CIRCULAR 7 – CHECKLIST FOR DEBT RE-ARRANGMENT APPLICATIONS - UPDATED

TO:	DEBT COUNSELLORS
FROM:	MR. L. RABOTAPI (REGISTRAR)
RE:	MOTION COURT PROCESS – CHECKLIST FOR DEBT RE-ARRANGEMENT APPLICATIONS - UPDATED
DATE:	7 May 2018

Dear Debt Counsellors,

1. BACKGROUND

This is the seventh circular we are issuing in respect of the motion court process to adjudicate on Debt Re-arrangement Applications (DRA).

Circular 1 titled *Interim measures to address delays in the processing of debt re-arrangement applications filed with the National Consumer Tribunal (NCT)* dated 3 August 2015, was issued by e-mail on 7 August 2015.

Circular 2 titled *Circular re motion court proceedings* dated 14 August 2015, was issued by e-mail on 14 August 2015.

Circular 3 titled *Debt re-arrangement motion courts* dated 17 August 2015, was issued by e-mail on 17 August 2015.

Circular 4 titled *Motion court process guideline to debt counsellors* dated 18 September 2015, was issued by e-mail on 21 September 2015.

Circular 5 titled *New consent order template* dated 2 November 2015 was issued by e-mail on 2 November 2015.

Circular 6 titled *Checklist for Debt Re-arrangement Applications* was issued on 30 January 2017

2. CHECKLIST FOR DEBT RE-ARRANGEMENT APPLICATIONS

This is an update on circular 6 that was issued previously. It appears from applications received that certain debt counsellors require further clarification on the previous circular issued. All additions to this circular are indicated in bold.

Debt counsellors can use this document as a checklist to ensure that their applications will be considered. If any of the documents listed below are not included in the application then the order may be refused or the application referred back to the debt counsellor.

All the documents (application form, proposal, acceptance letters etc.) that appear on the application brought to motion court must be the exact same documents that were served on all the credit providers when the application was filed with the NCT. The debt counsellor cannot and must not prepare any new documents when bringing the application to motion court. The only new document that will appear on the application to motion court is the proof that the application was served on the credit providers.

The list below reflects the documents that must be on the application served on the credit provider (except the proof of service which will naturally not form part of those documents) and therefore attached to the application.

If any of the documents are dated after the date of service then they could not have been sent to the credit provider and will therefore not be accepted.

To enable the Tribunal member to assess the application as quickly as possible the documents must further be attached in the order indicated (1 to 11)-

(1) Consent order **(attached separately to the application – must not be stapled or pinned to the main application)**

(a) This is the final order that will be signed by the Tribunal member. **No other signature must appear on this order. Only the Tribunal member signs this order.**

(b) The Debt counsellor must use the template provided by the NCT. No other format will be accepted.

(c) **The basic principle is that the loan repayment payment information on the consent order must match the loan repayment information on the acceptance letters in every respect.**

(d) **Do not insert a date on the consent order to be signed by the Tribunal member. The Tribunal member will insert the date by hand.**

(e) **Ensure there is sufficient space on the consent order for the Tribunal member to sign – as per the NCT template provided**

(2) Proof of service

(a) Proof that the entire application was served on all the credit providers. Will usually be a copy of the e-mail sent to the credit providers with the application as an attachment.
The date on which the email was sent to all the credit providers must clearly appear on the e-mail. The email must clearly indicate that the application for a section 138 order has been filed with the NCT and that the application is now being served on the credit providers. The correct email addresses for all the credit providers must appear on the e-mail. The application must clearly appear as an attachment on the e-mail. The e-mail must clearly indicate the names and Identity Number of the consumer.

Short service - The application allows for a period of 15 business days for a credit provider to file an objection to the application. The application can therefore not be considered until a period of 15 business days have elapsed from the date when the application was served/sent to the credit providers. Do not submit an application to motion court until the 15 business days have elapsed.

(3) Copy of Identity Document

(a) Clear and legible copy of the Consumer's identity document **or identity card**

(4) Power of attorney form

(a) Form signed by the consumer/s confirming that that the debt counsellor can act on their behalf in applying for the debt re-arrangement order and can sign the application and repayment agreement on their behalf.

(b) If there are two consumers on the application then the power of attorney form must be signed by both consumers **or there must be two separately signed power of attorney forms**.

(c) The form must clearly indicate the names of the consumer/s, **their identity numbers** and the date on which it was signed.

(d) **If the consumer's signature was attached by electronic means then a full and detailed explanation of how the signature was obtained must be attached to the application. The Tribunal must be satisfied that the consumer saw the actual form he/she signed. See Circular 1 of February 2018 issued by the Chairperson of the Tribunal for further detail in this regard.**

(e) **The form must clearly grant specific permission to the debt counsellor to sign the debt review application on behalf of the consumer/s.**

(f) **Only a natural person can register as a debt counsellor. The form must therefore grant power of attorney to a specific debt counsellor and their full names must be reflected (cannot grant power of attorney to a debt counselling firm or company). Only the debt counsellor who has the power of attorney indicated on the form can apply for the consent order – no other debt counsellor's name may appear as the applicant.**

(5) Acceptance letters

(a) The **signed** letter from each credit provider accepting the repayment proposal made by the debt counsellor. The signature may be electronic.
The letters must appear on the application or be filed in the exact same order as they appear on the consent order.

(b) **An email from a debt counsellor to a credit provider stating that, unless the credit provider responds to the proposal it will be deemed to have been accepted, will <u>not</u> be considered as an accepted proposal.**

(6) Draft consent order

(a) This draft order must be signed by the consumer/s or by the Debt counsellor on behalf of the consumer/s (if there is a power of attorney on the application).

(7) Repayment proposal sent to credit providers

(a) A **signed and dated** copy of the form 16 proposal sent to the credit providers, that also lists the credit providers and the repayments proposed.

(8) Income and expenditure statement

(a) Form setting out the income and expenditure of the Consumer **and the amount available for payment to creditors.** Normally this information forms part of the Form 16 that is sent to the credit providers.

(9) NCT application form (Section 138 form)

(a) Form must be fully completed, **dated** and signed by the debt counsellor.

(10) Consent to e-mail service letters

(a) Copies of the standard letter from each credit provider confirming that they consent to service by e-mail.

This consent often also appears in the certificate of balance sent by a credit provider – in this case a separate consent to service need not be attached for that credit provider.

(11) Proof of fee payment

(a) Proof that the R200 fee was paid to the NCT. Usually a copy of the EFT payment made to the NCT account **together with a list of the names and identity numbers of the consumers applicable.**

3. <u>COMMON PROBLEMS WITH APPLICATIONS</u>

The following is examples of checks performed by the Tribunal members and the common problems experienced – which may result in the application being refused or returned to the debt counsellor for corrections. An example of a properly completed order is attached to this circular.

(1) Order template as provided by the NCT must be used. Must reflect the case number on each page, page numbering etc.

(2) The case number appearing on the order must match the case number on the application or the notice of complete filing.

(3) The name and identity number of the consumer in the order must match the information on the consumer's ID document. **Names then surname of the consumer must appear on the consent order (not surname and then names).**

In instances where a married consumer has not formally changed her surname – the surname as it appears on her identity document must reflect on the order – not the married surname.

(4) The names and the number of credit providers listed on the order must match the number and names on the acceptance letters or the Form 16 proposal. All the credit providers listed in the proposal must accept the proposal. If any one credit provider does not accept the proposal then the order will be refused.

(5) The current outstanding balance, payment period, annual interest, monthly instalment and fees/insurance reflected on the order must match the acceptance letters.

(6) The outstanding balance reflected on the consent order must match the acceptance letter. If the balance is not reflected in the acceptance letter then it must match the balance reflected in the Form 16 proposal or in the certificate of balance. **The certificate of balance must then be inserted in the application directly after the acceptance letter to make it easier for the Tribunal member to check**. Mr Price and Old Mutual Finance are examples of credit providers that do not generally reflect the outstanding balance in their acceptance letter.

(7) If the acceptance letter states that the monthly payment is cascading then the word "Cascading" must appear below the monthly instalment amount in the order. Acceptance letters from FNB often contain a reference to the instalment amount being cascading.

(8) The **complete and legally registered business** name of the credit provider reflected in the acceptance letter must match the name reflected in the order exactly – i.e. "First National Bank, a division of First Rand Bank Limited", "JDG Trading (Pty) (Ltd) on behalf of Electric Express" etc.

4. CITATION OF PARTIES

The credit provider's correct company name must appear on the order – not the agent or the debt collection agency. The name of the agent can appear in brackets after the credit provider's name if necessary – "Truworths (Agent for credit provider – Consumer Friend)". Only the name of the credit provider must appear as a party on the order – not the type of loan. For example – do not reflect:

> **"Woolworths Financial Services (Pty) Ltd**
> **(Personal loan)"** **1st Credit Provider**

The credit provider name reflected for each loan in the table must match the name of the credit provider listed as a party to the order. For example - If the name "Edcon Ltd" is reflected as the credit provider then this name must appear in the table for the applicable loan. Any further detail can appear in brackets after the name, for example – "Edcon Ltd (Jet)"

5. INTEREST RATE(S)

The interest rates on the order and acceptance letter must not exceed maximum interest rates allowed by the NCA. The date of the acceptance letter will be relevant to determine the maximum rate that was applicable at the time. The interest rate formula in the NCA regulations changed on 6 May 2016 – the new formula allows for a maximum interest rate of 28% as from that date. Only loans in the order of less than R8000 and a repayment period not exceeding 6 months can reflect a higher interest rate. **The current maximum interest rate on unsecured credit agreements as from 29 March 2018 is 27.50% per annum.**

Applications which contain an interest rate exceeding the maximum rate will be refused. The debt counsellor will be required to lodge an entirely new application and again pay the fee once a satisfactory interest rate has been agreed to.

A higher interest rate will only be permitted if the original credit agreement agreed to clearly states that this higher interest rate is fixed for the period of the loan. A copy of

the original agreement must then be attached to the application to show the fixed interest rate agreed to.

6. MONTHLY SERVICE FEES

The monthly service fees indicated on the acceptance letter must also appear on the order. The monthly service fees must not exceed the amount allowed by the NCA – currently R60 excluding vat. The order must only reflect fees that appear in the acceptance letter. Fees that appear on the certificate of balance etc. must not be reflected on the order. If the acceptance letter does not reflect any fees then they must also not appear in the order. **If the acceptance letter reflects fees and further clearly states that the insurance/fees are already included in the monthly instalment then the words "(Included in monthly instalment)" must be typed in after the insurance/fee amount reflected on the order.**

7. INSURANCE PREMIUMS

If the fees/insurance amounts are reflected on the acceptance letter but the letter does not state that the fees/insurance amounts are included in the instalment, then merely reflect these fees/insurance amounts on the order.

If the acceptance letter is unclear as to whether or not the insurance is included then regard it as excluded.

Some Credit Provider(s) vow that the insurance amount reflected on their letter is included in the monthly instalment. Debt Counsellors need be certain as to whether this is the case with any specific application or not. It may not be that there is one size fits all practice among credit providers.

8. SIGNATURES ON ACCEPTANCE LETTERS

Every acceptance letter must be signed by a person on behalf of the credit provider.

9. CONCESSION PERIOD

If the payment acceptance on the loan is only applicable for a certain period then this must be clearly stated in the order under the repayment period column i.e. On Nedbank home loans it will often state that the concession period is applicable for 60 months only. The words "60 month concession period only" must then appear in the column indicating the repayment period.

If the full term of the payment period is also reflected in the letter then this must be reflected on the order as well – for example "(60 month concession period only. Full term 240 months)". Nedbank letters often contain this information.

Some credit providers use the phrase "Concession period" as a standard inclusion in their letters. This phrase must then be added to the instalment amount in the order for those loans – FNB letters are an example of this.

If the acceptance letter from the credit provider reflects cascading payments then all the instalments and periods as contained in the acceptance letter must appear in the order. The order must reflect the accepted repayment arrangement as contained in the acceptance letter exactly.

10. ACCOUNT NUMBERS

If the acceptance letter indicates additional information related to the account number then this information must also be reflected on the consent order. For example – FNB letters often reflect - "Account number 1232322332233 (Previously 3354345544)" This information must be reflected on the order exactly as per the letter. Direct Axis often includes an additional account number – i.e. "12322343 (DGB 233444D)" This additional information must also be reflected on the consent order.

11. ACCOUNTING SYMBOLS

The order must reflect all the "R" and "%" symbols where applicable. However, where the symbols are reflected in the top of the relevant column, these symbols need not be reiterated in the column against each figure as it goes without saying that the column head already indicates whether its Rands or percentages.

Amounts must be reflected clearly and legibly with spaces or commas between thousands and hundreds where applicable – i.e. "R112 233.23" or "R112,233.23" not "R112233,23"

12. INCOME AND EXPENDITURE STATEMENTS

The income and expenditure statement **will be assessed by the Tribunal member to confirm** whether the monthly surplus amount the consumer has available is sufficient to pay the total monthly amount for all the loans.

The consumer's age may be assessed to confirm whether the loan repayment period will extend until a period when the consumer may already be retired or unable to work. There is no fixed principle in this regard but an application which requires the consumer to still be employed into their 70's or 80's may well be refused as unreasonable.

All the interest rates on the consent order are fixed interest rates. If the acceptance letter states that the interest rate is variable or subject to the applicable contractual terms then this must be clearly reflected on the order – i.e. "6.70% (Variable)" or "10.00% (variable, subject to contractual terms)". Edcon acceptances generally use the phrase "Variable interest rate" in all their letters – the word "variable" must therefore be added after the interest rate amount.

13. PRESENTATION

The consent order is an order of the Tribunal. It must look professional, neat and tidy. The alignment, spacing, font must be correct. Use the same font throughout the

document as per the template provided. The names of the credit providers and all the parties must be properly aligned and spaced.

While the draft order is owned by the parties (especially the Debt Counsellor); once that draft order is confirmed by the Tribunal, it becomes an order of the Tribunal. So, the standards of the Tribunal apply.

14. TRIBUNAL MEMBER DISCRETION

Tribunal members have a judicial discretion to grant or refuse applications. Tribunal members will further exercise their judicial discretion to verify and consider any information relating to the application.

The fact that orders may sometimes be granted, despite the application not fully complying with this circular, does not imply or mean that it will always occur. Applications must fully comply with each and every aspect of this circular. These are the standards required and need to be observed.

Corrections/Additional information required from Tribunal Members –

Should a Tribunal Member request additional information, make corrections on the order, raise a query or require clarity on any issue, a return date will be indicated on the allocation form for the debt counsellor to provide the required information or corrected order. Should the information not be provided or the order corrected by the required date, the application will be refused.

15. TRIBUNAL CASE LAW REFERENCES

The Tribunal has issued a number of judgments relating to debt review applications. See www.saflii.org for all NCT judgments.

The most relevant cases can be summarised as follows –

Botha v Nedbank and others (NCT/63362/2016/165(1)NCA) [2016] – Applicant applied for a variation of a consent order based on a later acceptance letter from a credit provider for a lower installment. The later acceptance letter was dated after the order was granted. The application was brought previously and refused. The applicant brought the same application again. It was held that the previous judgment granted was final and a second application could not be brought again on the same facts.

Nedbank Ltd v Marumo and Others (NCT/7641/2013/165(1)(P)NCA) [2013] ZANCT 35 (22 October 2013) - Sec 138 order rescinded due to the credit provider not having agreed to the proposal made by the debt counsellor

Charles and Another v Absa Bank Limited and Others (NCT/11206/2013/165(1)(P)NCA) [2014] ZANCT 17 (20 May 2014) - Order refused due to the draft consent order not being attached to the application

Krige and Another v Direct Axis and Others (NCT/7267/2012/148(1)(P)NCA) [2013] ZANCT 27 (3 September 2013) – Tribunal found that members can request any information relating to an application, including information pertaining to whether the consumer is able to afford the agreed repayments. The application for a consent order can further be refused on the basis that the consumer cannot afford the repayments agreed on.

De Souza v Standard Bank of South Africa Limited (NCT/9176/2013/165(1)(P)NCA) [2013] ZANCT 44 (11 December 2013) – A change in the consumer's financial position does not form a basis for a variation of rescission of a consent order. (The NCA however now does provide for certain circumstances where a consumer may apply to a debt counsellor for a clearance certificate – Sec 71 (1) of the NCA.)

Moleme v Wesbank Limited (NCT/8589/2013/165(1) (P) NCA) [2013] ZANCT 47 (20 November 2013) – Tribunal found that one cannot add loan accounts which were previously omitted from the application. If the original application for the consent order omitted to include certain loans one cannot vary the order and include these loans at a later stage.

Cane v Standard Bank Ltd and Others (NCT/7637/2013/165) [2013] ZANCT 37 (30 October 2013) – The consumer had already settled most of his debts before the order was granted. He was no longer in financial difficulty at the time of the application. The Tribunal found that the order had been erroneously applied for by the debt counsellor and was therefore rescinded.

Absa Bank Limited v Zulu and Others (NCT/17150/2014/165) [2015] ZANCT 7 (23 February 2015) – Absa applied for the order to be rescinded on the basis that the consumer was not paying the debt in accordance with the order and had voluntarily withdrawn from debt review. Tribunal found that there is no basis in sec 165 for rescinding the order under these circumstances. One cannot voluntarily withdraw from debt review once an order has been made. (It is submitted that Sec 88(3)(b)(ii) of the NCA provides for this situation – the credit provider may commence litigation or enforcement of the loan agreement if the consumer does not comply with the order of the court or Tribunal. Therefore the order does not have to be rescinded.)

Nedbank Limited v Mbili and Others (NCT/17149/2014/165) [2015] ZANCT 6 (23 February 2015) – Nedbank applied for a variation of the original repayment structure agreed to. The new structure would result in the debt being paid within 33 months as opposed to the 79 months originally agreed to. The Tribunal refused the application as Nedbank could not provide a basis for such a variation in terms of section 165 of the NCA.

Van Vuuren v Nedbank Limited and Others (NCT/14495/2014/148(1)(P) NCA) [2014] ZANCT 39 (8 September 2014) – The Tribunal commented on the application of section 103(5) of the NCA (the so called statutory in duplum rule). The Tribunal commented that section 103(5) does not apply to the agreed loan repayment in a debt rearrangement consent order.

Lindecke v Nedbank Limited and Others (NCT/14498/2014/148(1)(P) NCA) [2014] ZANCT 31 (2 September 2014) – The Presiding member refused the application for a consent order on the basis that the credit provider was not properly described in the draft consent order. On appeal, the Tribunal found that the refusal could be set aside. Further, any problems with the description of the credit provider could reasonably be solved by a directive or query to the applicant. See also *Pettenburger- Perwald v JDG Trading (Pty) Limited and Others (NCT/17838/2014/148(1)(P)) [2015] ZANCT 1 (11 February 2015)*

SA Taxi Development Finance (Pty) Ltd v Jaeme and Another (NCT/5621/2012/165(1)(P)NCA) [2013] ZANCT 38 (1 November 2013) – The applicant in the matter had filed an answering affidavit opposing the original application for the consent order. The order was granted without the Presiding member being aware that an answering affidavit had been filed by the Applicant. The order granted was set aside.

Pretorius v Sanlam (Pty) Limited and Others (NCT/14496/2014/148(1)(P) NCA) [2014] ZANCT 40 (8 September 2014) – The Presiding member refused to grant the consent order application due to the consumer being unable to afford the repayments agreed to. The Tribunal confirmed the decision of the member on appeal and confirmed that it was the debt counsellor's responsibility to present clear and unambiguous information regarding the financial position of the consumer. (This approach was confirmed in various other appeals before the Tribunal by the same applicant on the same basis - See *Pettenburger-Perwald v Absa Bank Limited and Others (NCT/15542/2014/148(1)) [2014] ZANCT 49 (18 November 2014) Pettenburger-Perwald v Edcon (Pty) Limited and Others (NCT/15541/2014/148(1)) [2014] ZANCT 47 (30 October 2014)).*

Barnes v Absa Bank and Others (NCT/3898/2012/148(1)(P)NCA) [2013] ZANCT 1 (17 January 2013) – The Tribunal refused to grant an order allowing an interest rate (60%) which exceeds the maximum rate set down in the NCA.

First National Bank, A division of Firstrand Bank Limited v Lubbe and Others (NCT/86599/2017/165(1)) [2017] ZANCT 111 (7 October 2017) – **The credit provider applied for a rescission of a consent order on the basis that the monthly payments agreed to on the loan will not settle the loan within the agreed time and were not sufficient to cover the monthly interest on the loan. The credit provider submitted that the High Court judgment of *Nedbank Limited v Jones and Another [2016] ZAWCHC 139* was applicable. The Tribunal could therefore not order a reduction in the interest rate on the loan and the order was therefore *ultra vires*. The Tribunal found that the *Nedbank v Jones* judgment was not applicable to a consent order. The credit provider could not**

show any basis for rescinding the order – which was agreed to by the parties at the time. The application to rescind the order was refused. The credit provider was cautioned to ensure that it complies with the consent order of the Tribunal.

Issued by:

L. RABOTAPI **7 May 2018**

REGISTRAR