

## **Recent Constitutional Court decision could have dire consequences for consumers under debt review**

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The decision by the Constitutional Court to refuse a consumer, MS Collett, leave to appeal a decision by the Supreme Court of Appeal (SCA) could have dire consequences for consumers who are currently under debt review and may place the debt review process under severe pressure.

On the 8th of August 2011 the Constitutional Court also refused the National Credit Regulator's (NCR) application for direct access to the Constitutional Court on the same point in law.

The sections in question were section 86(10) and 86(11) of the National Credit Act (NCA) which deal with a credit provider's right to terminate the debt review process of a consumer.

The effect of the Constitutional Court decision is that the SCA judgment in the Collett matter, handed down on 27 May 2011, will not be tested. "The SCA found that a credit provider has the right to terminate the debt review process after a period of 60 days and on condition that the consumer is in default," says NCR Acting CEO Nomsa Motshegare. "This is irrespective of the fact that the debt review concerned has been referred to the magistrate's court for a re-arrangement order."

She adds that once a credit provider has terminated the debt review, that credit provider can enforce the consumer's obligations in terms of that credit agreement.

"In other words, defaulting consumers might be at risk of losing their assets such as their cars or houses in the event that 60 days have lapsed since they applied for debt review and their debt counsellors have not yet obtained an order for the re-arrangement of their obligations", says Motshegare.

The Constitutional Court's decision and the SCA's judgment mean debt counsellors and consumers must ensure compliance with the relevant time frames as prescribed by the National Credit Act and debt counsellors must file their applications for their clients' re-arrangement orders as soon as possible.

“Only once a magistrate’s order for the re-arrangement of a consumer’s obligations has been obtained, will that consumer be protected against the termination of the debt review by the credit providers,” says Motshegare. However, the implementation of the recommendations made by the Task Team by key industry stakeholders will to some extent alleviate the impact of this decision in the absence of amendments to the NCA. Ongoing collaboration by these key stakeholders will promote consensual resolution of cases by following the debt rearrangement guidelines proposed by Task Team.

Debt counsellors should also take note that the SCA confirmed in its judgment that the right of credit providers to terminate and enforce a credit agreement is balanced by the fact that a consumer may launch a substantive application to a magistrate’s court or a high court in which the credit provider has taken enforcement action to have the consumer’s debt review in terms of that agreement resume.

“During such an application the courts will look at whether the credit provider participated in good faith in the debt review proceedings and if not, the resumption of the debt review may well be ordered,” she says.

The NCR urges all consumers who may be experiencing financial difficulties to consult with a debt counsellor prior to defaulting in respect of any of their credit agreements and to engage with their debt counsellor to ensure a speedy resolution of the process. Debt counsellors are also urged to process their consumers’ debt re-arrangement applications with the necessary speed in order to provide their consumers with protection against enforcement action by their credit providers. The NCR also urges consumers to consult debt counsellors who have subscribed to the industry Code of Conduct as this will have a positive impact in negotiations with credit providers.

The NCR has taken the decision by the Constitutional Court to its legal team for further advice in order to decide the appropriate way forward.

ENDS

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