

Short notes on:

THE CASE OF DEBT REVIEW- CAN CONSUMER EXIT DEBT REVIEW EARLY?

Introduction

When Consumers are over-indebted, they can use the Debt Review mechanism provided by the National Credit Act 34 of 2005 (NCA) to restructure their debts as long as the Consumer is a natural person and the NCA applicable.¹ In terms of Section 79(1)(a) and (b) of the NCA, a Consumer is over-indebted when he/she is unable to satisfy in a timely manner all his/her obligations under all credit agreements taking into account his/her financial means, prospects, obligation and debt repayment history.²

What is Debt Review?

Debt Review is a debt relief mechanism whereby the Consumer's debt situation is assessed by a Debt Counsellor and restructured in terms of a Court Order until the Consumer settles all obligations to creditors or receives clearance certificate from the Debt Counsellor to expunge the Consumer's record on the Credit Bureau.³

Importantly, it serves as moratorium against any enforcement of credit agreements which are subject to the review.⁴ Consumers under review cannot incur more credit until issued with a clearance certificate.⁵

Court Ordered Debt Review vs Voluntary Debt Review

Court Ordered Debt Review

In terms of Section 85(a) and (b), a Court Ordered Debt Review takes place in any court proceedings in which a credit agreement is being considered and it is alleged that the Consumer is over-indebted. The Court may refer the matter directly to a Debt Counsellor to conduct an assessment and make recommendations to the Court to declare the consumer over-indebted or not.⁶

¹ Section 78(1) of the National Credit Act No. 34 of 2005 (NCA).

² No. 34 of 2005.

³ <https://www.debtbusters.co.za/faq/what-is-debt-review/> (accessed 05 September 2019)

⁴ <https://nationaldebtadvisors.co.za/faq/must-all-debt-review-clients-go-to-court/> (accessed 05 September 2019)

⁵ <https://www.businesslive.co.za/money/2019-09-03-no-court-can-release-you-from-debt-review/> (Accessed 05 September 2019).

⁶ No. 34 of 2005.

Voluntary Debt Review

This is when a Consumer voluntarily applies for a Debt Review to a Debt Counsellor before a Section 129 Notice and Summons is served upon the Consumer.⁷ In this case, the Consumer will have to provide comprehensive information about his/her debt situation to the Debt Counsellor.⁸ Upon the conclusion of the assessment, the Debt Counsellor must then make recommendation as to whether the Consumer is not over-indebted or is not yet over-indebted but will likely become so in the near future or is over-indebted.⁹

If the Debt Counsellor recommends that the Consumer is not over-indebted, his/her application must be rejected, and the consumer must then apply to the Court for further debt restructuring. If the Consumer is not yet over-indebted, the Debt Counsellor can attempt a voluntary debt rearrangement agreement between the Consumer and his/her credit providers. Therefore, if all credit providers consent to the restructuring, the agreement is filed at court as a consent order.

If the Debt Counsellor recommends that the Consumer is over-indebted, the Debt Counsellor must refer the matter to court with a recommendation to restructure one or several credit agreements. Only the Court can declare a consumer over-indebted.

And finally, when the court has declared that a Consumer is in fact over-indebted, it will proceed to restructure the Consumer's debt by way of different orders, with the effect of:

- a. "Extending the settlement period;
- b. Reducing the size of each repayment;
- c. Postponing during a certain period the dates upon which certain payments are due
- d. Recalculating the Consumer's obligation because of contraventions of Chapter 5 or of Chapter 6."¹⁰

Can Consumer exit Debt Review Early?

According to a recent Judgment by full bench of the Gauteng High Court, the Courts no longer have power to release consumers early from Debt review merely because they can show on a preponderance of possibilities that they are no longer over-indebted.¹¹

⁷ Section 86(2) of the National Credit Act.

⁸ Section 86(1) of the National Credit Act

⁹ Section 86(7) of the National Credit Act

¹⁰ Section 86(7)(c) of the National Credit Act.

¹¹ <https://www.businesslive.co.za/money/2019-09-03-no-court-can-release-you-from-debt-review/> [Accessed 05 September 2019].

This Judgment is a major setback for those Consumers with a Debt Review Court Order because this means they are bound and must settle all the debts subject to debt review first before they can be released. Alternatively, “pay off all your short-term debts plus catch up on the arrears on your home loan or any other long-term loans and revert to paying the original instalments.”

Consumers are advised that even if their financial situation has improved, not even a High Court will order such early exit thereof, but that does not mean that they are prohibited from paying creditors extra in with an aim of early exit.

However, for Consumers whose Applications for Debt Review have not been made an Order of Court can avoid this Debt Review predicament by presenting to the Magistrate Court additional and new information about their improved financial situation. And the Magistrate upon considering the information before the Court, and conducting hearing, he/she has the discretion to decide whether or not to grant the Debt Review Order.

Conclusion

This article demonstrates that our Courts have no power to grant early exit or exit from Debt Review as envisaged by Legislature in the NCA. Consumers are therefore warned that the improvement of their financial situation will not release them early from Debt Review and they should expect to be in the process paying up their debts or manage to get a clearance certificate.

For you Credit Agreement matters, seek advice from an expert at SchoemanLaw Inc.