National Credit Amendment Bill

-Opinion from Adv Trengove;
-Comments on further submissions

2018.07.31

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

Opinion of Adv Trengove, SC

Opinion - The debt relief measure

- The debt relief measure as provided for by the Bill constitutes a deprivation of property (par 24), but is permissible and lawful under section 25(1) of the Constitution (par 32)as it:
  - occurs in terms of a law of general application (par 25);
  - is not arbitrary in that it is procedurally fair (par 29):
    - "…credit providers, who are deprived of their contractual claims, are afforded an opportunity to place evidence before and make submissions to the Tribunal whenever it takes a decision to suspend or cancel their rights" (par 27); and
    - The Tribunal's decisions to suspend or cancel constitute administrative action and is thus subject to the principles of administrative justice (par 28); and
  - is not arbitrary as sufficient reason exists for the deprivation (par 32):
    - Its purpose and effect are to afford poor people the kind of relief that has always been available to more affluent debtors in distress (par 31.1) – i.e. to relieve insolvent debtors of the indefinite burden of debts that they cannot realistically ever repay (pat 31.4); and
    - The debt is only cancelled if there is no real prospect that the debtor will be able to pay the debt – and accordingly only when the credit provider's claim has become irrecoverable and worthless or worth very little (par 31.2-3).

Opinion – Constitutional concern

Constitutional concern: Clause 13 (section 86A(12)*(b)* & *(c)*: Allowing the Minister to extend the operation of the measure related to extinguishing of debt) and Clause 29 (section 171(2A): Empowering the Minister to prescribe a debt intervention measure) constitute delegation of plenary powers.

- Adv Trengove points out that:
  - Although the Constitution does not expressly regulate parliament's capacity to delegate its legislative power, it permits limited delegation by necessary implication (par 36 – see slide 4 for case law);
  - Legislative powers are usually delegated to "fill in the detail" of an existing statute rather than serving as an open-ended licence to legislate (par 37 see slide 5 for case law);
  - It is ordinarily for the Legislature to regulate any limitation of constitutional rights, which should not be left to the discretion of the executive (Par 38 see slide 6 for case law).
- Adv Trengove also expresses the concern that almost no limitation is placed on the delegation related to prescribing a debt relief measure:
  - the definitions do not assist in limiting the delegated powers;
  - the only real limitation is the categories of persons who may benefit; and
  - there is no limitation on the type of measure that the Minister may introduce.

Opinion – The applicable case law (1)

- *Executive Council, Western Cape Legislature v President of RSA 1995 (4) SA 877 (CC)* ("EC, Western Cape"): (The President had the power to amend the Local Government Transition Act and in fact amended it in such a way that certain functions created by the Act was moved from Provincial to National government.)

  "There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making…There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including, as section 16A does, the power to amend the Act under which the assignment is made." (par 51 – my emphasis)

  "…it is a necessary implication of the Constitution that Parliament should have the power to delegate subordinate legislative powers to the executive. To do so is not inconsistent with the Constitution; on the contrary it is necessary to give efficacy to the primary legislative power that Parliament enjoys. But to delegate to the executive the power to amend or repeal Acts of Parliament is quite different." (par 62 – my emphasis).

Opinion – The applicable case law (2)

- *Justice Alliance of SA v President of the RSA 2011 (5) SA 388 (CC)* ("Justice Alliance")
  (Regarding the decision by the President of the Republic of South Africa to extend the term of office of the Chief Justice for five years – S176 of the Constitution requires that this is done by an Act of Parliament.)

  "Thus section 8(a) confers a significant and wide discretion on the President... Parliament has not sought to furnish any, let alone adequate, guidelines for the exercise of the discretion by the President." (par 51 – my emphasis)

  "…the question whether Parliament is entitled to delegate must depend on whether the Constitution permits the delegation… (it) is a matter of constitutional interpretation dependent, in most part, on the language and context of the empowering constitutional provision." (par 54 – my emphasis)

  "The primary reason for delegation is to ensure that the legislature is not overwhelmed by the need to determine minor regulatory details. Thus, delegation relieves Parliament from dealing with detailed provisions that are often required for the purpose of implementing and regulating laws…Delegation is the conferral of a power for a specific reason, often a pragmatic grant of power to fill in the detail of a policy laid down by primary legislation. It is not power which has been transferred to the final decision-maker, to be used as they see fit, or alienated by them in turn." (Par 61 – my emphasis)

  "Parliament may not ordinarily delegate its essential legislative functions. The power to extend the term of a Constitutional Court judge goes to the core of the tenure of the judicial office, judicial independence and the separation of powers." (par 67)

Opinion – The applicable case law (3)

- *Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC)* ("Dawood") (In this matter the Court considered the constitutionality of the discretion given to officials to refuse a permit (which refusal could limit a person's constitutional rights))

  "We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable…Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance…Guidance could be provided either in the legislation itself, or where appropriate by a legislative requirement that delegated legislation be properly enacted by a competent authority." (Par 54 – my emphasis)

- *Affordable Medicines Trust and Others v Minister of Health of RSA and Another 2005 (6) BCLR 529 (CC)* (This case dealt with i.a. the discretion given to the Director General to prescribe conditions on which licenses may be issued)

  "However, the delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power ... These constraints will generally appear from the provisions of the empowering statute as well as the policies and objectives of the empowering statute." (Par 34– my emphasis)

Opinion – The applicable case law (4)

- *SA Reserve Bank v Shuttleworth 2015 (5) SA 146 (CC) para 113* ("SARB") (This case related to exit charges, but the Court also considered the broad discretionary powers of Minister and found that it was necessary for flexible, speedy and expert approach to exchange control.)

  "There can hardly be argument that Parliament is entitled to delegate subordinate legislation, and does so routinely, in the form of regulation-making to the Executive…The President has not delegated legislative power. His power is to regulate by imposing conditions for export of capital. To that end, the Minister set, amongst other conditions, an exit charge. The trail from the legislation to the regulations and to implementation is there." (Par 66-67 – my emphasis)

  "Capital exports have the capacity to drain an economy of its lifeblood, and so to impact catastrophically on the country's economic welfare…Hence the need for special regulation. Hence also the need for special amplitude of regulatory power. The nature of the power the Act confers on the President to make regulations in regard to currency is unusually wide, but its unusual width meets the unusual circumstance of the subject matter." (Par 69-70 – my emphasis)

  "The thrust of the attack is that the section and regulation give the Minister broad discretionary powers of the same kind that this Court criticised in Dawood. That decision warned against broad discretionary powers that may prejudice those who may be entitled to seek relief from an adverse decision arising from an open-ended discretion. We must however recognise that this Court's treatment in Dawood of broad discretionary powers conferred by legislation was measured and nuanced. It did not hold all wide legislative discretion to be inconsistent with the constitutional norm and invalid." (Par 71 – my emphasis)

Opinion – Discussion of Constitutional concern

- The danger in delegating plenary power is that:
  - The principle of separation of powers is ignored;
  - the Executive may introduce contentious matters into law, without the necessary involvement of the public, and without following the required processes set out in sections 74 to 77
- Case law:
  - In *EC, Western Cape* it was a clear case of delegation of plenary power – an Act was amended.
  - In *Justice Alliance* the Constitution itself stipulated that an Act of Parliament is the only method to extend the term of office of the CJ (which also affected the independence of the judiciary).
  - In *SARB* however, the facts of the case justified a broad discretion being delegated and the Court stressed that *Dawood* (which indicated that even the limitation of constitutional rights can be delegated) did not hold all wide legislative discretion to be unconstitutional.
- The approach in all the legal opinions received on this matter of delegation is that the powers given to the Minister is that of amending or developing legislation without following the procedure in section 75 or section 76.
- However, if the line between delegation → regulation → implementation is clear, the delegation will pass constitutional muster. As per *SARB*, each case must be considered on its own merits.
- It is however a grey area: If other means can be employed to achieve the same result, and if it is not crucial to the Bill, it is recommended that other means be employed.

Opinion – clause 13 (s86A(12))

RE: Allowing the Minister to extend the operation of the short term measure (extinguishing debt) constitutes delegation of a plenary power.

- "Sunset clause": In this case a new measure is created by the legislature. Based on consultations it is clear that there is a need for this measure to be long term, but there are concerns about its long term impact. "Sunset" is accordingly applied, with an instruction to the Minister to review the impact of the measure and if it is effective, the Minister may extend the operational period of the measure after consultation with the Assembly.
- Is this plenary power (e.g. an amendment), or implementation of the policy?

- Recommendation: The extension of the debt relief measure can easily be achieved in more than one other way. It is recommended that subsection (12)*(c)* be amended as follows:

  "(c) The Minister must review the impact of section 87A and ~~may extend the effective period contemplated in paragraph *(b)* by notice in the *Gazette* after consultation with~~ must, no later than 36 months after subsection (6)*(e)* is becomes operational, table a report in the National Assembly setting out the findings of that review."

  – Should the impact be effective, the period can be extended by way of a focused Committee Bill; or
  – The Minister can during the broader review of the National Credit Act propose an amendment to subsection (12)*(b)* so that the 48 months period is either extended, or by removal of the limited period.

Opinion – Clause 29 (S171(2A))

Re: Empowering the Minister to prescribe a debt intervention measure

- Clause 29 (section 171(2A)) could be tightened:
  - Paragraph *(b)*(i) can be deleted as "indigent" is covered by *(b)*(ii);
  - Paragraph *(b)*(iii) can be amended so that it is clear that the affected persons must be over-indebted and without sufficient funds or assets to pay their debts.
  - Paragraph *(c)* be amended so that it is clear that only the measures in sections 86A and 87A may be used.
- Is this plenary power (development of legislation), or implementation under specific circumstances?
- Recommendation:
  - Even if implementation, expanding debt intervention measures to other groups can be achieved through legislation, which can be fast-tracked in cases of urgency.
  - The requirements placed on the Minister will take months to comply with, thus limiting the effectiveness of the prescribed measure as an urgent legislative tool.
  - Given that the debt relief measure changed from once-off to permanent relief, is the objects of this clause not already achieved under the existing measure?
  - It is recommended that the clause be removed from the Bill.

Opinion – Specific comments (1)

- Par 5: Contradiction iro the maximum for "total unsecured debt" (R50 000): Section 86A(1) v S86A(12)(a)(ii) (clause 13):
  - There is no contradiction: Section 86A(1) sets the current maximum for "total unsecured debt" for all debt intervention applicants. The Bill allows the Minister to raise this maximum in respect of the long term measure (clause 29 – section 171(2B*)(b*)). Section 86A(12) makes it clear that this maximum cannot be increased in respect of the shorter term extinguishing measure.
- Par 6: As the debtor has to be over-indebted to qualify for debt relief, it seems to be incorrect to require the debtor to apply to be declared over-indebted (section 86A(1) – Clause 13):
  - The wording is correct: Section 86A(1) mirrors the wording of section 86(1) (in the principal Act), which uses the phrase "to have the consumer declared over-indebted". In section 86(7)*(a)*, the debt counsellor must reject the application for debt review if the consumer is not over-indebted. Section 86 thus implies that the consumer must be over-indebted in order to qualify: It is implied in the Act.
- Par 7 and 8: Clause 13 – section 86A(3) understates the duties of the Regulator:
  - Section 86A mirrors section 86, which also does not state all the duties of a debt counsellor. It is acceptable for an Act not to include all the operational issues associated with a function.
- Par 15: No specific provision is made for the Tribunal's hearing and determination of the second referral.
  - It is acceptable to not include all operational issues in the Bill. Section 87A(1) makes provision for the referral to be considered in the prescribed manner and form. One of the possible orders following on subsection (1) is the extension of the 12 month period, thus implying a similar process as provided for in subsection (1).

Opinion – Specific comments (2)

- Par 20: Given that the suspension period is a maximum of 12 months, is the rehabilitation process (Clause 16 – section 88B) still required?
  - During the development of he draft Bill, various periods were considered – some proposals were as long as five years. The maximum of 12 months was decided in the final draft. Recommendation: The Committee may consider whether there is still a need for rehabilitation given that the maximum period that the consumer will not be allowed to access credit, is 6 to 12 months.
- Par 21: It is not clear who will gather the information that the Tribunal must consider when suspending or extinguishing debt:
  - It is not necessary to include operational matters in a Bill. Most of this information will be obtained during the consideration of the application for debt intervention by the Regulator. Some of the information will obviously be provided by the credit providers concerned when making representations. The rules of the Tribunal will also provide more detail on this information gathering process.
- Par 50: The Bill is patchwork drafting: Clarity was sought on this and the comment received was that the measure should rather have been housed in 1 chapter than being slotted in all over the principal Act.
  - This was the original format of the Bill, but the industry complained that the Bill was not using existing measures and as such was not utilising the least restrictive ways to address the mischief – and accordingly was unconstitutional.
  - To show the public that the measure in fact mirrors existing measures, the measure was “broken up” into parts and inserted beneath each section that is being mirrored.
  - As the Bill has to follow the structure of the principal Act, it does then come across as patchwork, but that is unfortunately the nature of an Amendment Bill.

Opinion – Decisions required

- Clause 13: It is recommended that section 86A(12)*(c)* be amended as follows:

  "(c) The Minister must review the impact of section 87A and ~~may extend the effective period contemplated in paragraph *(b)* by notice in the *Gazette* after consultation with~~ must, no later than 36 months after subsection (6)*(e)* is becomes operational, table a report in the National Assembly setting out the findings of that review."

- Clause 29 (S171(2A)) – It is recommended that the power to make regulations prescribing a debt intervention measure be deleted, as the longer term measure as well as other laws regulating grave public interest and disasters, already make provision for this.

- Clause 16 – section 88B – It is recommended that the provision for rehabilitation be deleted as the period in which a consumer's participation in the credit market is limited (after extinguishment), will only be between six and 12 months.

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Comments on submissions received

Clause 12(b) - powers of the Court to reduce interest rates, charges and fees (1)

- Supported by: Black Sash; Cosatu, DCASA
- Concerns raised:
  - Deprivation of property (LNBLA, NCRF);
  - Affect sanctity of contracts (NCRF);
  - Lack of guidance may result in all debt re-arrangements will be at 0% interest (BASA, FRB, MFSA, Nedbank);
  - Will apply to all over-indebted consumers and credit agreements (e.g. secured debt incl. mortgages) (BASA, FRB);
  - May result in lending practices changing and access to credit being reduced (BASA, FRB);
  - If Credit Life Insurance is part of the reduced costs, will lose that CLI (BASA);
  - What happens at the end of the five years (BASA)? Will the consumer be able to pay the increased interest;
  - There are “voluntarily agreed to” restructuring rules in place (BASA);
  - First Rand Bank v Brand NO 2017 ZAGPPHC 438 stated that a debt re-arrangement order can not and does not extinguish underlying contractual obligations by lowering interest rates and other charges (CGCSA).

Clause 12(b) - powers of the Court to reduce interest rates, charges and fees (2)

- Deprivation: Yes, but is the deprivation arbitrary?
  - Law of general application ✓
  - Fair process? Yes: Sections 86 and 87: The Debt Counsellor makes a proposal. The Court MUST then conduct a hearing and must consider all the information before it as well as the consumer's financial means, prospects and obligations.
  - Sufficient reason?
    - In First Rand Bank v Brand the Court said that it cannot lower the interest rates as there is no provision in the Act to do so – legislation is thus necessary.
    - DCASA: Despite DCRS (debt review concessions) being in operation for over 10 years, uptake is low as most credit providers do not accept DCRS repayment proposals. This impacts on the success of the debt review process. This power to the courts will make debt review proceedings much more effective.
    - DCASA: Recent NCT Judgement (Case no: NCT/21237/2015/141(1)(b)): When a Magistrate re-arranges the consumer's obligations, the default was cured – i.e. section 102 charges are limited to the period from the date when the default occurred up to and including the date when the order was issued. As credit providers do not supply all the necessary information, it is difficult to check compliance and accordingly all prior charges are often included in debt review.

Clause 29*(a)* - funding for financial literacy & capability programmes (1)

- Supported by BASA, Black Sash, CGCSA, Cosatu, DCASA, FRB, MFSA, Nedbank.
- Concerns:
  - Capacity at the NCR (CGCSA);
    - NCR capacity is already being dealt with
  - The Department and NCR should be responsible for the costs (MFSA). It is a legislated responsibility (*S16(1)(*a)) of the NCR (NCRF);
    - Section 16(1)*(a)* requires the NCR to implement education measures, not to develop them.
  - This clause makes this Bill a money Bill as it allows the Minister to impose funding obligations on credit providers (NCRF).
    - The Bill does not impose any funding obligation. It only provides for a consultation between the relevant Ministers.

Clause 29*(a)* - funding for financial literacy & capability programmes (2)

- Proposals from the submissions:
  - The interventions should be available before a person enters the credit market (MFSA);
  - Compulsory proactive intervention should be implemented at the point of default – a levy could be charged to fund this (DCASA);
  - A levy could be charged as part of the monthly fees set out in section 105(1) (Nedbank)

- These are all policy decisions (inclusion of the proposal by Nedbank would render the Bill a money Bill – section 105 does not deal with levies)

Clause 29*(b)* – new subsection (2B)*(a)* - adjustment to the max gross income figure

- Supported by: Black Sash, CGCSA, COSATU, DCASA
- Concerns:
  - Will cause uncertainty in the market (BASA, FRB, Nedbank);
  - The Minister should keep in mind the impact on creditors etc. (BASA);
  - The powers are too broad (BASA, LNBLA);
  - R7500 is already too high (CGCSA);
  - The extinguishing of debt is arbitrary and the State should subsidise the loss of debts to credit providers (NCRF);
  - Other factors also play a role in whether a consumer can repay debt, not just his / her income. You cannot have a blanket approach. (MFSA);
  - There is no requirement for consultation when the adjustment is done (NCRF).
- These concerns are misplaced and speak to policy questions already considered: This increase only determines the consumer group that qualifies for assistance by the NCR. All of these consumers qualify to apply for debt review. The question is just whether the application should be to a debt counsellor / the NCR.
- The suspension / extinguishing part of the debt intervention measure is specifically excluded from this increase (see clause 13 - S89A(12*(a)*(i)).
- Consultation as a requirement speaks for itself: the Minister must provide a rationale to the Assembly stating how he or she arrived at the new amount. If the Assembly is not satisfied with how the Minister arrived at that amount – which will include the question on who the Minister consulted, what the Minister considered etc. – the Assembly will simply not agree to the new amount.

Clause 29*(b)* – new subsection (2B)*(b)* - adjustment to max total unsecured debt

- Supported by: Black Sash, CGCSA, COSATU, DCASA
- Concerns:
  - Same as with the adjustment to max gross income

- The concerns are again misplaced. These consumers all qualify for debt review. The only effect that this increase has is to determine the group of consumers who will be applying to the NCR rather than a debt counsellor.

- Concerns about consultation:
  - Invite sent to a closed list of participants (LNBLA): Publication was on Parliament's website, which is a forum accessible by the public and known as a space to keep track of legislation. There will furthermore be more opportunity for consultation in the NCOP process.
  - The whole Bill should have been advertised as it was substantively amended: *Truworths v Minister dti [2018] JOL 39718 (WCC)* (LNBLA, NCRF)
    - The only content of the Bill that is new (substantive changes), is the content that was advertised. All other clauses were shuffled around from draft 5 to draft 6, and were tightened and clarified based on public inputs – but they are not new / substantive and need not be opened up for consultation again.
    - The full quote from *Truworths* reads: "[43] It was submitted, correctly, on behalf of the respondents, that the Minister is not obliged to re-advertise for comment. However, where the Minister changes the draft regulations in a material respect, calling for further comment might under certain circumstances be advisable."

- Technical amendments
  - Included if it added value and did not change the content;
  - These will be presented with the final draft.

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Thank you