



National Credit Amendment Bill

BRIEFING TO PORTFOLIO COMMITTEE ON TRADE AND
INDUSTRY ON 17 OCTOBER 2017

THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

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Purpose of presentation

To provide the Department of Justice and Constitutional Development's views on—

- Application process for requesting debt relief, in particular the adjudication process;
- Application of the *in duplum* rule;
- Any other concerns pertinent to the draft framework Bill



Application process for requesting debt relief, in particular the adjudication process

- **Clause 10 seeks to introduce section 88A – 88D to address debt relief and section 88E to deal with debt relief measures by the Minister**
- **Section 88A contains definitions and under what circumstances a consumer may apply to the NCR for once-off debt relief.**
- **Section 86 deals with applications for debt review to a debt counsellor.**
- **Regulation 24 requires extensive information regarding personal details, income, expenses and debts.**



Section 88A continued/

- **Section 88A(4) sets out what information must support application for debt relief.**
- **In this regard, it is suggested that :**
 - ❖ **The requirements in regulation 24 be replicated in the application for debt relief for consistency; and**
 - ❖ **Consideration be given to providing definition of a “once-off debt relief” for clarity and certainty.**



Section 88B

- Section 88B provides for the evaluation of the application for debt relief by the NCR. A consumer applying for debt relief and a credit provider affected thereby must comply with reasonable requests by the NCR to facilitate the evaluation and must participate in good faith in the application.
- When considering these amendments, it is necessary to consider implementation challenges that may arise both out of members of the public accessing the relief and the capacity of the NCR and the Tribunal to deal with all the applications for a once-off debt relief.



Section 88C provides for:

- A single member of the Tribunal considering an application for debt relief;
- The orders the Tribunal may make;

Section 142 provides for:

- Hearings of the Tribunal, including that a single member may hear certain applications as assigned to him or her by the Chairperson.

It appears from clause 16 of the Bill which seeks to amend section 142 of the NCA that a single member may consider an application for debt relief on the papers without further evidence being led.

- It appears as if the presence of the consumer and credit providers may not be required.
- The question arises if the credit providers will have knowledge of the referral to the Tribunal and if further affidavits may be filed.
- The Bill does not seem to provide that the credit providers be informed as to when the application will be heard.



Section 88D deals with the effect of a once-off debt relief.

- A consumer must inform the NCR of changes to financial circumstances and NCR must evaluate;
- If it affects the debt relief the NCR must refer the matter to the Tribunal.;
- Tribunal may rescind or revise if consumer was dishonest or fails to comply with the conditions of the order.

In this regard, we repeat the concern about capacity and implementation issues that may arise.



The application of the *in duplum* rule

- Common law *in duplum* rule restricts the interest recoverable in terms of a loan or credit agreement where a debtor is in default.
- Interest stops running when the unpaid or arrear interest equals the outstanding capital amount.
- Founded on public policy to protect debtor in financial difficulty.
- Before commencement of the NCA, consumers could only rely on the common law *in duplum* rule to protect them from exploitation.



In duplum rule continued/

- Since 1 June 2007 consumers in credit agreements under the NCA can rely on the statutory *in duplum* rule.
- Section 103(5) of the NCA:
“Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section *101(1)(b)* to *(g)* that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs.”.



In duplum rule continued/

- **Section 101 of the NCA provides for the cost of credit.**
- **A credit agreement must not require payment of any money or other consideration except the principal debt, initiation fee, service fee, interest, cost of credit insurance, default administration charges and collection costs.**



In duplum rule continued/

- The main differences between common law *in duplum* and statutory *in duplum* rule:
 - Common law rule: Only the interest ceases to run if it equals the outstanding capital amount. The Paulsen CC judgment makes it clear that the common law *in duplum* rule is not suspended when legal proceedings are instituted.
 - Statutory rule: All the amounts referred to in section 101(1)(b)-(g) cease to run if they combine to exceed the outstanding capital debt.
 - Common law rule: Interest may start to run again once the consumer makes a payment and the arrear interest is reduced.
 - Statutory rule: Interest and other costs only start to run once the consumer is no longer in any default.



Any other concerns pertinent to the draft framework Bill

- **It may be advisable to have Office of the Chief State Law Adviser consider the draft Bill from a drafting perspective and adherence to drafting norms, once the content issues have been settled;**
- **Is the once-off debt relief in respect of a credit agreement or agreements or does it apply to the person of a consumer? In other words, can a consumer only apply once in respect of a specific agreement for debt relief and later again in further agreements or can a consumer only apply once in his or her lifetime for debt relief, notwithstanding how many credit agreements he or she might have?**
- **Definition of child headed household – what is position if parent is still alive, but missing or mentally disabled?**
- **What is situation of the elderly, households with women at the head or persons with disabilities?**



Any other concerns pertinent to the draft framework Bill continued/

- **List of assets in “realisable asset” that may not be realised does not include all the assets provided for in section 67 of the Magistrates’ Courts Act (see narrative document (4.4)).**
- **Section 88A(2) – retrospectivity may lead to unintended consequences (see narrative document (4.5)).**
- **Section 88A(4) – consideration could be given to list the information necessary for affordability assessment provided for in amended Magistrates’ Courts Act (see narrative document (4.6)).**
- **Consideration could also be given to list the factors to make a just and equitable order (see narrative document (4.7)).**



Any other concerns pertinent to the draft framework Bill continued/

- It may be prudent for the drafters of the Debt Relief Bill, to provide for proper mechanisms for affordability and oversight by the NCR or the Tribunal. See the amendment to section 65J of the Magistrates' Courts Act.
- Section 88B(3) – question arises whether sufficient provision is made for the credit provider to oppose the application, in stead of merely filing an affidavit.
- Section 88C(4)(a) – determination of the maximum interest, fees or other charges for a period the Tribunal may deem fair and reasonable. Does this provision not change the operation of the statutory *in duplum* rule (the rule starts to run if all the arrears are paid)?
- Section 88C(4)(d) – conditions related to the attendance of financial literacy or budgeting skills programme – who is liable for the costs and how is it monitored or enforced?



Any other concerns pertinent to the draft framework Bill continued/

- Section 88D – drafting aspects and the ordering of clauses should be considered: does this section not deal with the duties of the consumer and credit provider rather than the effect of a once-off debt relief?
- It is suggested that provision should be made for a process after the application has been granted, such as the notification to the consumer and credit provider.
- Section 88D(2)(a) – reference is made to a Provincial Credit Regulator, but no other reference is made to such a Provincial Regulator in the Bill.
- Section 88E – In section 88E, which provides for a debt relief measure to be prescribed by the Minister, subsection (4)(c) states that after consideration of the comments, a report on the comments must be tabled in the National Assembly and the final debt relief measure that the Minister intends to introduce. However, no mention is made of the process to follow after the submission. Should the Minister indicate how the comments have been considered? Should Parliament approve the measures prescribed by the Minister?



Thank you