

# PRESENTATION TO THE RHLF WORKSHOP

## DEBT ENFORCEMENT IN TERMS OF THE NATIONAL CREDIT ACT, 2005 – A LEGAL PERSPECTIVE

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# DEBT ENFORCEMENT IN TERMS OF THE NATIONAL CREDIT ACT, 2005 (NCA)

- **Introduction**
- Debt enforcement – the playing fields have changed!
- Old procedures outdated
- Purpose:
  - Transparency
  - Attempt to assist consumer with a referral to debt counsellor/debt review



## DEBT ENFORCEMENT CONTINUED

- Credit providers must comply with strict procedures prior to debt enforcement
- Cannot enforce credit agreement without prior notice in terms of Section 129
- Enforcement includes:
  - Interdicts
  - Claims for specific performance
  - Claims for damages
  - Order in terms of Section 57/58 of the Magistrate's Court Act
  - Cancellation of credit agreement



# REQUIRED PROCEDURES BEFORE DEBT ENFORCEMENT (SECTION 129)

- (1) If the consumer is in default under a credit agreement, the credit provider:
  - (a) May draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
  - (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before –
    - (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
    - (ii) meeting any further requirements set out in section 130.



## CONTENTS AND INTENDED PURPOSE OF DEFAULT NOTICE

- Default notice must be in writing (word “may” is misleading, notice is mandatory)
- Referral to
  - Debt counsellor
  - Alternative dispute resolution agent
  - Consumer court; or
  - Ombud with jurisdiction
- Purpose.....for the parties to resolve any dispute arising from the credit agreement; or
- To agree upon a plan to bring outstanding payments up to date



## DEFAULT NOTICE AND THE ROLE OF THE COURT

- A court may not determine a matter unless it is satisfied that the default notice has been sent to the defaulting consumer
- If no notice given, result will be defences raised in court by the defaulting consumer (particularly on default judgement)



## DEBT PROCEDURE IN A COURT (SECTION 130)

- (1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and;
  - (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be;
  - (b) in the case of a notice contemplated in section 129(1) the consumer has;
    - (i) not responded to that notice; or
    - (ii) responded to the notice by rejecting the credit provider's proposals; and
  - (c) In the case of an installment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.

## DEBT ADMINISTRATION AND THE NCA?

- NCA has not replaced old debt administration provisions – Sections 57/58 of Magistrate’s Court Act
  - Section 57 – Admission of liability and undertaking to pay debt in installments or otherwise
  - Section 58 – Consent to judgment or to judgment and an order for payment of judgment debt in installments
- Procedures still available to consumers ....., however credit providers must give Section 129 notice prior to proceeding to debt administration in terms of Magistrate’s Court Act





## PROHIBITION ON FURTHER LITIGATION

- Court is prohibited from determining a matter where the consumer has approached
  - a debt counsellor for debt review; or
  - a consumer court or ombud with jurisdiction
- Court is further prohibited from determining a matter where the consumer has agreed and has acted in good faith on a proposal made by the credit provider (for debt restructuring)



## SECTION 86 – APPLICATION FOR DEBT REVIEW (DEBT COUNSELLOR)

- Consumer applies to debt counsellor for debt review (prescribed form) – have consumer declared over-indebted
- In terms of Section 86(4) – upon receipt of an application, debt counsellor is obligated to notify all credit providers listed in the application for debt review and every registered credit bureau
- In terms of Section 86(5) – debt counsellor upon receipt of an application, will require consumer –
  - To comply with any reasonable request by the debt counsellor to facilitate evaluation of consumer's state of indebtedness
  - To participate in good faith in negotiations designed to result in responsible debt rearrangement
- Must determine within prescribed manner and within the prescribed time –
  - Whether consumer is over-indebted?
  - Are credit agreements



## SECTION 86(7)

- If as a result of assessment, debt counsellor concludes:
  - Consumer is not over-indebted ... reject application
  - Consumer is not over-indebted but consumer is experiencing or is likely to experience difficulty satisfying obligations under credit agreements in a timely manner .....debt counsellor may recommend that consumer and credit provider agree on plan; or



## SECTION 86(7) CONTINUED

- Consumer is over-indebted, debt counsellor issues a proposal to Magistrate Court for an order:
  - Declaration that one or more of consumer's credit agreements are reckless;
  - That one or more of consumer's obligations are to be rearranged as follows:
    - Extend period of agreement
    - Reduce payments
    - Postpone payments
    - Recalculation of consumer's obligations



## SECTION 86(9)

- If debt counsellor rejects application, consumer may apply directly to Magistrate's court for appropriate relief
- Application directly to Magistrate's Court must be with the "leave of the Court"



# SECTIONS 86(10) AND (11)

- Section 86(10) – If a consumer is in default under a credit agreement that is subject to debt review, then credit provider can give notice to terminate debt review process
- Section 86(10) – window period of 60 days from date of application before credit provider can give notice to terminate review process
- Section 86(11) – if notice given by credit provider to terminate review, Magistrate’s Court can order credit provider to resume debt review on any conditions court deems just in the circumstances



# SECTION 87 – MAGISTRATE’S COURT REARRANGEMENT OF CONSUMER’S OBLIGATIONS

- Debt counsellor —————> proposal for appropriate order to court
- Consumer —————> application directly to court for appropriate orders
- Magistrate’s Court has hearing and either:
  - Rejects application
  - Declaration of credit agreement to be reckless
  - Order of rearrangement
  - Order both



# SECTION 88 – EFFECT OF DEBT REVIEW OR REARRANGEMENT ORDER

- If filed for debt review consumer cannot enter into any further credit agreements until final determination by
  - Debt counsellor
  - Court
  - Until rearrangement obligations are fulfilled





## SECTION 88(3) – EFFECT OF DEBT REVIEW OR REARRANGEMENT ORDER CONTINUED

- Once received notice of review by a debt counsellor or of court proceedings credit provider may not exercise or enforce by litigation any right or security under a credit agreement until:
  - Consumer is in default AND.....
  - Determination of application to debt counsellor or a final ruling by the court; or
  - Consumer defaults on any obligation in terms of an rearrangement either agreed or ordered by a court



# DEBT REVIEW PROCESS AND ITS EFFECT ON JUDICIAL PROCESS

- Court hearing the matter can adjourn the matter if there is a pending debt review
- Court can order debt counsellor to report directly to court and thereafter declare consumer to be over-indebted..... results in rearrangement of consumer's obligations



# DEBT ENFORCEMENT AND THE DEBT REVIEW PROCESS

- Controversial issue – effect Section 129 notice has on consumer’s ability to apply for debt review?
- One view – once a credit provider has served it’s Section 129 notice can a consumer only apply to a debt counsellor for purposes of requesting assistance in debt mediation process (i.e. prohibited from applying for debt review); or
- Alternative view (Preferred view) – only the commencement of legal proceedings (such as the issue of summons) and not the Section 129 notice would prevent a consumer from applying to a debt counsellor or a court for debt review



# CONCLUSION

- New playing field for debt enforcement
- Credit providers need to administer their debt portfolio's with proper due diligence
- Credit providers must prepare valid "pro-forma" Section 129 notices
- Non-compliance will result in defences becoming available to defaulting debtors .....will result in delays in recoveries!



THANK YOU!

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