An assessment of voluntary debt review termination and the shortcomings of the National Credit Act in relieving the debt burden of over-indebted consumers in South Africa

By

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DECLARATION

I, 1370489 (student number), declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements of this degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

Among other objectives, two of the primary goals of the National Credit Act (NCA) are to help over-indebted consumers and to prevent the abuse of credit. This research report examines the NCA's legal framework and impact of the NCA on over-indebted consumers with regard to debt review and the voluntary termination process. This research report delves into the challenges that consumers face when attempting to voluntarily terminate debt review prior to their debts being paid off in full as seen in the *Van Vuuren* case whereby a consumer was unable to exit debt review despite having the means to manage his own finances. The conclusion reached in this study is that, while the NCA has introduced a procedure which results in the reduction of over-indebtedness among consumers, there are issues with the debt review regime that should be addressed. The report further concludes with recommendations for improving the NCA's debt review regime and providing an enhanced debt relief procedure for consumers in the Republic of South Africa. By adopting these recommendations, the debt review process will further advance the interests and protection of consumers.

Keywords: National Credit Act, over-indebtedness, debt review, voluntary termination, dignity, just administrative access, access to courts, recommendations, comparative analysis.

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I INTRODUCTION

The National Credit Act (NCA)[1] was enacted, among other objectives, to provide debt relief to over-indebted consumers and to regulate credit providers' lending practises. Section 86 of the NCA outlines the debt review process, which allows an over-indebted consumer to repay their financial obligations through a debt re-arrangement plan, thereby relieving themselves of overly demanding repayment conditions. The NCA contains provisions that allow creditors and debt counsellors to end the debt review process prior to the Magistrate's court issuing an order of over-indebtedness.

This research report is divided into two parts. The first part will address the issue that the NCA appears to lack provisions that allow consumers to voluntarily withdraw from the debt review process, even if their financial situation improves prior to the fulfilment of their financial obligations to creditors after a court has confirmed that a debtor is over-indebted and approved the repayment plans as structured by a debt counsellor.[2] For example, although the consumer's financial situation had improved in *Janse van Vuuren v Roets*,[3] the High Court held that a debt counsellor cannot terminate debt review at the request of a consumer who wishes to voluntarily withdraw from the process. The outcome of the court's ruling and its impact will be examined to determine whether the NCA's provisions and current legislation allow for the arbitrary and possibly unintended limitation of a consumer's constitutional rights to dignity, just administrative action and access to courts to the extent that the courts are not authorised to grant the consumer's requested relief and the consumer is unable to make their own financial decisions. The subject has been extensively addressed by van Heerden and Coetzee in a similar manner;[4] however, this research goes a step further in recommending that the Constitutional Court be approached to resolve the effect that the legislation has on consumer rights.

The second part of this report will address the deficiencies in the provisions of the NCA relating to debt review such as: the lack of clarity on specific forms for submissions to the Magistrate's court and the lack of a defined debt review period, which adds to the burden of

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[1] The National Credit Act 4 of 2005.
[2] *Botha v Koekemoer, Mafakane v MSA Consultants T/A Consumer Financial Services (LP)* unreported case no 7723/2017 (11 May 2018).
[3] 2019 (6) SA 506 (GJ), (*Van Vuuren*).
[4] CM van Heerden and H Coetzee 'Unintentionally Trapped by Debt Review: Procedural Inadequacies in the National Credit Act 34 of 2005 Relating to Withdrawal from the Debt Review Process' (2019) 22 *Potchefstroom Electronic Law Journal* 1-69.

over-indebtedness in South Africa.[5] The second part further considers the consumer debt review systems in both Germany and the United States of America so as to asses which aspects could be adopted to improve the South African debt review process.

Consequently, this study will analyse the provisions of the NCA governing the debt review process and proffer recommendations for their amendment.

II RESEARCH PROBLEM

Some of the drivers of over-indebtedness are behavioural issues such as impulsivity and overconfidence bias, unemployment, divorce, unforeseen expenses, bank lending policies, and inflation.[6] These circumstances are sometimes temporary, and people can recover from the situation that caused their misfortune. As a result, it is critical that debt resolution processes are thorough and provide solutions to consumer over-indebtedness in a way that is not unduly restrictive.[7]

This study aims to demonstrate that, while South African legislation allows for debt review and the exiting procedure prior to a court's confirmation of the debt review order, the shortcomings in the NCA serve to restrict the voluntary termination of debt review. The lack of provisions in the NCA regarding voluntary debt review termination and the steps thereto has complicated and lead to ineffectiveness of the debt review process. Improving the debt review process will result in time efficient proceedings which reduce the complications faced by consumers who are in a position to fulfil their financial obligations.

III THE NATIONAL CREDIT ACT

Prior to the passage of the NCA, consumer protection for debtors was governed by the Usury Act[8] and the Integration of Usury Laws Act,[9] both of which limited the charges attached to

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[5] World Bank Group 'Principles for effective insolvency and creditor/debtor regimes' available at *http://documents.worldbank.org/curated/en/391341619072648570/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes,* accessed on 16 July 2022.
[6] Kingstone Mutsonziwa and Ashenafi Fanta 'Over-indebtedness and its welfare effect on households: Evidence from the Southern African countries' (2019) 10 *African Journal of Economic and Management Studies* 186.
[7] Ralph Abbey Ssebagala, 'Relieving consumer over indebtedness in South Africa: Policy reviews and recommendations' (2017) 28 *Journal of Financial Counseling and Planning* 237.
[8] Usury Act 73 of 1968.
[9] Integration of Usury Laws Act 57 of 1996.

consumer loans, credit, and leasing transactions. The Credit Agreements Act[10] governed the contractual aspects of credit agreements involving the sale and lease of movable property.[11]

The NCA was enacted in 2005 and repealed the three preceding statutes by establishing a comprehensive framework to regulate consumer protection and debt re-organisation. The NCA also established institutions such as the National Credit Regulator (NCR) and the National Consumer Tribunal (NCT).[12] The purpose of the NCA is to 'promote and advance the social and economic welfare of South Africans, promote a fair … efficient, effective and accessible credit market and industry, and to protect consumers'.[13] The purpose of the NCA can be achieved by 'providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements'.[14]

The NCA applies to credit agreements which are entered into at 'arm's length and made within or having effect within, the Republic [of South Africa]'.[15] The types of credit covered by the NCA include a credit facility (akin to credit cards),[16] a credit transaction (as seen with a mortgage agreement or a lease of movable property)[17] and a credit guarantee[18] (such as a suretyship).[19] The NCA does not apply to insurance policies or leases of immovable property.[20]

The NCA was amended through two National Credit Amendment Acts (NCAAs) in 2014[21] and 2019[22] respectively. The NCAAs revised the NCA's definitions, added clauses requiring payment distribution agents to register, tightened regulations on debt counsellors, permitted registrants to voluntarily revoke their registration,[23] provided for debt intervention and

[10] Credit Agreements Act 75 of 1980.
[11] Jannie Otto, 'The history of consumer credit legislation in South Africa' (2010) 16 *Fundamina: A Journal of Legal History* at 266.
[12] National Credit Act supra note 1 Chap 2-part A (s12) and part B (s26).
[13] National Credit Act section 3.
[14] Ibid s 3(i).
[15] Ibid s 4(1).
[16] Ibid s 8(1)*(a)*.
[17] Ibid s 4(4).
[18] Ibid s 8(1)*(c)*.
[19] Ibid s 8(1)*(a) - (c)* and; 'An agreement by which a person undertakes to satisfy on demand an obligation of another consumer in terms of a credit facility or credit transaction to which the Act applies' in Sharrock *Business Transactions Law* 9th ed (2016) at 673.
[20] Ibid s 8(1)*(a) - (c)*.
[21] National Credit Amendment Act 19 of 2014.
[22] National Credit Amendment Act 7 of 2019.
[23] Ibid s 2.

supporting provisions, orders related to debt intervention and for the NCT to change or rescind an order under certain circumstances, as well as requirements for the Minister to make regulations related to a financial literacy programme.[24] As of 2021, 717 495 people had undertaken to reap the benefits of the debt review process, thus being indicative of the dire need for financial reprieve and assistance required by over-indebted consumers in South Africa.[25]

IV OVER-INDEBTEDNESS AND THE NCA

To determine whether a consumer is over-indebted, a balance of probabilities approach is used to evaluate factors such as the consumer's debt repayment history, financial prospects, current obligations, and ability to meet all credit agreements on time.[26]

Prior to the NCA, the only options for over-indebted consumers in South Africa were sequestration under the Insolvency Act[27] and administration under the Magistrates' Courts Act.[28] Individuals can have their estates sequestered under the voluntary surrender and compulsory sequestration processes under the Insolvency Act.[29] Under the voluntary surrender procedure, a debtor may petition the court to accept the surrender of their estate, whereas creditors may petition the court for the sequestration of a debtor's estate under compulsory sequestration procedure.[30]

Debt administration under section 74 of the Magistrates' Courts Act permits an individual who has no tangible assets,[31] and debt of up to R50 000,[32] to place their estate under

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[24] Ibid.
[25] Moeshfieka Botha 'South Africans are waking up to the benefits of debt counselling, but more education is needed' available at: *https://nationaldebtadvisors.co.za/personal-finance/south-africans-waking-up-to-the-benefits-of-debt-counselling/#:~:text=The%20data%20puts%20the%20current,people%20were%20under%20debt%20review*. accessed on 20 March 2023.
[26] *Standard Bank of SA LTD v Panayiotts* 2009 3 SA (W) (*Panayiotts*) para 25 and the National Credit Act supra note 1 s 79(1)*(a)-(b).*
[27] Insolvency Act 24 of 1936.
[28] Magistrates' Courts Act 32 of 1994.
[29] Insolvency Act supra note 27 s 3(1) and s 9(1).
[30] Robert Sharrock, Kathleen van Der Linde and Alastair Smith *Hockley's Insolvency Law* 9 ed (2012) at 34.
[31] Magistrates' Courts Act supra note 28.
[32] As determined by the Minister of Justice in the Government Notice R1411 in GG 19434 of 30 October 1998. This amount is subject to change.

administration under the supervision of a debt administrator, who ensures that a debtor repays their creditors in instalments, as specified in a court order made by a Magistrate.

Section 86 of the NCA introduced a new debt relief measure in the form of a debt review process that can result in the creation of a debt restructuring plan drafted by a debt counsellor and approved by a Magistrate. A debt counsellor is a natural person and a 'neutral functionary who does not seek to advance any particular party's cause'[33] registered under section 44 of the NCA for the purpose of providing debt relief to over-indebted consumers 'by affording the consumer the opportunity to survive the immediate consequences of his or her financial predicament and to attain a manageable financial position'.[34] Payment Distribution Agents (PDAs) distribute payments to credit providers in terms of a debt rearrangement, court order, order of the NCT or an agreement on behalf of a consumer and must apply to the NCR to be registered as such.[35]

Debt review can be entered in a variety of situations. In the first instance, if it is claimed in court that a consumer is over-indebted, the court may either declare a consumer to be over-indebted or may refer the matter directly to a debt counsellor who will assess the consumer's circumstances and make recommendations in accordance with their findings.[36] Alternatively, a consumer may make an application to a debt counsellor to be declared over-indebted.[37] In these instances, a court or a debt counsellor will have to establish whether a consumer is over-indebted by assessing the criteria set out in section 79(1) *(a)* to *(b)* of the NCA.[38]

According to section 86(2) of the NCA, the debt review procedure will not apply to credit agreements where a creditor has already instituted debt enforcement proceedings against a consumer. This was confirmed and clarified in *BMW Financial Services (SA) (Pty) Ltd v Donkin* [39] where a consumer contested the debt enforcement by BMW after she had instituted debt review proceedings. The court found that because the debtor pursued debt review after the creditor's section 129 notice was issued to her, BMW's claim could be enforced.

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[33]*National Credit Regulator v Nedbank Limited and Others* 2009 (6) SA 295 (GNP) para 30.
[34] Melanie Roestoff, Franciscus Haupt, Hermie Coetzee, and Mareesa Erasmus 'The debt counselling process – closing the loopholes in the National Credit Act 34 of 2008' (2009) 4 *Potchefstroom Electronic Law Journal* 253.
[35] National Credit Amendment Act supra note 21 s 1(f) and s 44A.
[36] National Credit Act supra note 1 s 85*(a)-(b).*
[37]Ibid s 86(1).
[38] National Credit Act supra note 1 s 79(1)*(a)-(b).*
[39] 2009 (6) SA 63 (KZD) (4 June 2009).

In terms of section 86(10) of the NCA, if a consumer is in default of the credit agreements which are under debt review,[40] a credit provider is permitted to 'withdraw from the debt review process after 60 days of the debt review application on notice to the consumer, debt counsellor and National Credit Regulator'.[41]

When a debtor considers entering debt review and consults with a debt counsellor, the debt counsellor must notify the debtor's creditors. The NCA precludes the debtor from accruing additional debt through credit agreements and places a moratorium on debt enforcement by creditors.[42] The moratorium must be respected by credit providers throughout the debt review process and can only be set aside if: a debt counsellor determines that a consumer is not over-indebted and thus cannot apply for a debt review order under section 86(7) of the NCA, a credit provider terminates the debt review process within 60 business days of a consumer's application, a court rejects the application or declares a consumer to be not-over-indebted, the consumer fulfils their credit agreements under a debt re-arrangement agreement, or if the consumer defaults on their obligations under a debt re-arrangement agreement.[43] Furthermore, debtors are not permitted to enter into new credit agreements during the debt review process.[44]

After filing an application for debt review, if a debt counsellor determines that a consumer is not over-indebted, the application will be rejected.[45] However, if a consumer has not been declared over-indebted but is financially strained in their efforts to meet their debt obligations, a debt counsellor may recommend to the consumer's creditors that a debt re-arrangement plan be implemented.[46] If a Magistrate's court grants an order of over-indebtedness, steps may be taken to restore the consumer's financial stability through the use of a debt counsellor who will restructure existing credit agreement repayments and determine whether credit agreements entered into by the consumer were recklessly granted.[47]

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[40] Chanell Bristol 'Credit Provider's rights under the NCA' (2012) 12 *Without Prejudice at* 3.
[41] Gareth Courtois 'Clarity on NCA debt review process: unpacking legislation' (2010) 14 *Professional Accountant* 1.
[42] National Credit Act supra note 1 s 88(1).
[43] *Coetzee v Nedbank* 2011 (2) SA 372 para 8 and National Credit Act supra note 1 s 88(3).
[44] National Credit Act supra note 1 s 88(1).
[45] Ibid s 86(7)*(a)*.
[46] Ibid.
[47] National Credit Act supra note 1 s 86(7)(*c)*(i) -(ii)*(aa-dd)*.

The NCA makes no mention of a time limit for the debt review process,[48] and it does not terminate due to the lapsing of time.[49] However, a debt counsellor is required to complete the debt review process within a reasonable timeframe.[50] Debt counselling agents in South Africa such as National Debt Advisers and Debt Busters have indicated that the process generally takes about three to five years to complete.[51] Both debt counselling agencies advise that the length of the process is generally determined by clients' financial ability to repay debts on time and thus accelerate the debt review process. If a creditor cancels the debt counselling process by withdrawing from debt review under section 88 of the NCA,[52] a Magistrate's court may allow the debt review to resume where the court deems it appropriate such as instances where cancellation of debt review was done in bad faith.[53] The NCA does not contain provisions relating to the amendment, suspension, or discharge of a debt review order.[54]

Once the debtor has fulfilled their obligations under their debt restructuring, a clearance certificate will be issued to the debtor, the credit bureau, and the NCR, expunging the matter from the credit bureau's records and allowing the consumer to resume normal economic activity by re-entering the credit market.[55] When a consumer has satisfied the requirements of section 71 of the NCA, which state that all short-term debts must be paid in accordance with the debt restructuring order, the debt review process can be concluded.[56]

Forms are a subset of the documents used in the debt review procedure. Form 17.1 is used by debt counsellors to notify credit providers and credit bureaus that a consumer has applied for debt review, and it protects the consumer from legal action instituted by their creditors.[57] The

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[48]André Boraine, Corlia Van Heerden and Melanie Roestoff 'A comparison between formal debt administration and debt review-the pros and cons of these measures and suggestions for law reform (Part 2)' (2012) 45 *De Jure* 265.

[49] *Coetzee v Nedbank* supra note 43 para 18.

[50]*Pelzer v Nedbank Ltd* 2011 (4) SA 388 (GNP) para 6.3.

[51] National Debt Advisors 'How long does debt review last?' available at *https://nationaldebtadvisors.co.za/faq/how-long-will-i-be-under-debt-review/* and Debt Busters 'How long does the debt counselling process take?' available *at https://www.debtbusters.co.za/articles/long-debt-counselling-process-take/*accessed on 20 July 2022.

[52] Bristol supra note 40 at 28

[53] *SA Taxi Securitization (PTY) Ltd v Mbatha* 2011 1 SA 310 (GSJ) para 63.

[54] Boraine, Van Heerden and Roestoff supra note 48 at 265.

[55] National Credit Act supra note 1 s 1.

[56] CM Van Heerden and H Coetzee supra note 4 at 19-20.

[57] All forms can be found on the National Credit Regulator's 'List of forms' available at *https://www.ncr.org.za/index.php/act/list-of-forms* accessed on 30 November 2022.

status of the debtor's application for debt review and whether the debt obligations have actually been restructured are reported to creditors and credit bureaus on Form 17.2.[58]

Second, consumers may exit the debt review process if they submitted an application but Form 17.1 was not sent to or approved by a Magistrate's court, and thus they have not yet been declared over-indebted. The implications of withdrawing at this point are that the moratorium established by issuing Form 17.1 to creditors is no longer applicable, and the consumer may resume their normal credit activity.[59]

Third, a debtor may exit the debt review process if an application for debt review has been filed and Form 17.1 has been sent to the court but has not yet been approved. The submission of the form has no effect on the consumer's financial situation; however, the debt counsellor should notify the respective creditors of the debtor's decision not to participate in the debt review process.[60] In the next event, if Forms 17.1 and 17.2 have been sent out but no court order has been issued, a consumer should be able to exit the debt review process voluntarily.[61]

Finally, if a debt review application was submitted with both Forms 17.1 and 17.2, as well as the proposal being referred to the court, but the matter was not heard and the order was not formalised, the consumer should be able to exit the review process, and the debt counsellor should notify the creditors of the debtor's 'change of heart'.[62] In other words, if a court order declares that a consumer is over-indebted, they cannot exit debt review, and if a court order is issued, the only way a consumer can exit the procedure is if all debts, excluding the consumer's mortgage, have been paid up.[63]

As noted above,[64] there are grounds for credit providers to withdraw from the debt review process and instances where a credit provider may disregard the moratorium on a debtor's property; however, consumers do not have the same right to withdraw from the debt review

[58] CM Van Heerden and H Coetzee supra note 4 at 22.
[59] Ibid.
[60] Ibid.
[61] Idem at 23-24.
[62] Idem at 4.
[63] Ibid at 13.
[64] Courtois supra note 41.

process voluntarily when their circumstances change.[65] As a result, problems arise for consumers because the legislation has a restrictive effect on their ability to terminate the debt review process voluntarily.

PART ONE:

V VOLUNTARY WITHDRAWAL FROM DEBT REVIEW

a) PRE-COURT ORDER VOLUNTARY WITHDRAWAL FROM THE DEBT REVIEW PROCESS

Debt counsellors may only issue a clearance certificate indicating that a debtor has fulfilled all of their obligations under the restructured agreement if the debtor has actually fulfilled their obligations.[66] In *Rougier v Nedbank Ltd*,[67] the High Court heard a matter in which the applicant was under debt review, which was approved by the courts, but her debt counsellor terminated the debt review order because the applicant was uncooperative.[68] According to Nobanda AJ, the powers bestowed on a debt counsellor under the NCA are a statutory function; thus, the debt counsellor cannot cancel a debt review order issued by the court because they would be acting *ultra vires*. This clarified the position that debt counsellors are not permitted to terminate a debt review order because doing so would go beyond the scope and duties of their professional obligations.[69] Subsequent to this case, the NCR issued its Withdrawal From Debt Review Guidelines,[70] and the Explanatory Note to the Withdrawal Guidelines.[71] These instruments allow debt counsellors to withdraw and terminate the debt review process before a court grants a declaration of over-indebtedness after Forms 17.1 and 17.2 have been submitted. Making provisions for debt review termination before the court issues a debt review order thus falls within the scope of the debt counsellor's duties.

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[65] *Botha v Koekemoer* op cit note 2 para 14.
[66] National Credit Act supra note 1 s 71.
[67] *Rougier v Nedbank Ltd* (GPJ) unreported case no 27333/2010 (28 May 2013) hereafter '*Rougier*'; also discussed in CM Van Heerden and H Coetzee supra note 4.
[68] *Ibid* para 6.
[69] *Rougier* supra note 67 paras 12-13.
[70] National Credit Regulator 'NCR Withdrawal Guidelines 002/2015: Practical Implementation Guideline for Debt Counsellors' available at *http://www.dcasa.co.za/wp-content/uploads/2017/06/DCASA-Practical-Withdrawal-Guidelines-May-2015-3.pdf* accessed on 25 April 2022, hereinafter 'Withdrawal Guidelines'.
[71] National Credit Regulator (NCR) 'Explanatory Note to Withdrawal Guidelines' available at *https://www.ncr.org.za/documents/Withdrawal_guidelines/Explanatory%20Note%20to%20the%20Withdrawal%20Guidelines.pdf* accessed on 26 April 2022.

There have been conflicting decisions on whether a High Court can: make declaratory orders regarding debt review procedures, terminate a debt review process, and insert words into legislation that were not expressed or implied by the legislature.[72] The existing case law for pre-court order withdrawal from debt review mostly engaged with facts about applicants who sought to have their records expunged from the credit bureau and declared to be no longer indebted after complying with a debt-rearrangement order despite the fact that their debt review orders had not been confirmed by the courts and having no opposition from their creditors to withdraw from debt review. Additionally, there was no opposition from the creditors to withdraw from debt review in these cases.[73]

Although these were unconfirmed debt review cases, they provide useful extracts that could aid in finding a solution for debtors who wish to voluntarily withdraw from court-confirmed debt review. In *Phaladi v Lamara*,[74] Binns-Ward J held that the 'inherent jurisdiction of the High Court could not be invoked to grant the relief sought' as doing so would result in the judiciary taking on a legislative role and stepping into the terrain of the legislature.[75] In *Du Toit v Benay Sager*,[76] Thulare AJ found that it is inappropriate to overlook the NCR, NCT, and the Magistrates' courts by using the High Court as a court of first instance in matters relating to the termination of the debt review process.[77] Thulare AJ further held that:

> the [Magistrate's] Court's power to find that the consumer is not over-indebted is by implication, conferred when the [Magistrate's] Court is given the jurisdiction to entertain proposals from the debt counsellor to re-arrange a consumer's obligations.[78]

In *Botha v Koekemoer*,[79] Muller J agreed with Binns-Ward J and Thulare AJ in their earlier decisions that the courts do not have the authority to go beyond the limitations imposed by statutory provisions. This marks a starting point for revoking debt review orders, with the Magistrates' courts, the NCR, and the NCT at the forefront of advocating for the development

[72] CM Van Heerden and H Coetzee supra note 4 at 37-50; see the article for a discussion of these cases.
[73] See ibid at 37-50 for detailed discussions of the cases.
[74] 2018 (3) SA 265 (WCC).
[75] CM Van Heerden and H Coetzee supra note 4 at 42.
[76] (NCRD2484) t/a Debt Busters and Others (WCC) unreported case no 16226/17, (17 November 2017); also discussed in CM Van Heerden and H Coetzee supra note 4 at 44-48.
[77] Ibid para 9.
[78] Ibid para 25.
[79] *Botha v Koekemoer* supra note 2.

of legislation that allows consumers to exit the debt review process voluntarily when their financial circumstances have improved.[80]

b) POST-COURT ORDER VOLUNTARY WITHDRAWAL

In *Van Vuuren*,[81] Janse van Vuuren's application to be declared over-indebted was successful, and Roets, his debt counsellor, had complied with his obligations to assist Janse van Vuuren in achieving financial stability through debt review. [82] Janse van Vuuren's financial situation had changed after eighteen months of debt review, and despite not fulfilling all of his financial obligations, he had hoped to exit debt review early so that he could manage his finances on his own. [83] Due to the fact that Jansen van Vuuren had not fulfilled all of the debt review procedure's obligations, Roets was unable to release him from the process or provide a clearance certificate exonerating him from his debt review obligations.[84] Additionally, Roets informed Janse van Vuuren that the Magistrate's Court lacked the jurisdiction to release a consumer from debt review and advised him to apply to the High Court for the relief sought.[85]

Janse van Vuuren filed an application with the High Court to be released from the debt review process. In response, the High Court ruled that it would be acting outside of its jurisdiction if it released a debtor from debt review before they met their debt review obligations.[86] The court referred to the NCA's prohibition on the court's ability to declare that consumers who are over-indebted are not over-indebted, regardless of whether a debtor's circumstances have improved to the point where they can manage their affairs. In *Van Vuuren* the court held that before making such a ruling, the legislation would need to be amended to allow the courts to do so.[87] Furthermore, the court noted that the NCA is inconsistent in that the courts are involved in the beginning and are duly authorised to declare an individual as over-indebted and issue a clearance certificate when the consumer has relieved themselves of

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80 CM Van Heerden and H Coetzee supra note 4 at 53-55.
81 *Van Vuuren* supra note 3.
82 Ibid para 5.1.
83 Ibid.
84 Ibid.
85 Ibid.
86 Idem para 53.
87 Idem para 37.

obligations, but the courts cannot terminate the process unless the consumer has relieved him/herself of obligations in terms of section 88 of the NCA.[88]

c) *ISSUES PRESENTED BY THE APPROACH IN VAN VUUREN*

The NCA contains several contradictions, including the fact that Magistrates have several discretionary powers assigned to them but cannot use those discretionary powers for consumers in Janse van Vuuren's position. An example of this contradiction can be seen in the fact that an order may be made to declare that a consumer is over-indebted,[89] and a consumer may be declared to be no longer over-indebted;[90] however, no authority is granted to allow the debtor to withdraw voluntarily if their circumstances change, or to revoke their debt review procedure within 60 business days.[91] Furthermore, section 86(11) of the NCA provides for a magistrate to exercise a discretion in determining whether a debt review process should be resumed,[92] demonstrating that magistrates have both declaratory and discretionary powers in terms of the NCA, but none when it comes to voluntary debt review withdrawal.[93]

Moreover, under the debt administration procedure, the Magistrates' Courts Act states that:

> [the] court under whose supervision any administration order is being executed, may at any time upon application by the debtor or any interested party re-open the proceedings and call upon the debtor to appear for such further examination as the court may deem necessary, and the court may thereupon on good cause shown suspend, amend …or rescind the administration order, and when it suspends such an order it may impose such conditions as it may deem just and reasonable.[94]

Debt administration is catered to by the Magistrates' Court Act which permits the Magistrate to cancel a debt admin order, despite the fact that the debtor is in an overly precarious financial situation. This ability to order cancellation of a debt review in circumstances as indicated in *Van Vuuren* would be equally useful for consumers under debt

[88] *Van Vuuren* supra note 3 para 37.
[89] National Credit Act supra note 1 s 85.
[90] National Credit Act supra note 1 s 71.
[91] Similar to the powers of creditors in terms of s 86(10) of the National Credit Act.
[92] Bristol supra note 40.
[93] CM Van Heerden and H Coetzee supra note 4 at 28.
[94] Magistrates' Courts Act supra note 28 s 74Q(1).

review which have a less precarious financial situation in that they are able to repay a greater part of their debts. What is more, in terms of the provisions of the Insolvency Act, the High Court has the same powers concerning the declarations of insolvency.[95] Therefore, it is not uncommon for High Court judges to issue declaratory orders terminating various forms of debt relief procedures, with the consequences of the respective regime taking effect if the applicant withdraws.

Incorporating mechanisms into the NCA to avoid keeping consumers under debt review unnecessarily and indefinitely is critical to making the debt review process viable, accessible, and manageable for all who wish to participate in debt relief programmes. The mechanisms that may be of assistance are discussed in the recommendations section below.

d) VOLUNTARY WITHDRAWAL, DIGNITY, JUST ADMINISTRATIVE ACTION, AND ACCESS TO COURTS

The Constitution of the Republic of South Africa[96] is the supreme law of South Africa and any conduct that is inconsistent with it is invalid.[97] Moreover, the Bill of Rights[98] is binding on all organs of state, including the judiciary.[99] The courts must apply or develop the common law if legislation does not give effect to rights in the Bill of Rights.[100] In terms of section 8 of the Constitution, a court may develop the common law in the interests of justice to give effect to rights in the Bill of Rights. The rights provided in the Bill of Rights are not absolute and 'may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable'.[101] To determine whether a provision is a law of general application, the provision in question must be authorised by law and 'sufficiently clear, accessible, and precise that those who are affected by it can ascertain the extent of their rights and obligations'.[102]

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[95] Insolvency Act supra note 27 s 9(5).
[96] The Constitution of the Republic of South Africa, 1996, 'the Constitution'.
[97] Ibid s 2.
[98] Ibid s 8.
[99] Ibid.
[100] Ibid s 8(3)
[101] Ibid s 36.
[102] Iain Curry and Johan de Waal, '*The Bill of Rights handbook'* sixth ed. (2017) 155-156.

The right to human dignity seeks to protect people's inherent dignity by providing that everyone has the right to have their dignity respected and protected.[103] In *S v Makwanyane*,[104] dignity was held to be one of 'the most important of all human rights, and the source of all other personal rights'. Moreover, 'self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment,' is the very essence of freedom and a vital part of dignity.[105] This extends to opting to voluntarily apply for debt counselling and making decisions about terminating debt review and managing one's own finances as their financial situation improves.

Section 33 of the Constitution provides for the right to just administrative action which right seeks to provide persons with administrative action which is lawful, reasonable, and procedurally fair as well as provide for a review of administrative action by a court or tribunal.[106] In addition, the right to access courts granted in section 34 seeks to grant everyone the 'right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. It is submitted that when consumers who are under debt review and who are able to prove that they have the means to manage their own finances, such as in *Van Vuuren,*[107] should be able to employ their rights to just administrative action and access to courts for relief in the form of debt relief termination.

Previously, the Magistrates' Courts Act authorised a magistrate to issue an order to commit the judgment debtor to prison on a charge of contempt of court for failure to pay the debt[108]unless the debtor could prove that they were a minor, unaware of the original debt judgment against them , or had no means of paying the judgment debt. The onus was on the debtor to prove these factors.[109] In *Coetzee v Government of the Republic of South Africa* ,[110] the Constitutional Court decided that the aforementioned provision of the Magistrates' Courts Act unjustifiably violated the right to freedom and security of the person in that the means for achieving the goal of enforcing judgment debts were not reasonable and resulted in treating a

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[103] The Constitution supra note 97 s 10.
[104] 1995 (3) SA 391 (CC).
[105]*Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 57.
[106] The Constitution supra note 97 s 33(1) and (3)(a).
[107] National Credit Act supra note 1 s 80-87.
[108] The Magistrates' Courts Act supra note 28 s 65A – s 65M.
[109] Ibid.
[110]*Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* 1995 (10) BCLR 1382; 1995 (4) SA 631 (CC) (22 September 1995).

civil judgment debtor more severely than a criminal.[111] The abovementioned provision was declared unconstitutional and the court struck out the provisions of the Act which resulted in imprisonment for those who did not pay their judgment debts.[112] Although keeping debtors under debt review even when their circumstances have changed does not result in imprisonment, one of the consequences of the NCA's provisions is, in my opinion, that consumers are similarly denied the freedom to make their own financial decisions even when their financial situation has improved.

In cases where consumers are able to repay their financial obligations independently due to an improved financial situation, they fall short of being over-indebted as defined by the NCA, which states that the debtor must be unable to fulfil their debt obligations 'in a timely manner'.[113] Thus, the over-indebted consumer's right to the dignity of being able to decide how to address their financial obligations themselves is restricted. The court's acknowledgment that it lacks the authority to end the debt review process unless the legislature authorises it to do so has a negative impact on an aggrieved consumer's ability to rely on a court or tribunal to provide the relief sought, and thus limits the right of access to courts.

The NCA specifies that to be over-indebted, the debtor must be unable to fulfil their debt obligations 'in a timely manner'.[114] In cases where consumers are able to repay their financial obligations timeously due to an improved financial situation, they fall short of being over-indebted as defined by the NCA.

Thus, the over-indebted consumer's right to the dignity of being able to decide how to address their financial obligations themselves is restricted. The court's acknowledgement that it lacks the authority to end the debt review process unless the legislature authorises it to do so has a negative impact on an aggrieved consumer's ability to rely on a court or tribunal to provide the relief sought, thereby limiting the right of access to courts and by implication, the right to just administrative action.

[111] Ibid paras 63, 71 and 14.
[112] Ibid para 74.
[113] National Credit Act supra note 1 s 79(1) *(a)-(b)*.
[114] National Credit Act supra note 1 s 79(1) *(a)-(b)*.

The consumer's right appears to be justifiably limited during the debt review and when a consumer is unable to manage their financial affairs. However, once the consumer is able to manage their finances, the restriction is no longer justified and should be removed. The NCA's restrictions on the consumer's rights to dignity, access to courts and to just administrative action should be strongly considered in debt review matters so that they do not unduly limit a consumer's fundamental rights. An amendment to the NCA is proposed.

PART TWO:

VI FURTHER MATTERS AT THE CORE OF THE NCA

The debt review process is lengthy because an application for debt review is submitted using Rule 55A of the Magistrates' Courts Act, subjecting both debtors and debt counsellors to the same overburdened court system and waiting time as anyone else who submits a Rule 55A form.[115] In addition to the lengthy nature of the process, *Roestoff* concluded that the 60 business days allotted by section 86(10) of the NCA is insufficient to complete the debt review process. It typically takes 82 business days to hear back from a debt counsellor after submitting a proposal for debt restructuring.[116] Furthermore, applications for court-ordered debt restructuring often include documents that may not be necessary because there is no set list of information that must be included.[117]

The lack of a defined debt review period is further problematic because consumers can remain over-indebted and financially restricted for long periods of time if they do not have reasonable income prospects or assets with which to pay the restructured debt obligations.[118]

VII COMPARATIVE ANALYSIS

a) United States of America

The debt resolution regime of the United States of America (USA) is referred to as the Bankruptcy Code. The Bankruptcy Code is a federal law which is consumer-centric and

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[115] *National Credit Regulator v Nedbank Limited* [2009] 4 All SA 505 (GNP) (21 August 2009) para 24.
[116] Melanie Roestoff, 'Termination of debt review in terms of s 86(10) of the National Credit Act and the right of a credit provider to enforce its claim: cases' (2010) 31 *Obiter* 190 at 790.
[117] CM Van Heerden and H Coetzee supra note 4 at 262.
[118] Ssebagala supra note 7 at 240.

characterised by less time-consuming procedures that aim to provide different types of debt relief and creditor repayment while taking the debtor's circumstances into account.[119] In 2005 the USA introduced the Bankruptcy Abuse Prevention and Consumer Protection Act [120]which initiated reform of the Bankruptcy Code. The BAPCPA seeks to prevent fraudulent bankruptcy filings by raising the entry barriers to Chapter 7 of the Bankruptcy Code (liquidity proceedings), which previously allowed for an automatic discharge of debts.[121]

Chapters 7 and 13 (which deal with adjustments of the debts of an individual with regular income) of the Bankruptcy Code may be employed by individuals seeking debt relief.[122] The income of the consumer determines whether they file for Chapter 7 or Chapter 13, with higher income individuals expected to use the Chapter 13 provisions.[123]

Chapter 7 is employed for debtors who surrender all of their non-exempt assets (including secondary residential property or vehicles, luxury clothing and musical instruments which do not form the core of the debtors income)[124] for the immediate and automatic discharge of their debts.[125] If a debtor does not have assets and files for Chapter 7, the case is considered a 'no asset case', which means there can be no liquidation and the debtor is discharged.[126] Thereafter, a consumer may only reapply for debt discharge after six to eight years.[127] After completing their payment plans, consumers may apply for a discharge of debts.[128]

A consumer will not be eligible for debt relief under any Chapter of the Bankruptcy Code if they have not received credit counselling within 180 days prior to filing their debt relief

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[119] Maria Gerhardt 'Consumer bankruptcy regimes and credit default in the US and Europe: A comparative study', *CEPS Working Document* No.318 / July 2009 at 1-2.
[120] Of 2005, 'BAPCPA'.
[121] Ruser Rachel 'Analysis of the bankruptcy abuse prevention and Consumer Protection Act of 2005 (BAPCPA)' (2006) 2 *SPNA Review* 86. Melanie Roestoff and Hermie Coetzee, '*Debt relief for South African NINA debtors and what can be learned from the European approach'* (2017) 50 *Comparative and International Law Journal of Southern Africa* at 260.
[122] Gerhardt supra note 119 at 2.
[123] Gerhardt supra note 119 at 4.
[124] Bill Fay 'Bankruptcy Exemptions' available at *https://www.debt.org/bankruptcy/exemptions/* accessed on 30 November 2022.
[125] Roestoff and Coetzee supra 121 at 260.
[126] Gerhardt supra note 119 at 2.
[127] Gerhardt supra note 119 at 4.
[128] United States Courts, 'Discharge in Bankruptcy – Bankruptcy basics', available *https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics* accessed on 21 September 2022.

application.[129] Consumers must complete an instructional course on financial management before applying for debt discharge under either chapter; otherwise, the court may deny the debt discharge if the course is not completed.[130]

Chapter 13 is comparable to the South African debt review process, where consumers adhere to a debt reorganisation plan for three to five years, depending on their ability to pay under the prescribed means test, and can exit the process after paying their creditors in full and receiving a debt discharge.[131] Thereafter, a debtor may only reapply to engage in another debt review process after two to four years.[132] Chapter 13 of the Bankruptcy Code further provides for a hardship discharge for debtors who cannot fulfil the obligations as per their repayment plan.[133]

b) GERMANY

Consumer insolvency is covered by the *Insolvenzordnung* (the Germany Insolvency Regulation),[134] which prioritises paying creditors first and giving debtors a chance to emerge from their insolvent state through *Restschuldbefreiung* (debt discharge).[135]

The procedure includes an obligatory out-of-court negotiation between the debtor and a creditor, an in-court settlement phase if the former attempt fails, and if an in-court negotiation is not executed, a liquidation process will take place in which the debtor's property will be seized and income will be transferred to a trustee who will distribute it among creditors. If a debtor has exhibited good conduct for six years, they may be allowed to remain in the process.[136] The procedure can be relied on every ten years.[137] A commendable feature of the

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[129] United States Courts 'Chapter 7 – Bankruptcy Basics' available at *https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics* accessed on 30 November 2022.
[130] Ibid.
[131] United States Courts, 'Chapter 13 - Bankruptcy Basics' available at*https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics* accessed on 22 September 2022 and Coetzee at 260.
[132] Gerhardt supra note 119 at 4.
[133] Roestoff and Coetzee supra note 121 at 260-261.
[134] Being insolvent refers to the state of being unable to pay debts –The World Bank Group's grouping of all the credit and debtor solutions includes all procedures resolving over-indebtedness, thus German insolvency is a debt resolution parallel and can be referred to for recommendations on amending South African laws – supra note 6.
[135] Gerhardt supra note 119 at 8.
[136] Roestoff and Coetzee supra note 121 at 262.
[137] Gerhardt supra note 119 at 8.

German insolvency system is a state-funded debt-counselling centre that assists debtors during the negotiation phase of their debt review.[138]

c) COMPARATIVE ANALYSIS

To reform and strengthen its own debt relief regime, South Africa could benefit from adopting certain aspects of the debt review regimes used by the USA and Germany.

The pre-debt re-organisation strategies of the American system reduce the burden on the courts to deal with debt review applications that are likely to be rejected, provide solutions for different types of applicants, and the Chapter 13 debt resolution brings forth a defined period of debt re-organisation – thus, presenting an effective solution for South Africa's undefined period. The American approach is further advantageous in that debt relief provides a clear set of eligibility criteria. These criteria eliminate the administrative process presently undertaken in the South African system which requires a debt counsellor or the courts to establish that a consumer is over-indebted. Furthermore, consumers do not have to wait for long periods of time before receiving a debt discharge; however, Porter and Thorne's 2006 study found that some consumers who received a debt discharge did not maintain the fresh start that they were given.[139] According to the said study, debtor discharge is only effective when combined with other factors such as a steady income and economic transformation to enable the former factor.[140] It is thus incumbent on the legislature to establish a debt review process which promotes long term efficiency.

In common with the USA, the German process is time-limited, and debt discharge is an option, in addition to a state subsidy that ensures low-cost access to debt relief mechanisms. This results in a more appealing debt resolution process. While it is recognised that the German insolvency procedure requires earned discharge and the debtor's best effort to maintain reasonable employment,[141]as well as defined deadlines that provide clarity and stability for all parties involved in the process – the period attached to relief and debt discharge is strenuous and would result in the unjustified limitation that this submission seeks to reduce.

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138 Roestoff and Coetzee supra note 121 at 261.
139 K Porter and D Thorne 'The Failure of Bankruptcy's Fresh Start' (2006) 92 *Cornell Law Review* 70.
140 Ibid.
141 Roestoff and Coetzee supra note 121 at 261 and 263.

It is submitted that South Africa could improve the fairness of the debt review process by combining certain elements of both the American and German processes, resulting in greater protection of citizens' rights in the debt review process.

VIII RECOMMENDATIONS

a) VOLUNTARY WITHDRAWAL FROM COURT CONFIRMED DEBT REVIEW

When a consumer's debt review has been confirmed by a Magistrates' Court, the NCA does not provide for the termination of debt review prior to the consumer fulfilling all of its obligations as per a debt rearrangement order. Section 71 of the NCA allows for the termination of debt review in a variety of circumstances. Following the 2014 amendment to the NCA, the courts either found that the High Court or magistrates' courts had inherent jurisdiction to hear cases involving consumers whose circumstances had improved through debt restructuring – even if their debt review proposals had not been confirmed by the courts. It has been suggested in both case law and literature on the NCA that it is possible that the legislature did not anticipate a situation in which a debtor's financial situation would improve and thus excluded provisions of withdrawal under those circumstances.[142]

The South African Law Reform Commission (SALRC) is an organisation entrusted with making recommendations to the national government to develop, improve, modernise, or reform the law.[143] In aid of the legislative amendment, the SALRC should consider making reform recommendations to the provisions allowing for voluntary exit from the debt review process under section 86(10) of the NCA. The recommendations should allow consumers to exit debt review at any time after the court confirms a debt review order and within the 60 business-day period granted to creditors.[144] Furthermore, the SALRC should consider introducing an informal pre-debt review approach to help debtors improve their financial situation without the longer-term commitment associated with entering formal debt

[142] CM Van Heerden and H Coetzee supra note 4 and *Vuuren* supra note 3 at para 37.
[143] The body responsible for 'research with reference to all branches of the law in order to make recommendations to Government for the development, improvement, modernization or reform of the law'; available at South African 'Welcome' available at *https://www.justice.gov.za/salrc/* accessed on 02 December 2022.
[144] In assent with Van Heerden and Coetzee supra note 4 at 61.

reorganisation. Consumers will benefit from increased flexibility as a result of these legislative changes.

Though the High Court was approached to resolve a consumer's desire to exit debt review, the rights of the consumer were not considered. In the event that consumers find themselves in Janse Van Vuuren's position, they could approach the High Court claiming that the NCA is not an 'adequate justification for [the] infringement of [their] fundamental rights' to dignity and access to courts,[145] as well as contend that they are able to repay their financial obligations and are thus not over-indebted as defined by the NCA. If the High Court fails to develop the law in terms of their constitutional obligation to do so,[146] consumers may appeal to the Supreme Court of Appeal. Should such an appeal be unsuccessful, consumers should consider approaching the Constitutional Court for relief.

Consumers who cannot afford to litigate their matters could rely on the principle established in *Biowatch Trust v Registrar, Genetic Resources*,[147] which states that if an applicant litigates against the State and wins, the State must pay their costs; if they lose, they are exempt from paying costs. As a result, consumers could seek the assistance of a law clinic or Legal Aid South Africa to serve as *amicus curiae* in their case against the Minister of Trade and Industry for voluntary relief from the debt review process which supports the rights to dignity, access to courts and just administration.

b) Recommendations for improving the National Credit Act

The World Bank published a report in 2015 titled *Treatment of the Insolvency of Natural Persons* [148] which addressed Insolvency and Creditor/Debtor Regimes and included recommendations from the United Nations Commission for International Trade Law (UNCITRAL), Legislative Guide on Insolvency Law and the World Bank Principles for Effective Insolvency and Creditor Rights Systems (the Principles).[149] The World Bank's report

[145] Curry and De Waal supra note 102 at 169.
[146] In terms of s 39(2) of the Constitution supra note 96.

[147] 2009 (6) SA 232 (CC).
[148] World Bank Group Insolvency and Creditor/Debtor Regimes Task Force 'Report on the Treatment of the Insolvency of Natural Persons' (2014) available at *https://openknowledge.worldbank.org/handle/10986/17606* accessed on 20 February 2023.
[149] Ibid at 8, 'The Guide'.

makes recommendations on the features that natural person debt resolution systems should include, and provides examples of desirable debt resolution processes from various jurisdictions.[150] Of these recommendations, South Africa's debt review framework already has the qualities like the enforcement of judgment debts,[151] data privacy regulations,[152] debt counselling,[153] penalties for reckless lenders,[154] a moratorium on credit repayments,[155] and excluding home mortgages ('long-term debts' in terms of the NCA)[156] from 'personal insolvency'.[157]

In particular, the World Bank's report makes the suggestion of using a pre-insolvency prerequisite mechanism with regard to the current issue of voluntarily terminating debt review. By setting up voluntary settlements with creditors, this mechanism would compel consumers to make an independent effort to restructure their debt before applying for debt review[158] This suggestion could be combined with the suggestion that debtors be provided with low-cost or free advisory services to assist them in rearranging their debts, thus equipping and reducing the number of debtors who enter the lengthy process of debt review for assistance.[159] Banks could incorporate these suggestions into their service offerings at a lower cost because they already have all of the details of a debtor's account, including their debts, expenditure, and spending habits. This will limit the resources required by a debt counsellor and reduce the number of consultations required for a debt counsellor with an independent debt agency to fully comprehend the nature of the consumer's financial difficulties. Furthermore, assuming that the bank is also owed money by its debtor client, it would be advantageous for a bank to develop a service offering that also caters for debt repayments owed to the bank. As a result, the debt resolution process will be improved for consumers, and the debt burden on South African consumers will be reduced. To prevent an abuse of the debt review process by banks, the

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[150] The report only lists the features and not the specific country that the feature of consumer insolvency is found in.
[151] National Credit Act supra note 1 ss 124-130.
[152] In terms of the Protection of Personal Information Act (POPIA) 4 of 2013.
[153] Supra note 1 ch 4.
[154] National Credit Act supra note 1 ss 80-83.
[155] Ibid.
[156]World Bank supra note 148 at 114.
[157]Ibid at 53, 74, 111, 68, 114.
[158]Ibid at 46.
[159] World Bank supra note 148 at 19.

legislature could consider introducing penalties for wrongfully instituting the debt review procedure for clients who do not need it.

With regard to the cumbersome civil procedure followed by debt counsellors in debt review processes, some scholars have recommended that the issue be resolved through a 'standard form prescribed for such purposes' in response to the cumbersome civil procedure followed by debt counsellors in debt review processes.[160] Similarly, a separate debt review process could be established, with the magistrates' court or the NCT having a sole mandate to deal with debt review applications. This would result in a more focused approach to debt review, which could decrease time spent on debt review and consequently improve the process as a whole.

To prevent consumers from arriving at unmanageable financial situations, financial education should be integrated into the South African education system.[161] National government should require successful completion of a financial literacy course as a required component of the debt rehabilitation process and integrate financial literacy into the curriculum of South African schools as part of the Life Orientation subject. These initiatives are necessary to resolve the existing problem of financial illiteracy amongst South African consumers. Furthermore, it has been proposed that the NCR makes use of road shows to educate consumers about the reality of being over-indebted and alert them to the availability of debt counsellors who can assist them in cases of over-indebtedness.[162]

Part of improving the debt review process for consumers is informing them about the time frames associated with the debt review process, so they know how long they are giving up their financial freedom for and when they can expect to be in control of their finances. This is especially important because longer repayment terms are likely to discourage over-indebted consumers from relying on debt review and lead to emotional distress. Furthermore, payments made to payment distribution agencies under debt review may result in increased financial

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[160] Boraine, Van Heerden and Roestoff supra note 48 at 262.
[161] Melanie Roestoff, Franciscus Haupt, Hermie Coetzee, and Mareesa Erasmus supra note 34 at 248.
[162] K.H Masilo 'Perceptions of the National Credit Regulator on the usefulness of the debt counselling process in South Africa.' (2017) 9 *Journal of Economics and Behavioural Studies* at 212.

obligations for debtors that could be avoided if they were allowed to manage their own finances sooner under voluntary termination of their debt review.

Given the dire financial situation of many consumers, a model more appropriate for South Africa would be a three-year period with the option to extend the debt rehabilitation if the judge and debt counsellor deem it necessary. Furthermore, debtors whose surplus income covers at least one-quarter of their debts could be offered a shorter repayment term and early release as an incentive for debtors who are unable to make substantial repayments.[163] This approach would help to build confidence in the debt review process and potential voluntary withdrawal mechanisms. Previously, the South African Law Commission proposed establishing a pre-liquidation composition to assist low-income earners, but the NCR did not implement this.[164] If the composition had been implemented, it was argued that it would be insufficient because a debtor would be forced to engage in the futile exercise of negotiating with creditors while lacking assets or income to supplement the negotiations – thus emphasising the importance of the pre-debt review mechanisms as seen in the USA.[165]

While some consumers will be able to restructure their debt, repay their creditors, and be successfully rehabilitated, consumers who do not have access to an income or assets will be unable to pay for their debts – even under restructured circumstances – and will likely remain under debt review indefinitely.[166]

IX CONCLUSION

The lack of provisions for voluntary withdrawal in the NCA’s debt review proves presents a significant challenge to consumers seeking to exit the process before the repayments of all their debts. The purpose of this report was to examine the NCA's purpose and mandate to provide for debt re-organisation through the debt review procedure, as well as the lack of provisions for voluntarily exiting the debt review prior to repaying all debts according to a debt rearrangement plan. Although judgments in which consumers sought to exit the debt review

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[163] World Bank supra note 148 at 89.

[164] Hermie Coetzee, ‘Does the Proposed Pre-Liquidation Composition Proffer a Solution to the No Income No Asset (NINA) Debtor's Quandary and, If Not, What Would’ (2017) 80 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 18.

[165] Ibid at 25.

[166] Ssebagala supra note 7 at 239.

process before the court confirmed their debt review process did not provide solutions to the *Van Vuuren* problem, what can be taken from the judgments is that the magistrates' courts and existing platforms of the NCR and NCT can be used as a starting point for addressing the unaddressed problem in the NCA.

The right to dignity, access to courts and just administrative action provide a rights-based motivation for lawmakers to amend laws or for the Constitutional Court to address the lack of voluntary withdrawal in the debt review process. This report also addressed issues that have a direct impact on the NCA's debt review process, such as the length of the debt review process due to the lack of a prescribed court form for debt review and the lack of a defined debt review period, which could be resolved by developing a specific court form for debt review, varying debt review procedures for different types of consumers, and instituting a defined debt review period.

This report sought to provide general recommendations for the NCA's debt review procedure in its entirety, including incentives for good debt review behaviour, pre-insolvency (pre-debt review in the case of South Africa) mechanisms, bank lead debt review mechanisms, prohibitions on re-entering debt review abruptly, and financial literacy education prior to entering debt review. It is submitted that to develop the current approach to South African debt relief, which includes the absence of voluntary withdrawal provisions, catering for debt discharge, and pre-debt review education, the legislature should take into account international insolvency regime standards such as the World Bank's report on the treatment of insolvency of natural persons and the systems adopted in both Germany and the United States of America. in reforming debt resolution processes in South Africa. Alternatively, consumers could file an application in the Constitutional Court to address the unfavourable and eschewed limitation of the rights of those consumers undergoing debt review.

The SALRC and the legislature should consider these recommendations to improve the debt review process to continue its efforts to provide debt relief to financially over-burdened consumers.

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