

NCR DEBT REVIEW WITHDRAWAL GUIDELINES 2021



01/2021
MAY 2021

GUIDELINES FOR THE WITHDRAWAL FROM DEBT REVIEW

INTRODUCTION

The National Credit Act 34 of 2005 (NCA) introduced debt review as a debt relief measure for over-indebted consumers. However, the provisions to withdraw from this process by the consumer or debt counsellor (DC) is not specified in the NCA.

To provide a solution for consumers whose financial circumstances have improved whilst under debt review to revert to contractual payments, in 2011 the credit industry implemented a voluntary Form 17.4 withdrawal process which was subsequently replaced on 19 February 2015 by the Withdrawal Guidelines 002 of 2015 issued by the National Credit Regulator (NCR). Since implementation of the NCR withdrawal guidelines in 2015, legal clarity has been obtained through the High Court, which necessitated a review of the NCR Withdrawal Guidelines 002 of 2015.

Final legal clarity was obtained in the full bench High Court matter: Van Vuuren v Roets and Others (37407/2018) [2019] ZAGPJHC 286; [2019] 4 All SA 583 (GJ); 2019 (6) SA 506 (GJ) (3 September 2019) ("Van Vuuren Judgment") which judgment provided clarity on whether a consumer under debt review whose financial circumstance has improved can withdraw from debt review in absence of a clearance certificate.

Following an intensive review process of the Van Vuuren judgement and its impact on the Withdrawal Guidelines 002 of 2015 by the Credit Industry Forum(CIF), the NCR is pleased to announce that the paper developed by the CIF has been signed off and is issued as guidelines to be applied by all industry participants. These guidelines will replace all previous Withdrawal Guidelines from the date of issue and publication. Please take note that the NCA, it's regulations or case law will take precedence over provisions made in these guidelines and will where necessary be amended.

COMPLIANCE

All credit providers, credit bureaus and debt counsellors are requested to comply with the current legal framework and prevailing case law within which these guidelines are established from. Non-compliance with these guidelines should be reported to the NCR.

GUIDELINES

1. SUMMARY OF THE VAN VUUREN JUDGMENT

The following legal principles were decided in this High Court Judgment:

- 1.1 A High Court cannot make an order confirming that an applicant (a consumer under debt review) is no longer over-indebted. This means the High Court may not order a release of the consumer from debt review.

- 1.2 Where a debt counsellor has notified all credit providers and every credit bureau of the consumer's application for debt review, or after the assessment and conclusion that a consumer appears to be over-indebted has been made and a new fact arise, the High Court is not the forum of first instance to approach. This means if no order is in place, the correct court to approach is the Magistrate Court. In the event of a consent order, the National Consumer Tribunal (NCT) may be approached.
- 1.3 A consumer who is not yet the subject of a Magistrates' Court debt re-arrangement order in terms of section 87 of the NCA, may together with the proposal of the debt counsellor present the additional facts to the court to bring about a rejection of the proposal. If the proposal is rejected by the Magistrate, every credit provider and every credit bureau should be notified of the relevant order. This means that in cases where debt re-arrangement order has not yet been granted, the debt counsellor and consumer must place the new facts in front of the Magistrate who can then declare the consumer not over-indebted.
- 1.4 If a Magistrate has already granted a debt rearrangement order, section 71 of the NCA regulates the only route to exit the debt review. This means that where a debt re-arrangement order is in place, the consumer has to repay all debt (excluding home loans) and apply for a clearance certificate in terms of section 71.
- 1.5 If a Magistrate has already granted a debt rearrangement order, the High Court may not order a release of the consumer from debt review. This means no court may declare a consumer no longer over-indebted. In terms of the deliberate chosen objective in the NCA, the only remedy is the repayment of debt in terms of section 71.

2. CONSUMER AWARENESS OF THE WITHDRAWAL PROCESS

The NCR and debt counsellors must educate consumers regarding: i. The effects of debt review (primarily before and/or when an application is made); and ii. The limited ways in which a consumer can withdraw from debt review.

3. WHEN IS A CONSUMER UNDER DEBT REVIEW?

- 3.1 A consumer is under debt review when he/she has applied for debt review in the prescribed manner as set out in section 86 of the NCA.
- 3.2 In the judgment of the National Credit Regulator v Lamara (NCT/102200/2018/57(1)) [2019] ZANCT 180 (13 December 2019), the NCT at paragraph 145 states that there needs to be a clear indication and date when the consumer applied for debt review. This will be in the form of a duly completed and signed form 16, or a clear record of when the consumer furnished all information to the debt counsellor as contemplated in regulation 24(1)(b).

- 3.3 Where a consumer makes an allegation against a debt counsellor to the effect that the consumer did not apply for debt review, the debt counsellor must make available to the consumer a duly completed and signed Form 16 or specified documents, giving a clear indication as to the date when the consumer applied or furnished such documentation in terms of regulation 24(1)(b).
- 3.4 The consumer may lodge a complaint with the NCR who will investigate the matter based on information supplied by the consumer, debt counsellor and credit providers. In cases where the debt review application did not follow the prescribed manner set out in the NCA, the NCR may issue a finding that the consumer did not apply for debt review and will advise the relevant parties of the outcome.
- 3.5 In cases where a finding is made by the NCR that the consumer did not apply for debt review, the NCR must inform the debt counsellor and the debt counsellor is to update the Debt Help System(DHS) to Status B and notify credit providers accordingly. The NCR will monitor that the update on DHS takes place accordingly.

4. WHAT HAPPENS AFTER AN ASSESSMENT HAS BEEN CONDUCTED BY THE DEBT COUNSELLOR?

- 4.1 When a consumer applies for debt review and is found to be not over-indebted, in terms of section 86(7)(a) of the NCA, the debt counsellor must reject the debt review application as per the procedure determined in the NCA and its regulations and issue a Form 17.2(a) and update the DHS to Status B.
- 4.2 When a debt review application has not been rejected, a debt counsellor must, (in terms of section 86(7)(b) or section 86(7)(c)) submit a proposal to the Magistrate Court to re-arrange the consumers' obligation or to obtain a consent order from the NCT in terms of section 138. For clarity this means that once a debt counsellor has found a consumer over-indebted and issued a Form 17.2, the Magistrate Court is required make an order as contemplated in section 87 of the NCA.

5. WHEN CAN A CONSUMER EXIT THE DEBT REVIEW PROCESS?

- 5.1. After the debt counsellor has made a determination of over-indebtedness but before the Magistrates Court has granted a debt re-arrangement order:
 - i. Section 87 of the NCA is applicable. A debt counsellor makes a determination of over-indebtedness when they issue a Form 17.2(b) to credit providers and update the credit bureaus via DHS.
 - ii. A consumer who is not yet subject to a Magistrates court debt re-arrangement order in terms of section 87, may together with the proposal of the debt counsellor present additional facts

to the Magistrates Court to bring about a rejection of the debt counsellor's initial proposal of over-indebtedness. This means that the consumer has to present to the Magistrates Court the new or additional facts to support the fact that he/she is not over-indebted and that he/she is able to pay contractual repayments, including any arrears that exist at that point in time. If the Magistrates Court finds the consumer not over-indebted, the debt review ends and the debt counsellor is required to update DHS to Status G1 to indicate that the consumer is not over-indebted. The debt counsellor should send out a Form 17 W(c) (Annexure A) accompanied by the order of the court to credit providers where the Magistrates Court has found the consumer not over-indebted.

- iii. The debt counsellor will charge the consumer debt counselling fees in line with the NCR Debt Counselling Fee guidelines applicable from time to time, and the consumer remains liable for the payment of these fees to the debt counsellor.
- iv. If the Magistrates Court finds the consumer over-indebted, the debt review process continues, and the consumer cannot withdraw from debt review.

5.2. After the Magistrates Court has granted a debt re-arrangement order:

- i. Section 71 of the NCA is applicable. Once a debt re-arrangement order or debt re-arrangement consent order has been granted, the consumer can no longer withdraw from debt review.
- ii. The only way to end or exit the debt review is in terms of section 71 through the issuance of a clearance certificate by a debt counsellor once all the substantive and procedural statutory requirements have been met.
- iii. For the sake of clarity, no process exists in the NCA that enables voluntary withdrawal from the debt review process after the consumer has applied for debt review in the prescribed manner and form.

6. CAN A CONSUMER BE DECLARED NO LONGER OVER-INDEBTED AFTER A MAGISTRATES COURT ORDER DECLARING THE CONSUMER OVER-INDEBTED HAS BEEN GRANTED?

Legal clarity was obtained in the Van Vuuren Judgement that no court has the power to declare the consumer no longer over indebted after a Magistrate has made an order that the consumer is over-indebted. The only remedy to exit debt review is to repay the debt as set out in section 71 of the NCA.

7. CAN A DEBT COUNSELLOR WITHDRAW A CONSUMER FROM DEBT REVIEW?

- 7.1 A debt counsellor does not have the statutory powers to withdraw the debt review. Once the consumer has applied for debt review, the debt counsellor cannot withdraw a consumer from debt review.
- 7.2 The debt counsellor could, however withdraw or suspend his or her debt counselling services to the consumer.

8. CAN A CONSUMER WITHDRAW FROM DEBT REVIEW AFTER A DETERMINATION OF OVER-INDEBTEDNESS BY THE DEBT COUNSELLOR HAS BEEN MADE?

- 8.1 Once the consumer has applied for debt review in the prescribed manner and form, the consumer can no longer withdraw from debt review.
- 8.2 If the Magistrates Court rejects the debt review application, as set out in paragraph 5.1(ii) above, the consumer will remain liable for the payment of the debt counselling fees for work completed as well as legal fees in line with the NCR Debt Counselling Fee Guidelines.
- 8.3 If the Magistrates Court finds the consumer over-indebted the debt review process continues, and the consumer cannot withdraw from debt review.

9. CAN A DEBT COUNSELLOR SUSPEND HIS/HER SERVICE FROM A CONSUMER UNDER REVIEW?

- 9.1 Where a consumer is not co-operating with the debt counsellor (e.g. not providing relevant information or proof, non-payment of debt counselling fees, etc.) a debt counsellor can suspend provision of his/her service to the consumer. The suspension of service can be lifted by the debt counsellor when arrear fees are paid by the consumer or documents have been duly provided.
- 9.2 To suspend services, the debt counsellor will submit Form 17W(b) to all credit providers and will select the suspension indicator field on DHS to reflect suspension of services. For the duration of the suspension, the consumer will remain on the same DHS status that was applicable at the time of suspension.
- 9.3 In matters where a debt counsellor has suspended his/her service, a debt counsellor will assist the consumer with:
- i. A clearance certificate when proof is received that all statutory requirements have been met; and

- ii. A transfer to another debt counsellor if the outstanding debt counselling fees and legal fees for work completed are paid by the consumer. The outstanding debt counselling fees and legal fees as set out in the NCR Debt Counselling Fee Guidelines are limited to work which has actually been performed up to the suspension of the debt counselling services. Proof of work done to earn such fees must be provided to the debt counsellor requesting the transfer and the consumer together with the request for payment of such fees.

10. WHAT HAPPENS IF A CONSUMER ELECTS TO PAY CREDIT PROVIDERS DIRECTLY?

- 10.1 If a consumer elects to pay his/her credit providers directly (i.e. not via a Payment Distribution Agent (PDA), the consumer remains under debt review and has to provide paid up letters to the debt counsellor when requesting a clearance certificate.
- 10.2 A consumer cannot be under debt review without a debt counsellor. The consumer remains liable for payment of debt counselling fees as set out in the NCR Debt Counselling Fee Guidelines for work actually completed.

11. CAN THE CONSUMER WITHDRAW FROM DEBT REVIEW IF ALL CREDIT AGREEMENTS HAVE BEEN TERMINATED BY CREDIT PROVIDERS?

- 11.1 If all the consumer's credit agreements have been terminated from debt review (by way of section 86(10) or section 88(3) enforcement) of the NCA; the consumer will remain in debt review.
- 11.2 When credit agreements are terminated from debt review, the consumer no longer enjoys the concessions that were agreed to by the credit provider(s) and the original contractual terms of the relevant credit agreement become applicable again. In this instance, the only way that the consumer can have their debt review status removed from the credit bureau, will be to make payment of the full outstanding amount owing on the terminated credit agreement(s), excluding any previous concessions.

12. CAN A CONSUMER BE TRANSFERRED TO ANOTHER DEBT COUNSELLOR?

A consumer can be transferred to another registered debt counsellor at any stage during the debt review process. When a consumer is transferred the following applies:

- i. The debt review process does not start afresh. The receiving debt counsellor has to continue with the debt review process where the previous debt counsellor left off. To this end, the transferring debt counsellor must supply all consumer and debt counselling related documents to the receiving debt counsellor upon transfer

- ii. The receiving debt counsellor may not charge a new application fee, administration fee, restructuring fee or legal fee if these fees were already paid by the consumer to the previous(transferring) debt counsellor.
- iii. After-care fee by the receiving debt counsellor can only be charged from the date of transfer.
- iv. A consumer is required to pay all outstanding debt counselling fees for work actually completed up to date of transfer before the transfer date.

13. RE-APPLICATION BY INACTIVE CONSUMERS LISTED ON THE DEBT HELP SYSTEM

- 13.1 If a consumer who is on an inactive status code (i.e. A1, F, G, G1 and H) on DHS and wants to re-apply for debt review, the DHS is enabled to allow a debt counsellor to load this re-application without the intervention of the NCR. This will be deemed a new application and will be linked to status code A.
- 13.2 Where the status code of the consumer wishing to re-apply remains on an active status code on DHS, the consumer may dispute this information by approaching the NCR and submitting the documents to substantiate the inactive status allegations.
- 13.3 If a consumer withdrew from debt review in terms of the NCR Withdrawal Guidelines 002 of 2015 and prior to the Van Vuuren Judgment in 2019 and the relevant status code at the time was not updated, the consumer may dispute this information by approaching the NCR and submitting the documents to substantiate the allegations.

14. FREQUENTLY ASKED QUESTIONS AND ANSWERS ON THE WITHDRAWAL PROCESS

- 14.1 What happens when a consumer under debt review is sequestered?

Answer: A consumer may be sequestered (or in the instance of a trust, liquidated) while the consumer is under debt review and the granting of the sequestration or liquidation order will bring the debt review process to an end. The NCR must be requested in writing, together with proof of the sequestration order, to update the DHS with Status J.

- 14.2 Can a Consumer under debt review withdraw voluntarily from debt review?

Answer: No

14.2 What happens if the debt review application process has not been followed correctly by a debt counsellor?

Answer: A consumer can lodge a complaint with the NCR. If a consumer alleges that he/she did not apply for debt review the NCR will investigate the matter by requesting proof of application for debt review from the consumer and debt counsellor and related evidence from credit providers and credit bureaus. If the finding of the NCR is that the correct debt review process was not followed, it will be deemed that the consumer did not apply for debt review and the debt review process will end and listing on the credit bureau removed.

14.4 Can a Magistrate Court grant an order declaring that a consumer is no longer over-indebted and no longer in debt review?

Answer: Based on the current legal framework and prevailing case law once a debt review order has been confirmed by a court order in terms of section 87(1)(b) of the NCA, no court is empowered to declare a consumer not over-indebted or to end the debt review. The only way to end the debt review is in terms of section 71 read with section 88(1)(c) of the NCA. This means that there is no voluntary withdrawal process which could deviate from the current case law and legal provisions contained in the NCA. To emphasize this position, no voluntary process currently exists. Any consumer, debt counsellor or credit provider that participates in such a voluntary process would expose themselves to various legal and compliance risks.

PLEASE NOTE THAT A TEMPLATE OF FORM 17.W IS ATTACHED TO THE GUIDELINES AS ANNEXURE A.

FURTHER INFORMATION Please contact Timmy Van Der Grijp on 011 554 2802 or tvandergrijp@ncr.org.za should you have any queries.

Form 17.W (Withdrawal from debt review)

Debt Counsellor's Name

Registered Debt Counsellor. Registration Number NCRDC 0000

To the Credit Department: Name of Credit Provider _____
 Address of Credit Provider _____

From: Debt Counsellor Name: _____
 Registration number: _____
 Address of Debt Counsellor: _____
 Telephone: _____
 E-Mail: _____

Date: Today's date _____

Date Form 16 signed: Insert date F16 signed _____

NOTIFICATION TO ALL CREDIT PROVIDERS AND ALL REGISTERED CREDIT BUREAUS

Name and Surname of Consumer: _____

Identity Number of Consumer: _____

Account Number: _____

This notice serves to notify you that: (Select the appropriate option)

- Consumer has withdrawn from debt review process prior to issuance of Form 17.2 and the Credit Bureaus have been updated via the NCR Debt Help System.
- The Debt Counsellor has suspended provision of service due to non-cooperation by the Consumer. The Debt Counsellor remains the Debt Counsellor on record.
- Debt review Court Order Rescinded (Historic option only). Copy of Order to be submitted to the NCR. The Consumer opposed the Debt review application and has been declared not over-indebted. Credit bureaus have been updated via the NCR Debt Help System.
- Application for Debt review rejected by Magistrate - Not over-indebted. Credit Bureaus have been updated via the NCR Debt Help System.

Signed at _____ **on this** _____ **day** _____ **of** _____

Debt Counsellor Signature _____