

# A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (Part 2)

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## OPSOMMING

### **'n Vergelyking tussen formele skuldadministrasie en skuldher siening – die voor- en nadele van hierdie maatreëls en voorstelle vir regshervorming**

Ongeveer 'n dekade gelede het die Departement van Justisie en Konstitusionele Ontwikkeling, na aanleiding van klagtes deur verbruikers oor die misbruik van die administrasieprosedure, 'n projek ter hervorming van hierdie prosedure van stapel gestuur. Hierdie projek is egter opgeskort vanweë 'n onafhanklike inisiatief van die Departement van Handel en Nywerheid om verbruikerswetgewing, wat in 2007 in die Nasionale Kredietwet 34 van 2005 gekulmineer het, te hervorm. Ongelukkig het die wetgewer met die invoering van die skuldher sieningsprosedure ingevolge die Nasionale Kredietwet 'n gulde geleentheid laat verbygaan om die reg insake skuldverligtingsmaatreëls behoorlik en volledig te hersien. Daarbenewens het die wetgewer ook nie die verhouding tussen skuldher siening en ander bestaande skuldverligtingsmaatreëls, in die besonder administrasiebevele, behoorlik oorweeg nie. In die eerste gedeelte van hierdie artikel wat in 2012 *De Jure* 80 verskyn het is administrasie ingevolge die Wet op Landdroshowe 32 van 1944 en skuldher siening ingevolge die Nasionale Kredietwet geanaliseer om sodoende sekere positiewe en negatiewe aspekte rakende hierdie twee prosedures te identifiseer. In hierdie tweede gedeelte van die artikel word 'n vergelyking tussen administrasie en skuldher siening gedoen en voorstelle ter regshervorming gemaak. Die skrywers doen aan die hand dat Suid-Afrika 'n volledige her siening van sy huidige skuldher skeduleringsmaatreëls benodig en dat die wetgewer vir een enkele maatreël wat op alle skuldher skeduleringsgevalle van toepassing is, voorsiening moet maak. Na aanleiding van die vergelyking tussen administrasie en skuldher siening belig die skrywers die hoofkwessies wat die wetgewer na hul mening in ag moet neem wanneer so 'n nuwe prosedure ontwerp word.

## 4 Some Comparisons Between Administration and Debt Review

### 4 1 Gateways

#### 4 1 1 *Monetary and Other Limitations*

As indicated, administration applications have a monetary cap of R50,000, whereas debt review has no monetary cap. It is submitted that this cap excludes many debtors from the relief offered by way of an administration order, especially those debtors whose debts are not of a credit agreement nature and who are thus not eligible for debt review. Debt review applies only to credit agreement debt to which the NCA applies whereas administration is not subject to such limitation. However, administration orders may not include *in futuro* debt whereas it appears that many of the debts included under debt review in terms of the NCA will be of an *in futuro* nature.

It should further be noted that whereas the administration procedure appears to address the issue of over-indebtedness only by providing for restructuring of debt, debt review in terms of the NCA addresses the issue of both over-indebtedness and reckless credit as the debt counsellor is obliged to consider same and the court can be approached later to order debt restructuring to cure over-indebtedness and also to declare credit reckless.<sup>162</sup>

In terms of section 86(2) of the NCA credit agreement debt may not be included in the debt review where the credit provider has already taken steps to enforce the agreement.<sup>163</sup> However, with regard to administration orders, judgment debts are included in the order. In terms of section 74P(2) of the MCA the court in which proceedings have been instituted against a debtor in respect of any debt<sup>164</sup> must suspend such proceedings as soon as it has received notice of the administration order.<sup>165</sup>

There is no statutory limitation on the number of times a debtor may apply for administration or debt review.<sup>166</sup> Therefore, it appears that a

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162 S 86(6) & 87(1)(b). A declaration of reckless credit may in some instances have the effect of relieving a consumer from the debt altogether. For a detailed discussion see Boraine & Van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" 2010 *THRHR* 650 and Van Heerden & Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" 2011 *De Jure* 44.

163 See the discussion in par 3 3 1 above.

164 Except a debt due under a mortgage bond or a debt referred to in s 74B(3) – s 74P(2) MCA.

165 See the discussion in par 2 7 above.

166 See, however, *Changing Tides 17 (Pty) Ltd v Grobler* (unreported case no 9226/2010) (GNP) par 12 where it was held that a consumer is not entitled

debtor may, after the administration order has lapsed in terms of section 74U, or in the case of debt review, after a clearance certificate has been issued, once again apply for administration or debt review. However, contrary to other legal systems, where a limitation is indeed placed on the number of times a debtor may qualify for debt relief by way of debt-reorganisation within a specified period of time,<sup>167</sup> it should be noted that neither administration nor debt review affords the debtor any discharge of debt.

#### 4 1 2 Who May Apply and Methods of Access

Administration and debt review are only available to natural person debtors and not to juristic persons. Where the consumer is a juristic person<sup>168</sup> in terms of the NCA, Chapter 4, Part D, which regulates over-indebtedness and reckless credit, does not apply.<sup>169</sup>

Administration may only be initiated by means of an application by an individual debtor made to a magistrate's court in terms of sections 74 and 65I of the MCA.<sup>170</sup>

The NCA provides a number of methods to access its debt relief provisions. A consumer may on own initiative approach a debt counsellor for debt review in terms of section 86. If a consumer had not approached a debt counsellor prior to litigation, and the proceedings are proceedings in which a credit agreement is being considered, the consumer may invoke section 85 of the NCA in terms of which the court in its discretion may refer the consumer for debt review.<sup>171</sup> As pointed out above,<sup>172</sup> section 86(11) of the NCA also allows a consumer in respect of whom a debt review has been terminated in accordance with section 86(10) to request the court to allow the debt review to resume.

Although it is usually the consumer who initiates and applies for debt review by a debt counsellor, only the debt counsellor has *locus standi* to approach a magistrate's court by way of application with a

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to delay enforcement of a credit agreement by again applying for debt review in terms of s 86(1) NCA prior to enforcement but after an earlier debt review in respect of the said credit agreement was terminated in accordance with s 86(10) NCA.

167 See eg s 1328(f) American Bankruptcy Reform Act of 1978 (commonly known as the Bankruptcy Code or Code) and s 288 Dutch *Wet Schuldsanering Natuurlijke Personen*.

168 S 1 NCA defines a juristic person so as to include a partnership, association or other body of persons, corporate or unincorporated, or a trust if there are three or more individual trustees, or where the trustee is itself a juristic person, but does not include a stokvel.

169 S 6 NCA.

170 Par 2 2 above.

171 Par 3 3 3 above. It appears that such referral will not readily be granted. See Van Heerden & Lötze "Over-indebtedness and discretion of court to refer to debt counsellor – *Standard Bank Ltd v Hales* 2009 3 SA 315 (D)" 2010 *THRHR* 502.

172 Par 3 3 4 above.

recommendation for debt restructuring in respect of the consumer's credit agreement debt in terms of section 86(7)(c).<sup>173</sup> However, it is clear that in those instances where a debt counsellor finds a consumer to be not over-indebted, the consumer has *locus standi* to approach the court to be declared over-indebted and to have his or her credit agreement debt restructured.

### 4 1 3 Jurisdiction

Administration orders are heard by the magistrates' courts exclusively. Although it may seem that only the magistrate's court is clothed with the jurisdiction to hear debt restructuring applications, the view has been expressed that the high court may also do so where the debt review is initiated as a result of an invocation of section 85 of the NCA.<sup>174</sup>

The court where the debtor resides, carries on business or is employed will have jurisdiction in respect of an application for an administration order.<sup>175</sup> Due to the fact that the NCA contains no provision specifying geographical jurisdiction of the court to be approached for purposes of a court ordered debt restructuring, uncertainty prevailed and arguments were raised that the appropriate court should be the court where the debt counsellor is located. This aspect now also appears to have been resolved as a result of the declarator applied for by the NCR in *National Credit Regulator v Nedbank Ltd*.<sup>176</sup> The court held that the appropriate court to approach in such instance would be the magistrate's court that has jurisdiction over the consumer, which means it will be the court of the area where the debtor resides, is employed and carries on business.<sup>177</sup>

## 4 2 Administrators and Debt Counsellors

Debt counsellors are rather strictly regulated by the NCR which was created by the NCA as a regulatory body. In case of administration orders there is no regulatory body except when the administrator is for instance also an attorney or an accountant that might be disciplined by their respective professional bodies in the event of misconduct. In order to apply for registration, debt counsellors must meet certain requirements with regard to their education, working experience and competence and must *inter alia* also undergo some prescribed training<sup>178</sup> whilst there are no such requirements for administrators. The court hearing an application for administration has a discretion to appoint any person as an administrator.<sup>179</sup>

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173 *National Credit Regulator v Nedbank* (GNP) *supra* 311.

174 *Standard Bank v Panayiotts supra* par 16–31. See further Roestoff *et al* 2009 PER 257.

175 S 74(1) MCA.

176 *National Credit Regulator v Nedbank* (GNP) *supra*.

177 *Idem* 314.

178 R 10 CR.

179 S 74E MCA.

Section 74J of the MCA lists some of the duties<sup>180</sup> of an administrator and although there is no regulatory body for administrators the court has certain statutory powers to deal with an administrator who fails to meet his or her statutory duties. An administrator may be removed from office on good cause shown and replaced by another administrator appointed by the court.<sup>181</sup> Where an administrator fails to enforce an administration order, any creditor may do so and reclaim his or her costs from the administrator *de bonis propriis*.<sup>182</sup>

An important regulatory measure regarding all moneys received by an administrator from or on behalf of debtors whose estates are under administration is section 74J(7) of the MCA that requires administrators who are not practising attorneys to deposit such moneys in a separate trust account that is deemed to be not part of the administrator's assets in the event of insolvency or death. Where the administrator is a practising attorney, such moneys must be deposited in the formal attorney's trust account.<sup>183</sup> In general the remuneration of an administrator is capped to 12.5 per cent of the regular payments received from the debtor for the purposes of distribution amongst the creditors.<sup>184</sup>

Section 86 read together with regulation 24 to 27 of the NCA Regulations sets out various duties of the debt counsellor, *inter alia*, that he or she must provide the consumer with proof of the debt review application, must notify credit providers and registered credit bureaux thereof and must review and assess the consumer's financial affairs and credit agreements in order to determine whether the consumer is over-indebted and whether reckless credit has been extended. In *National Credit Regulator v Nedbank Ltd*<sup>185</sup> the court held that a debt counsellor is a neutral<sup>186</sup> person whose function is to assist the court and who might incur costs *de bonis propriis* for failure to comply with his or her duties.<sup>187</sup> The debt counsellor's remuneration consists of an initial application fee of R50. A debt counsellor may also claim the fees prescribed by the Debt Counselling Association of South Africa (DCASA).<sup>188</sup>

180 See par 2 5 above.

181 S 74E(2) MCA. See also *Stander v Erasmus supra* 324.

182 S 74N MCA.

183 An administrator who fails to carry out this duty will be guilty of an offence – see s 74W MCA.

184 S 74L(2) MCA – see the discussion in par 2 6 above.

185 *National Credit Regulator v Nedbank* (GNP) *supra*.

186 R 1 CR. In *National Credit Regulator v Nedbank* (GNP) *supra* 313, Du Plessis J indicated that the role of the debt counsellor is that of a neutral functionary who does not seek to advance any particular party's case

187 *National Credit Regulator v Nedbank* (GNP) *supra* 312.

188 The NCA in s 86(3)(a) read with sch 2 CR, currently only provides for an application fee of R50. One of the initial concerns after commencement of the NCA was that the prescribed fee is so dismal that no one would be willing to practise as a debt counsellor. As a result, a recommended cost and fee structure was drafted by DCASA which was endorsed by the NCR.

### 4 3 Debt Incurred After Administration or Debt Review

Agreements or debts that were not initially included in the administration order may subsequently be included and become part of that order.<sup>189</sup> However, a debtor who is subject to an administration order and incurs debt without disclosing it is guilty of an offence.<sup>190</sup>

Where a debt restructuring order has been granted by the court no provision is made in the NCA for inclusion of other credit agreement debt owing to credit providers that were not initially part of the restructuring recommendation. The NCA also does not specifically provide for any offences with regard to over-indebtedness but sanctions the debtor who incurs further credit agreements whilst under debt review by denying him the remedies pertaining to over-indebtedness and reckless credit granting. Moreover, a credit provider who enters into a credit agreement with a consumer in respect of whom a restructuring order has been granted, runs the risk of such agreement being declared reckless credit.<sup>191</sup>

### 4 4 Distributions to Creditors

Administrators may handle vast amounts of money and make distributions to creditors<sup>192</sup> whilst distributions in terms of debt review are the responsibility of PDAs.<sup>193</sup> In this regard the trust accounts of those administrators who are not members of existing professional bodies remain a major concern since there is no proper body to regulate administrators and the security expected from them to fulfil their statutory duties are not on a firm footing. Section 74E(3) of the MCA provides that an administrator who is not an officer of the court or a practitioner, must provide security to the satisfaction of the court for due and prompt payment to the parties entitled thereto but even this requirement seems to be troublesome in practice.<sup>194</sup> It is thus clear that misappropriation of funds by administrators is a major concern<sup>195</sup> whilst it is not an issue in case of debt review due to the payment structure.

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Currently debt counsellors are bound to this fee structure as a condition of their registration as debt counsellors.

189 S 74H MCA and par 2 5 above.

190 S 74S MCA and par 2 7 above.

191 Ss 88(4) & (5) NCA and par 3 3 6 2 above.

192 See eg the facts in *Stander v Erasmus supra*.

193 It is currently a condition of registration for debt counsellors that they only use PDAs accredited by the NCR.

194 One of the abuses noted by Boraine 2003 *De Jure* 231 regarding administration orders, is the evading by non-attorneys of the requirements of the Act pertaining to security by forming arrangements with attorneys to pose as the appointed administrators – cf the facts in *African Bank Ltd v Weiner (C) supra*.

195 Eg the facts in *Stander v Erasmus supra*.

Administrators are compelled to make distributions every three months<sup>196</sup> whilst the NCR apparently compels PDAs to make distributions on a monthly basis in the case of debt review.

#### 4 5 Role of Creditors

In the case of administration, creditors may in principle oppose an application on the basis that the applicant does not comply with the statutory requirements, or that the debtor has the means to pay the debt, or that his debt is not reflected or not reflected correctly. In terms of section 74B of the MCA any creditor, whether he has received notice of the order or not, may object to any debt listed in the statement of affairs. After granting of the order, any creditor who has not received notice of the application may also object to any debt listed in the order or to the manner in which payments are to be made in terms of the order.<sup>197</sup> In considering the creditor's objection, the court may uphold or refuse it, or postpone consideration thereof for hearing after notice to the persons concerned and on such conditions as the court may deem fit.<sup>198</sup> One of the advantages of administration compared to debt review is that creditors and the court may interrogate the debtor with regard to his or her financial situation.<sup>199</sup> The evidence obtained in this way will obviously influence the court when exercising its discretion to grant the administration order.

Section 86 of the NCA provides no opportunity for the credit provider to oppose a pending debt review whilst it is being conducted by a debt counsellor. As indicated, section 86(10) provides for termination of a debt review, but only after at least 60 business days (which is a relatively long period) after the debt review application was made to the debt counsellor. However, as indicated, such termination is not necessarily a dead end for an over-indebted consumer due to the provisions of section 86(11) which allow a magistrate's court to order that debt review may resume in respect of a credit agreement that is being enforced by litigation.

In case of debt restructuring by the court, the NCA does not indicate under what circumstances creditors may oppose the restructuring in court. Where the restructuring has been accepted in terms of section 86(8)(a) all the credit providers involved would have agreed and the filing of the consent order would be a mere formality. However, in other circumstances where the debt counsellor has determined that the consumer is over-indebted and no voluntary re-arrangement is agreed to by the credit providers, the debt counsellor must make an application to court in order to achieve a court-induced restructuring.<sup>200</sup> It is submitted that a credit provider who is opposed to the debt restructuring terms as

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196 S74J(1) MCA.

197 S 74F(3) MCA.

198 S 74F(4) MCA.

199 S 74B(e) MCA and *Madari v Cassim supra* 38.

200 Ss 86(7)(c), 86(8)(b) & 87 NCA.

recommended by the debt counsellor may then oppose the application for debt restructuring in terms of ordinary application procedure principles as it has been held that the application procedure is the proper procedure by which to approach a court for purposes of court-induced restructuring.<sup>201</sup> However, unlike the position with regard to administration,<sup>202</sup> the NCA does not allow a credit provider to oppose or object to the debt restructuring order once a debt restructuring order has been granted by the court.

## **4 6 Preliminary Procedures**

### ***4 6 1 Time Periods for Service of Application***

In case of administration the application may be brought with three calendar days' notice to creditors.<sup>203</sup> In the case of debt review the application to court for debt restructuring may be brought with 10 court days' prior notice in accordance with rule 55 of the Magistrates' Courts Rules. It is submitted that the time period allowed for notice of a debt restructuring application is much more advantageous for purposes of ensuring that creditors are properly informed of the application, than in the case of an administration order.

### ***4 6 2 Manner of Service***

Applications for administration orders are normally served by registered post.<sup>204</sup> Service of applications for court-ordered debt restructuring in terms of the NCA has been a very contentious issue as credit providers wanted such service to be done by the sheriff, which of course had extreme cost implications for the already over-indebted debtor with a large number of creditors. In *National Credit Regulator v Nedbank Ltd*<sup>205</sup> it was held that apart from service by the sheriff the parties can also agree to service by fax or email.<sup>206</sup> It should also be noted that the new rule 9(3)(f) of the Magistrate's Court Rules contains a proviso to the effect that a debt counsellor who makes a referral to court in terms of section 86(7)(c) or 86(8)(b) of the NCA may cause the referral to be served by registered post or by hand.<sup>207</sup>

## **4 7 Procedure in Court and Powers of Court**

### ***4 7 1 Contents of Application***

An application for administration must contain pertinent information

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201 *National Credit Regulator v Nedbank* (GNP) *supra* 310, 320.

202 S 74F(3) MCA.

203 S 74A(5) MCA.

204 Ito s 74A(5) MCA the application may be delivered to creditors personally or by registered post.

205 *National Credit Regulator v Nedbank* (GNP) *supra*.

206 *National Credit Regulator v Nedbank Ltd supra* 312, 320–321.

207 See also Van Heerden in Scholtz par 11 6.

regarding the financial situation of the applicant.<sup>208</sup>

Apart from prescribing in regulation 24 which information has to be submitted for purposes of initially applying for debt review in terms of section 86, the NCA contains no specific provisions or prescribed forms indicating which information has to be disclosed in an application for a court-ordered debt restructuring. Unfortunately, uncertainty in this regard has led to various fragmented approaches to this issue. This uncertainty is inherently problematic as it forces many applicants for a court-ordered debt restructuring to attach every document they regard as relevant to their applications, which inevitably has severe cost implications. It is submitted that it is imperative that a solution to this problem be found urgently and that it should most likely entail that a standard form be prescribed for such purposes.<sup>209</sup>

#### **4 7 2 Procedure at Hearing**

At the hearing of the application for administration the court must clearly first establish that proper notice has been given and that the application complies with the prescriptions laid down by the MCA. It is an implicit part of the hearing that the court must be convinced on a balance of probabilities that the debtor is indeed unable to forthwith pay the amount of any judgment obtained against him or her in court, or to meet his or her financial obligations, that he or she has no sufficient assets to satisfy such judgments or obligations and that the total amount of the debts does not exceed the amount determined by the Minister of Justice from time to time.<sup>210</sup>

The NCA does not contain any provision indicating the specific procedure to be followed in bringing the recommendation for debt restructuring before the court. Section 86 refers to a proposal to court that must be “recommended” by the debt counsellor and section 87 obliges the court to conduct a “hearing”, but neither of these sections indicate what exactly is meant by “recommendation” or “hearing”. A practice has developed and it has subsequently been confirmed by case

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208 S74A MCA discussed in par 2 2 above.

209 Draft r 3 Debt Counselling Regulations published for comment in GN 503 in GG 32229 of 2009-03-15 endeavoured to address this issue by providing that the debt counsellor must lodge his or her proposal in Form B which must be filed as soon as it has been delivered to the consumer and credit providers. Such proposal must be substantiated by a written statement which must contain the information set out in sub-r 2. The credit providers affected must be informed that they may oppose the proposal by filing a notice in the form of Form C with the clerk of the court and delivering a copy thereof to the debt counsellor. In draft r 3(4) this notice must be filed and delivered within 15 days after the proposal was served on the credit provider, that it must be substantiated by a written statement containing the credit provider’s objections to the proposal and that it must be accompanied by a certified copy of the relevant agreement and relevant documentation intended to be used as evidence to substantiate the objections. See also Roestoff *et al* 2009 PER 274.

210 S 74(1)(a) & (b) MCA.

law, to use the application procedure as set out in rule 55 of the Magistrates' Courts Rules for this purpose.<sup>211</sup> Currently these applications thus serve before the motion court and involve an exchange of affidavits. Given the fact that rule 55 is employed, it is submitted that it would also be possible for a court to refer an application for debt restructuring for oral evidence should a creditor oppose the matter and a dispute of facts be disclosed.<sup>212</sup> However, debt restructuring in accordance with the NCA, unlike the administration order process, does not explicitly provide for financial interrogation<sup>213</sup> of the consumer and the procedure is also not held in camera.<sup>214</sup>

The finding that the application procedure should be used is evidently to fill a *lacuna* in the NCA, but it is submitted that this procedure is clearly not the best way to deal with the debt counsellor's recommendation and the hearing relating thereto.<sup>215</sup> In *Wesbank v Schroder*<sup>216</sup> Van Zyl J made the following observation in this regard:

It is regrettable that the legislature has not seen it fit to put into place a more simplistic and less formal procedure for dealing with the referral of the proposal of the debt counsellor to the magistrate's court and the manner in which the hearing is to be conducted as envisaged in section 87(1) of the Act. The unfortunate result of this is that, as in the instant case, once the proposal is referred to the magistrate's court, the matter then lands up in the hands of lawyers at which time the spirit of cooperation more often than not sadly disappears. The result is unnecessary delays in the finalisation of the debt review process and the resultant incurring of costs.

#### **4 7 3 Powers of Court**

In terms of section 87 of the NCA, the court has the power to either reject the debt counsellor's proposal, or to make an order declaring any credit agreement to be reckless and/or to make an order re-arranging the consumer's obligations. As pointed out above,<sup>217</sup> the magistrate's court granting an administration order does not have the power to make any order in respect of reckless credit granting. However, in other respects the court seems to have a wider discretion with regard to the granting of an administration order than is the case with regard to debt restructuring orders in terms of the NCA. In the case of administration, the court is empowered to grant an administration order providing for the administration of the debtor's estate and for the payment of his or her debts in instalments or otherwise, when the requirements in terms of

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211 *National Credit Regulator v Nedbank* (GNP) *supra* 310.

212 R 55(1)(k)(ii) MCR.

213 S 74B(e) MCA.

214 It is unlikely that the high court would be approached for debt restructuring but in such event it is submitted that r 6 Uniform Rules of the High Court will have to be used.

215 See *Wesbank v Schroder*, *Stolz v Wesbank and Schroder* (unreported case numbers EL1450/2011; ECD2485/2011).

216 *Supra* par 16.

217 Par 4 1 1.

section 74(1) of the MCA are satisfied.<sup>218</sup> Furthermore, section 74(1) stipulates that the order may be made subject to such conditions as the court may deem fit with regard to security, preservation or disposal of assets, realisation of movables subject to hypothec, or otherwise.<sup>219</sup> In terms of section 74C(1)(b) an administration order may *inter alia* specify the assets of the estate which may be realised by the administrator for the purpose of distributing the proceeds among creditors. Although a court ordering debt-restructuring in terms of the NCA may not order that assets be realised,<sup>220</sup> it is submitted that the court may reject<sup>221</sup> the debt counsellor's recommendation for debt restructuring if it is of the opinion that certain assets are luxurious items and unnecessary for the maintenance of the consumer and his or her dependants and that the consumer's over-indebtedness could be reduced if such assets be realised.<sup>222</sup>

Section 74 clearly envisages that all debt of a debtor under administration should be repaid and the court may thus not order that the debtor be granted a discharge of any of his or her debts.<sup>223</sup> A court who orders debt re-structuring in terms of the NCA is likewise not empowered to reduce interest or to impose a discharge for debt relief purposes.<sup>224</sup> The court has limited restructuring powers and can basically only postpone and/or extend payment dates.<sup>225</sup> However, notwithstanding objections and opposition by creditors,<sup>226</sup> the court, in the case of both administration and debt-rearrangement orders in terms of the NCA, is in actual fact empowered to force or "cram-down" a re-scheduling of debt upon creditors. With regard to debt-rearrangement in terms of the NCA the court is also empowered to order such rescheduling with regard to secured debt as would *inter alia* include obligations with regard to home mortgages. Although foreign systems are not discussed at large for the purposes of this article, it should be noted that this is quite revolutionary when compared with the position regarding Chapter 13 repayment plans in terms of the American Bankruptcy Code.<sup>227</sup> In a Chapter 13 reorganisation bankruptcy a payment plan is created and administered over a period of three to five years. With regard to secured

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218 S 74(1) MCA.

219 S 74(1)(b) MCA and see also s 74C(1)(b)(v) MCA.

220 It is submitted that the high court will be able to make such an order in terms of its inherent jurisdiction. Magistrates' Courts are creatures of statute and will not be able to do anything not specifically permitted by either the MCA or NCA.

221 S 87(1)(a) NCA.

222 Cf *Standard Bank v Panayiotts supra* par 77 and the discussion in par 3 2 above.

223 S 74U MCA.

224 Cf the position in the USA where the debtor, subject to certain exceptions, receives a discharge of all unsecured debt after completion of a Chapter 13 repayment plan – see s 1328(a) Bankruptcy Code.

225 S 86(7)(c)(ii) NCA.

226 See the discussion in par 4 5 above.

227 See in general iro Chapter 13, Ferriell & Janger *Understanding Bankruptcy* (2007) 641 *et seq.*

claims the court may only approve the plan if provision is made for payment of at least the amount equal to the value of the claim.<sup>228</sup> However, although secured claims in Chapter 13 are subject to modification, meaning that the debtor may change the amount and time of payments,<sup>229</sup> such modification is not allowed where the claim is secured only by “real property that is the debtor’s principal residence”.<sup>230</sup> Should the debtor therefore opt to retain the property and should he or she wish to deal with the debt in terms of a Chapter 13 plan, such plan must provide for payment of the regular mortgage instalments as originally agreed. The court is not empowered to reduce the instalments and extend the period of the agreement. However, any amount that is in arrears may be repaid over the duration of the plan.<sup>231</sup> With regard to administration orders, secured debt, insofar as it qualifies as *in futuro* debt, is excluded from the order and an order for the rescheduling of such debt is therefore not possible. However, the court may in its discretion, when calculating the amount to be paid to the administrator in terms of the order, make provision for the periodical payments which a debtor is obliged to make under a credit agreement in terms of the NCA as well as for the periodical payments under a mortgage bond.<sup>232</sup>

#### 4 8 Remedies for Non-compliance

The NCA contains no provisions in terms of which a credit provider may compel a consumer to comply with a section 138 consent order or with a court-induced restructuring order. Unlike the position with regard to administration,<sup>233</sup> the NCA also does not provide for an amendment or suspension of the order or for the lapsing or discharge thereof.<sup>234</sup> However, section 88(3) contains the sanction in this regard as the moratorium on enforcement is lifted allowing the credit provider to enforce his rights under the credit agreement in the event of such non-compliance.

#### 4 9 Duration and Discharge

As pointed out, neither administration nor debt review provides the debtor with a discharge of any of his or her debt and in theory a debtor may remain under administration and debt review indefinitely. Although a maximum time period is not stipulated for a re-arrangement in case of debt review, it seems unlikely that a consumer will be allowed to extend

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228 S 1325(a)(5) Bankruptcy Code.

229 S 1322(b)(2) Bankruptcy Code.

230 *Ibid.*

231 S 1322(c)(1) Bankruptcy Code.

232 See s 74C(2) MCA and the discussion in par 2 4 above.

233 See s 74Q MCA and the discussion in par 2 8 above.

234 An administration order may also not be granted if it is proved that any administration order was rescinded because of the debtor’s non-compliance therewith, unless the debtor proves that his non-compliance was not wilful – s 74B(5) MCA.

the period of repayment for too long or indefinitely. Even though debt review and a subsequent debt rearrangement are aimed at eventual satisfaction of debts, case law indicates a reluctance by courts to reschedule debts over unfeasibly long periods.<sup>235</sup> It thus appears that debt review in terms of the NCA is best suited to those instances where a consumer needs a “financial breathing space” of a year or so to recover financially.<sup>236</sup>

#### 4 10 Alternative Measures

Neither the administration nor the debt review process (before the debt counsellor or court) prohibits other debt relief measures such as a voluntary distribution based on a composition between a debtor and his or her creditor(s), or sequestration of the estate of a debtor.<sup>237</sup> In this regard it has been held that applications for administration constitute an act of insolvency for purposes of section 8 of the Insolvency Act<sup>238</sup> due to it evidencing an inability by the debtor to pay his debts.<sup>239</sup> The position relating to a request for debt review by a consumer seems unclear<sup>240</sup> but it is suggested that if a debt counsellor for instance informs a credit provider about such request it may amount to such an

235 In *Firstrand Bank v Olivier* 2009 3 SA 353 (SE) it was held that the purpose of the Act is, *inter alia*, to provide for the debt reorganisation of a person who is over-indebted, thereby affording that person the opportunity to survive the immediate consequences of his financial distress and achieve a manageable financial position.

236 See also iro administration *African Bank v Weiner (C) supra* 575 and the discussion in par 2 2 above.

237 See s 74R MCA with regard to administration. Debt review also does not, according to case law, create a bar to sequestration. In *Investec Bank Ltd v Mutemeri* 2010 1 SA 265 (GSJ) 274–277, Trengove AJ held that an application for compulsory sequestration did not amount to debt enforcement i/o the NCA (see s 130(1) NCA) and therefore did not preclude the applicant creditor from proceeding with an application for sequestration. See also *Firstrand Bank Ltd v Evans* 2011 4 SA 597 (KZD) and *Naidoo v Absa Bank supra* confirming the decision in *Mutemeri* and the discussion of *Naidoo* by Maghembe “The appellate division has spoken – sequestration proceedings do not qualify as proceedings to enforce a credit agreement under the National Credit Act 34 of 2005: *Naidoo v Absa Bank* 2010 4 SA 597” 2011 *PER* 171. See also Boraine & Van Heerden “To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgments” 2010 *PER* 84 for a detailed discussion of the *Mutemeri* case. When applying for voluntary surrender i/o the Insolvency Act and where a large portion of a debtor’s debt consists of credit agreements in terms of the NCA, it has also been held that such debtor should explain that he or she has considered debt review as a possible solution for his or her debt problems – see *Ex parte Ford* 2009 3 SA 376 (WCC). For a detailed discussion of *Ford* see Van Heerden & Boraine “The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of insolvency law” 2009 *PER* 161.

238 12 of 1976.

239 See *Volkscas Bank v Pietersen supra* 316; *Fortuin v Various Creditors supra* 573; *Ex Parte August supra* 271.

240 *Firstrand Bank Ltd v Evans supra* but cf *FirstRand Bank Ltd v Heinrich Janse van Rensburg*; *FirstRand Bank Ltd v Azelle Janse van Rensburg* (unreported case numbers 3846/2011; 3847/2011) (ECP) where the court ruled that the

act of insolvency if the requirements of section 8(g) of the Insolvency Act are met.

In case of administration it is highly unlikely, if at all possible, that a voluntary distribution will run concurrently with an administration order since the debtor must in principle disclose and deal with all his debts in the application and debts not included at that stage may also be added later during the execution of the administration procedure. In the case of debt review, debt counsellors in practice often propose a comprehensive repayment plan to creditors that also includes non-credit agreement debt. In this way a voluntary distribution may be used in tandem with the formal debt review process in terms of the NCA.

The provisions pertaining to debt review do not exclude an application for an administration order but although it seems unlikely that a consumer will end up under both procedures, it apparently happens in practice occasionally. However, this situation, if it is submitted, is undesirable not only due to the potential difficulty of administering both procedures simultaneously but also because of the duplication of costs that it would of necessity entail. In those instances where a debtor has debts that may be subject to debt review as well as other types of debt, he or she may thus rather have to consider a voluntary distribution to deal with such debt in conjunction with the debt review.

#### **4 11 Moratorium on Enforcement**

As indicated, being under debt review or complying with a voluntary debt rearrangement order as a section 138 consent order or with a court-ordered debt restructuring, creates a moratorium on enforcement of the credit provider's rights under the credit agreement. Non-compliance by the customer entitles the credit provider to proceed with enforcement subject to compliance with section 86(10) in respect of a pending debt review.<sup>241</sup>

Section 131 of the NCA provides for debt enforcement by repossession of goods by authorising the court to grant an attachment order with respect to property that is the subject of a credit agreement. However, while the debt review process before the debt counsellor is still pending and the credit agreement has not yet been terminated in terms of section 86(10), such attachment will in terms of section 88(3) not be allowed. Also, such repossession will not be allowed once a rearrangement agreement has been reached or a re-arrangement order in terms of section 87 has been granted, unless the consumer defaulted on any obligation in terms of the re-arrangement agreement or order.<sup>242</sup>

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initiation of debt review by the debtor (per se) does not amount to such an act of insolvency. See also Van Heerden in Scholtz par 11 7.

241 S 88(3) NCA.

242 S 88(3)(b)(ii) NCA.

However, it should be noted that the moratorium provided for by the NCA only applies to the enforcement of a credit provider's rights under a credit agreement in terms of the NCA. With regard to administration all debts are covered as section 74P(1) provides that no creditor shall have any remedy against the debtor or his property for collecting money, except where the debt pertains to a mortgage bond, or where the debt has been rejected by the court in terms of section 74B(2) or where the court grants leave to institute enforcement proceedings. With regard to credit agreement debt in terms of the NCA, it should be noted that section 74C(2)(b) excludes such debt from the administration order. However, the court may in its discretion refuse to make allowance for the periodical payments which the debtor is obliged to make under a credit agreement for the purchase of goods. Should the court refuse to make allowance for such payments, the creditor would not be able to enforce such debt and repossess the goods which are the subject matter of the relevant agreement, unless the court lifts the moratorium in terms of section 74P(1). However, the court may also, if the credit provider advises the administrator that he elects to demand immediate payment of the outstanding purchase price, authorise the seller to repossess the goods which are the subject matter of a credit agreement in terms of the NCA, to sell them and, if the net proceeds are insufficient to pay his debt in full, to lodge a claim with the administrator in respect of the balance of the purchase price still owing to him. Where the credit agreement was concluded after granting of the administration order, the same procedure applies, but the creditor will not be entitled to a dividend in terms of the administration order until all creditors who were creditors on the date of the administration order have been paid in full.<sup>243</sup>

#### **4 12 Position of Debtor**

A debtor under administration or debt review does not undergo a diminution of his status as is the position with sequestration. However, being under administration or debt review will obviously affect such debtor's credit worthiness.<sup>244</sup>

### **5 Conclusion**

It is a pity that the various state departments involved did not communicate properly about the reform of consumer debt relief measures. It is now about a decade after the first steps in the reform of the administration procedure were initiated and South Africa still does not have a proper alternative debt relief measure to sequestration. The legislature, when introducing the NCA in 2007, clearly also missed a golden opportunity for comprehensive reform of this area of our law. It

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<sup>243</sup> Ss74G(7)–(9) MCA read with s 74H(4) MCA and the discussion in par 2 5 above.

<sup>244</sup> Ito s 86(4)(b)(ii) NCA read with r 24(2) CR, a debt counsellor is obliged to notify all registered credit bureaux of an application for debt review. Credit bureaux are regulated by the NCA – see ss 70–73.

is for instance not clear if and how administration and debt review could operate in the same case.<sup>245</sup> The question also arises as to what purpose is served by having two co-existing procedures serving the same purpose, namely, to provide for a debt re-organisation measure in cases of over-indebtedness.

Whilst the debt review procedure is an attempt to address some of the shortcomings of the administration order – in particular with regard to the appointment requirements and regulation of the person responsible to facilitate this procedure – a major flaw regarding debt review remains that it caters only for certain types of debt regulated by the NCA. It thus lacks general application in this regard and, as is the case with administration, it also does not provide for some kind of a discharge in worthy cases. Administration and debt review are also not subject to a maximum rescheduling time which may cause the repayment period to be extended indefinitely.

Although the administration order may provide some assistance in certain instances, for example where the debt is not credit agreement debt in terms of the NCA or where debt review is ruled out because the credit provider has initiated a debt enforcement procedure, the procedure in itself is dated and recent events have indicated a number of serious deficiencies in the system that give rise to abuse of the procedure.<sup>246</sup> The number of recent court cases on this procedure is also indicative of its relative importance as an alternative to sequestration.

Although the non-statutory voluntary re-arrangement is not that popular in practice and of course creditors cannot be compelled to accept its terms, the newly adopted formal debt review in terms of the NCA has now provided a statutory alternative to this kind of work-out with regard to credit agreements in terms of the NCA.<sup>247</sup> The statutory procedure did not rule out an informal re-arrangement outside the ambit of the NCA but the non-statutory voluntary re-arrangement may be the preferred option in those instances where the consumer has credit agreements as well as other debts not regulated by the NCA.<sup>248</sup>

We are thus still faced by the reality that those debtors who can prove an advantage to creditors may in principle obtain a sequestration order and thereafter qualify for a statutory discharge following rehabilitation whilst such a benefit is not available to those debtors who cannot obtain a sequestration order. It is submitted that South African law needs a complete overhaul as regards its current debt-reorganisation measures. It is suggested that lawmakers should devise one single measure providing for all debt reorganisation cases. When devising this new measure, the positive and negative aspects pertaining to administration and debt review should be taken into account and it is suggested that

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245 Par 4 10 above.

246 Par 1 above and Boraine 2003 *De Jure* 217 230 *et seq.*

247 Par 3 3 2 2 above.

248 Par 4 10.

lawmakers should build on the existing and well-established system of debt counselling which, as opposed to administration, is currently strictly regulated by the NCR which was created by the NCA as regulatory body. The issue of distributions to creditors,<sup>249</sup> which is currently one of the major concerns with regard to administration, is also well regulated, as the NCR compels debt counsellors to use PDAs accredited by the NCR to effect the necessary distributions.

The above comparison<sup>250</sup> between administration and debt review, it is suggested, indicates that the main issues to be considered when devising the new debt re-organisation procedure are the following:

(a) *Limitations on relief.* There should be no monetary cap and all debt obligations, including judgment debts, should be covered. Furthermore, steps taken to enforce a debt should not bar a debtor from obtaining relief.<sup>251</sup> The new procedure should obviously provide for a discharge of debt and in this regard it is submitted that lawmakers should, in order to prevent abuse of the procedure, place a time limit on the frequency with which such discharge may be obtained.<sup>252</sup> Another issue that needs to be considered is the type of debtor who may qualify for relief. It is submitted that the legislature should consider extending the relief under the new measure to small juristic persons.<sup>253</sup>

(b) *Procedural issues.* The methods of access to relief and the procedure for the hearing in the case of administration are clearly described in the MCA and its rules.<sup>254</sup> The NCA on the other hand does not specifically prescribe the procedure to be followed or the information to be disclosed when bringing a debt review matter to court. Nor is the procedure for possible opposition of such application by creditors prescribed in any way. It is also not clear what exactly the procedure at the hearing in terms of section 87 entails.<sup>255</sup> As a whole the procedure may be regarded as cumbersome, costly and slow.<sup>256</sup> It is submitted that the procedural issues be addressed by first of all prescribing standard forms for the application and any possible opposition to such application.<sup>257</sup> Although many of the other uncertainties pertaining to the procedure before the court have been dealt with by the Supreme Court of Appeal in *National Credit Regulator v Nedbank*,<sup>258</sup> it is submitted that the legislator should also deal with these issues.<sup>259</sup> In accordance with the administration procedure it is submitted that the manner in which the hearing is to be conducted should be simplified and should *inter alia* provide

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249 Par 4 4 above.

250 Par 4 above.

251 See s 86(2) NCA and the discussion in par 4 1 1 above.

252 Par 4 1 1 above.

253 Par 4 1 2 above.

254 Par 2 2 & 2 3 above.

255 Par 4 7 1 & 4 7 2.

256 See *Wesbank v Schroder* referred to in par 4 7 2 above.

257 See the discussion in par 4 7 1 above.

258 *Supra*.

259 These issues include the uncertainties pertaining to the person who has *locus standi* to approach the court for debt restructuring, jurisdiction and the manner of service of the application – see par 4 1 2, 4 1 3 & 4 6 2 above.

for the possibility to interrogate the debtor with regard to his or her financial situation.<sup>260</sup>

(c) *Obtaining further credit.* For obvious reasons a debtor should be prevented from incurring further credit once debt relief has been granted to him or her.<sup>261</sup> However, since such limitation may have the result that the debtor may be denied credit indefinitely, it is submitted that such limitation would only be justifiable when provision is made for a maximum repayment period.

(d) *Powers of court.* One of the positive aspects pertaining to debt review, as opposed to administration, is the fact that the court, apart from being empowered to grant a debt re-arranging order, may also make certain orders pertaining to reckless credit granting. However, in other respects the court's powers are limited<sup>262</sup> and it is submitted that the new procedure should afford the court a wider discretion. So, for instance, the court should also be empowered to make an order for assets to be realised if, for example, it is of the opinion that it is not necessary for the maintenance of the debtor and his or her dependants and that it would reduce the debtor's over-indebtedness.<sup>263</sup> The court should also be able to grant a debt re-arrangement order that would afford the debtor a discharge of all remaining unsecured debt after completion of the repayment plan. With regard to secured debt it is submitted that the American example should be followed in terms of which secured creditors should at least receive the value of their security. With regard to housing loans debtors should be able to repay their arrears in terms of the payment plan, but the normal mortgage instalments should be continued with as originally agreed. Where the debtor continues with both these payments, foreclosure should not be possible.<sup>264</sup>

(e) *Non-compliance with court order.* Although the NCA addresses the issue of non-compliance by allowing the credit provider to continue with enforcement actions, it does not deal with the situation where the debtor experiences a change in circumstances during the period in which the order is in force, for example an increase in income or a temporary disability to pay instalments due to the debtor losing his or her job. It is submitted that the new procedure, in accordance with the position regarding administration,<sup>265</sup> should provide for the possibility that the order, depending on the circumstances, could in such instances be amended or suspended.

(f) *Moratorium on enforcement.* In principle the new procedure should provide for a moratorium on enforcement with regard to all debt obligations. However, in accordance with the position pertaining to administration, it is submitted that the court should be empowered to lift the moratorium if in the opinion of the court it would be justifiable in the circumstances.<sup>266</sup>

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260 Par 2 2, 2 3 & 4 7 2 above.

261 See s 88(5) NCA and the discussion in par 4 3 above.

262 Par 4 7 3 above.

263 See with regard to administration s 74C(1)(b)(i), 74K(1) & (2) MCA and the discussion in par 2 4 & 4 7 3 above.

264 Par 4 7 3 above.

265 See s 74Q MCA and the discussion in par 2 8 & 4 8 above. See also *Fortuin v Various Creditors supra* 576.

266 See s 74P(1) MCA and the discussion in par 4 11 above.