

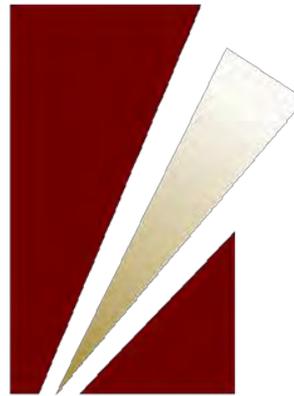
Briefing to the PC: Trade and Industry on Proposed Debt Relief Measures

Presented by:

Prof Bonke Dumisa
Acting Executive
Chairperson

Prof Joseph Maseko
Tribunal Member

Ms Marelize Bosch,
COO



national consumer tribunal

Date: **13 June 2017**



OVERVIEW - ACRONYMS

<i>CPA:</i>	Consumer Protection Act
<i>DRA:</i>	Debt re-arrangement
<i>NCT:</i>	National Consumer Tribunal / Tribunal
<i>NCR:</i>	National Credit Regulator
<i>NCC:</i>	National Consumer Commission
<i>NCA/NCAA:</i>	National Credit Act , and National Credit Amendment Act
<i>Non-DRA:</i>	Non-debt re-arrangement
<i>PAJA</i>	Promotion of Administrative Justice Act



INTRODUCTION

1. The purpose of these submissions is to address the proposed debt relief measures as presented in the Credit Law Review discussion document and presentation made to the Portfolio Committee on aspects thereof.
2. The Tribunal's submissions will only relate to specific aspects relating to the NCT, alternatively those which appear legally and constitutionally problematic from a validity perspective as highlighted in this presentation.
3. In order to not burden the presentation slides, a separate written submission is also provided. This submission contains detailed explanations of points made as well as case law and legislation relied on in support of these submissions.



EFFECTIVE ENFORCEMENT OF THE NCA BY THE NCR

1. The NCA **correctly** does not currently empower the NCR to impose remedial sanctions.
2. Section 15(e) of the NCA – empowers the NCR to **issue and enforce compliance notices.**
3. In terms of **Section 55 of the NCA** – the compliance notice informs recipient that conduct is in contravention of the NCA, the steps to be taken to become compliant and consequences of non-compliance.



EFFECTIVE ENFORCEMENT OF THE NCA BY THE NCR (continued)

4. It is unclear to which effect the NCR utilises this power in terms of the NCA.
5. NCT has only received 5 applications to enforce compliance notices from 1 April 2010 to 31 March 2017. In addition, we have received 11 applications which object to compliance notices which were issued. These would have been appeals against the NCR if they were to be in the form of judgments by the NCR as proposed.
6. It is not clear how exactly the NCR would be more effective if its powers are increased to enforce its own decisions. The 11 challenges made against its judgments would just become appeals.



EFFECTIVE ENFORCEMENT OF THE NCA BY THE NCR (continued)

7. There are a number of challenges to the view as set out in the Credit Law Review discussion document – specifically in relation to the *“transferring of some administrative functions currently residing with the NCT to the NCR”*

(in essence allowing the NCR to be **the investigator, prosecutor, judge and punisher** in relation to their own matters)



CHALLENGE 1: INSTITUTIONAL BIAS

- 1) Section 33 of the Constitution – provides the **right to fair administrative action**
- 2) Great potential for inherent complaints of **institutional bias**.
- 3) Test for institutional bias – *“Whether a reasonable objective and informed person would on the correct facts reasonable apprehend that the decision-maker has not or will not bring **an impartial mind** to bear on the adjudication of the matter.”*
(*President of the Republic of South Africa and Others v South African Rugby Football Union*)
- 4) Decisions may be set aside based on **actual or reasonably suspected bias** ito PAJA



CHALLENGE 2: NO PUBLIC HEARING

- 1) Section 34 of the Constitution – right to have a dispute which may be **resolved by the application of law** in an open/public hearing by **an independent and impartial tribunal or forum**.
- 2) As can be seen from some of the major cases dealt with by the Tribunal, there is often disputes between the NCR and the respondents, which must be resolved into Section 34 of the Constitution as the **issues of law and fact are highly contested**:
 - a) NCR v Lewis; (both matters)
 - b) NCR v Edcon;
 - c) NCR v Capitec etc.
- 3) A hearing resolves disputes of fact and the Tribunal then applies the law to ultimately resolve the dispute between the parties.



CHALLENGE 3: PROCEDURAL FAIRNESS

- 1) Fairness is a **guaranteed Constitutional right** in section 33.
- 2) PAJA enacted to give effect to the rights contemplated in section 33 of the Constitution.
- 3) It would constitute **a breach of the Constitution, PAJA and the principles of natural justice** to “*only be guided by principles of fairness, equity and redress, regardless of whether or not the threshold of legal technicalities has been resolved*”
- 4) The Constitution and the principles of natural justice prescribes that these “*legal technicalities*” must be resolved fairly between the parties during the adjudication process.
 - Both parties involved in a dispute should be allowed **an equal opportunity** to make representation to an independent Court, Tribunal or forum prior to reaching a decision, whether with regards to merits or penalties.



CHALLENGE 3: PROCEDURAL FAIRNESS (continued)

Technical Issues are Law of Procedure

- Procedural aspects are as much law as substantive issues. It would be wrong to see them as an unnecessary addition.
- For instance, starting with a sanction before hearing the evidence and deciding that a party is at fault or not is a violation of procedure to an unalienable right in the constitution.



CHALLENGE 3: PROCEDURAL FAIRNESS (continued)

Procedurally Fair =

- A **fair hearing** (procedural technical law)
- An **impartial decision-maker**
- **Reasons** for the Decisions



CHALLENGE 3: PROCEDURAL FAIRNESS (continued)

Principles of Natural Justice =

- A. Audi alteram partem (**Listen to Both Sides**)
 - Receiving an opportunity to make representations
 - Advanced notice of the hearing
 - Hearing to precede decision
- B. Nemo iudex in sua cause (No one should be a **judge in his or her own case**)
 - Rule against bias
 - Sources of bias:
 - Financial interest
 - Personal interest
 - Bias on the subject matter
 - Official or Institutional bias



CHALLENGE 3: PROCEDURAL FAIRNESS (continued)

- C. Res Judicata (**Matter already dealt with** in another forum)
 - Final judgment of a competent court is conclusive upon the parties in any subsequent litigation involving the same cause of action.
- D. Right to reasons
 - Codified in section 33 of the Constitution



CHALLENGE 3: PROCEDURAL FAIRNESS (continued)

- 1) Fundamental part of administrative justice
- 2) Procedural as well as substantive benefits
- 3) Focus the mind of the decision-maker, leading to structured decision-making, explaining the rationale for the decision.
- 4) Reasons must include the decision-maker's understanding of the **relevant law**, any **findings of fact** on which conclusions depend and the **reasoning process** that led to the conclusions. Language must be clear and unambiguous.



CHALLENGE 3: PROCEDURAL FAIRNESS (continued)

- 5) “Legal technicalities” must be vigorously **tested against the Constitution** and the principles of natural justice.
- 6) “Legal technicalities” often used to refer to interlocutory applications or points *in limine*.
- 7) Administrative fairness applies to all parts of a matter.
- 8) The **limitation clause** in the Constitution (Section 36) must also be considered.
- 9) In our view, the **extenuating circumstances** necessary to invoke the provisions of Section 36 of the Constitution have not yet existed on the cases brought to the Tribunal.



CHALLENGE 3: PROCEDURAL FAIRNESS (continued)

- 10) Failure to consider interlocutory applications or points *in limine* will result in **a failure to comply with the provisions of the Constitution, PAJA and the principles of natural justice.**
- 11) The above failure will result in an **automatic right to review** the matter in a superior court, regardless of whether or not the finding on the ultimate merits and penalties imposed, were correct or not.
- 12) The Tribunal has an exemplary record iro Appeals and Reviews, as the Tribunal comply with the Constitution, PAJA and the principles of natural justice in the adjudication of its matters.



CHALLENGE 3: PROCEDURAL FAIRNESS (continued)

- 13) Being **inquisitorial does not equate to not following the law** or not allowing the parties an opportunity to exercise their constitutional rights.
- 14) Inquisitorial approach **within an adversarial system** – collection and processing of evidence. Tribunal does not become a party to the matter.



CHALLENGE 4: UNINTENDED CONSEQUENCES

Over-reaching proposal

- Due to proposed over-reaching by the NCR, pressure may **increase with an additional load of appeals and reviews by parties** challenging perceptions or existence of:
 - Bias;
 - Unfairness;
 - Impartiality;
 - Lack of Independence;
 - Arguments of fact;
 - Arguments on points of law;
 - Quantum of Fines proposed.



CHALLENGE 4: UNINTENDED CONSEQUENCES (continued)

Impartiality

- NCR investigating and then also adjudicating its own cases it has investigated **cannot** be said to **engender any semblance of impartiality or independence to a matter at hand.**



CHALLENGE 4: UNINTENDED CONSEQUENCES (continued)

Hearing consumer protection complaints in terms of the Consumer Protection Act

- The provisions of the NCA are utilised in hearing **cases brought to the Tribunal in terms of the CPA.**
- If the NCA is therefore changed to change the NCT into an Appeals Tribunal as opposed to a Tribunal of first instance, it would have the effect that a **similar structure would have to be followed for CPA matters.**
- Accordingly, the **NCC** should in such instances also adjudicate on their own cases, with the NCT then only tasked with appeals and reviews.



CHALLENGE 4: UNINTENDED CONSEQUENCES (continued)

No further recourse for consumers non-referred by the NCR

- Consumers who are non-referred by the NCR, would have to **take their matters to Courts** should they disagree with the decision of the NCR.
- The Tribunal as an Appeals Tribunal would **not be inquisitorial** and accordingly would not be in a position to assist an unrepresented consumer to elicit additional evidence necessary to prove his case.
- As an Appeals Tribunal, the Tribunal would be **bound to the evidence already deduced** before the NCR, as “court of first instance”.
- Currently, the Tribunal, as Tribunal of first instance, may elicit any additional evidence necessary in order to fully ventilate a matter before the Tribunal.

EFFECTIVE SERVICE DELIVERY AT THE NCT



- 1) NCT's service delivery system is **not hampered and rendered inefficient** by referrals from the NCR, applications by consumers whose cases have not been entertained by the NCR or debt counsellor for orders within the debt review process.
- 2) Challenges previously experienced have been **resolved**.

EFFECTIVE SERVICE DELIVERY AT THE NCT (continued)



- 3) Extensive **ICT automation** will continue to enable the NCT to deal with **large volumes of debt re-arrangement matters**, despite limited resources and an increase in case load.

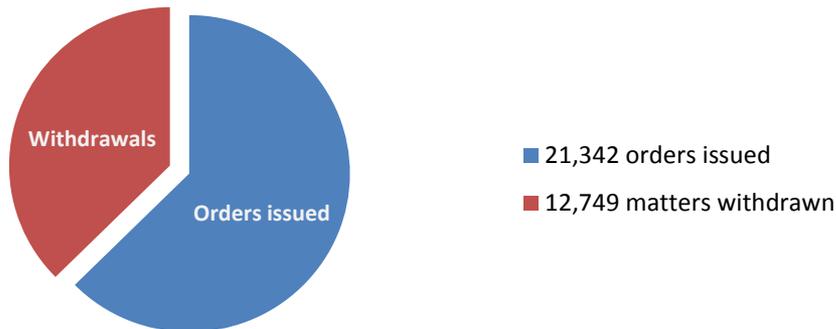
- 4) **Effective and efficient case management processes** as well as **capacitated Tribunal members and employees** will enable the Tribunal to deal with non-debt re-arrangement matters as filed with the Tribunal.

EFFECTIVE SERVICE DELIVERY AT THE NCT (continued)

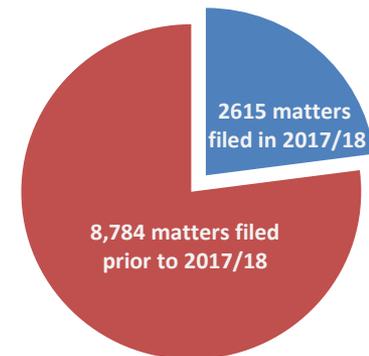


Debt Re-arrangement Matters (DRA's)

**34,091 DRA's finalised during
2016/17**



**11,399 DRA's pending as at
20 May 2017**



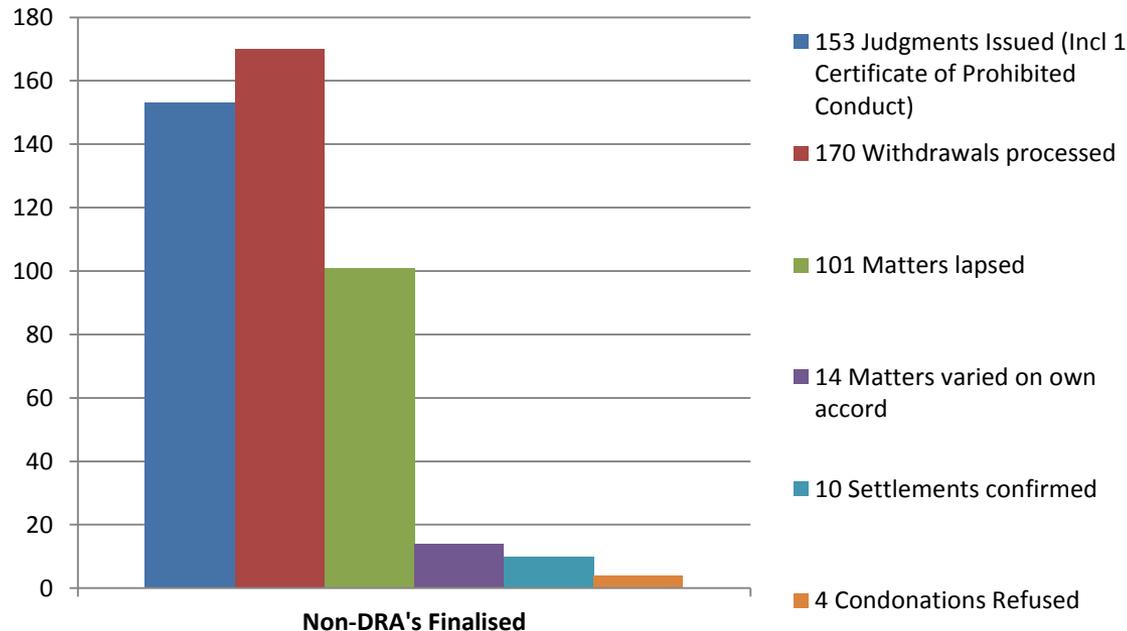
- The above pending DRA's equates to approximately a quarter to a quarter and a half's worth of filings

EFFECTIVE SERVICE DELIVERY AT THE NCT (continued)



Non-Debt Re-arrangement Matters (Non-DRA's)

- The NCT finalised 452 Non-DRA's during 2016/17.

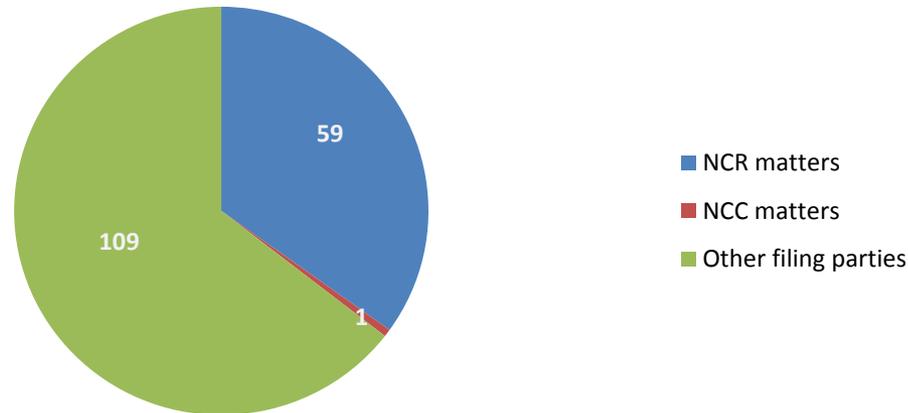


EFFECTIVE SERVICE DELIVERY AT THE NCT (continued)



Non-Debt Re-arrangement Matters (Non-DRA's)

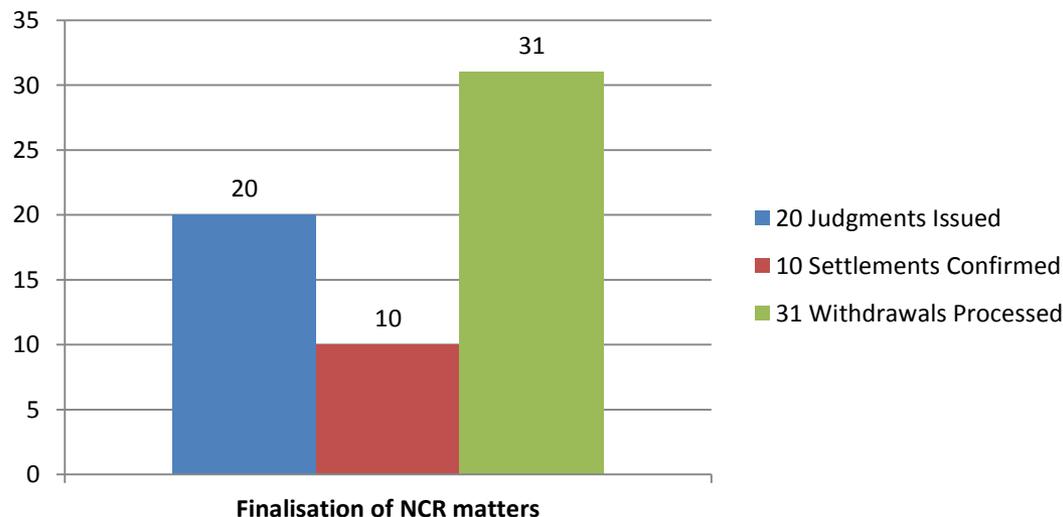
169 Pending Non-DRA's as at
20 May 2017



EFFECTIVE SERVICE DELIVERY AT THE NCT (continued)



- The Tribunal received 37 filings from the NCR during 2016/17 and 2 filings during 2017/18 up to 25 May 2017. During the same period, the NCT finalised 61 NCR matters (53 matters during 2016/17 and 8 matters during 2017/18 up to 25 May 2017).

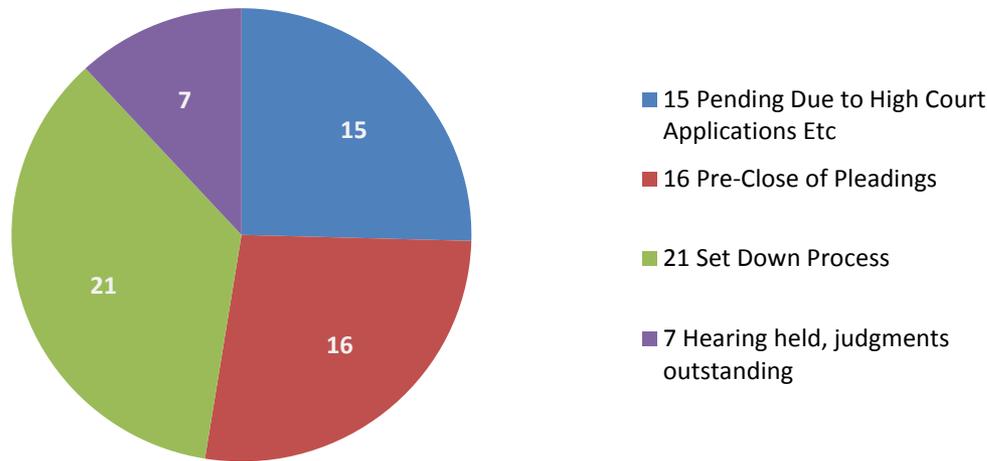


EFFECTIVE SERVICE DELIVERY AT THE NCT (continued)



The Tribunal currently has 59 pending NCR-matters.

59 Pending NCR Matters as at 25 May 2017



The NCT regularly engages with the NCR and report on the progress of its cases. The NCR has indicated to the NCT on more than one occasion that it is satisfied with the progress made on these cases.



EFFECTIVE SERVICE DELIVERY AT THE NCT (continued)

- Amendments requested by NCT to further improve efficiencies:
 - Change to allow the Chairperson a discretion in relation to the allocation of cases;
 - Change to allow full-time Tribunal members (excluding the Chairperson) to be permanent appointment as opposed to contract appointments;
 - Change to allow for rescission or variation to Section 165 of the NCA where the consumer's circumstances changed or by agreement between the parties.



CONCLUSION

- 1) We are **uncertain** as to the rationale and justification for the need to make the proposed amendments we have addressed where efficiencies and numbers are concerned.
- 2) We are **certain** that the proposed changes addressed in our submission will mean that the proposed amending Act would not survive constitutional muster.
- 3) Even if our submissions do not curry favour, they will still feature in the Constitutional Court tests at the level of Assent when they are legally and constitutionally reconsidered as is the practice.
- 4) Even if by some fluke of nature, Assent would be obtained, the courts would strike those and excise those provisions when challenged by litigants which is a guaranteed certainty.

GLOSSARY OF TERMINOLOGY



Allocation:

To allocate a matter to a single member or three member Tribunal panel for hearing as required by the NCA.

Close of pleadings:

Pleadings is open for a set period of time after complete filing to allow the parties to file an answering and replying affidavit. After this period pleadings close and the matter is ready to be allocated for a hearing.

Condonation application:

If a party fails to follow the Tribunal rules (for example file an answering affidavit outside of the permitted time period), such a party must apply to the Tribunal to condone non-compliance with its Rules. If the non-compliance is not condoned, the step will be irregular and disregarded.



GLOSSARY OF TERMINOLOGY (continued)

Interlocutory proceedings / applications (includes condonation applications)

These are proceedings that deal with the rights of the parties between the commencement of the action and its final determination for example -

- Apply for an extension of time for submitting pleadings
- Amendments to pleadings
- Additional answering and replying affidavits
- Seek directions regarding the conduct of the case
- Compel the other party to comply with the rules or directions or
- Apply for interim relief or remedy etc.



GLOSSARY OF TERMINOLOGY (continued)

Complete filing

- A term which means that **all** the filing requirements for a specific application, as set out in the Tribunal rules, have been met. This notice also signals that pleadings are open and that the Respondent may file an answering affidavit.



GLOSSARY OF TERMINOLOGY (continued)

DRA

- A Debt re-arrangement application is brought by a Debt Counselor on behalf of a consumer to re-arrange the consumer's credit agreement obligations as agreed with the consumer's credit providers.
- Though these are agreements entered into between the DCs and credit providers on behalf of consumers the NCT interrogates these settlements carefully as they may contain –
 - illegal interest rates
 - Instances where the consumer has in fact not consented to the DRA
 - Amounts to be repaid that are in excess of what the consumer can afford
 - Not all the consumers' creditors' consented to the DRA
 - Repayment terms that are longer than the reasonable work life of the consumer
 - Repayment agreements do not settle the debts
 - Insufficient provision for consumers' living expenses
 - Unaffordable repayments

GLOSSARY OF TERMINOLOGY (continued)



- Non-debt re-arrangement application. All other applications which may be heard by the Tribunal, excluding DRA's. These applications in most instances require three member Tribunal members and a formal hearing.
- Approximately 53 Prohibited Conduct types and 34 applications in terms of NCA, for example referral of prohibited conduct by Regulator i.e reckless credit granting, failure to do affordability assessments, charging illegal interest rates, review of sale of goods, resolving disputed entries on statements or cases of prohibited conduct referred directly to the Tribunal by a consumer after receipt of a non-referral notice.



GLOSSARY OF TERMINOLOGY (continued)

Non-DRA

- Approximately 99 Prohibited Conduct applications in terms of the CPA for example issues of quality of services and goods, warranties offered on repaired goods;
- These are often complex matters. Involving new legislation without guiding precedents.



OUR CONTACT DETAILS

Office Hours:

Monday to Friday, excluding public holidays, from 09:00 to 16:00.

Postal Address:

Private Bag X 110
Centurion
0046

Physical Address:

The National Consumer Tribunal
Ground Floor, Building B,
272 West Avenue
Lakefield Office Park
Centurion, Pretoria

Telephone: (012) 683 8140.

Facsimile: (012) 663 5693.

E-mail: Registry@thenct.org.za



THANK YOU

Q&A