers;
- (6) Signature and acceptance of the conditions as set out in the Form 16;
- (7) Knowledge of reckless lending;
- (8) Knowledge of obligations relating to changes of address and personal circumstances;
- (9) Accuracy of employment details and income;
- (10) Accuracy of residential address and proof of residence;
- (11) Marital status;
- (12) Dependents;
- (13) Circumstances in which the Consumer became over-indebted; and
- (14) Exposition of the Consumer's assets and liabilities.

7. Notice of Set Down

In terms of the MCA and MCR it is a requirement to serve on all the respondents a Notice of Motion, which contains all the necessary supporting documents.

Best practice indicates the serving and filing of a notice for set down for every matter before it is formally heard. This practice is required on opposed and unopposed matters in terms

of Rule 55(1)(f) of the MCR. Compliance with this process will allow Debt Counsellors or attorneys to have their Debt Review Applications filed timeously and in order to allow time for the finalisation of all negotiations and issues between the parties before the matter finally appears before the Court.

In addition to the requirements as set out in the MCR, the process and finalisation of negotiations between parties influenced the approved NCRTask Team Agreement Guidelines.

8. Jurisdiction

The application must be brought in the Magistrates' Court having jurisdiction in respect of the Consumer; that is where the Consumer resides, works or carries on business. Couples who are married in Community of Property must apply jointly for Debt Review and, in this case, the Magistrates' Court where the couple resides has jurisdiction. Where the applicant is a Trust, the registered address of the Trust will determine Jurisdiction. Proof of jurisdiction must be attached to the Debt Review Court Application as an Annexure.

9. Representation

The Debt Counsellor or Consumer may be represented by an attorney and any evidence provided or required by or from the Consumer and Debt Counsellor should be in an Affidavit in support of the application for the Order.

In terms of the *Van Der Hoven Attorneys* Declaratory Order the physical presence of the Debt Counsellor and/or Consumer is not required at the hearing of the Debt Review Application.

10. No Monetary Limit

There is no monetary limit upon the jurisdiction of the Magistrates' Court to hear a referral under Section 87 of the Act ((Sec 29(1)(e) of the MCA).

11. Service

Service of the application must be effected as per Rule 9 of the MCR.

In the matter of *National Credit Regulator vs Nedbank & Others 2009(6) SA 295 (GNP)*, Justice Du Plessis stated the following:

"There is, however, no reason in law why all or some of the affected parties cannot agree to waive service in terms of the Rules and to agree on a different form of notification."

This was in response to a submission that there are Magistrates who hold the view that parties to an application cannot agree on a form of service different from that prescribed by the MCR, and for that reason and in order to provide absolute clarity Justice Du Plessis granted the following Order:

“Service of any recommendation or other document contemplated in Section 86 or 87 of the Act, with the agreement of the affected parties, are by way of fax or e-mail.”

For the sake of clarity Justice Du Plessis included the above-mentioned in the following Order:

“Rule 9 of the Magistrate’s Court Rules pertaining to services are applicable to the services of processes, any recommendation and other documentation for the purpose of the referral and hearing contemplated in Section 86(7)(c), 86(8)(b) and 87 of the National Credit Act, 2005 but service of any such documentation may, with the agreement of the affected parties, be by way of fax or e-mail.”

In terms of the Task Team Agreement, issued by the NCR as guidelines, the credit industry has agreed to implement a general agreement of service by fax or e-mail. This general agreement notice from Credit Providers must be added as Annexures to Court Applications as confirmation that the Debt Review application can be served in this fashion.

The standard COB format approved in the Task Team Agreement also includes the following:

“This serves to confirm that we will accept service of any legal documents or court application via e-mail or facsimile at the following address or number.”

The prescribed COB format is implemented by all Credit Providers and all COB’s include the agreed standard wording as set out above.

Justice Du Plessis’s ruling in *NCR v Nedbank supra* in this regard is as follows:

“...the referral (application) is governed by the Rules and must be served on affected parties in terms of the Rules. There is, however, no reason in law why all or some of the affected parties cannot agree to waive service in terms of the Rules and to agree on a different form of notification. I have been informed that there are magistrates who hold the view that the parties to an application cannot agree on a form of service different from that prescribed by the rules. With that I cannot agree and in view thereof the order sought in terms of prayer 1.6 must be made.”

Service in terms of Section 65 and Section 168 of the Act does not apply.

The effect of the Declaratory Order is that Credit Providers may consent to service by fax or e-mail, which of necessity, also, implies a waiver of the Rules regarding service.

The current MCR now provides for service by facsimile or e-mail. Where service by fax and e-mail is used, Chapter 111, Part 2 of the Electronic Communications and Transaction Act 25 of 2002 will be applicable (Copy attached in Annexure C). However, in the event of consent to service by way of fax, e-mail or registered mail as a result of an agreement between the parties, the Debt Counsellor must also file a "Service Affidavit" together with the Debt Review Application.

In addition, and in support of the view expressed above, the Department of Trade and Industry issued Government Notice No. R362 on 10 May 2012 wherein "delivery" was defined as follows:

"Delivery means to file with the registrar or clerk of the court and serve a copy on the opposite party either by hand delivery, registered post, or where agreed between the parties or so ordered by court, by facsimile or electronic mail (in which instance Chapter III, Part 2 of the electronic Communications and Transaction Act, Act No. 25 of 2002 will apply), and delivery, delivered and delivering have corresponding meanings."

The Van Der Hoven Attorneys Declaratory Order also stated that, in the event of an agreement between interested parties to a Debt Review Application service of process by way of e-mail or fax or registered post or hand may be effected by the Debt Counsellor or his or her attorney and need not be caused by the Sheriff of the High Court.

12. Task Team Agreement

Due to the fact that the Act provides limited guidance on Debt Review Process issues, the credit industry and NCR have agreed to implement certain voluntary measures to standardise and enhance the Debt Review Process. The Task Team Agreement has been issued as Guidelines by the NCR.

The following issues are addressed in the Task Team Agreement:

- (1) To standardise forms used in the Debt Review Process;
- (2) To agree on process rules and timelines in addition to the process and timeline issues as required in the Act;
- (3) To provide Debt Review Affordability Guidelines for Debt Counsellors when a Debt Review Assessment is conducted; and

- (4) To make provision for fee and interest rate concessions by Credit Providers for qualifying Consumers. Although Courts do not have the discretion to reduce fees or interest rates these concessions indicate agreement between parties with regards to the repayment plan submitted to Court in line with the provisions of the Act in this regard. It is important to note that although a Court has no authority to amend interest rates and fees; this is not applicable when an agreement in writing is in place to amend the interest rate and fees. Where an agreement is in place, proof of agreement should be included in the Debt Review application and this agreement should be accepted by the Court. The reason for this is that that agreement concluded between the parties should be confirmed by the Court.

In terms of the Van Der Hoven Attorneys Declaratory Order in circumstances where parties reached an agreement in terms of which a Credit Provider consents to an amended interest rate other than provided for in the credit agreement, the Magistrate may make an order rearranging the Consumer's payment obligations based upon the agreed amended interest rates to give effect to the agreement between the parties.

13. Debt Review Affordability Assessment

In terms of Section 86(6)(a) of the Act the Debt Counsellor should determine if the Consumer appears to be over-indebted and in terms of Section 79 of the Act should conduct a detailed financial assessment as set out in Regulation 24(7) of the Act. This will enable the Debt Counsellor to determine a reasonable repayment amount.

The NCR has issued the Task Team Agreement as guidelines and Debt Counsellors are required to use Annexure B of the Task Team Agreement as guidelines to conduct the Affordability Assessment.

The above-mentioned Task Team Assessment Guidelines deal with eligibility, marital status, income and expenditure and the setting of a reasonable and sustainable budget to repay debt. These Assessment Guidelines were implemented to ensure a consistent and fair assessment process.

14. Debt Review Application

- (1) Index

In terms of Rule 63(3) of the MCR the application should be indexed and paginated. The index is a document that serves to guide, point out and facilitate reference to documents contained in the Court pack to which it is attached.

It contains information regarding the Court, parties and contents of the attached Court pack defining the documents as contained therein and identifying such documents by way of page number.

(2) Notice of Motion

The Notice of Motion refers to the prescribed format, in the long form, as set out in Rule 55 of the Magistrates' Court Rules. Such notification includes *inter alia* reference to the Court case number, parties, relief sought, date of hearing, instructions regarding opposition, and details of service addresses of both applicant(s) and respondent(s).

The Notice must be served on Credit Providers after it has been issued by the Magistrates' Court in compliance with the time periods specified in Rule 55 of the MCR.

In terms of Section 86(10(b) of the Act no Credit Provider may terminate an application for Debt Review lodged in terms of this Act, if such application for review has already been filed in a Court or in the National Consumer Tribunal. Consumers should, however, not be advised to take any payment holiday. Monthly payments in line with the Debt Review repayment proposal should continue.

The Notice of Motion must be supported by –

- (a) A Founding Affidavit;
- (b) A Confirmatory Affidavit/s; and
- (c) Annexures.

The Notice of Motion must indicate three dates as follows:

- (a) The date the notice of intention to oppose must be filed, which must be at least FIVE (5) Court days from the date of service of the Notice of Motion;
- (b) The date that opposing Affidavit must be filed, which must be at least TEN (10) business or Court days from the date of service of the Notice of Intention to Oppose; and
- (c) The unopposed Court file date, which must be at least FIFTEEN (15) Court days from the date of service of the Replying Affidavit.

The Notice of Motion must be filed by the Applicant/Debt Counsellor/Attorney and the party servicing the Notice of Motion must provide a service affidavit to the effect that the Notice of Motion was duly served on all Credit Providers. The general consent by Credit Providers to service by fax or e-mail must be attached to this service affidavit and as stated above also contained in the COB.

If the Debt Review Application remains unopposed it will be heard on the unopposed date specified in the Notice of Motion. The Debt Counsellor or Attorney may, where the matter is not opposed in the required timeframe, place the matter on the roll by giving the Clerk of the Court FIVE (5) business days' notice by filing a notice of set down.

A summary of documents to be included in the Notice of Motion is included in Annexure A.

(3) Consent Orders

It is important to note that an unopposed Debt Review Application in terms of Section 86 and a Consent Order in terms of Section 138 of the Act are not the same.

In terms of Section 86(7)(b) of the Act a Consumer may not be over-indebted but nevertheless be experiencing difficulty in paying debt repayments in a timely manner.

Where this is the case the Debt Counsellor may recommend and facilitate a voluntary repayment agreement as part of the Statutory Debt Review Process.

Where all parties have agreed to a repayment plan the Debt Counsellor must refer the Consent Order to the Magistrate Court with a recommendation for approval (Section 86(8)(a)).

This Consent Order must be prepared in the prescribed fashion by the Debt Counsellor and should be filed with the Clerk of the Civil Court who will allocate a case number.

It must contain the agreement/acceptance letter (there could be separate agreement/acceptance letters from each Credit Provider) and acceptance from the Debt Counsellor (in his capacity as Debt Counsellor and on behalf of the Consumer who mandated the Debt Counsellor to negotiate a repayment plan) and a coversheet requesting the Consent Order to be made in terms of Section 138 read with Section 86(8)(a) of the Act.

The file is then forwarded to a Magistrate like a Default Judgment Application for consideration.

The Magistrate notes the Consent Order. Consent Orders should not be considered and noted by Clerks of the Civil Court.

In terms of the *Van Der Hoven Attorneys* Declaratory Order in circumstances where parties reached an agreement in terms of which a Credit Provider consents to an amended interest rate other than provided for in the credit agreement, the Magistrate may make an Order re-arranging the Consumer's payment obligations based upon the agreed amended interest rates to give effect to the agreement between the parties.

(4) Opposed Debt Review Application

(a) Where the matter is opposed then the Credit Provider must –

- (i) Serve and file a Notice of Intention to Oppose within FIVE (5) Court days after service of the Notice of Motion (thus on or before the date specified in the Notice of Motion); and
- (ii) Serve and file the opposing Affidavit within TEN (10) Court days after the service of the Notice of Intention to Oppose (thus on or before the date specified in the Notice of Motion).

It must be noted that where a Debt Review Court Application is opposed by the Credit Provider's Attorney of record, all documents must be served and filed on the said Attorney of record and not the Credit Provider, and vice versa.

(b) Replying Affidavit

The Debt Counsellor/Attorney may within TEN (10) Court days of service of the opposing Affidavit from the Credit Provider's Attorney, serve on the Credit Provider's Attorney the Replying Affidavit, should it elect to do so.

(c) Apply for Court Date

The Debt Counsellor/Attorney may apply for a Court date for the matter to be heard within FIVE (5) Court days after the service of the Replying Affidavit. Rule 55 also allows the Credit Provider to apply for a Court Date, should same not have been secured by the Debt Counsellor/Attorney within the time period prescribed in that rule.

- (d) Notify all parties of the Court date – notice of set down (Rule 55(1)(f)). The Debt Counsellor/ Attorney must advise all parties of the Court date in the form of a Notice of Set Down. Such notification must be provided at least TEN (10) Court days before the Court date.

(5) Founding Affidavit

An application for Debt Review must be substantiated by an Affidavit deposed to by the Debt Counsellor in which the following, as contained in (a) to (t) *infra* (below), is set out.

- (a) An exposition of the Debt Counsellor's assessment conducted in terms of Section 86(6) of the Act, read with Sections 78(3), 79, 80 and Regulation 24 of the Act.
- (b) The relief claimed in terms of Section 86(7)(c) of the Act.
- (c) Full particulars of each Credit Provider.
- (d) Full particulars of the Consumer and the Debt Counsellor.
- (e) An Affidavit from the affected Consumer(s).
- (f) Form 16. A statement that Form 16 was completed and provided all information required in terms of Regulation 24(1)(a). Also required is a requirement for the Debt Review fee structure to be included in Form 16. This will serve as confirmation that the fee structure has been disclosed to the Consumer before acceptance of the Debt Counselling (Section 86(3)(a) of the Act). In terms of the *Van Der Hoven Attorneys Declaratory Order* a Form 16, as required in Regulation 24, is not a required Annexure to the Application for Debt Review as it is not a prerequisite for the Consumer to be declared over-indebted, as long as the information contained in the Form 16 is set out in the Founding Affidavit itself.
- (g) A statement regarding compliance to time limits. A statement that within FIVE (5) business days after receiving and accepting the application for Debt Review in terms of Section 86(1) of the Act being, a completed Form 17.1 was submitted to all Credit Providers listed in the application and delivered to every registered Credit Bureau (Section 86(4)(b) of the Act and Regulation 24(2)). (Debt Counsellors are required in terms of their Conditions of Registration to update Credit Bureaus via the NCR Debt Help System only.) In terms of the *Van Der Hoven Attorneys Declaratory Order* a Debt Counsellor has substantially complied with Section 86(4)(b)(ii) of the Act, read with Regulation 24(2) promulgated thereunder, once he has successfully uploaded the details of a Consumer onto the NCR's electronic Debt Help System (as nominal addressee for all registered Credit Bureaus).

- (h) A statement regarding required information. A statement that the information provided in terms of Regulation 24(1) of the Act was verified by requesting information and documentary proof from the following persons: (Regulation 24(3) of the Act), e.g.
 - (i) The Consumer;
 - (ii) The Credit Providers listed in the Form 16;
 - (iii) The Consumer's employer (only when applicable); and
 - (iv) Credit Bureau.
- (i) A statement that a determination was made. A statement that within THIRTY (30) business days after receiving and accepting the application in terms of Section 86(1) of the Act, a determination was made in terms of Section 86(6) read with Regulation 24(7) and (8) of the Act.
- (j) Form 17.2. A statement that a Form 17.2 was submitted to all affected Credit Providers and Credit Bureaus (via NCR Debt Help System) within FIVE (5) business days after completion of the assessment.
- (k) A statement regarding repayment proposals. A statement that proposals setting out how the Consumer's obligations are rearranged were sent to each of the Credit Providers.
- (l) A Certificate of Balance must be attached, for the sake of certainty on interest rates. A COB is also used to verify that interest rate does not exceed the maximum rates as per Regulation 42 of the Act. Where no COB has been received the Debt Counsellor can apply Regulation 24(4) of the Act. In terms of Regulation 24(4) of the Act where Credit Providers fail to provide the Debt Counsellor with the correct information within FIVE (5) business days of such verification being requested, the Debt Counsellor may use the information provided by the Consumer as being correct. Where this is the case an allegation to the effect has to be included in the application. More information on this issue is included in Annexure C. It is important to note that where an interest rate is used which is not in line with the contractual rate that the Consumer will be required to repay the debt in line with approved Court Order and when the debt is repaid in line with the Court Order an end balance reconciliation needs to take place. This process is covered by a separate process approved by CIF and issued as guidelines by the NCR.

- (m) Credit Agreements. It is not a requirement to include or attach Credit Agreements.
- (n) Proposal responses. Statements that the proposal was rejected, or that no response was forthcoming, or that not all the Credit Providers accepted the proposal.
- (o) Credit Provider names on proposals. The names of the Credit Provider on the proposal must correspond with the respondent's unless the Credit Provider has appointed an Agent to fulfil this function on his behalf.
- (p) Section 129 and/or 130. No steps in terms of Section 129 and/or 130 of the Act were taken by any Credit Provider at the time of the application.
- (q) Reasons for over-indebtedness. The reasons for the over-indebtedness and/or difficulties being experienced must be set out. A mere statement of being over-indebted would not be sufficient to enable the Court to exercise its discretion judicially.
- (r) Determination of over-indebtedness after assessment, applying the criteria in Section 79 and Regulation 24(7) of the Act.
- (s) Re-arrangement proposals. If over-indebted, full particulars of the re-arrangement of the Consumer's obligation and the reasons for each proposal (Section 86(7)(c) (ii) of the Act).
- (t) Determination: Credit agreement(s) be declared reckless credit, applying the criteria in Section 80 and Regulation 24(8) of the Act.

Notwithstanding the above high level overview of the contents of the Founding Affidavit, the following information on a lower level would be required as outlined in (a) to (r) *infra* (below).

- (a) Identity of the Debt Counsellor including NCR DC number and practice address, averment as to personal knowledge, as well as reference to the Debt Counsellor's statutory obligations in terms of the Act.
- (b) Identity of the Consumer(s) including sex, residential address (jurisdiction) and a reference to proof of these allegations as Annexures.
- (c) Identity of all Credit Providers cited as respondents including the entity description and address for service.

- (d) Purpose of the application. This refers to Section 86(7) read with Section 87 and 79 of the Act with the purpose of placing the Court in a position to assess the relief sought in the Notice of Motion with a direct bearing on the information contained in the Founding Affidavit.
- (e) Formal requirement. The formal requirement refers to Section 86 of the Act with specific reference to Regulation 24 as same is contained in the Act.
- (f) Compliance to time limits. This refers to averments regarding the Form 16, 17.1 and 17.2, compliance with the formal time limits as set out in the Act as well as information regarding the assessment of the Consumer's financial position and guidelines used for the assessment thereof.
- (g) The reason for over-indebtedness. This contains information regarding the reason for the Consumer's over-indebtedness, with as much specificity to the Consumer's financial circumstances as possible.
- (h) Proposal and responses. This section contains averments regarding the income, expenditures, debt, monthly repayments, interest rates and funds available for distribution by the Consumer(s) to Credit Providers.
- (i) Determination by Debt Counsellor, including compliance with Section 86(6) of the Act, the issuing of Form 17.2, affordability assessment details (including overtime and/or allowances where applicable) and repayment proposals.
- (j) Proposal methodology. A brief description regarding the method used in generating the proposal, including reference to the Task Team Agreement concessions to reduced interest, extensions of repayment terms and Regulation 42 of the Act, if applicable, and other general information assisting the Court in understanding the repayment proposal.
- (k) Proposal responses. This entails details of the Credit Provider's response (if any) to the repayment proposal(s) with specific reference to acceptance or rejection and/or counter-proposals by the Credit Provider as received by the Debt Counsellor.
- (l) *In duplum*. This Section refers to Section 103(5) of the Act and the Debt Counsellor's compliance with regards to issues relating to *in duplum*.
- (m) Reckless lending. This Section deals with issues relating to reckless lending, with reference to the Consumer's request for such an investigation, if applicable, as

well as the Debt Counsellor's recommendation to Court regarding the outcome of such investigation, if any.

- (n) Termination. This Section brings to the Court's attention any alleged termination of credit agreements by Credit Providers which could have an effect on credit agreements subject to exclusion from the Debt Review application. Where applicable, reference to the termination guidelines in the Task Team Agreement, issued by the NCR as Guidelines, should be included.

This is important as the Court's attention should always be drawn to a disputed fact or law contained within any motion proceedings. Should a litigant anticipate a dispute of fact, as a general rule, an application would be inappropriate and the action procedure should be followed in dealing with such anticipated dispute.

This section must not make any reference to a request by the Debt Counsellor that the terminated credit agreement(s) be reinstated by the Magistrate's Court hearing the Debt Review Court Application.

- (o) Details surrounding service. It is important for the Court to have details surrounding service addresses and method of service on affected parties of the application for Debt Review. This Section contains such details including consents (general and on COB) and/or waiver to service of the application.
- (p) *Lis pendens* (pending litigation). This Section confirms to the Court the non-existence of a similar application in the same or other Courts.
- (q) General. This Section refers to certain standard general averments as contained in motion proceedings. This has specific reference to the proposed outcome if the relief is granted as prayed, as well as reference to the conduct which a party could generally expect from another litigant.
- (r) Commissioning. The commissioning of such an Affidavit would be done under the general rules as set out in Government Notice No. 1258 of 1972.

The Founding Affidavit may make several references to the Annexures in support of the application. Details of Annexures to the Debt Review Application are contained in Annexure B.

Annexures would typically be referred to in alphabetical order and the description of the Annexure would be contained towards the top-right corner of such source document. This is for easy identification for either the Court or a litigant in the matter of such source document.

Some Courts request the Debt Counsellors to provide original documentation. The *Van Der Hoven Attorneys* Declaratory Ordered that in circumstances where the Debt Counsellor is not in possession of the original documents, but copies thereof, the Debt Counsellor shall explain, under oath, why the original documents are not in his possession or in whose possession he believes the documents may be. Upon a satisfactory explanation, copies of original documents will be admissible as evidence.

15. Debt Review Court Order

A Debt Review Court Order should contain the information as set out in (1) to (21) *infra* (below).

- (1) The name of the Magistrates' Court where the Debt Review Court Order was granted.
- (2) The Court case number.
- (3) The full name, surname and identity number of the Consumer(s).
- (4) The full name, surname and registration number of the Debt Counsellor.
- (5) The details of the Credit Providers impacted by the Debt Review Court Order.
- (6) The details of the credit agreements which includes *inter alia* credit agreement type and account/reference number.
- (7) A clause indicating that the Consumer be declared over-indebted.
- (8) A clause confirming that the Consumer must give notice to the Applicant within TEN (10) business days of any change in his or her financial position that has a material effect on his or her or their ability to comply with his or her or their obligations in terms of this Court Order;
- (9) A clause indicating that the Credit Providers may enforce their rights in terms of Section 88(3)(b)(ii) of the Act.
- (10) A clause indicating that the Consumer(s) may at any time pay additional amounts to any of the Credit Providers in order to shorten the repayment term of the relevant credit agreements in terms of Section 126 of the Act.

- (11) A clause indicating that the period of repayment in respect of each credit agreement with each respondent be extended and the amounts payable per month be reduced in accordance with the debt restructuring proposal prepared by the Debt Counsellor, as contemplated in Section 86(7)(c)(ii)(aa) to (dd) of the Act.
- (12) A clause indicating the repayment method selected by the Consumer. Where a PDA is selected, only a PDA registered in terms of Section 44A of the Act may be used. It must be confirmed that the appropriate PDA mandate is completed as required.
- (13) A clause or schedule containing details of the debt repayment Court Order. This clause or schedule normally should include the following:
- (a) The current outstanding amount;
 - (b) The proposed monthly instalment;
 - (c) The proposed estimated repayment period to repay the debt in full;
 - (d) The proposed interest rate and an indication if this is a fixed or variable interest rate. This interest rate must be the interest rate in terms of the COB or Regulation 24(4) of the Act, unless a change was consented to by the Credit Provider. (For instance if the concessions in terms of the Task Team Guidelines are used);
 - (e) Where applicable the monthly credit insurance premiums payable; and
 - (f) The proposed monthly fees.
- (14) A clause indicating the agreed term extension on secured debt, the concession period for fees and interest rate, and that at the expiry of the concession period for fees and interest rate the remaining instalment will be recalculated based on the contractual fee and interest rates and the term extension as agreed in the Court Order.
- (15) A clause indicating the first date of payment in terms of this Order and monthly payment thereafter, until all the Consumer(s) debt obligations with reference to the credit agreement in the Court Order have been settled in full.
- (16) An indication of the Cost Order will be included in the Order if granted by the Court.

- (17) Where the Court Order is granted in terms of an acceptance of a Debt Review repayment proposal, the acceptance letter from the impacted Credit Provider should be attached and where the repayment is not the same every month the repayment schedule should be approved and signed by the Court.
- (18) The Debt Review Court Order should be signed by the Magistrate or Clerk of the Court depending on the standard practice of the relevant Magistrates' Court.
- (19) The date the Debt Review Court Order was granted must be clearly indicated.
- (20) The Debt Review Court Order and Debt Review Repayment Plan must contain a clear Court stamp.
- (21) If the Debt Review Court Order contains or refers to Annexures the same should be clearly marked and attached to the Debt Review Court Order and endorsed by the Court.

ANNEXURE A

Guideline of documents to be included as Annexures to the Notice of Motion

Document Required	Information Required
Notice of Motion (Form 1A)	<ul style="list-style-type: none"> • It must be complete and signed; • It must contain the following details: <ul style="list-style-type: none"> - Date when the matter will be heard (unopposed date). - Date by when the application is to be opposed and the opposing Affidavit filed. - Details of Debt Counsellor and Attorney. - Correct citation of the Magistrates’ Court having jurisdiction; - Case Number. - Prayers (relief requested from the Court).
Founding Affidavit deposed to by the Debt Counsellor	<ul style="list-style-type: none"> • All the information & facts required to allow the Court to determine over-indebtedness. • The Credit Provider must be able to determine the nature and extent of the application and how it will impact the Credit Provider.
Confirmatory Affidavit duly deposed to by the Consumer	<ul style="list-style-type: none"> • It is critical for the Consumer to confirm all the details contained in the Founding Affidavit that will fall within the personal knowledge of the Consumer including the fact that he/she has applied for Debt Review with the Debt Counsellor. • This will ensure that hearsay evidence is not placed before the Court.
Form 16	<p>The form must be completed and signed by the Consumer or voice logged (Regulation 24(1) of the Act).</p> <p>In terms of the <i>Van Der Hoven Attorneys</i> Declaratory Order a Form 16, as required in Regulation 24, is not a required Annexure to the Application for Debt Review as it is not a prerequisite for the Consumer to be declared over-indebted, as long as the information that would be provided in Form 16 is set out in the Founding Affidavit.</p>
Proof of income (current)	<p>To validate the income declared by the Consumer. Normally proof of income (payslip) not older than 4 months from date of issue of the application would be appropriate. Exceptions should be motivated.</p>

ANNEXURE A (Continued)

Explanation of excessive and/or extraordinary expenditure	To validate the expense.
Debt restructuring proposal with Task Team concessions	The proposal must contain: <ul style="list-style-type: none"> • The name of the Credit Provider; • The credit agreement reference (example account number); • The contractual monthly instalment; • The contractual interest rate; • The contractual repayment term; • The proposed instalment; • Proposed interest rate; • Proposed term; and • The outstanding balance.
Debt restructuring proposal without Task Team concessions	This will indicate how the outstanding balance will be repaid.
Draft Order (Optional)	In terms of current practice a Draft Order is only finalised shortly before the matter is heard, a draft Order may be added to enable the Credit Provider to have a full and proper knowledge of the prayers/relief sought.

ANNEXURE B

Annexures to a Debt Review Application

Annexures would typically be referred to in alphabetical order and the description of the Annexure would be contained towards the top-right corner of such source document. This is for easy identification of either the Court or a litigant in the matter of such source document.

The typical Annexures to a Debt Review application would be as follows:

i. NCR Certificate and renewal letter

This Annexure refers to the certificate issued by the NCR to each registered Debt Counsellor and refers to the Debt Counsellor's name, DC number and date of registration. This Annexure confers *locus standi* to the Debt Counsellor appearing in the matter. Since registration is subject to renewal, such Annexure would contain proof that such renewal was applied and approved by the NCR for a specific period. Where confirmation of renewal has not been received from the NCR on time then proof of payment of the NCR renewal fees should be included.

In terms of the Van Der Hoven Attorneys Declaratory Order a Debt Counsellor need not annex proof of registration as a Debt Counsellor, nor proof of payment of renewal fees, subject thereto that the Debt Counsellor attests to valid registration under Oath.

ii. Identity Document

This Annexure refers to the proof of identity of the Consumer as issued under regulation of the Department of Home Affairs. This would typically not include the driver's licence or any temporary permit of any nature issued to the Consumer. Foreigners are required to use their Passports.

iii. Consumer's proof of income

This Annexure refers to proof of the Consumer's income at the time of the application for Debt Review. This would typically include a payslip issued by the employer which contains information regarding gross pay, statutory or other reductions, additional income and a calculation of nett income. This forms the source document to a Court regarding affordability as well as the reasonableness of the terms and amount for repayment in the proposal.

iv. Proof of residence of the Consumer or proof of work address of the Consumer

This refers to a source document indicating the address which is used to confer jurisdiction upon Court only. This does not refer to the standard as set in the Financial Intelligence Centre Act 38 of 2001, but it refers to a source document indicating an address within the jurisdiction of the Court, as referred to in Section 28 of the Magistrates' Court Act.

v. Consumer's Confirmatory Affidavit

This Affidavit refers to an Affidavit deposed to by the Consumer confirming information deposed to by the Debt Counsellor in the Founding Affidavit which is within the Consumer's personal knowledge relating to the Debt Review. The information typically contains the Consumer's residential address, employment, income, expenditure, assets, liabilities and formal requirements in terms of the NCA regarding the signature of the Form 16 and source documents supplied to the Debt Counsellor as well as the appointment of the Debt Counsellor.

It would typically not refer to any information falling outside the personal knowledge of the Consumer, being certain functions performed by the Debt Counsellor.

vi. Form 16

The Form 16 refers to the document as referred to in the Act duly completed and signed by the Consumer. This serves as the source document for the Court indicating an application in terms of the Act.

In terms of the *Van Der Hoven Attorneys* Declaratory Order a Form 16, as required in Regulation 24, is not a required Annexure to the Application for Debt Review as it is not a prerequisite for the Consumer to be declared over-indebted.

vii. Form 17.1 notification and proof of service

Form 17.1 notification refers to that form as contained in the Act and proof of delivery of such form to the affected Credit Providers, which form serves to advise each of the Consumer's Credit Providers that s/he has applied for Debt Review at his/her offices. It is standard practice that only one Form 17.1 and proof of service is attached to the application not to unnecessarily make such application voluminous. Since the Debt Counsellor stores all information regarding the Debt Review electronically, additional proof of service could easily be reproduced as contemplated in Regulation 55(3) of the Magistrates' Court Rules and made available to the Court. Some Credit Providers include consent to service clauses at the bottom of their COBs.

viii. Credit Provider's Certificate of Balance

This refers to the certificates issued by the Credit Providers to the Debt Counsellor in response to the Form 17.1 above. This would also include any Regulation 24 notices as dispatched by the Debt Counsellor due to non-compliance by any Credit Provider.

ix. Form 17.2 notice and proof of service

Form 17.2 notification refers to that form as contained in the Act and proof of service of such form to the affected Credit Providers, which form serves to advise each of the Consumer's Credit Providers that the Consumer's application for Debt Review has been successful. It is standard practice that only one proof of service is attached to the application not to unnecessarily make such application voluminous. Since the Debt Counsellor stores all information regarding the Debt Review electronically, additional proof of service could easily be reproduced as contemplated in Regulation 55(3) of the Magistrates' Court Rules and made available to the Court.

The second Order in the *Van der Hoven Attorneys* Declaratory Order in this regard must be taken into account.

x. Repayment proposal and proposal responses

This contains the proposal as generated by the Debt Counsellor indicating the repayment amount, term and interest rates, which the Debt Counsellor proposes for the repayment of debt of credit agreements as contained in the application.

The proposal responses refer to acceptances, rejections and/or counter-proposals as received by the Credit Providers in response to the proposal as above.

xi. Consent letter of service

As it is generally accepted within the Credit Industry, and approved by CIF, that service of the application can be done by fax or e-mail. The Court would require the general consent for alternative service, as well as the address as nominated by such entity. This general consent would be in an official format by such entity, signed by a duly authorised official indicating unequivocal consent to service as stated above. The onus is on the Credit Providers to provide the Debt Counsellor with updated fax numbers and e-mail addresses. Credit Providers normally include consent to service clauses at the bottom of their Certificates of Balance (as agreed in the Task Team Agreement issued by the NCR) – or fax or registered post or hand may be effected by the Debt Counsellor or his Attorney and need not be caused by the Sheriff of Court.

xii. Service Affidavit

This Affidavit would be deposed to by either the Debt Counsellor/Attorney or an authorised official indicating the service of the application. It will indicate what document was serviced on which party and in what fashion.

xiii. Notice of Set Down

This notice informs the parties to the application as well as the Clerk of the Court as to the date of the hearing, time of hearing, place of hearing and other requirements if applicable. This would be in terms of the prescribed format as set out in the Magistrates' Court Act and/or practice directives as issued by a Senior Magistrate for a region if applicable.

It is of the utmost importance that certainty and consistency is created within all the Courts by way of a standardisation of the documents produced to the Court, its contents as well as interpretation to be clearly defined.

This will not only make debt counselling more accessible to the Consumer, but will assist all interested parties and the Magistrates in accessing all relevant facts.

xiv. Proof of Marital Status

It is good practice to include the following:

- Marriage Certificate
- Antenuptial Agreement
- Divorce Order

ANNEXURE C

Extract from Electronic Communications and Transactions Act 25 of 2002

Chapter III

Part 2

Communication of data messages

21. Variation by agreement between parties

This Part only applies if the parties involved in generating, sending, receiving, storing or otherwise processing data messages have not reached agreement on the issues provided for therein.

22. Formation and validity of agreements

- (1) An agreement is not without legal force and effect merely because it was concluded partly or in whole by means of data messages.
- (2) An agreement concluded between parties by means of data messages is concluded at the time when and place where the acceptance of the offer was received by the offeror.

23. Time and place of communications, dispatch and receipt

A data message –

- (a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator, or if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee;
- (b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee; and
- (c) must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.

24. Expression of intent or other statement

As between the originator and the addressee of a data message an expression of intent or other statement is not without legal force and effect merely on the grounds that –

- (a) it is in the form of a data message; or
- (b) it is not evidenced by an electronic signature but by other means from which such person's intent or other statement can be inferred.

25. Attribution of data messages to originator

A data message is that of the originator if it was sent by

- (a) the originator personally;
- (b) a person who had authority to act on behalf of the originator in respect of that data message; or
- (c) an information system programmed by or on behalf of the originator to operate automatically unless it is proved that the information system did not properly execute such programming.

26. Acknowledgement of receipt of data message

(1) An acknowledgement of receipt of a data message is not necessary to give legal effect to that message.

(2) An acknowledgement of receipt may be given by –

- (a) any communication by the addressee, whether automated or otherwise; or
- (b) any conduct of the addressee, sufficient to indicate to the originator that the data message has been received.