

COMMITTEE REPORT

(Negotiating mandate stage) Report of the Standing Committee on Economic Opportunities, Tourism and Agriculture on the National Credit Amendment Bill [B 30 - 2018](NCOP)(S76), dated 6 February 2019, as follows:

The Standing Committee on Economic Opportunities, Tourism and Agriculture, having considered the subject of the National Credit Amendment Bill [B 30 - 2018](NCOP)(S76) referred to it in terms of Standing Rule 220, confers on the Western Cape's delegation in the NCOP the authority not to support the Bill for the following reasons:

1. Property rights versus proposed extinguishment of debt

- 1.1 The rights of credit providers as party to a credit agreement qualify as a "property right" for purposes of Section 25 of the Constitution of the Republic of South Africa, 1996 (the Constitution). See submission by the Banking Association of South Africa (BASA)(Pages 87 to 92 of the Matrix of Submissions), which states that, "The proposed extinguishment measure in section 87A will interfere with those property rights in a manner that constitutes a deprivation of property under section 25(1) of the Constitution. Section 25(1) of the Constitution provides that a deprivation of property must not be arbitrary. The test for arbitrariness requires that there be a rational connection between the deprivation and the end sought to be achieved and, where the deprivation is severe, that it be proportionate". (In *National Credit Regulator versus Opperman and Others*, the Constitutional Court held that contractual rights and delicts are property rights.)
- 1.2 The Bill, through debt interventions procedure, will arbitrarily deprive credit providers of their rights.
- 1.3 This deprivation will not be procedurally and substantively fair.
- 1.4 The debt intervention will serve as a "substantial interference" in the rights of the credit provider, given that a consumer's debt obligations may be suspended, and ultimately extinguished, to the potential prejudice of the credit provider – *Substantially arbitrary*.
- 1.5 Furthermore, the Bill does not provide the credit providers sufficient opportunity to make representations before a decision to suspend debt obligations is made. For Example, when an application for debt intervention is made to the National Credit Regulator (NCR), the debtor makes representations. Then the NCR makes recommendations to the National Credit Tribunal (NCT), where a final decision is made. It is at this stage that the credit provider's input is not sought. As a result, a final decision, which affects the rights of the credit provider, is then made. (Procedurally arbitrary)
- 1.6 It can be argued that a credit provider may seek to assert his/her rights by invoking the provisions of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), for example, to get a hearing, but it would have been more prudent to expressly include this mechanism in the Bill.
- 1.7 Furthermore, the Bill provides that the NCT, after an assessment of a consumer's financial situation after a 12 month suspension, must, if the consumer's situation has not improved, make a decision to extinguish the credit agreement and the resultant debt. In other words, the Bill does not afford the NCT any discretion to make other less invasive or prejudicial decisions, as far as the credit provider is concerned.

1.8 See also Paragraph 34.4 of the Legal Opinion provided by the National Treasury on “The Constitutionality of Aspects of the National Credit Amendment Bill”, which states the following: “However, it appears to us that 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”.

2. Power of the Minister to make regulations

2.1 The Bill provides that the Minister may make regulations as debt-intervention measures to alleviate household debt.

2.2 In this regard, the Minister may be of the opinion that the existing measures are not sufficient or effective, and may then as a result introduce new measures. It is argued that this will provide the Minister with too broad powers and too much discretion, and this unfettered discretion may be tantamount to granting the Minister legislative powers.

2.3 While there are certain criteria for the Minister to first satisfy, the Minister may seek the permission of the National Assembly (NA) if the new regulations fall outside those criteria. This, it is submitted, may not be constitutional. Also, it is not clear why only the NA should give approval, and not both Houses of Parliament.

2.4 See the Matrix of submissions: Dean Macpherson and Geordin Hill-Lewis (Pages 4 and 5), Nedbank (Pages 12, 24 - 27), Micro Finance South Africa (Pages 49 - 53), and Banking Association of South Africa (Pages 72 - 74).

3. Unfair discrimination against individuals as recognised by the Immigration Act, 2002 (Act 13 of 2002)

3.1 The National Credit Act, 2005 (Act 34 of 2005) provides that it applies to all consumers who are natural persons, regardless of nationality and immigration status.

3.2 However, the Bill provides that it shall only apply to South African citizens and permanent residents (Section 88A of the Bill).

3.3 Furthermore, the Bill also seeks to exclude refugees and asylum seekers from protection.

3.4 While refugees and asylum seekers are ordinarily protected in terms of the Refugees Act, 1998 (Act 130 of 1998), to “live, work & study” in the country, pending a decision on their status application, it is unclear how their exclusion from the protective measures available in the Bill will be legally and rationally justified.

3.5 As a result, this may be in breach of Section 9(1) and Section 9(3) of the Constitution – which speaks to equality and unfair discrimination based on race.

4. Discrimination against married couples

4.1 The Bill provides for individuals with unsecured debt totalling R50 000. No provision is made for spouses married in community of property, with a combined household debt of R50 000 or more.

4.2 See page 18 of the Department of Trade and Industry’s Legal Opinion on “The Constitutionality of the Proposed Debt Intervention Procedure in the National Credit Amendment Bill, 2018”.

5. Retrospective effect of the Bill

- 5.1 It appears that the Bill seeks to avail debt protective measures to all consumers, even to those consumers who were over-indebted before the provisions of the Bill became effective. This is demonstrated by the criteria that the consumer, for successful debt intervention, must have had total unsecured debt of no more than R50 000 as at 24 November 2017.
- 5.2 Whereas there is no hard-and-fast rule against retrospective legislation, in the present scenario it may have more prejudicial consequences than the purpose it seeks to serve.
- 5.3 For example, if a credit agreement was entered into three years ago, and a consumer now wishes to apply for debt protection and intervention, it may be substantially prejudicial to the credit provider who, three years earlier, would have entered into an agreement, stuck to all its terms and conditions, only to now, three years later, be potentially deprived of his/her property rights through, for example, debt extinguishment.
- 5.4 In this regard, it is submitted that in order for this retrospective legislation to be constitutional, mindful of its impactful consequences, particularly on credit providers, there will have to be compelling justification.

6. Recommendation

The Committee recommends that consumers are protected as well as the sustainability of the credit environment, which will ultimately benefit the consumers as well as promote financial inclusion. This recommendation should also include vulnerable individuals as listed in the Immigration Act, 2002 (Act 13 of 2002).



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