

DEBT RELIEF FOR CONSUMERS – THE INTERACTION BETWEEN INSOLVENCY AND CONSUMER PROTECTION LEGISLATION (PART 1)

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SUMMARY

In March 2002 the Department of Trade and Industry established a task team to review the legislation that has an impact on consumer credit. This resulted in a detailed report containing proposals for a new regulatory framework for consumer credit. Subsequently, in June 2005 the National Credit Bill was tabled in Parliament. Measures aimed directly at resolving over-indebtedness in the form of debt re-arrangement are introduced by the Credit Bill. The report also highlighted weaknesses in the current insolvency legislation especially with regard to available debt relief measures for consumers. It should, however, be noted that the 2000 Insolvency Bill *inter alia* provides for an alternative to insolvency proceedings in the form of a pre-liquidation composition.

This article examines the interaction between current and proposed insolvency and consumer protection legislation with regard to debt relief measures for consumers. The question arises whether the current and the proposed debt relief measures, when introduced, will not overlap unnecessarily. Furthermore, the question whether these measures will provide adequate relief to deal with current demands is also addressed. The South African Law Reform Commission when proposing the pre-liquidation composition in the Insolvency Bill, did not indicate what its relationship should be with the administration order procedure in terms of section 74 of the Magistrates Courts' Act. The question is therefore whether a need for administration orders will still exist if the proposed legislation relating to the pre-liquidation composition is introduced. Lastly, as South African law does not offer debt relief to debtors who have no income and no assets, proposals by the Department of Trade and Industry in the United Kingdom for a non-court based scheme of debt relief aimed at such debtors (the so-called "NINA" cases) are investigated in order to supply guidelines for South African law reform in this regard.

It is submitted that the proposals in the Credit Bill on debt re-arrangement could assist debtors to manage their debt in certain circumstances. It is furthermore suggested that a combination of the proposed pre-liquidation composition and a modified administration order procedure could offer the necessary debt relief in

situations where a debtor, apart from his debt in terms of a credit agreement, also has other outstanding debts. Finally, it is submitted that the "NINA" scheme could offer some guidance for the reform of South African law regarding debt relief to debtors who have no income and no assets.

1 INTRODUCTION

In August 2004 the Department of Trade and Industry (hereinafter "the DTI") published a Policy Framework for Consumer Credit¹ and subsequently, in June 2005, tabled the National Credit Bill in Parliament.² According to section 3 of the Credit Bill, a purpose of the proposed legislation is to protect consumers *inter alia* by "addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations".³ In this regard the Credit Bill introduces measures directly aimed at resolving over-indebtedness in that it allows for debt re-arrangement if a consumer is over-indebted.⁴

According to the Policy Framework,⁵ the Credit Law Review⁶ highlighted serious weaknesses in the current insolvency legislation, particularly with reference to the available debt relief measures for consumers who are over-indebted. The Policy Framework⁷ notes that Government recognizes the need for implementing effective mechanisms to rectify these weaknesses and that the problems resulting from over-indebtedness should be dealt with in a holistic way. In this regard it should be noted that the South African Law Reform Commission had embarked on an investigation into the whole of the insolvency law as early as 1987. This investigation led to a variety of reports and eventually culminated in a draft bill in 2000.⁸ In this bill the Commission

¹ The Department of Trade and Industry South Africa *Consumer Credit Law Reform: Policy Framework for Consumer Credit* 2004 (hereinafter "Policy Framework").

² The National Credit Bill (hereinafter "the Credit Bill") was tabled in Parliament's Portfolio Committee on Trade and Industry on 2005-06-08. It will repeal the Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968.

³ S 3(f).

⁴ See the discussion in par 2.2 below.

⁵ 32.

⁶ This refers to a process of review of the legislation that has an impact on consumer credit. The task team, established by the DTI in March 2002 to do the review, also had to make proposals for a new regulatory framework for consumer credit. This resulted in a detailed report – see Policy Framework 8.

⁷ 32.

⁸ SA Law Commission Report Project 63 Draft Bill *Review of the Law of Insolvency* 2000 Vol 2 (hereinafter "the Insolvency Bill"). Also see Centre for Advanced Corporate and Insolvency Law – University of Pretoria *Final Report Containing Proposals on a Unified Act* January 2000. The last-mentioned report is based on the Insolvency Bill and recommends that the liquidation provisions of the Companies Act 61 of 1973 and the Closed Corporations Act 69 of 1984 as well as the insolvency provisions applicable to individuals and partnerships be incorporated in one consolidated act. As part of the broader project regarding insolvency law reform a research project aimed at the reform of the administration order procedure in terms of s 74 of The Magistrates' Courts Act was launched in July 2000 which culminated in an interim report presented to the Department of Justice and the Law Society in June 2002 – Centre for Advanced Corporate and Insolvency Law – University of Pretoria *Interim Research Report on the Review of Administration Orders in terms of Section 74 of the Magistrates' Courts Act 32 of 1944* May 2002 (hereinafter "Report on Administration Orders").

inter alia recommended that provision be made for an alternative to insolvency proceedings in the form of a pre-liquidation⁹ composition in section 74X of the Magistrates' Courts Act.¹⁰

The purpose of this article is to investigate the interaction between current and proposed insolvency and consumer protection legislation with regard to debt relief measures for consumers. The question arises whether the current measures and the proposed measures when introduced, will not overlap unnecessarily. As noted in the Report on Administration Orders¹¹ many people from previously disadvantaged communities are fast becoming part of the credit industry in some way or another. The Policy Framework points out that low-income consumers (who represent the majority of the population in South Africa) do not have access to reasonably priced credit, causing a large number of consumers to be over-indebted.¹² The question therefore also arises whether the existing and the proposed debt relief measures, when introduced, will provide adequate relief to deal with current demands. The Report on Administration Orders¹³ also pointed out that South African law does not offer any debt relief to debtors who have no assets and no income. In this regard it is interesting to note that the Department of Trade and Industry in the United Kingdom, in March 2005, issued a Consultation Paper¹⁴ that proposes a new scheme for debt relief aimed at people for whom the currently available debt solution procedures are inappropriate or effectively unavailable. The 2005 Consultation Paper presents proposals for a non-court based scheme of debt relief aimed at people who have no assets, a relatively low level of liabilities and no surplus income with which to come to an arrangement with their creditors (the so-called "NINA" cases).¹⁵

Paragraph 2 of this article examines the proposed mechanisms in the Credit Bill for resolving over-indebtedness. In the light of the stated purpose of this article specific attention will be given to the scope of application of the Credit Bill and its proposals on debt re-arrangement. Paragraph 1 in Part 2 briefly deals with the current South African debt relief measures, as well as the proposed pre-liquidation composition. In this regard it is important to note that the South African Law Reform Commission, when proposing the pre-liquidation composition, did not indicate what its relationship should be with the administration order procedure in terms of section 74 of the Magistrates'

⁹ Because uniform legislation dealing with all insolvency provisions is envisaged, the Insolvency Bill uses the term "liquidation" instead of "sequestration" where natural persons' estates are concerned.

¹⁰ 32 of 1944. See appendix 4 to the Insolvency Bill and the explanatory memorandum. See Roestoff and Jacobs "Statutêre Akkoord voor Likwidasië: 'n Toereikende Skuldenaarremedie?" 1997 *De Jure* 189; and Roestoff 'n *Kritiese Evaluasie van Skuldverligtingsmaatreëls vir Individue in die Suid-Afrikaanse Insolvensiereg* (LLD thesis, UP 2002) 423ff for a detailed discussion of the proposed procedure.

¹¹ 3.

¹² 12 and 13. Cf also *Report on Administration Orders* 3 noting that some South Africans can obtain credit from the mainstream financial institutions whilst the majority have to go to either informal money lenders ("loan sharks") or the so-called micro-lenders that grant small loans but at high interest rates.

¹³ 33.

¹⁴ Department of Trade and Industry *Relief for the Indebted – An Alternative to Bankruptcy* March 2005 (hereinafter "2005 Consultation Paper").

¹⁵ The "no income and no assets" cases.

Courts Act.¹⁶ The question therefore arises whether there will still be a need for administration orders if the proposed legislation relating to the pre-liquidation composition is introduced.¹⁷ Paragraph 2 in Part 2 investigates the recent developments in English insolvency law pertaining to debt solution procedures for the so-called “NINA” cases. The aim of this investigation is to give some direction to South African law reform regarding debt relief measures for this category of debtors. Paragraph 3 in Part 2 contains our conclusions.

2 DEBT RE-ARRANGEMENT IN TERMS OF THE CREDIT BILL

2.1 Field of application

It goes without saying that the proposed debt relief measures in the Credit Bill will only apply to a consumer¹⁸ who is a party to a credit agreement subject to the Credit Bill’s provisions. Therefore, the field of application of the Credit Bill needs to be determined.¹⁹

The Credit Bill, as a general rule, applies to basically every credit agreement made within, or having an effect within, the Republic.²⁰ The only qualification is that the parties to the credit agreement must be dealing at arm’s length. An agreement constitutes a credit agreement if it qualifies as a credit facility, credit transaction, credit guarantee or a combination thereof.²¹

An agreement constitutes a credit facility²² if a credit provider undertakes

- (a) to supply goods or services²³ or to pay an amount or amounts to a consumer;²⁴ and
- (b) to either
 - (i) defer the consumer’s obligation to pay any part of the cost of such goods or services or to repay to the credit provider any part of such amount; or
 - (ii) bill the consumer periodically for any part of such costs or amount; and

¹⁶ Report on Administration Orders 3.

¹⁷ Cf Report on Administration Orders 32 and 56.

¹⁸ S 1 contains a definition of “consumer”. In essence “consumer” iro a credit agreement to which the Credit Bill applies, means the party to whom goods or services are sold, to whom money is paid or credit granted *etc.*

¹⁹ Only an overview of the scope of application of the proposed legislation is provided.

²⁰ S 4(1). The exceptions to the general rule are discussed below.

²¹ S 8(1). Ito s 8(2) certain agreements do not qualify as credit agreements – see discussion below. The Credit Bill also provides for developmental and public interest credit agreements. See ss 10 and 11 respectively. For the sake of completeness, it needs to be mentioned that for purposes of the Credit Bill, every credit agreement is characterised as a small, an intermediate or large agreement – s 9.

²² S 8(3). Agreements contemplated in s 8(2) are excluded.

²³ The Credit Agreements Act does not apply to the rendering of services. The regulations giving effect to the Act’s application omit the rendering of services. The Usury Act, however, applies to the rendering of services on credit.

²⁴ Or on behalf of or at the direction of a consumer.

- (c) any charge, fee or interest is payable to the credit provider in respect of such agreement, deferred payment or amount billed and not paid within the time provided in the agreement.

The following agreements²⁵ constitute credit transactions:²⁶

- (a) *Pawn transactions*: These are agreements in terms of which one party advances money or grants credit to another and takes possession of goods as security for the money advanced or credit granted. Either the estimated resale value of the goods exceeds the value of the money advanced or credit granted or a charge, fee or interest is imposed. On expiry of a defined period the party who took possession of the goods as security is entitled to sell the goods and retain the proceeds of the sale in settlement of the consumer's obligations.²⁷
- (b) *Discount transactions*: These are agreements in terms of which goods or services are to be provided to a consumer over a period of time and where a lower and higher price is quoted for the goods or services. If the account is settled on or before a determined date, the lower price is payable. If payment occurs after that date, or is paid periodically during the period, the higher price(s) will apply.²⁸
- (c) *Incidental credit agreements*.²⁹ These entail outstanding account or prepaid transactions.³⁰ In terms of an *outstanding account agreement*, a statement of account is tendered for goods or services provided to the consumer and either or both of the following conditions apply:
- (i) a fee, charge or interest becomes payable if payment of any amount charged on the statement of account is deferred beyond a determined period or date; or
 - (ii) a lower or higher price is quoted for settlement of the account. If the account is settled on or before a determined date, the lower price applies. After that date, the higher price will be payable.³¹

A *prepaid transaction* means an agreement in terms of which goods or services are to be provided to a consumer over a period of time, and either or both of the following conditions apply:

- (i) a fee, charge or interest becomes payable if payment of any part of the price is deferred beyond a determined period or date or;
- (ii) the price of the goods or services may be paid by a single payment before a determined date or in instalments. If the price is paid in instalments, the total amount to be paid is greater than the price if paid by a single payment.³²

²⁵ Excluding s 8(2) agreements.

²⁶ S 8(4).

²⁷ S 1.

²⁸ *Ibid.*

²⁹ The Credit Bill only has limited application to incidental credit agreements – see s 5.

³⁰ S 1.

³¹ *Ibid.*

³² *Ibid.*

- (d) *Instalment agreements* entail the sale of movable property where payment of the price or part thereof is deferred and is to be paid by periodic payments. Possession and use of the property is transferred to the consumer immediately. The contract however either contains an ownership reservation clause in terms whereof the consumer only becomes the owner of the property once the contract is fully complied with or it allows for ownership to pass to the consumer immediately subject to a right of the credit provider to re-possess the property if the consumer fails to satisfy all his/her financial obligations under the agreement.³³
- (e) *Mortgages or secured loans*.³⁴ A secured loan is an agreement (excluding an instalment agreement) in terms of which a person advances money or grants credit to another and retains or receives a pledge or cession of the title to movable property or other thing of value as security for all amounts due under that agreement.
- (f) *Leases*: These transactions are defined as leasing transactions of movable property. Payment for the possession or use of the property is made on an agreed or determined periodic basis during the life of the agreement or deferred in whole or in part for any period during the life of the agreement. Interest, fees or other charges are payable to the credit provider in respect of the agreement or deferred amount. At the end of the term of the agreement, ownership of the property either passes to the consumer absolutely or upon satisfaction of specific conditions set out in the agreement.³⁵
- (g) Other agreements (except a credit facility or credit guarantee) in terms of which payment of an amount owed by one person to another is deferred and a fee, charge or interest is payable to the credit provider in respect thereof.³⁶

An agreement³⁷ constitutes a credit guarantee if a person in terms thereof undertakes or promises to satisfy upon demand any obligation of another

³³ *Ibid.* This is the typical instalment sale transaction to the Credit Agreements Act. It seems that, in contrast with the definition of instalment sale transaction in the Credit Agreements Act, the Credit Bill's definition only provides for periodic payments and not for a lump sum payment in future as well. See with regard to the payment requirement in the definition of instalment sale transaction in the Credit Agreements Act *Ukubona 2000 Electrical CC and Abb South Africa (Pty) Ltd v City Power Johannesburg (Pty) Ltd* 2004 6 SA 323 (SCA) and the discussion thereof by Renke "Credit Agreements: Lump Sum Payment or Payments by Way of Instalments in Future Required? Ukubona 2000 Electrical CC and ABB South Africa (Pty) Ltd v City Power Johannesburg (Pty) Ltd (case no 155/03 (SCA))" 2004 *THRHR* 710.

³⁴ S 1. "Mortgage" is defined in s 1 as "a mortgage of immovable property". Loans secured by a mortgage of immovable property therefore also qualify as credit transactions.

³⁵ See s 1. Ito the definition of leasing transaction in s 1 of the Credit Agreements Act, if the goods automatically become the property of the lessee at the expiration of the lease, the transaction is not regarded as a lease – see Grové and Otto *Basic Principles of Consumer Credit Law* (2002) 11; and Otto "Commentary" 1991 *Credit Law Service* par 7.

³⁶ S 8(4)(f).

³⁷ Excluding s 8(2) agreements.

consumer in terms of a credit facility or a credit transaction to which the Credit Bill applies.³⁸

The Credit Bill applies to a (proposed) credit agreement irrespective of whether the credit provider³⁹

- (a) resides or has its principal office within the Republic or not;⁴⁰
- (b) is an organ of state;⁴¹
- (c) is an entity controlled by an organ of state;
- (d) is an entity created in terms of any public regulation; or
- (e) is the Land and Agricultural Development Bank.⁴²

As was stated above, the Credit Bill only applies to credit agreements between parties dealing at arm's length. In the following instances the parties are not dealing at arm's length (and logically the Credit Bill does not apply to these agreements):

- (a) A shareholder loan or other credit agreement between a juristic person,⁴³ as consumer, and a person who has a controlling interest in that juristic person, as credit provider.⁴⁴
- (b) A credit agreement between natural persons who are in a familial relationship and are co-dependent on each other or one is dependent upon the other.⁴⁵
- (c) Any other arrangement in which each party is not independent of the other.⁴⁶

³⁸ S 8(5). Also see s 4(2)(c) which makes it clear that the Credit Bill applies to a credit guarantee only to the extent that it applies to a credit facility or credit transaction in which the credit guarantee is granted.

³⁹ Defined in s 1 *inter alia* as the party who supplies goods or services or advances money or credit to another under different types of credit agreements. It includes a person who acquires the rights of a credit provider under a credit agreement after it has been entered into.

⁴⁰ S 4(3)(a). Once the Credit Bill applies to a credit agreement, it continues to apply to that agreement even if a party thereto ceases to reside or have its principal office in the Republic. It also applies in relation to every transaction, act or omission under such agreement, whether it occurs within the Republic or not – s 4 (4)(a) and (b).

⁴¹ As defined in s 239 of the Constitution of the Republic of South Africa, 1996 – see s 1. The scope of application of consumer protection legislation is thus extended. The Credit Agreements Act (see s 2(1)) does not apply to agreements where credit is provided by the state.

⁴² S 4(3)(b). The Credit Bill, however, does not apply if the credit provider is the Reserve Bank of South Africa – (s 4(1)(c)). The Usury Act does not apply to Land and Agricultural Development Bank transactions – see s 15.

⁴³ "Juristic person", for purposes of the Credit Bill (s 1), includes a partnership, association or other body of persons corporate or unincorporated. It also includes a trust if there are three or more individual trustees or if the trustee itself is a juristic person.

⁴⁴ And *vice versa* – see s 4(2)(b).

⁴⁵ S 4(2)(b).

⁴⁶ And consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction. Arrangements of a type that has been held in law to be between parties who are not dealing at arm's length are included as well – s 4(2)(b).

Credit agreements in terms of which the consumer is a juristic person,⁴⁷ the state or an organ of state⁴⁸ are not subject to the provisions of the Credit Bill.⁴⁹ The same applies to credit agreements in terms of which the credit provider is the Reserve Bank of South Africa.⁵⁰

If a person sells goods or services and accepts, as full payment for those goods or services, a cheque⁵¹ upon which payment is subsequently refused, the resulting debt owed to the seller by the issuer of the cheque does not constitute a credit agreement for any purpose of the Bill.⁵² Consequently the Bill does not apply.

The following agreements do not constitute credit agreements and therefore the Credit Bill does not apply to such agreements:⁵³

- (a) A policy of insurance.
- (b) A lease of immovable property.
- (c) A transaction between a *stokvel*⁵⁴ and a member of that *stokvel*.⁵⁵

For the sake of completeness it must be mentioned that certain parts of the Credit Bill have only a limited application.⁵⁶

The Credit Bill will apply to a far greater number of contracts than the legislation it is going to repeal.⁵⁷ It can be concluded that, except for the few

⁴⁷ Whose asset value or annual turnover, at the time the agreement is made (*ie* the value stated as such by that juristic person at the time it applies for or enters into that agreement (s 4(2)(a)) equals or exceeds a certain threshold value (still to be) determined by the Minister *ito* s 7(1). S 4(1)(b) also excludes a large agreement (see fn 21) *ito* which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the said threshold value. In instances where the Bill does apply to (proposed) credit agreements *ito* which the consumer is a juristic person, it only has limited application – s 6.

⁴⁸ See fn 41.

⁴⁹ S 4(1)(a).

⁵⁰ S 4(1)(c).

⁵¹ Or similar instrument.

⁵² S 4(5)(a). The situation is the same where the seller accepts, as full payment for the goods or services, a charge by or on behalf of the buyer against a credit facility *ito* which a third person is the credit provider, and that credit provider subsequently refuses the charge for any reason. The resulting debt owed to the seller by the issuer of that charge does not constitute a credit agreement – s 4(5)(b) and (6).

⁵³ S 8(2).

⁵⁴ Defined in s 1 as a formal or informal rotating financial scheme with entertainment, social or economic functions. It consists of two or more persons in a voluntary association each of whom has pledged mutual support to the others towards the attainment of specific objectives. It also establishes a continuous pool of capital by raising funds by means of the subscription of its members, grants credit to and on behalf of members, provides for members to share in profits from, and to nominate management of, the scheme and relies on self-imposed regulation to protect the interest of its members.

⁵⁵ In accordance with the rules of that *stokvel*.

⁵⁶ Certain parts of the Credit Bill do not apply to all the credit agreements provided for in ss 8-11, *eg* the part in the Credit Bill concerning over-indebtedness and reckless credit does not apply to all credit agreements – see par 2.2.

⁵⁷ *Eg* the Credit Bill will apply to the rendering of services on credit. The Credit Agreements Act does not. The application of the Credit Bill is furthermore not restricted to certain movable goods as is the position *ito* the Credit Agreements Act.

transactions specifically excluded from its ambit,⁵⁸ the Credit Bill (or a part or parts thereof) will apply to all credit agreements whether small or large and irrespective of their form, the type of movable goods (or services) or the amount of money involved.⁵⁹ This naturally means that a large group of consumers are going to enjoy the protection of the debt relief measures provided for by the Credit Bill. Included hereunder are the low-income consumers who currently have to *inter alia* turn to micro-lenders for credit.⁶⁰ Thereby a single law that treats transactions equivalently is established.⁶¹

2.2 Debt relief measures in the Credit Bill

Before considering the measures in the Credit Bill aimed at resolving over-indebtedness of consumers,⁶² it is important to take note that the part in the Credit Bill dealing with over-indebtedness and reckless credit and which contains the proposed debt relief measures, does not apply to credit agreements in respect of which the consumer is a juristic person.⁶³ A consumer is over-indebted in terms of the Credit Bill if he or she will not be able to satisfy in a timely manner all the obligations under all the credit agreements to which he or she is a party.⁶⁴

The application procedure for debt review is set out in section 86. A consumer may apply⁶⁵ to a debt counsellor to be declared over-indebted.⁶⁶ The debt counsellor must then determine whether the consumer appears to be over-indebted (and if such a determination was sought by the consumer,

⁵⁸ See discussion above.

⁵⁹ As long as it is concluded at arm's length. Regarding credit agreements where the consumer is a juristic person, the situation is unclear at present as the Minister still has to determine the threshold value – see fn 47.

⁶⁰ The contracts to which money is advanced to these consumers constitute credit facilities. Also see Roestoff and Renke "Solving the Problem of Overspending by Individuals: International Guidelines" 2003 *Obiter* 2 and 20-21.

⁶¹ See Policy Framework 23.

⁶² The Credit Bill also contains important measures to prevent over-indebtedness of consumers. See in this regard Renke and Roestoff "The Consumer Credit Bill – A Solution to Over-indebtedness?" 2005 *THRHR* 115.

⁶³ S 78(1).

⁶⁴ S 79(1). The determination whether the consumer is over-indebted or not, is done on the preponderance of available information at the time the determination is made. Regard is had to the consumer's financial means, prospects and obligations and probable propensity to satisfy in a timely manner all his or her obligations under all his or her credit agreements taking into consideration the consumer's history of debt repayment. "Financial means, prospects and obligations" *inter alia* include income or a right to receive income, shared income with an immediate family or household member (if obligations are mutually borne as well) *etc* – s 78(3). When making such determination, the settlement value at that time of *eg* the credit facility is used – s 79(3).

⁶⁵ If a credit provider under a credit agreement has proceeded to take steps to s 129 to enforce the agreement, an application to s 86 may not be made *iro* such agreement – s 86(2).

⁶⁶ A court may also declare and relieve over-indebtedness. If it is alleged in any court proceedings in which a credit agreement is being considered that the specific consumer is over-indebted, the court may refer the matter directly to a debt counsellor with a request to evaluate the consumer's circumstances and to make a recommendation to the court to s 86(7) – see s 85(a). Alternatively the court may declare that the consumer is over-indebted and make any order contemplated in s 87 – see s 85(b).

whether any of the consumer's credit agreements appears to be reckless).⁶⁷ If the debt counsellor reasonably concludes that the consumer is not over-indebted the application must be rejected.⁶⁸ If, however, the conclusion is reached that the consumer is over-indebted, the debt counsellor may recommend that the Magistrate's Court make an order that one or more of the consumer's credit agreements be declared to be reckless credit and/or that one or more of the consumer's obligations be re-arranged.⁶⁹ Debt re-arrangement may be done by extending the period of the agreement and thereby reducing the amount of each payment due accordingly or by postponing the dates on which payments are due under the agreement for a specified time.⁷⁰ It may also be done by recalculating the consumer's obligations because of contraventions of certain parts⁷¹ of the Credit Bill.⁷²

In terms of section 87(1), the Magistrate's Court, acting on the debt counsellor's proposal⁷³ or the consumer's application,⁷⁴ must conduct a hearing.⁷⁵ The court may then either reject the recommendation or application as the case may be⁷⁶ or make an order⁷⁷ declaring any credit agreement to be reckless credit⁷⁸ and/or re-arranging the consumer's obligations.⁷⁹

The effects of debt review or of a debt re-arrangement order or agreement are far-reaching. In terms of section 88(1) a consumer who has applied to a

⁶⁷ S 86(6).

⁶⁸ Even if a particular credit agreement was found to be reckless at the time it was entered into – s 86(7)(a). The consumer, with leave of the Magistrate's Court, may then apply directly to the said court. S 86(9). If the debt counsellor however concludes that the consumer is nevertheless experiencing, or is likely to experience, difficulty to satisfy all his or her obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and his or her credit providers voluntarily consider and agree to a plan of debt re-arrangement – s 86(7)(b). If all the parties accept the proposal, the debt counsellor must record the proposal in the form of an order and if it is consented to by all involved, file it as a consent order ito s 138. Otherwise the debt counsellor must refer the case to the Magistrate's Court with the recommendation – s 86(8)(a) and (b).

⁶⁹ S 86(7)(c).

⁷⁰ Or by doing both – s 86(7)(c)(ii).

⁷¹ Contravention of Part A ch 5 (unlawful agreements and provisions), Part B ch 5 (disclosure, form and effect of credit agreements) and Part A ch 6 (collection and repayment practices).

⁷² S 86(7)(c)(ii). If a consumer is in default under a credit agreement that is being reviewed ito s 86, the credit provider iro that agreement may give notice to terminate the review. This may be done at any time at least 60 business days after the date on which the consumer applied for debt review – s 86(10). If such a credit provider then proceeds to enforce the agreement ito Part C ch 6 (debt enforcement by repossession or judgment), the Magistrate's Court hearing the matter may order that the debt review resume (on any conditions considered to be just in the circumstances – s 86(11)).

⁷³ Ito s 86(8)(b). S 87(1) omits to provide for the situation where the recommendation is made by the debt counsellor to the Magistrate's Court ito s 86(7)(c). It is submitted that s 87 applies to such a situation as well.

⁷⁴ Ito s 86(9).

⁷⁵ The Magistrate's Court has to take into account the proposal or application and the consumer's financial means, prospects and obligations – see fn 64.

⁷⁶ S 87(1)(a).

⁷⁷ S 87(1)(b).

⁷⁸ In which event the court may also make an order ito s 83(2) or (3) – see discussion below.

⁷⁹ In any manner contemplated in s 86(7)(c)(ii) – see fn 70-72. The National Credit Regulator may not intervene before the Magistrate's Court in these matters – s 87(2).

debt counsellor to be declared over-indebted⁸⁰ must not incur any further charges under a credit facility or enter into any further credit agreement (other than a consolidation agreement)⁸¹ with any credit provider until

- (a) the debt counsellor rejects the application;⁸²
- (b) the court has determined that the consumer is not over-indebted;⁸³ or
- (c) the court having made an order (or the consumer and credit providers having made an agreement) re-arranging the consumer's obligations, all the consumer's obligations under the re-arranged credit agreements are fulfilled.

If, however, the consumer fulfils obligations by way of a consolidation agreement,⁸⁴ he or she must not enter into further credit agreements⁸⁵ until all the obligations under the consolidation agreement are fulfilled.⁸⁶

A credit provider who⁸⁷ receives a notice of an application for debt review or of court proceedings as contemplated in section 83⁸⁸ or 85,⁸⁹ may not exercise or enforce by litigation⁹⁰ any right or security under that credit agreement until

- (a) the consumer is in default under the credit agreement; and
- (b) the debt counsellor rejects the application;⁹¹ or
- (c) the court has determined that the consumer is not over-indebted;⁹² or
- (d) all the consumer's obligations under re-arranged credit agreements are fulfilled,⁹³ or
- (e) the consumer defaults on any obligation in terms of a re-arrangement.⁹⁴

⁸⁰ Ito s 86(1) or who has alleged in court that the consumer is over-indebted.

⁸¹ The Credit Bill contains no definition of "consolidation agreement". In practice it usually entails an agreement into which debts under various agreements are consolidated under one agreement. The debtor to the consolidation agreement will then only be liable to one creditor to settle the consolidated debt.

⁸² And the prescribed time period for direct filing into s 86(9) has expired without the consumer having so applied – see fn 68.

⁸³ Or has rejected the debt counsellor's proposal or the consumer's application.

⁸⁴ Ito s 88(1) or (2).

⁸⁵ Or incur any further charges under a credit facility.

⁸⁶ Unless the consumer again fulfilled the obligations by way of a consolidation agreement – s 88(2).

⁸⁷ Subject to s 86(9) and (10) – see fn 68 and 72.

⁸⁸ See below.

⁸⁹ See fn 66.

⁹⁰ Or other judicial process.

⁹¹ And the prescribed time period for direct filing into s 86(9) has expired without the consumer having so applied.

⁹² Or has rejected a debt counsellor's proposal or the consumer's application.

⁹³ Ito a court order or an agreement with the consumer's credit providers, unless the consumer has fulfilled the obligations by way of a consolidation agreement.

⁹⁴ Agreed upon or ordered by a court or the Tribunal (referring to the National Consumer Tribunal – see ch 2 Part B) – s 88(3). This sudden reference to the Tribunal is strange. It is submitted that it is incorrect as the whole of Part D dealing with over-indebtedness and reckless credit thus far only contains references to the Magistrate's Court.

If a credit provider enters into a credit agreement⁹⁵ with a consumer who has applied for a debt re-arrangement while the re-arrangement still subsists, all or part of that new credit agreement may be declared reckless.⁹⁶ If a consumer applies for or enters into a credit agreement contrary to the provisions of section 88, the part in the Credit Bill dealing with over-indebtedness and reckless credit⁹⁷ does not apply to such agreement.⁹⁸

It is submitted that the provisions in the Credit Bill dealing with reckless credit,⁹⁹ may provide indirect debt relief to consumers. Before a credit agreement is entered into, a credit provider has to take reasonable steps to assess a proposed consumer's

- (a) general understanding and appreciation of the risks and costs of the proposed credit and of the consumer's rights and obligations under a credit agreement;
- (b) debt re-payment history;¹⁰⁰
- (c) existing financial means, prospects and obligations.¹⁰¹ If, at the time that the agreement was made, the credit provider failed to conduct such an assessment,¹⁰² the credit agreement is reckless.¹⁰³ The agreement will also be reckless if the credit provider, having conducted the assessment, entered into the credit agreement even though the preponderance of information available to him or her indicated that the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed agreement¹⁰⁴ or that entering into the credit agreement would make the consumer over-indebted.¹⁰⁵

A credit provider is prohibited from entering into a reckless credit agreement with a prospective consumer.¹⁰⁶ In any court proceedings in which a credit agreement is being considered, the court may declare that the credit agreement is reckless.¹⁰⁷ If it is declared that the credit agreement is reckless in terms of section 80(1)(a)¹⁰⁸ or 80(1)(b)(i)¹⁰⁹ the court may make

⁹⁵ Other than a consolidation agreement ito s 88.

⁹⁶ Irrespective of whether the circumstances in s 80 apply or not – see below – s 88(4).

⁹⁷ Ch 4 Part D.

⁹⁸ S 88(5). The consumer thus forfeits the protection afforded by the said part's provisions.

⁹⁹ Ss 80-84. These provisions, and any other provisions of ch 4 Part D to the extent that they relate to reckless credit, do not apply to *inter alia* pawn transactions, incidental credit agreements or any temporary increase in the credit limit under a credit facility – s 78(2).

¹⁰⁰ As a consumer under credit agreements.

¹⁰¹ And if a consumer has a commercial purpose for applying for credit, whether there is a reasonable basis to conclude that such purpose may prove to be successful – s 81.

¹⁰² Irrespective of what the outcome of the assessment might have been.

¹⁰³ S 80(1)(a).

¹⁰⁴ S 80(1)(b)(i).

¹⁰⁵ S 80(1)(b)(ii). The criteria set out in s 80(1)(a) and (b) as they existed at the time the agreement was made must be applied when the determination is made – s 80(2). When making the determination, the credit limit of any credit facility at that time is considered (or certain settlement values when dealing with pre-existing or new credit guarantees) – s 80(3).

¹⁰⁶ S 81(3).

¹⁰⁷ S 83(1).

¹⁰⁸ See fn 103.

an order¹¹⁰ setting aside all or part of the consumer's obligations under such agreement or suspending the force and effect of the agreement.¹¹¹ When, however, the agreement is found to be reckless in terms of section 80(1)(b)(ii), the court must further consider whether the consumer is over-indebted at the time of the court proceedings. If so, the court may make an order suspending the force and effect of that agreement¹¹² and re-structuring the consumer's obligations under any other credit agreement¹¹³ in accordance with section 87.¹¹⁴

During the period that the force and effect of a credit agreement is suspended

- (a) the consumer is not required to make any payment in terms of the agreement;
- (b) no interest, fee or other charge under the agreement may be charged; and
- (c) the credit provider may not enforce any of his or her rights under the agreement.¹¹⁵

After the suspension of a credit agreement ends, all the rights and obligations of the credit provider and the consumer under the agreement are revived and are fully enforceable.¹¹⁶ No amount may be charged to the consumer by the credit provider with respect to any interest, fee or other charge that could not be charged during the suspension.¹¹⁷

Finally it has to be mentioned that, in recovery of debts proceedings in terms of chapter VIII and execution proceedings in terms of chapter IX¹¹⁸ of the Magistrates' Courts Act, the court may determine the matter only if the court is satisfied that certain sections of the Credit Bill¹¹⁹ have been complied with and that the matter is not already pending before *inter alia* a debt counsellor or alternative dispute resolution agent.¹²⁰ If the court in any proceedings contemplated in section 130 of the Credit Bill¹²¹ *inter alia* determines that the credit agreement was reckless, the court has to make an

¹⁰⁹ See fn 104.

¹¹⁰ Ito s 83(2).

¹¹¹ In accordance with s 83(3)(b)(i) until a date determined by the court.

¹¹² Ito s 83(3)(b)(i).

¹¹³ Ito s 83(3)(b)(ii).

¹¹⁴ See the discussion above. When making an order ito s 83(3), the court must consider the consumer's current means and ability to pay his or her current financial obligations (that existed at the time the agreement was made) and the expected date when any such obligation will be fully satisfied, assuming the consumer makes all required payments in accordance with any proposed order – s 83(4).

¹¹⁵ Or under any law iro the agreement, despite any law to the contrary – s 84(1).

¹¹⁶ Except to the extent that a court may order otherwise – s 84(2)(a).

¹¹⁷ S 84(2)(b).

¹¹⁸ Ch IX of the Magistrates' Courts Act includes s 74 of the said Act which deals with the granting of administration orders - see par 1 in Part 2 for a discussion of administration as a debt relief procedure.

¹¹⁹ Eg s 127 dealing with surrender of the goods.

¹²⁰ S 130(3).

¹²¹ S 130 deals with debt procedures in the Magistrate's Court. These procedures include the procedures ito ch VIII and IX of the Magistrates' Courts Act.

order contemplated in section 83¹²² of the Credit Bill.¹²³ If it is determined that the credit agreement is subject to a pending debt review,¹²⁴ the court may adjourn the matter, pending a final determination of the debt review proceedings or order the debt counsellor to report directly to the court.¹²⁵

It is interesting to note that the English Consumer Credit Act¹²⁶ enables a court to make so-called time orders.¹²⁷ Such an order may provide for the payment of a sum owed¹²⁸ by means of such instalments and at such times as the court deems reasonable¹²⁹ and/or for the remedying by the debtor of any breach of contract (other than non-payment of money) within a specified period.¹³⁰ Skene,¹³¹ however, points out that applications for time orders are uncommon *inter alia* due to the fact that such orders may be inappropriate in situations of multiple debt.

¹²² See the discussion above.

¹²³ S 130(4)(a).

¹²⁴ Ito ch 4 Part D of the Credit Bill. See the discussion above.

¹²⁵ Thereafter the court may make an order contemplated in s 85(b) discussed above (fn 66). The court may also order the debt counsellor (or the Tribunal – see the comment in fn 94) to discontinue the debt review proceedings, and make an order in terms of s 85(b) – s 130(4)(c). If the court determines that the credit agreement is suspended or subject to a debt re-arrangement order or agreement, and that the consumer has complied with such order or agreement, the court has to dismiss the matter – s 130(4)(e).

¹²⁶ Of 1974. This Act has a similar purpose to consumers, and concerns the control of traders who provide credit or supply goods on hire or hire-purchase and their transactions.

¹²⁷ Ss 129 and 130. A debtor may apply for such order in certain circumstances. Such an order may also be made in an action brought by the creditor to enforce an agreement regulated by the Act or to recover possession of goods or land to which the agreement relates.

¹²⁸ Ito an agreement regulated by the Act.

¹²⁹ Having regard to the means of the debtor – s 129(2)(a). In the case of *inter alia* a hire-purchase agreement, such a time order may deal with sums which will only become payable in future – see s 130(2).

¹³⁰ S 129(2)(b).

¹³¹ In a paper entitled: "Forgiving our Debtors: A Scottish Perspective on a Fresh Start for Debtors" April 2004 *INSOL International Academics' Group Meeting* 3.