



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

National Credit Amendment Bill

-Comments on legal concerns raised in submissions



2018.11.28



General comments (1)

- Association of Black Securities and Investment Professionals: Support the Bill. Call for stricter regulation iro reckless lending and more initiatives to promote credit- and financial literacy.
- COSATU: Wholeheartedly support the Bill. They urge the committee to urgently consider and pass it. It is a fair and rational bill that will not threaten the stability of the financial sector or consumers. It is a critical and progressive Bill and workers will benefit from the assistance it will provide.
- Mr. E Matlala: Support the Bill. Call for lenders who lend against the prescripts of the Act to be criminalized (lending to social grant recipients).
 - This is provided for in the Bill – clause 25, section 157B
- Law Society of SA (LSSA): LSSA supports measures aimed protecting consumers who are over-indebted.
- Consumer Goods Council of South Africa (CGCSA): Support the underlying aims of the Bill (to address high levels of over-indebtedness amongst low-income consumers).
- South African Consumer Coalition (CC-SA): Supports the Bill and the provision for credit stressed consumers to apply for debt intervention without third party assistance. Welcomes the provision for the NCR to evaluate and refer debt intervention applications, and that capacity will be created within the NCR. Supports statutory provisions for mandatory credit life insurance.
- MG Buthelezi: We should cancel all debts and have no monetary system.

General comments (2)

- Debt Counsellors Association of South Africa (DCASA): Recognise that Debt Relief is required for over-indebted Consumers who have no other effective or efficient option to extract themselves from over-indebtedness – the NCAB however has procedural weaknesses.
 - See slides dealing specifically with the weaknesses identified by DCASA
- Large Non Bank Lender Association (LNBLA): Welcomes the Bill insofar as it wishes to address over indebtedness, - the severe impact it may have on the unsecured credit industry is however a concern.
 - See slides dealing specifically with the impact identified by LNBLA
- Micro Finance SA (MFSA): Recognizes that existing legislation may not adequately provide for debt interventions and relief mechanisms for certain segments of the population due to affordability and accessibility limitations. However, MFSA members engage with consumers and are aware of their personal circumstances, which enables them to voluntarily offer debt interventions measures geared to assist financially distressed consumers.
 - As the identified sector is still severely over-indebted and not receiving relief, measures offered by MFSA are clearly not sufficient.
- National Debt Counselling Association (NDCA): The Bill will have a very long implementation timeline of years.
 - Provision is made in clause 32 for the Bill to have a delayed operational date. This is to allow the Department, credit providers and debt counsellors to create the necessary systems. The Department will speak to the implementation plan.

NCR v Debt Counsellors

- LNBLA, National Clothing Retail Federation of South Africa (NCRF), Nedbank, R Marais : The debt intervention qualification criteria should enable a consumer to be subsidised to enter the debt review process, which is a process that has been streamlined and proven to be successful. The report commissioned by the NCR also proposed a subsidy for low income earners and there has been no explanation why this approach was not followed.
 - A subsidy can only be imposed through a money Bill.
 - The dti will speak to previous attempts at subsidies and why this was not successful.
 - This Bill places the responsibility on government to assist the most vulnerable of consumers, rather than outsourcing the solution with government left to foot the bill.
- National Debt Counselling Association (NDCA), Nedbank, R Marais: The Bill will shut out debt counsellors from the debt relief process and does not use the existing infrastructure, systems, and skills in the debt counselling industry. It also puts the NCR in direct competition with its own registrants (debt counsellors) and will result in private sector job losses in the debt counselling industry.
 - This is not correct. Debt Counsellors were consulted by the Portfolio Committee and it is only that group of consumers who are not economically viable for debt counsellors to assist that will be assisted by the NCR. There is thus NO competition.
 - If there is a change iro the salary required to be economically viable for a debt counsellor to assist a consumer (including a lower salary bracket), the Minister may by way of regulations amend that salary bracket – See clause 29(b), Section 171(2A)(a)(i), which specifically mentions the fact of consumers not being economically viable customers of a debt counsellor as one of the considerations.



Role of NCR and NCT (1)

- LSSA; CGCSA; Banking Association South Africa (BASA); NDCA, R Marais: The evaluation of debt intervention applications will compromise the independence and impartiality of the NCR;
 - Conflicting interests were carefully considered and provision was made for the necessary checks and balances.
 - Clause 3: Section 15A provides for the appointment of persons who will act as debt intervention officers. It will thus not be the same person who assists applicants, who will also deal with enforcement of the Act.
 - Where there is a dispute, the Tribunal becomes involved as independent adjudicator: See clause 8, section 71(3A) and Clause 9, section 71A(3D).
- LSSA, NDCA, Nedbank: The new functions / powers of the NCR and NCT are in conflict with existing functions and would result in a violation of statutes.
 - Both the NCR and NCT are creatures of statute – they do what legislation determines they do. Legislation may be amended.
 - The Department of Justice was further consulted iro the changing functions of the NCT.

Role of NCR and NCT (2)

- LSSA; CGCSA; BASA, NDCA: The additional role will be a strain on the NCR and NCT. Who will pay for additional staff employed? What systems will be used to do assessments and ensure repayments by consumers? Where will consumers be able to access the NCR?
 - Capacity and footprint have already been considered and planned for – the department to advise.
- LSSA; CGCSA; BASA: Strict timelines must be set and adhered to
 - The Bill already provides some strict timelines for NCR to comply with – Clauses 8 and 9. Implementation of the Bill will further be subject to Parliamentary oversight
- LSSA: The provisions of the Bill will erode judicial oversight by empowering the NCT in section 87 to do a declaration of reckless agreement in terms of section 83
 - Refers to University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services [2016] ZACC 32, para 74
 - The Tribunal is a judicial body (Section 166(e) of the Constitution). The case referred to deals with constitutionality of a section that made NO provision for judicial oversight.
 - The Act as it currently reads already allows the Tribunal to make an order under section 83. There is thus no eroding of judicial oversight.

Role of NCR and Courts

- CCSA: Propose that both a magistrate's court and the Tribunal may hear and determine debt intervention matters to ensure easy access.
 - The intention was to limit costs. Magistrate Courts require costly legal representation.
 - However, clause 11, amending section 85, provides that where a matter is already before a Magistrate and there is sufficient information, the Magistrate may consider the matter as a debt intervention matter if the consumer agrees.



Debt intervention criteria

– Clause 1 [S1]; Clause 13 [S86A] (1)

- CGCSA: No explanation or supporting evidence has been given by the Committee as to how they arrived at the R7,500.00 and R50,000.00 figures.
 - The Committee consulted extensive and received confirmation from Debt Counsellors that they choose not to assist consumers who earn less than R7500 per month as it is not cost effective to do so.
 - The principal debt of R50,000 is taken from another insolvency measure – administration.
- LNBLA: The provisions setting out the relief measure in the Bill are overly complicated and will be difficult for the ordinary person to understand.
 - Because of the need to balance constitutional rights (property vs equality), the process requires a number of steps and has built in safeguards. The role of the NCR is thus critical and the dti will explain further iro the accessibility / outreaches / footprint that the NCR will ensure are in place.
 - It must however be pointed out that the whole debt intervention process is copying that of the existing debt review and can thus not be that difficult for the consumer to grasp.
- LNBLA: All processes should allow for participation by credit providers
 - All processes do require the involvement of credit providers: See clauses 13 [S86A(94) and (9)]; clause 14 [S87(1B)]; Clause 15 [S87A(5)(d) and (10)] and Clause 16 [S88B(4)].



Debt intervention criteria

– Clause 1 [S1]; Clause 13 [S86A] (2)

- MFSA: This criteria only relates to “unsecured” credit, which is itself discriminatory as MFSA members only offer short-term unsecured credit and will thus be affected the most.
 - Only unsecured credit is included as secured credit can be realised by way of attachment of the asset involved. It could thus be unfair to the rights of a credit provider if a debt that has an underlying asset securing it, be suspended or extinguished.
 - The law is of general application: it affects all credit providers.



Zero rating – clause 12(b) [S86]

- CGCSA, LNBLA: The Constitutional right to property can only be limited to the extent that the limitation is reasonable and justifiable taking into account less restrictive means to achieve the purpose. This should only be done if the credit provider agrees.
 - Zero rating happens in practice and is agreed to by industry as a whole. There are however credit providers who refuse to participate, which renders the debt review process powerless. Clause 29 provides for the Minister to prescribe how any decision to zero rate must be made (insertion of s171(1)(bB) – these regulations must reflect the above industry agreement. This section further provides very clear guidelines on how the process to zero rate must unfold. There is thus substantive and procedural fairness and zero rating is according constitutional.
- BASA: Align wording in section 86(7)(c)(ii)(ccA) (clause 12) and 87(1A)(b)(ii)(dd) (clause 14)
 - This can be done, but an Act must be read as a whole. Clause 29 provides for the Minister to prescribe how these two paragraphs in the Act (once amended) must be implemented (insertion of s171(1)(bB). The guidelines provided to the Minister were developed by the Portfolio Committee in consultation with National Treasury to ensure that there will be no adverse effect on the market. There is thus no chance for a misinterpretation.
- DCASA: (ccA) will make a significant impact on the Debt Counsellor’s ability to assist consumers and to reduce the rehabilitation period and can quickly be incorporated into systems. (ccA) should however apply for 60 months and thereafter normal interest rates.
 - (ccA) stipulates that the period of reduced interest may not exceed the period stipulated in section 86A(6)(d). This period is currently 5 years (60 months), where after the rates will revert to normal. This is thus already provided for in the Bill.

Extinguishing debt

– Clause 15 [S87A]

- LNBLA: Enabling the Tribunal to order that a debt be extinguished amounts to arbitrary deprivation of property. The Bill should not sterilise assets where credit providers were not reckless and acted in compliance with the NCR.
 - It is agreed that this constitutes deprivation of property, but this is a law of general application, with substantive fairness (rationale – addressing socio-economic inequality) and procedural fairness: thus it is not arbitrary and is constitutional. The Portfolio Committee obtained an opinion from Adv Trengove, SC who confirmed that the extinguishing of debt under the circumstances set out, and the procedure required by the Bill would pass constitutional muster.
 - Consumers who can afford a lawyer can “sterilise” their assets through sequestration, even if the credit provider was fully compliant with the Act. To refuse this benefit to consumers who cannot afford a lawyer, constitutes unfair discrimination.



Mandatory Life insurance – Clause 19

[S106]

- Nedbank : Concerned that in the event that insurers are unable to price for the risk, consumers applying for credit longer than 6 months with a loan amount of up to R50 000, will not be able to obtain credit from the formal sector.
 - This requirement was specifically delegated to the Minister to provide for in regulations to ensure that there is an insurance product available (and the Minister of Finance must be consulted in this regard), before the regulations are made effective.

Financial literacy training

– Clause 29(a) [S171]

- DCASA: Offering this is, based on DCASAs extensive experience, very effective and lasting. Recommend compulsory proactive intervention at the point of default (Can be funded by a small levy on Debit Orders or Credit Agreements)
 - Was considered by the Portfolio Committee, but a levy is a money Bill and cannot be included in this Bill.
 - Clause 13: Section 86A(5) requires the NCR to provide financial literacy counselling to all applicants. Training becomes compulsory when an applicant's debts are suspended for the first time. Read with this clause 29, the Ministers of Trade and of Finance will consult on a financial literacy programme before the regulations are made.



Constitutionality of ministerial powers

– Clause 29(b) [S171]

- BASA, Nedbank: S 171(2A) circumvents the prescribed legislative processes and is unconstitutional. While it requires the approval of the NA, no provision is made for affected rights-holders to make inputs and so permits arbitrary deprivation of property. This results in an unquantifiable risk – the factors guiding the Minister should be expanded.
 - Section 171(2A) allows the Minister to adjust parameters subject to specific steps that must be taken. This constitutes the delegation of legislation – a function which Parliament is empowered to do.
 - Executive Council, Western Cape Legislature v President of RSA 1995 (4) SA 877 (CC) par 51: “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...”
 - Section 59(1)(a) of the Constitution requires the National Assembly to facilitate public involvement in the legislative and other processes of the Assembly and its committees. This requirement is echoed in the rules of the National Assembly. It is not necessary to repeat this in legislation. The criteria set by the legislation sets the base parameters. When the public is consulted other factors may be included in submissions.
- DCASA: The proposed maximum gross income and total unsecured debt figures are only relevant to determine which Consumers are provided with assistance at no cost. This could also affect the level at which subsidised access is required.
 - Correct: the purpose is to determine the group of qualifying consumers

Offences

- CGCSA: Introducing a long list of new criminal offences is not the way to drive compliance. All it will do is clog up the courts with time-consuming and costly litigation to the detriment of the consumer.
 - It was necessary to link a criminal offence to false information being submitted on an application for debt intervention to ensure that the measure is only available to its intended target group.
 - Iro failure to register as required by the Act and participating in prohibited acts, the Portfolio Committee was of the view that these are so prevalent, are so severely prejudicial to consumers and are clearly not curtailed by mere administrative fines that they had to be made offences.
- NDCA: The Bill proposes that a debt counsellor who does not report on reckless lending could be sent to jail for up to ten years.
 - Clause 10 [S82A] only provides for an administrative fine iro a credit provider who fails to provide a debt counsellor with information. There is no criminal sanction in this Bill that attaches to reckless lending or the reporting thereof. This is because there are too many different ways in which to calculate affordability. Until that test has been made uniform, anything connected with reckless lending cannot constitute an offence.

Impact of the Bill on the credit market

- CGCSA: The Bill was supposed to be a once off measure
 - This was the intention, but consultations with the public showed that a long term measure is required. Furthermore, it was pointed out that the failure of government to provide such a long term measure was unconstitutional as it allowed discrimination on socio-economic status (equality).
- BASA, CGCSA, NCRF, Nedbank: The bill may result in persons earning less than R7500 per month being excluded from the credit market. The income of R7500 should be lowered.
 - These persons qualify at the moment for debt review. The problem is that they cannot afford a debt counsellor. As to the extinguishing of debt, there is a rigorous process to first ensure repayment of debt. It is as a last resort that debt is written off. – and at that stage, the Credit Provider will have very little prospect of recovering the money.
- LNBLA, Nedbank: Introducing a measure that will extinguish debt will create a moral hazard and a culture where consumers are incentivised not to pay back their debt. It also creates uncertainty in the market.
 - The Portfolio Committee did a study tour to the UK, who has a similar system. It was confirmed by the UK that no moral hazard arose from their programme and no adverse effects were seen in the market.
 - Furthermore, the process requires the cooperation of the consumer, which includes the attendance of financial literacy training. The actions or inactions of the consumer during the 2 years in which the debt is suspended will also determine whether the debt is extinguished or not. All of these are mitigating factors that speak against the creation of a moral hazard.

Procedural concerns

- CGCSA: There should have been an opportunity to comment on the entirety of the revised Bill (2nd advert)
 - *Truworths v Minister dti [2018] JOL 39718 (WCC)* (dealt with regulations, but the same principle applies to primary legislation): “[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.”
 - Iro a second advert, only content that is new (substantive changes), have to be advertised.
 - Draft 5 of the Bill inserted the measure into the Act in one chapter. Because of public input, the chapter was split up and the relevant portions inserted into the Act below the sections that they copied –This is a technical change (layout) and did not have to be opened up for consultation again.
- CGCSA, BASA, LNBLA; NCRF: There was no socio economic impact assessment done on the Bill; there was only a limited review commissioned by NCR into the feasibility of a debt-forgiveness programme that involved no original research and was generated within the space of a month. That report suggested that it would be more feasible to amend the Insolvency Act than to include such a mechanism within the NCA.
 - A SEIAS is not a legislative requirement for a Committee Bill.
 - The Bill did not solely rely on the NCR study. The PC proposed a Committee Bill as the overall review of the Act, which would include such a measure, was taking too long.
 - The Committee further requested National Treasury to do an impact assessment on draft 5 of the Bill and based on the findings amended the Bill to ensure the Bill achieves its objectives.
- Nedbank: An impact study should be done within the first 6 months of the Bill being operational
 - Clause 13 [S86A(12)(b)] requires the Minister to “review the impact of section 87A and must, no later than 36 months after subsection (6)(e) becomes operational, table a report in the National Assembly setting out the findings of that review.” Section 87A is the only new step in the process (provides for suspension and extinguishing). The rest of the debt intervention already exists – the only difference is that the NCR will assist a bracket of consumers at no cost to the consumer. The part that is different must be by legislation, by reviewed. This cannot be done in the first 6 months as there will not be any data to analyse.



Thank you