

Registration of debt counsellors

44. (1) A natural person may apply to be registered as a debt counsellor.

(2) A person must not offer or engage in the services of a debt counsellor in terms of this Act, or hold themselves out to the public as being authorised to offer any such service, unless that person is registered as such in terms of this Chapter. 25

(3) In addition to the requirements of section **46**, an applicant for registration as a debt counsellor must—

(a) satisfy any prescribed education, experience or competency requirements, or 30

(b) be in a position to satisfy within a reasonable time such requirements as the National Credit Regulator may determine as a condition of the applicant's registration.

Over-indebtedness

79.(1) A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's —

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(a) financial means, prospects and obligations; and

(b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.

(2) When a determination is to be made whether a consumer is over-indebted or not, the person making that determination must apply the criteria set out in subsection (1) as they exist at the time the determination is being made.

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(3) When making a determination in terms of this section, the value of—

- (a) any credit facility is the settlement value at that time under that credit facility; and
- (b) any credit guarantee is—
 - (i) the settlement value of the credit agreement that it guarantees, if the guarantor has been called upon to honour that guarantee; or
 - (ii) the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor.

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Reckless credit

80. (1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)—

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- (a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or
- (b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that—
 - (i) the consumer did not generally understand or appreciate the consumer’s risks, costs or obligations under the proposed credit agreement; or
 - (ii) entering into that credit agreement would make the consumer over-indebted.

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(2) When a determination is to be made whether a credit agreement is reckless or not, the person making that determination must apply the criteria set out in subsection (1) as they existed at the time the agreement was made, and without regard for the ability of the consumer to—

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- (a) meet the obligations under that credit agreement; or
- (b) understand or appreciate the risks, costs and obligations under the proposed credit agreement,

at the time the determination is being made.

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(3) When making a determination in terms of this section, the value of—

- (a) any credit facility is the credit limit at that time under that credit facility;
- (b) any pre-existing credit guarantee is—
 - (i) the settlement value of the credit agreement that it guarantees, if the guarantor has been called upon to honour that guarantee; or
 - (ii) the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor; and
- (c) any new credit guarantee is the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor.

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Prevention of reckless credit

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81. (1) When applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section.

(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess—

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- (a) the proposed consumer’s—
 - (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
 - (ii) debt re-payment history as a consumer under credit agreements;

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(iii) existing financial means, prospects and obligations; and

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.

(3) A credit provider must not enter into a reckless credit agreement with a prospective consumer. 5

(4) For all purposes of this Act, it is a complete defence to an allegation that a credit agreement is reckless if—

(a) the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section; and 10

(b) a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment.

Assessment mechanisms and procedures 15

82. (1) Subject to subsections(2)(a) and (3), a credit provider may determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under section 81, provided that any such mechanism, model or procedure results in a fair and objective assessment.

(2) The National Credit Regulator may— 20

(a) pre-approve the evaluative mechanisms, models and procedures to be used in terms of section 81 in respect of proposed developmental credit agreements; and

(b) publish guidelines proposing evaluative mechanisms, models and procedures to be used in terms of section 81, applicable to other credit agreements. 25

(3) Subject to subsections(2)(a) and (4), a guideline published by the National Credit Regulator is not binding on a credit provider.

(4) If the Tribunal finds that a credit provider has repeatedly failed to meet its obligations under section 81, or customarily uses evaluative mechanisms, models or procedures that do not result in a fair and objective assessment, the Tribunal, on application by the National Credit Regulator, may require that credit provider to— 30

(a) apply any guidelines published by the National Credit Regulator in terms of subsection (2)(b); or

(b) apply any alternative guidelines consistent with prevailing industry practice, as determined by the Tribunal. 35

Court may suspend reckless credit agreement

83. (1) Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, the court may declare that the credit agreement is reckless, as determined in accordance with this Part.

(2) If a court declares that a credit agreement is reckless in terms of section 80(1)(a) or 80(1)(b)(i), the court may make an order— 40

(a) setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or

(b) suspending the force and effect of that credit agreement in accordance with subsection (3)(b)(i). 45

(3) If a court declares that a credit agreement is reckless in terms of section 80(1)(b)(ii), the court—

(a) must further consider whether the consumer is over-indebted at the time of those court proceedings; and 50

(b) if the court concludes that the consumer is over-indebted, the court may make an order—

- (i) suspending the force and effect of that credit agreement until a date determined by the Court when making the order of suspension; and
 - (ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.
- (4) Before making an order in terms of subsection (3), the court must consider— 5
- (a) the consumer's current means and ability to pay the consumer's current financial obligations that existed at the time the agreement was made; and
 - (b) the expected date when any such obligation under a credit agreement will be fully satisfied, assuming the consumer makes all required payments in accordance with any proposed order. 10

Effect of suspension of credit agreement

84. (1) During the period that the force and effect of a credit agreement is suspended in terms of this Act—
- (a) the consumer is not required to make any payment required under the agreement; 15
 - (b) no interest, fee or other charge under the agreement may be charged to the consumer; and
 - (c) the credit provider's rights under the agreement, or under any law in respect of that agreement, are unenforceable, despite any law to the contrary. 20
- (2) After a suspension of the force and effect of a credit agreement ends— 20
- (a) all the respective rights and obligations of the credit provider and the consumer under that agreement —
 - (i) are revived; and
 - (ii) are fully enforceable except to the extent that a court may order otherwise; and 25
 - (b) for greater certainty, no amount may be charged to the consumer by the credit provider with respect to any interest, fee or other charge that were unable to be charged during the suspension in terms of subsection (1)(b).

Court may declare and relieve over-indebtedness

85. Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may— 30
- (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or 35
 - (b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

Application for debt review

86. (1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted. 40
- (2) An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement. 45
- (3) A debt counsellor—
- (a) may require the consumer to pay an application fee, not exceeding the prescribed amount, before accepting an application in terms of subsection (1); and

- (b) may not require or accept a fee from a credit provider in respect of an application in terms of this section.
- (4)** On receipt of an application in terms of subsection (1), a debt counsellor must—
- (a) provide the consumer with proof of receipt of the application;
 - (b) notify, in the prescribed manner and form—
 - (i) all credit providers that are listed in the application; and
 - (ii) every registered credit bureau.
- (5)** A consumer who applies to a debt counsellor, and each credit provider contemplated in subsection (4)(b), must—
- (a) comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement; and
 - (b) participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.
- (6)** A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time—
- (a) whether the consumer appears to be over-indebted; and
 - (b) if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.
- (7)** If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that—
- (a) the consumer is not over-indebted, the debt counsellor must reject the application, even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into;
 - (b) the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement; or
 - (c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders—
 - (i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and
 - (ii) that one or more of the consumer's obligations be re-arranged by—
 - (aa) extending the period of the agreement and reducing the amount of each payment due accordingly;
 - (bb) postponing during a specified period the dates on which payments are due under the agreement;
 - (cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
 - (dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.
- (8)** If a debt counsellor makes a recommendation in terms of subsection (7)(b) and—
- (a) the consumer and each credit provider concerned accept that proposal, the debt counsellor must record the proposal in the form of an order, and if it is consented to by the consumer and each credit provider concerned, file it as a consent order in terms of section 138; or
 - (b) if paragraph (a) does not apply, the debt counsellor must refer the matter to the Magistrate's Court with the recommendation.
- (9)** If a debt counsellor rejects an application as contemplated in subsection (7)(a), the consumer, with leave of the Magistrate's Court, may apply directly to the Magistrate's Court, in the prescribed manner and form, for an order contemplated in subsection (7)(c).

(10) If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to—

- (a) the consumer;
- (b) the debt counsellor; and
- (c) the National Credit Regulator,

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at any time at least 60 business days after the date on which the consumer applied for the debt review.

(11) If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the Magistrate's Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.

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Magistrate's Court may re-arrange consumer's obligations

87. (1) If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86(8)(b), or a consumer applies to the Magistrate's Court in terms of section 86(9), the Magistrate's Court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means, prospects and obligations, may—

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- (a) reject the recommendation or application as the case may be; or
- (b) make—
 - (i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) or (3), if the Magistrate's Court concludes that the agreement is reckless;
 - (ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii); or
 - (iii) both orders contemplated in subparagraph (i) and (ii).

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(2) The National Credit Regulator may not intervene before the Magistrate's Court in a matter referred to it in terms of this section.

Effect of debt review or re-arrangement order or agreement

88. (1) A consumer who has filed an application in terms of section 86(1), or who has alleged in court that the consumer is over-indebted, must not incur any further charges under a credit facility or enter into any further credit agreement, other than a consolidation agreement, with any credit provider until one of the following events has occurred:

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- (a) The debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) has expired without the consumer having so applied;
- (b) the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application; or
- (c) a 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 credit agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.

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(2) If a consumer fulfils obligations by way of a consolidation agreement as contemplated in subsection (c), or this subsection, the effect of subsection (1) continues until the consumer fulfils all the obligations under the consolidation agreement, unless the consumer again fulfilled the obligations by way of a consolidation agreement.

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(3) Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until—

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- (a) the consumer is in default under the credit agreement; and
- (b) one of the following has occurred:
 - (i) **An** event contemplated in subsection (1)(a) through (c); or
 - (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.

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(4) If a credit provider enters into a credit agreement, other than a consolidation agreement contemplated in this section, with a consumer who has applied for a debt re-arrangement and that re-arrangement still subsists, all or part of that new credit agreement may be declared to be reckless credit, whether or not the circumstances set out in section 80 apply. 10

(5) If a consumer applies for or enters into a credit agreement contrary to this section, the provisions of this Part will never apply to that agreement.