

DRAFT NATIONAL CREDIT AMENDMENT BILL, 2018

Constitutionality

National Treasury presentation to Portfolio Committee on Trade and Industry, 7 March 2018



national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

Background

- To support the Portfolio Committee on Trade and Industry ('the Committee') on the draft National Credit Amendment Bill ('the Bill'), NT obtained a legal opinion from Adv G Malindi SC and Adv S Budlender ('Counsel').
- Counsel were requested to consider the constitutionality of the Bill to the extent that it deals with debt intervention.
- Counsel highlighted the "very limited time period, even though some of the issues it raises are novel and complex and have not yet been addressed squarely by our courts."
- Important to note that aim of engagement on Constitutionality is to reduce risk of Constitutional challenge, and therefore to reduce risk of implementation delays of much needed relief

Structure of the opinion

- **Part 1:** Considers the proposed provisions which create a debt intervention mechanism, and in particular provide for the permanent extinguishing of a debt – that is primarily the sections 88A to 88E.
- **Part 2:** Considers the proposed provision allowing the Minister of Trade and Industry ('the Minister') to prescribe by regulation a debt intervention measure – that is the proposed section 88F.

Part 1 – Consideration of debt intervention, that permanently extinguishes debt

- Notes processes relating to existing mechanisms are retained i.e. as pertains to unlawful credit agreements (s. 89), reckless credit agreements (secs. 80-83), and overindebtedness (s. 79 and s. 85).
- The relevant section of the Constitution is considered section 25(1):
“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”
- Therefore deprivation alone is not necessarily unconstitutional, must show that deprivation is arbitrary.

Part 1 – Consideration of debt intervention, cont.

- *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another* 2002 (4) SA 768 (CC) found that: A deprivation will only be arbitrary if –
 - “the ‘law’ referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair”
- Therefore the legal test for s 25(1) requires asking the following:
 - Is there a **deprivation of property**?
 - Is the deprivation **procedurally arbitrary**?
 - Is the deprivation **substantively arbitrary**?

Is there a deprivation of property?

- **Key legal issues** identified for “deprivation of property” are:
 - Whether there has been “**interference with the use, enjoyment or exploitation of private property**” (cite case)
 - “**depends on the extent of the interference with or limitation of use, enjoyment or exploitation...**” (cite case)
 - Even an **impairment - rather than total removal - of rights could constitute deprivation** (cite case)
- **Conclusion:**
 - “No doubt that the provisions allow for a deprivation of property. They allow the National Consumer Tribunal, in specified circumstances, to extinguish a debt owed by a consumer to a credit provider. That is certainly a deprivation of property.”
 - Confirmed by ConCourt case of *NCR v Opperman and Others* 2013 (2) SA 1 (CC)
 - This is not an “expropriation” of property, as is not acquired by the state, See: *Agri SA v Minister for Minerals & Energy* 2013 (4) SA 1 (CC)

Is the deprivation procedurally arbitrary?

- **Key legal issue identified:**
 - Is the bill procedurally fair?
 - Does the Bill expressly incorporate the right of the relevant credit providers – whose rights are at risk of extinguished – to be heard before such a decision is made?
- **Conclusions at the level of NCR:**
 - Provisions can reasonably be interpreted that the credit provider is entitled to make representations to the National Credit Regulator before it decides on whether to recommend to the National Consumer Tribunal to grant debt intervention.
 - This conclusion is strengthened if the provisions are read together with the provisions of the Promotion of Administrative Justice Act 3 of 2000

Is the deprivation procedurally arbitrary? Cont

- **Conclusions at the level of National Consumer Tribunal:**

- Provisions do not afford credit providers the right to be heard by the Tribunal before it decides whether to suspend the debt or obligations or grant debt intervention.
- The Tribunal is not required to follow the recommendation of the Regulator and must itself decide whether to suspend the debt concerned. It would be expected that the credit providers would have the right to make at least written submissions to the Tribunal on whether the applicant qualified for debt intervention and whether the Regulator's recommendation was well-founded.
- But the Bill appears to permit the Tribunal to decide the matter only on the basis of documents provided by the Regulator to the Tribunal.
- This could give rise to constitutional difficulties (noting as well that credit providers *do* have the opportunity to make submissions after 12 months).

Is the deprivation procedurally arbitrary – Recommendation

- It might be possible to avoid constitutional challenge by relying on PAJA and the general powers of the Tribunal to contend that the right of the credit providers is preserved.
- But far preferable for the Bill to expressly lay down the right of the credit providers to be heard before the Tribunal, even if by written submission.

Is the deprivation substantively arbitrary?

- **Key legal issue** identified: Is the deprivation of property “without sufficient reason”?
- **Tests for substantive arbitrariness:** *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (2) BCLR 150 (CC):
 - the nature of the property concerned and the extent of the deprivation must be considered;
 - the nature of the means-ends relationship that is required considering the deprivation must be evaluated;
 - whether the relationship between means and ends accords with what is appropriate in the circumstances and whether it constitutes sufficient reason for the deprivation of property.

In other words, **is the nature and extent of deprivation proportionate to what the deprivation achieves?**



Test for substantively arbitrariness

- *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) confirms this approach
- Also states: *“The more extensive the deprivation and the stronger the property interest, the more compelling the state’s purpose has to be for having the regulatory deprivation at question in place.”*
- Is there a sufficient connection between the aims of the Bill and the means put in place by the Bill to overcome the arbitrariness enquiry?
- *“The deprivation at issue here is not of a partial nature; it effectively removes an unregistered credit provider’s right to restitution. For this, there must be persuasive reasons.”*

Test for substantive arbitrariness cont.

- **Four considerations identified:**

- Similar legislative schemes internationally (UK and NZ), noting that these countries do not have a Bill of Rights against which each law must be tested, implying parliaments have more latitude
- Bill does not expressly give the National Consumer Tribunal discretion to grant whatever order it considers just and equitable
- Bill applies debt intervention measures to credit agreements that come into force before the Bill becomes law
- Existence of alternative and less invasive mechanisms for addressing the problem

Test for substantive arbitrariness - discretion

- **Conclusions regarding discretion of Tribunal:**
 - Bill does not expressly give the National Consumer Tribunal the power to grant whatever order it considers is just and equitable, in its discretion, once it has found that the applicant qualifies for debt intervention.
 - Bill requires that if the Tribunal concludes that the applicant meets the requirements, the Tribunal then **“must” grant a 12 month suspension**. Similarly, the Bill appears to suggest that if at the end of the 12 month period, the financial circumstances of the applicant have not improved, the **Tribunal then “must” declare the debt extinguished**.
 - ***“...a lack of discretion on the part of a court to forfeit property would result in an arbitrary deprivation of property” (NCR v Oppermann).***
 - Constraining the discretion of the Tribunal regarding what order it can make, once it finds that an applicant qualifies for debt intervention, creates a potential constitutional difficulty as part of the arbitrariness enquiry

Test for substantive arbitrariness - retrospectivity

- **Conclusions regarding retrospective effect of procedure:**
 - It appears that the intention is that the Bill will apply to all credit agreements that qualify, irrespective of whether they came into force before or after the Bill became law - intends to have retrospective effect.
 - Constitution does not bar all retrospective laws, or even all retrospective laws that give rise to a deprivation of property (reference recent judgment of the High Court in *Pienaar Brothers v SARS*)
 - But, a deprivation of property which applies to transactions which pre-existed the statute concerned is a more severe deprivation than where the deprivation only applies to transactions that post-date the statute.
 - A particularly compelling justification must be present for the retrospective application of law that results in a deprivation to pass constitutional muster.

Test for substantive arbitrariness - alternatives

- **Conclusions regarding alternative and less invasive mechanisms:**
 - Not obvious why existing mechanisms for addressing unlawful credit agreements, reckless credit agreements and over-indebtedness would not provide an alternative and less invasive mechanism for achieving the aims
 - Cite sections 79 and 85 of the Act, read with sections 86 and 87, which appear to provide wide powers to a court to deal with a consumer who is over-indebted. This includes the power to make orders contemplated to relieve the consumer's over-indebtedness.
 - *“Given that the extent of deprivation here is far reaching, the purpose should be stated clearly, and the means chosen to accomplish it must be narrowly framed. In this case the means chosen are disproportionate to the purpose, as is further demonstrated by the less restrictive means analysed below under the justification enquiry” (NCR v Oppermann)*
 - A potential less invasive amendment could be made to the Act so that the Tribunal could have appropriate powers.

Test for substantive arbitrariness - Recommendations

- **Recommendation regarding the powers of the Tribunal:**
 - Expressly grant the Tribunal the power to make such order as it deems just and equitable in respect of any applicant who qualifies for debt intervention
- **Recommendation regarding retrospective application:**
 - Avoid the retrospective application of the relevant provisions and make it clear that they only apply to credit agreements which come into force after the Bill takes effect
- **Recommendation regarding less invasive alternatives:**
 - Essential to fully articulate the inadequacies of the existing legislative mechanism and explain on what basis this relatively radical new mechanism is essential, and why the existing mechanism (if needs be somewhat adapted) could not have been a viable alternative.

Returning to the original question: Is the deprivation arbitrary?

- **Overall conclusion:**

- A debt intervention measure is not inherently arbitrary or unconstitutional. The manner in which the provisions are currently drafted open the way to the real risk of constitutional attack.

- **Overall recommendation:**

- To minimise the risk of constitutional attack, implement the recommendations to address each of the key legal issues identified.

Part 2: Minister to prescribe by regulation debt intervention, incl extinguishing debt

- **Key legal issue** identified: Is the nature and extent of delegation of legislative powers to the Minister in terms of s. 88F constitutionally permissible?
- Noted that powers are st three main qualifications, “though the extent of these qualifications appear somewhat undermined by the confusing effect of the proposed section 88F(5)(c)”.

Delegation of powers - Principles from constitutional case law

- **Principles from constitutional case law** relating to the delegation of powers:
 - Parliament is perfectly entitled to delegate its law-making authority, even where the body has a fair degree of flexibility available to it regarding the content of the delegated legislation it will make.
 - However, not all delegations of legislative power will necessarily be valid. Various factors must be taken into account in assessing the validity of the delegation. These include:
 - The nature and ambit of the delegation
 - The identity of the person or institution to whom the power is delegated
 - The subject-matter of the delegated power
- The delegation of legislative power will normally be permissible when:
 - what the regulation maker is required to do is to fill in the detail underlying a broad statutory scheme already laid down by Parliament; or
 - where there is a special need for speed in dealing with the matter concerned.

Delegation of powers - conclusions

- **Conclusions regarding the constitutionality of the delegation of powers:**
 - There may be extraordinary circumstances which demand a rapid series of debt intervention measures.
 - These circumstances appear to be covered by the proposed sections 88F(2)(a) and (b), that is economic circumstances which:
 - “(a) constitutes a significant exogenous shock that caused widespread job losses;
 - (b) were caused by a regional natural disaster or similar emergent and that is of grave public interest, which was identified by the Minister by notice in the Gazette as such”.
 - It is far less clear that the same considerations apply to regulations made to address:
 - the criteria in the proposed section 88F(2)(c);
 - the criteria in the proposed section 88F(3); or
 - the unspecified criteria apparently permitted by the proposed section 88F(5)(c).

Delegation of powers – conclusions cont.

- It is difficult to see why the matters cannot be dealt with by the legislation itself, rather than leaving the Minister the very wide powers contemplated to determine what debt intervention measures should be adopted, for what purpose and in respect of which consumers.
- This does not appear to be a case where the Minister is merely being asked to fill in the detail of Parliament’s legislative scheme so that Parliament does not itself have to provide the detail.
- The proposed sections 88A to 88E already allow for very specific debt intervention measures with detailed procedures being laid down. If these measures are insufficient or effective, Parliament must be asked to amend them. It does not seem permissible for the Minister to do so by making regulations.
- Section 88F appears to give the Minister his own free-standing power to enact a debt intervention measure for persons earning less than R7500 per month in which the will have their debts extinguished. It is difficult to understand the need for this.

Delegation of powers – conclusions cont 2.

- Conferring a power on the Minister to enact debt intervention regulations dealing with the criteria covered by the proposed sections 88F(2)(a) and (b) is likely constitutionally permissible.
- To the extent that the section goes beyond this, there is a real risk of it being held to be unconstitutional.
- The constitutional difficulties are not resolved by the role afforded to the National Assembly in terms of s 88F(5)(c).
- The Minister is not required to obtain the National Assembly's approval for all of the regulations envisaged by section 88F, but only when the regulations go beyond the criteria referred to in sections 88F(2) and (3) or beyond the measures referred to in section 88F(4).

Delegation of powers – final conclusions and recommendation

- Where the regulation falls with the criteria referred in sections 88F(2) and (3) and within the measures referred to in section 88F(4), the Minister is merely required to consult National Assembly, which is a much weaker safeguard.
- Even a requirement of obtaining the National Assembly's consent would not address the constitutional issue- *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) at para 64
- **Recommendation:**
 - Amend the proposed section 88F so that it only allows for the Minister to prescribe debt intervention measures for the purposes set out in the proposed sections 88F(2)(a) and (b).

In conclusion

- NT is engaging Council on the extent to which its technical proposals may address Constitutional concerns, for example:
 - Applying an affordability test in the debt intervention assessment, that gives discretion to the Tribunal over the extent to which borrowers debt obligations are reduced/eliminated, and only extinguishing debt in cases of need, may address concerns relating to “discretion” and “less invasive alternatives”.
 - Section 88F may not be necessary if can have an ongoing, permanently established NINA programme; would extend beyond the identified categories and can give immediate relief i.e. won't be subject to implementation delays
- Follow-up technical questions to Council by the Committee are welcomed
- Technical proposals continue to be worked on, in support of the relief of NINA's that currently cannot rehabilitate in the current system