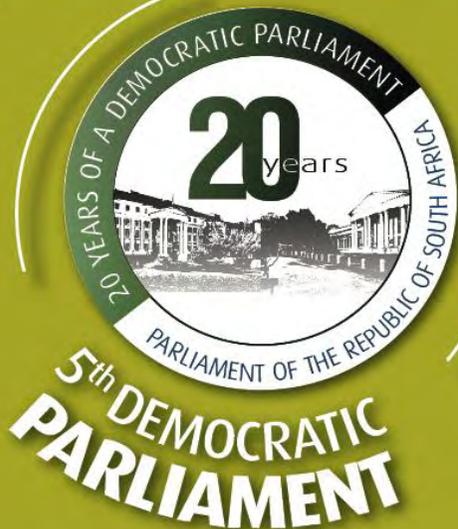


NATIONAL CREDIT AMENDMENT BILL [B30-2018]



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA



Presentation to Select Committee
2018.10.10



Content of presentation

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Development of the Bill (1)

- 13 October 2016: Portfolio Committee Trade and Industry (PC T&I) adopted a resolution that it should consider initiating legislation to pursue debt relief measures for the most vulnerable of consumers;
- 21 October 2016: PC T&I established a sub committee to spearhead the process;
- 15, 17 and 25 November 2016: PC T&I engaged with stakeholders in the industry (Debt Counsellor Associations; Banks; Non Bank Lenders; Micro Finance; Retail; Financial Consultants) on possible debt relief measures;
- 6 December: PC T&I adopted a memorandum (NA Rule 273(1)) seeking permission to develop legislation;
- 2 March 2017: National Assembly gives permission that the PC T&I may proceed with such development;
- 17 May 2017: The Department briefed the PC T&I on the policy that would underpin debt relief (further briefs on the policy received from National Treasury (30 May 2017) and the Department of Justice and Constitutional Development (13 and 27 June 2017));
- 20 June 2017: The framework for a possible debt relief Bill presented by Legal Services;
- August – November 2017: Deliberations, further engagements with National Treasury, Department of Justice and Constitutional Development, SA Reserve Bank and the Department of Labour; the framework developed into a Bill – with continuous shaping, adding, deleting;
- 24 November 2017: Draft 5 of the Bill published for public inputs (The Committee received 31 submissions);
- 30, 31 January 2018, 2 and 13 February 2018: Public hearings held;



Development of the Bill (2)

- February 2018 – June 2018: Deliberations continued: The PC T&I:
 - approached the National Economic Development and Labour Council (NEDLAC) for inputs on the Bill;
 - considered 2 legal opinions on Constitutionality of two concepts in the Bill;
 - considered statistics presented by National Treasury (Eighty20) and NCR on over-indebtedness and the possible impact of the Bill in its draft 5-form;
 - Requested Legal Services to amend the Bill so that the constitutional concerns and the concerns of National Treasury are addressed so that the Bill would be constitutional and the impact of the Bill be fair and balanced.
- April / May 2018: Study tour to the UK regarding its legislative provisions for debt relief (Key finding: The UK did not experience significant moral hazard and unintended consequences were negligible);
- May / June 2018: A second call for comments on new clauses that resulted from deliberations in the PC T&I;
- July 2018: PC T&I sought a legal opinion from Adv Trengove re the constitutionality of two concepts in the Bill that were raised as constitutional concerns by stakeholders. His views were that:
 - the debt intervention measure contained in the Bill is substantially and procedurally fair and should pass constitutional muster;
 - the power to the Minister to prescribe a debt relief measure constitutes delegation of plenary powers and is unlikely to pass constitutional muster (PC T&I removed this power as it also became superfluous given other changes made in the Bill).
- July / August 2018: Further deliberations and amendments to address inputs received from the public and Adv Trengove.
- 30 August 2018: Bill certified as consistent with the constitution and existing legislation and as properly drafted in the form and style that conforms to legislative practice as is required by NA Rule 279(4);
- 5 September 2018: The JTM classifies the Bill as a section 76 Bill, affecting Provinces in that it in a substantial manner affects “Trade” and “Consumer Protection” in Schedule 4 of the Constitution.
- 5 September 2018: The PC T&I introduces Bill 30-2018, classified by the JTM as a section 76 Bill.
- 12 September 2018: Bill 30-2018 passed by the National Assembly and transferred to the National Council of Provinces.

Rationale of the Bill

- Preamble:
 - Purpose of the National Credit Act, 2005: to promote and advance the social and economic welfare of South Africans; to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market industry; and to protect consumers;
 - Existing natural person insolvency measures are not accessible to all consumers:
 - Insolvency / Sequestration requires benefit to credit providers;
 - Administration and Debt Review are not affordable for some consumers;
 - These consumers who are not able to access natural person insolvency measures find it an insurmountable challenge to manage or improve their financial position; and
 - Not providing suitable alternative measures subjects these consumers to unjustified and unfair discrimination on socio-economic grounds.
- Clause 2 inserts the provision of appropriate debt intervention measures into section 3 as one of the methods through which the purpose of the National Credit Act, 2005 is to be achieved.

Main themes of the Bill

- Create a targeted debt intervention measure for over-indebted consumers who are not able to qualify for, or afford existing debt relief measures;
- Address some deficiencies around reckless lending;
- Providing for possible compulsory credit life insurance (may be prescribed) in certain instances;
- Provide for better enforcement of the Act, including measures to address actions that were rendered unlawful by the Act but which were not criminal so that enforcement was limited to civil actions.
- Correct deficiencies in the powers of Magistrate's Court related to debt relief measures.

Debt intervention measure - Administrative

Who will administer the debt intervention measure?

- Clauses 3, 6 and 13: The debt intervention measure will be administered and processed by the National Credit Regulator (NCR) without charge to a qualifying applicant.
 - Clause 3 sets out the functions of the NCR related to the debt intervention measure: The NCR must assist a debt intervention applicant with the process to be declared over-indebted; to rearrange her obligations; to have her debt obligations suspended and possibly extinguished where applicable; to have her application for debt intervention and thereafter for rehabilitation, if relevant, considered.
 - Clause 3 also empowers the NCR to appoint debt intervention officers.

How will information about debt intervention applications be stored?

- Clause 6 requires the NCR to keep a record of debt intervention measure applications;
- Clause 7 provides for information related to debt intervention measure applications, the status of such applications and orders related to such applications to be accepted by Credit Bureaux without charge to the NCR.
- Clause 8 requires a clearance certificate to be issued for debt intervention applicants who have satisfied all obligations or showed an ability to settle all obligations. It also provides that a consumer may approach the Tribunal to review any decision or failure by the NCR in respect of the issuing of such a clearance certificate.
 - This clause copies section 71 (1)(a) and (3), which deals with clearance certificates issued by a debt counsellor for a debt review applicant.
- Clause 9 provides for the submission of relevant debt intervention information by the NCR to credit bureaux and for the removal of such information by the credit bureaux when they receive information that an order related to the debt intervention measure has run its course (e.g. the period during which the right to apply for credit has been limited, has run out; the debt intervention measure applicant successfully applied for rehabilitation).
 - Clause 9 further provides for a dispute mechanism related to the information so submitted to a credit bureaux – applicants may approach the Tribunal
 - Clause 9 also requires credit providers to update their records with 7 business days from the date on which an order related to the debt intervention measure was served upon them.

Debt intervention measure – Qualifying criteria

Who qualifies? Clauses 1(b) and Clause 13 (section 86A(1)):

- A person who--
 - is a natural person (or joint estate);
 - is a consumer under unsecured credit agreements / short term credit transactions / credit facilities only:
Provided that the total of the principal debts under these agreements may not be more than R50,000;
 - during the 6 months preceding the application, has received an average income of no more than R 7,500 per month;
 - is over-indebted; and
 - is not sequestrated or subject to an administration order.

Clause 29(b): The Minister may annually review the qualifying values for gross income (R7,500) and total unsecured debt (R50,000).

- These amounts may however not be amended in respect of any application that is referred for suspension and possible extinguishing of debt (i.e. only applications where the income is a maximum of R7500 and total unsecured debt is a maximum of R50,000 may be referred to the Tribunal to consider suspension / extinguishing, as this measure is only available for 4 years – see discussion in slide 10)

Are any agreements excluded? Clause 1(b) and Clause 13 (Section 86A(2))

- Having a secured agreement disqualifies the consumer;
- A developmental credit agreement and a credit agreement where the credit provider has started legal proceedings form part of the R50,000 total, but does not form part of any restructuring of obligations and cannot be extinguished.

Debt intervention measure

The application process (1)

- Clause 13, section 86A(3) to (11)
 - Duplicating the debt review process (s86).

1
Application submitted

2
NCR acknowledges receipt and notifies all CPs and CBs

The applicant and CPs must participate in good faith and comply with reasonable requests by the NCR

NCR must:

1. determine if the consumer is over-indebted and if any of the agreements may be reckless credit agreements
 2. Provide the applicant with financial literacy counselling and access to training that could improve the applicant's financial literacy.
- 3

4
The NCR may S86A(6):
(a) Reject the application;
(b) Recommend voluntary re-arrangement of debt;
(c) Refer a reckless credit agreement to the Tribunal;

(d) If the applicant **can** solve in 5 years, refer the application to the Tribunal to re-arrange the obligations;

(e) If the applicant **cannot** solve in 5 years, refer the application to the Tribunal to consider suspension of the obligations (12 months x 2) → extinguishing

Debt intervention measure

The application process (2)

Clause 13:

- S86A(7): If the NCR rejects an application, the consumer may approach a Magistrate's Court for a debt review order;
- S86A(8): If the NCR recommends voluntary re-arrangement and the parties:
 - reach agreement: Proceed with a consent order (s138); or
 - does not reach agreement: Refer the matter to the Tribunal.
- S86A(9): If the NCR refers an application for suspension and subsequent extinguishing, the NCR must notify each affected credit provider, who may submit written representations to the Tribunal.
 - Clause 13: S86A(12): These referrals may only be made for a period of 48 months from the date on which S86A(6)(e) becomes operational.
 - The Minister must review the effectiveness of this measure and within 36 months of it becoming operational file a report in the NA setting out the findings. The intention is that the period may at that stage then be extended by way of an Amendment Bill.
- S86A(10) and (11): Duplicates S86(10) and (11) (dealing with debt review) and provides for the right of a credit provider to terminate the debt intervention where a consumer is in default, before the application is filed with the Tribunal.¹⁰

Debt intervention measure - Re-arranging obligations

- Clause 14: Duplicates section 87(1), which sets out the powers of the Magistrate's Court iro debt review.

1
NCR refers an application that can solve in 5 years – S86A(6)(d)

2
Tribunal, or 1 Tribunal member:

- conducts a hearing;
- considers the NCR's recommendation;
- considers all other available information;
 - considers the consumer's financial means, prospects and obligations

and makes an order:

3
(1A) (a) rejecting the NCR's recommendation or the whole application;

(b)(i) declaring any agreement reckless;

(b)(ii) re-arranging the obligations of the applicant by:

- (aa) extending the period and reducing instalments;
- (bb) postponing due dates for a period;
- (cc) extending the period and postponing due dates;
- (dd) determining maximum interest, fees and charges (excl. insurance in S101(1)(e)), which max may be zero for a period of up to 5 years.
- (ee) recalculating obligations because of contraventions of the Act.

4
NCR must notify the applicant of the order and serve a copy on all affected CPs and registered CBs

Debt intervention measure - Suspension → extinguishing (1)

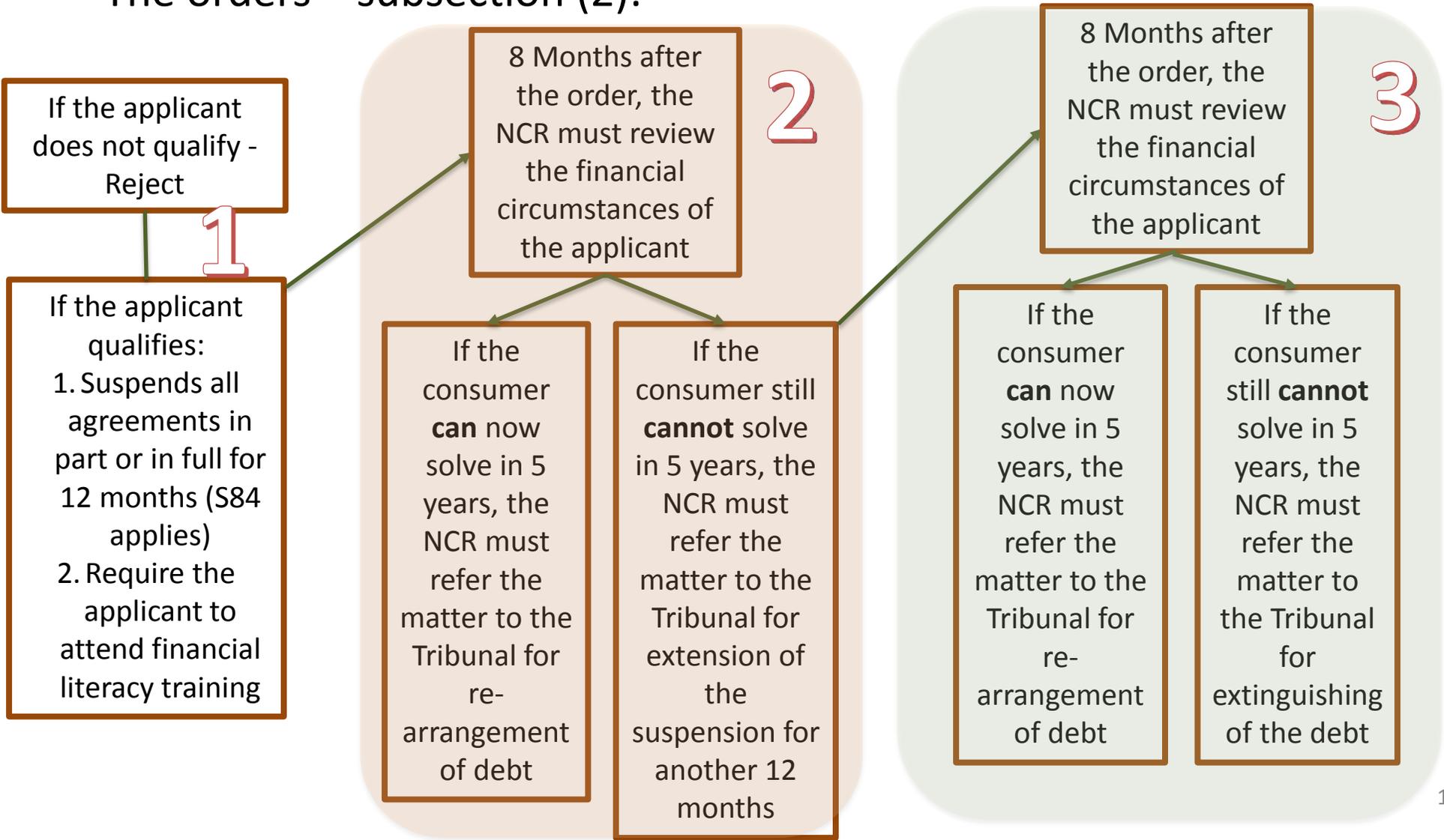
Clause 15: Inserts section 87A

- S87A(1): A single member of the Tribunal may consider a section 86A(6)(e) referral and must take into account the referral from the NCR and any representations made by CPs.
- S87A(3): When considering suspension, or extension of the suspension, or extinguishing, the Tribunal must consider:
 - (a) and (b): The circumstances of the applicant;
 - (b): The credit behaviour of the applicant and attempts to secure an income; and
 - (c): Acts or omissions by every affected credit provider.
- Suspension:
 - S87(4)(a): S84 applies, i.e. no charges or interest run during this period, the consumer need not make payments and the Credit Provider cannot enforce the contract;
 - S87A(4)(b): If a debt would prescribe during suspension, another year is allowed after suspension ended.
- S87A(5)(d): Every time the NCR refers the matter to the Tribunal – for suspension, extension of suspension, or extinguishing – the NCR must inform the affected credit providers, who may make representations to the Tribunal.
- S87A(10): The NCR must notify the applicant of an order and must serve a copy of the order on each affected credit provider and registered credit bureau.



Debt intervention measure - Suspension → extinguishing (2)

- The orders – subsection (2):



Debt intervention measure - Extinguishing

- The total of the amounts in section 101(1) may be extinguished in respect of each qualifying credit agreement – S86A(6).
- The extinguishing may be a percentage of the total amounts, provided it applies equally to all credit agreements affected by the application – S86A(7).
- S 87A(9) When extinguishing debt, the Tribunal must also limit the applicant's right to apply for credit for at least 6 months and may increase this period up to 12 months. In determining the period, the Tribunal must consider:
 - The total unsecured debt and number and period of agreements affected;
 - The applicant's credit record.
- The Tribunal may rescind or amend an order if information is placed before it showing the applicant was dishonest or fails to comply with the order.

Debt intervention measure – effect and rehabilitation

- Clause 16, Section 88A: Effect of debt intervention:
 - The applicant may not enter into any further credit agreement (excl. agreements to provide debt relief) until all re-arranged obligations are fulfilled or the period of limitation after extinguishing of debt has lapsed.
 - If a credit provider enters into a credit agreement with the applicant after application, but before a debt intervention order was granted, it will be regarded as reckless;
 - If an applicant applies for credit, that subsequent agreement will not be eligible for debt intervention.
 - Credit Providers may not enforce credit agreements through litigation or judicial process until all re-arranged obligations are fulfilled. If debts were extinguished all rights to enforce ceases (see clause 1(c) for the definition);
- Clause 16, Section 88B: Rehabilitation
 - If the applicant has repaid the full amount that was due on the date of the application, has attended financial literacy training and has improved his / her financial circumstances, he / she may apply for rehabilitation
 - The NCR must notify all affected credit providers, who may make submissions to the Tribunal, and registered credit bureaux.
 - The NCR must notify the applicant of an order and must serve a copy of the order on each affected credit provider and registered credit bureau.

Reckless lending

- The National Credit Act, 2005, currently only requires a debt counsellor to consider whether a credit agreement is reckless, if the consumer makes such a request.
 - Clause 12 now requires a debt counsellor to ALWAYS consider whether a credit agreement is reckless.
- Clause 10 requires a debt counsellor to report an agreement where there are reasonable grounds to suspect that it is reckless credit agreement to the NCR for investigation of the complaint (where debt review is not recommended), or to a Magistrate's court (with the debt review referral)
 - Credit providers MUST within seven business days of receipt of a request for information, provide the debt counsellor with that information. If a credit provider intentionally fails to provide the information, the Tribunal may impose an administrative fine.
 - Failure to report is NOT made a criminal offence as there are different methods of determining whether an agreement is a reckless credit agreement and thus it can not be determined with certainty.
 - The Department will consider the methods of calculation and attempt an alignment so that there is certainty.

Credit Life insurance

- Clause 19(*b*): The Minister of Trade and Industry, after consultation with the Minister of Finance, is empowered to introduce regulations making credit life insurance compulsory for all unsecured credit that is extended for 6 or more months up to a value of R50 000.
- Clause 19(*e*): In this regard, the Minister of Trade and Industry, in consultation with the Minister of Finance, must further prescribe a cap on the cost of such credit life insurance.

Better enforcement

- Clause 25 inserts new offences and clause 26 provides the penalties for these offences:
 - Section 157A: Making it a criminal offence if a person intentionally submits false or misleading information when applying for debt intervention, or if a person intentionally alters his / her financial circumstances in order to qualify for debt intervention;
 - Clause 26: a fine or imprisonment not exceeding two years (or both), and a permanent prohibition for applying for debt intervention;
 - Section 157B: Making it an offence if a person intentionally participates in conduct that is currently made unlawful by the National Credit Act, 2005 (e.g. unlawful credit market practices; unlawful practices when entering into a credit agreement at a consumer's home or place of business; requires unreasonable insurance to be taken out; intentionally sells prescribed debt for collection or intentionally collects prescribed debt)
 - Clause 26: a fine or imprisonment not exceeding 10 years (or both);
 - Section 157C: Making it an offence to operate as a credit provider, credit provider of developmental credit, a credit bureau, a debt counsellor, a payment distribution agent or an alternative dispute resolution agent, without having registered as is required by the National Credit Act, 2005.
 - Subsection (2) provides an exception – where the credit transaction was incidental and does not form part of the person's normal business or where the person is still applying for registration.
 - Clause 26: a fine or imprisonment not exceeding 10 years (or both);
 - Section 157D: Providing that where an offence was created by a company, directors and prescribed officers who was knowingly (word is defined in the Bill) a party, would be liable.
 - Clause 26: a fine not exceeding 10% of annual turnover or R1 Million, whichever is the greater amount;
- Clause 26 also provides factors to take into account when determining the penalty.

Strengthening the powers of the Magistrate's Court

- Clause 11 empowers Magistrate to intervene where a consumer appears to be over-indebted:
 - The National Credit Act, 2005 currently requires an allegation before the Magistrate may act.
 - The Magistrate may now also enquire whether the consumer wishes to participate in debt intervention, and if so, either refer the consumer to the NCR, or adjudicate the matter as a debt intervention application.
- Clause 12(b) empowers the Magistrate's Court to determine the maximum rate of interest, fees or other charges (but not insurance charges) under a credit agreement as part of the debt review process.
 - Clause 29(a): The Minister must prescribe guidelines on how the court should apply this power to reduce the cost of credit.
 - One of the main determinations is the formalisation of the existing voluntary Task Team Agreement that guides credit providers and debt counsellors on how to restructure debt so that consumers can solve within 60 months.
 - These regulations must differentiate between the lowering of the rate of interest between unsecured and secured loans.

Consequential amendments (1)

- Clause 4: Amends section 27, which deals with the powers of the Tribunal, to add the adjudication of a “referral” to the powers of the Tribunal (NCR “refers” a debt intervention application).
- Clause 5: To amend section 60, which deals with the right to apply for credit, so that it is clear that the right to apply for credit can be limited by the National Credit Act, 2005.
- Clauses 17 and 18: Amends sections 89 and 90, which deals with unlawful agreements and provisions, to empower the Tribunal to make an order related to unlawful credit agreements or unlawful provisions of credit agreements.
 - The National Credit Act, 2005, currently only provides for the Magistrate’s Court to make an order in this regard.
- Clause 20: Amends section 129, which deals with the procedures that are required before debt enforcement may begin, so that—
 - the credit provider may also suggest to the consumer to approach the NCR for debt intervention, where applicable; and
 - a credit provider may not revive or re-instate an agreement after the execution of an order of the Tribunal enforcing that agreement, or after the obligations under that agreement were extinguished by the Tribunal.
- Clause 21: Amends section 130, which deals with debt procedures in court, so that a Magistrate is required to dismiss a matter where the obligations under a credit agreement before it was fully extinguished by the Tribunal.



Consequential amendments (2)

- Clause 22: Amends section 137, which deals with the initiation of applications to the Tribunal, so that the NCR may refer debt intervention applications to the Tribunal.
- Clause 23: Amends section 142, which deals with hearings before the Tribunal, to provide that debt intervention applications may be considered by a single member of the Tribunal.
- Clause 24: Amends section 152, which deals with the status and enforcement of orders of the Tribunal, so that it is clear that orders of the Tribunal are also binding on consumers and credit providers.
- Clause 27: Amends section 164, which deals with civil actions and jurisdiction, to provide for the Tribunal's jurisdiction to declare an agreement or a provision unlawful.
- Clause 28: Amends section 165, which deals with the variation of orders, so that the Tribunal is empowered to rescind orders under certain circumstances.
- Clause 30: Amends the long title to include a provision for “debt intervention”.

Consequential amendments (3)

- Regulations

- Clause 29 amends section 171, which deals with regulations, so that the Minister is empowered to make regulations:
 - regarding participation in a financial literacy programme after consultation with the Minister of Finance;
 - regarding the determination that a magistrate and tribunal member can make iro a maximum interest and other charges cap.
 - The clause provides guidance on what the Minister must take into account when making these regulations: Existing industry standards; agreed to industry guidelines; must distinguish between secured and unsecured debt; must require the magistrate / tribunal member to apply the reduction of interest / charges incrementally.
 - adjusting the qualifying amounts for a debt intervention applicant, i.e. gross income and total unsecured debt (the Minister is not empowered to adjust these amounts for applications that will be considered for suspension / extinguishing of debt)
 - The Minister is given guidance on what to consider when reviewing these amounts (inflation; cost of natural person insolvency measures).
 - The Minister must review this amount 12 months after the commencement of the Amendment Bill and thereafter every 24 months.
 - The Minister may however only adjust the amounts once per year. When the Minister proposed an adjustment, he / she must consult stakeholders; must table a report in the National Assembly summarising the consultations and providing the proposed adjustment with a rationale for the adjustment. The National Assembly must then approve the proposed adjusted amount.



Transitional provision and short title

- Clause 31 provides that the National Credit Amendment Bill applies retrospectively. I.e. it applies to a credit agreement that was made before its commencement date.
 - Rationale: consumers are over-indebted under existing credit agreements. If this clause is not inserted, the measure will only be available iro credit obtained **after** the commencement date, which thus nullifies the intent of the Bill.
- Clause 32 provides the short title and that the Bill will only become operational upon proclamation by the President in the *Gazette*.
 - This is to allow the NCR, credit providers, credit bureaux and debt counsellors to update their systems and make provision for the new debt intervention measure. It also allows the NCR to appoint the necessary staff to administer the measure.



END