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**WRITTEN SUBMISSIONS PUSUANT TO PUBLICATION OF THE
NATIONAL CREDIT AMENDMENT BILL OF 2018 IN
PARLIAMENTARY NOTICE 922 PUBLISHED ON 24 NOVEMBER
2017 IN GOVERNMENT GAZETTE VOL 629, NO 41274**

**DIRECTED AT THE DEPARTMENT OF TRADE AND INDUSTRY
PARLIAMENTARY PORTFOLIO COMMITTEE**

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Table of Contents

- EXECUTIVE SUMMARY 3**

- Part 1..... 5**
- LACK OF CONSTITUTIONALITY 5**
 - Introduction..... 5
 - Constitutional Concerns Regarding the Legislative Process 6
 - Constitutional Concerns Regarding the Merits 9
 - EXTINGUISHING OR SUSPENDING A DEBT PURSUANT TO AN APPLICATION 10**
 - THE RELEVANT CONSTITUTIONAL / LEGAL PRINCIPLES 12**
 - THE EXTINGUISHMENT OF A DEBT RESULTS IN DEPRIVATION OF PROPERTY 14**
 - APPLICATIONS FOR DEBT INTERVENTION: THE DEPRIVATION IS PROCEDURALLY UNFAIR 15**
 - APPLICATIONS FOR DEBT INTERVENTION: THE DEPRIVATION IS SUBSTANTIVELY UNFAIR..... 17**
 - APPLICATIONS FOR DEBT INTERVENTION: VAGUENESS..... 20**
 - DEBT INTERVENTION TO BE PRESCRIBED BY THE MINISTER 21**

- Part 2..... 23**
- RECOVERY OF PRESCRIBED DEBT..... 23**
 - Introduction..... 23
 - Constitutional Concerns..... 24
 - The Purpose of the Defence of Prescription 25
 - The Morality of the Concept of Prescription..... 25
 - Is criminalization justified on a policy basis? 26
 - Conclusion 28

- Part 3..... 29**
- FAILURE TO MEET THE OBJECTIVES OF THE NCA AND THE BILL 29**
 - Introductory Comments..... 29
 - International Experience..... 30
 - Comparative analysis: Foreign Jurisdictions compared to The Bill 31*
 - Scientific Studies into the Outcome of Foreign Debt Intervention Programs..... 32

- Part 4..... 34**

Unintended Consequences	34
Depreciation of Asset Value.....	34
Legal Action	34
Part 5.....	36
Proposed Solution	36
INFORMATION RELATING TO THE AUTHOR	38

EXECUTIVE SUMMARY

The Association of Debt Recovery Agents (“ADRA”) herewith provide written submissions on the Draft National Credit Amendment Bill of 2018 (“The Bill”) as published in Parliamentary Notice 922 published on 24 November 2017 in Government Gazette Vol 629, No 41274. ADRA further accept the invitation to participate in the public hearings.

Ongoing rampant household over-indebtedness and the socio-economic deprivation it subjects our society to require urgent redress. It is imperative that the outcome of this initiative:

1. address the fundamental underlying causes of consumer over-indebtedness thereby ensuring that the objective is sustainably attained, whilst
2. fundamental principles upon which our democracy is based are preserved.

ADRA’s constructive submissions are aimed at ensuring that this urgent objective is sustainably attain and urgently implemented and not indefinitely delayed by avoidable challenge.

This document supports the following conclusions in respect of The Bill, each of which is dealt with in the ensuing sections of this document:

Part 1: Lack of Constitutionality

1. The legislative process may not comply with the requirement that parliament and its committees provides stakeholders with a reasonable opportunity to participate in the legislative process.
2. The Bill and in particular the provisions relating to debt intervention as contained therein infringes upon fundamental constitutional rights and will not pass constitutional muster.
3. Constitutional rights of both credit provider and credit consumer will be infringed upon.

Part 2: The desirability and potential unconstitutionality of criminalising a contravention of section 126B and the proportionate fairness of the ensuing sanction.

Part 3: Failure to Achieve the Objectives of the National Credit Act (“NCA”)

The objectives of The Bill and the NCA will not be achieved by the implementation of its provisions and will in many respects achieve the opposite negative outcome.

Part 4: Unintended Consequences

Besides the unintended consequences dealt with elsewhere in these submissions, ADRA emphasises the severe negative consequences occasioned by the foreseeable artificially created insolvency of credit providers and undesirable consequences of steering debt enforcement into legal processes..

Part 5: Proposed Solution

ADRA proposes a combination of solutions including:

1. Due enforcement of existing legislative consumer protection provisions.
2. A strategic national household financial education program
3. A set of principles consistent in law upon which any form of intervention should be based.

Part 1
LACK OF CONSTITUTIONALITY

Introduction

ADRA is concerned that legislative process followed thus far, as well as key aspects of the Bill, will not pass constitutional muster.

The result of the short notice period, which traversed the festive season and *dies non* is that ADRA has not been afforded a reasonable opportunity to submit considered comment. It has been constrained in this regard in that the timeframes imposed have not allowed for a full and exhaustive ventilation of the complex issues presented by the Bill. It has also not allowed for the opportunity to obtain full and proper expert insight into the full implications of the Bill for the credit industry. The gravitas hereof is beyond challenge and does the Bill warrant a “...**thoroughgoing public participation process...**”, which we respectfully submit, is not being adhered to due to self-imposed urgency.

ADRA considers certain key aspects of the Bill to be fundamentally problematic and in certain key instances, unconstitutional. ADRA’s concerns are primarily in respect of the intended amendment of the NCA so as to provide for debt intervention and to criminalise a contravention of section 126B of the NCA.

We will deal with the legislative process and constitutional merit of The Bill in turn.

Constitutional Concerns Regarding the Legislative Process

The Bill was published on 24 November 2017 and invited written submissions by 15 January 2018 with public hearings scheduled to commence on 30 January. On 4 December 2017 ADRA requested a postponement of the time-line provided for providing written submissions to 1 April 2018. Our request was denied without consideration. The only reason provided is that the Portfolio Committee is adamant to finalise the Bill before the parliamentary year-end, which is 28 February 2018, as the following year is a general election year. ADRA was granted an extension to only 22 January 2018. The extension of one week does not remove this practical impossibility and were ADRA's submissions prepared in great haste, without the input of the necessary experts and industry research the topic warrants. Considering the time-line imposed, which include *dies non* and the festive season, the gravitas of the matter which is sourced from the Bill of Rights contained in the Constitution and the potential impact it will have on stakeholders and the lack and obvious need of industry research, ADRA was prejudiced in that we were not granted a reasonable opportunity to consider, research and ventilate all aspects of The Bill.

In particular we submit that the process followed is not compliant with section 59(1) of The Constitution.

Section 59(1) of The Constitution reads as follow:

"Public access to and involvement in National Assembly

59. (1) The National Assembly must—

(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and ..."

In **New Clicks** Sachs J wrote:

"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say."¹ (*Emphasis added*)

In **The Land Access Movement Of South Africa**² the Constitutional Court grappled with the question what constitutes "...a reasonable opportunity..." at public participation in the legislative process as provided for in section 72(1)(a) of the Constitution. Section 72(1)(a)

¹ Minister of health and Another v New Clicks South Africa (Pty) Ltd and Others [2005] ZACC 14; 2006 (2) SA 311 (CC) at para 630. See also Doctors for Life n15 at para 125.

² The Land Access Movement of South Africa and Others v The Chairperson of the National Council of Provinces [2016] CCT 40/15 CC.

impose a duty upon the National Council of Provinces (“NCOP”) to facilitate public participation in legislative processes before the NCOP. Sections 72(1)(a) and 59(1)(a) uses the same wording with only the reference to the legislative body differing. In line with the trite rules of interpretation, there must be consistency in the application and interpretation to the same words/phrases used in legislation, especially when ascribing an interpretation to words/phrases repeated in the same legislation.

In determining whether the NCOP facilitated public hearings affording stakeholders a reasonable opportunity at effective participation, The Constitutional Court considers *inter alia* the short parliamentary time line provided for the hosting of public hearings by the National Council of Provinces (4 weeks) and the opportunity provided for participants to consider and prepare meaningful input in the legislative process. In the unanimous judgement by the Constitutional Court, the Constitutional Court found as followed:

“[60] So, the standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament’s conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament’s conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament. The Court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public.”³

The Constitutional Court found that the issue of land restitution is sourced from the Constitution itself and is of paramount importance and public interest and; that the urgency of the parliamentary time-line to complete the Bill before the end of term is self-imposed by the relevant parliamentary portfolio committee and not urgent in law and; that the time line is the root cause of the deficiencies in the legislative process.⁴

“[67] **Given the gravitas of the legislation and the thoroughgoing public participation process that it warranted, the truncated timeline was inherently unreasonable.** Objectively, on the terms stipulated by the timeline, it was simply impossible for the NCOP – and by extension the Provincial Legislatures – to afford the public a meaningful opportunity to participate.”⁵ (*Emphasis added*)

In its conclusion, the Constitutional Court finds that:

“For all the reasons I have given, the NCOP public participation process was unreasonable and thus constitutionally invalid. Failure by one of the Houses of Parliament to comply with a constitutional obligation amounts to failure by

³ Para 60 p 27.

⁴ Para 66 p 29.

⁵ Para 67 p 30.

Parliament. The deficient conduct of the NCOP in facilitating public participation in passing the Bill taints the entire legislative process and is a lapse by Parliament as a whole.”⁶

In its judgement The Constitutional Court further state that:

“Sections 59 and 118 impose separate but parallel obligations on the National Assembly and Provincial Legislatures respectively to facilitate public participation.”⁷

⁶ Para 82 p 30.

⁷ Para 56 p 25

Constitutional Concerns Regarding the Merits

ADRA considers certain key aspects of the Bill to be fundamentally problematic and in certain key instances, unconstitutional.

The Bill provides for debt intervention through two key mechanisms, *viz*:

1. An application for debt intervention by a debtor.⁸
2. The Minister prescribing a debt intervention measure in order to alleviate household debt.⁹

At the core of ADRA's objections to the Bill lie the following:

1. The NCA and its extant regulations provide for certain criteria to be applied for making credit available to a consumer. Notwithstanding strict compliance with the prescribed criteria and the rights to repayment of a debt that would vest in a credit provider pursuant to a credit agreement, the Bill provides for inter alia: (a) the capping of certain charges; (b) the suspension of repayments for a stipulated period; and (c) the extinguishing of a debt (in part or in full) in certain circumstances. All of this may occur despite a credit provider having complied fully with the requirements of the law for the granting of credit and irrespective of the effect of these measures on the rights of the credit provider.
2. The criteria in respect of who may benefit from the debt intervention measures are vague and draw arbitrary distinctions between different categories of debtors and credit providers.
3. The process by which the debt intervention measures apply is unfair.

ADRA submits that the effect of the provisions of the Bill in respect of debt intervention is that credit will ultimately not be extended to persons who qualify for debt intervention measures and in particular, persons who earn less than R 7500 per month; this, despite the fact that access to credit is critical to especially low income category consumers in time of desperate need and/or to improve their socio-economic circumstances. Indeed, in its policy framework for consumer credit entitled "Making Credit Markets Work", ("**the Credit Policy**"), the role of credit in the South African economy was recognised as follows¹⁰:

⁸ Section 88A of the Bill.

⁹ Section 88F of the Bill.

¹⁰ At para 1.7. of the Credit Policy.

“Consumers would generally not be able to purchase items such as houses or cars if it were not possible to obtain finance. In acquiring such items, it is necessary to be able to spread the payments over a number of months. For a huge number of people the same is true in respect of the purchase of a fridge, bed, radio or television. It is also true in respect of the cost of a university education and even true for a great many South Africans in respect of the cost of items such as school fees and school uniforms, or the equipment or trading stock of a small business. Credit thus unlocks a diverse range of opportunities, some of which are economic, others educational and yet others simply improvement of ‘standard of living’.”

EXTINGUISHING OR SUSPENDING A DEBT PURSUANT TO AN APPLICATION

In terms of the Bill, a “debt intervention applicant” has inter alia the following criteria as its defining characteristics (determined at the date of submission of an application for debt intervention)¹¹:

1. A person who receives no income, or if he or she receives an income or has a right to receive an income, regardless of the source, frequency or regularity of that income, that gross income did on average for the six months preceding the date of the application for debt intervention not exceed R7500 per month;
 - a. Has no reasonable assets; and
 - b. Is not subject to debt review contemplated in section 86.

A “realisable asset” is defined (subject to certain exceptions) as an “asset that can swiftly be converted into cash at a value that reasonably reflects the second hand market value of that asset”.¹²

The new proposed section 88B regulates orders for debt intervention. In terms thereof, the NCR may, amongst other things conclude that an applicant qualifies for debt intervention and the NCR must make a recommendation to the Tribunal for debt intervention to be granted.

Section 88C prescribes the orders that may be granted in respect of debt intervention. The following aspects thereof warrant highlighting:

¹¹ Section 88A(1).

¹² Section 88A(1)(b).

- a. First, the only documents that are considered by the Tribunal (consisting of a single member) are the documents included in the referral from the NCR; the Bill expressly provides that no further evidence may be led.¹³ This provision appears to be contradicted by section 88C(2) which permits the Tribunal to consider the referral and “any other relevant information”.
- b. Second, section 88C(2) allows for the Tribunal to grant a range of different orders included amongst which are:
1. An order that the debt intervention applicant qualifies for debt intervention, in which event the Tribunal may suspend all of the qualifying credit agreements, in part or in full, for 12 months, before the expiry of which the debt intervention applicant must present his or her financial circumstances to the Tribunal for: (a) an order extending the suspension for a further period of 12 months; or (b) an order in terms of subsection (4).¹⁴
 2. If the Tribunal is of the view that the financial circumstances of the debt intervention applicant did not sufficiently improve, during the period or extended period contemplated in subsection (3), to justify an order releasing the debt intervention applicant from the debt intervention process or an order contemplated in subsection (2)(b), (c) or (f), the Tribunal must declare the debt under the qualifying credit agreement as extinguished.¹⁵ In other words, a debt under a qualifying credit agreement becomes extinguished unless:
 - 2.1 the applicant’s financial circumstances have improved sufficient to justify an order releasing him / her from the debt intervention process; or
 - 2.2 the Tribunal has requested the NCR to refer the applicant to a debt counsellor for debt review or assistance with a voluntary plan of debt re-arrangement; or
 - 2.3 the Tribunal has determined that the applicant could satisfy payment requirements but that an order for a debt review or a voluntary plan of debt re-arrangement (as contemplated in the preceding subparagraph) would not be effective, determine the maximum interest, fees or other charges under a qualifying credit agreement for such a period as the Tribunal determines to be fair and reasonable subject to certain prescribed timeframes; or

¹³ Section 88C(1).

¹⁴ Section 88C(3).

¹⁵ Section 88C(4).

2.4 a combination of orders have been granted.

THE RELEVANT CONSTITUTIONAL / LEGAL PRINCIPLES

Section 25(1) of the Constitution provides as follows:

“No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.”

Applying the principles set forth by the Constitutional Court in Wesbank¹⁶, in an analysis of a section 25 infringement, the following questions arise in an analysis of the Bill:

- a. Does that which is taken away amount to “property” for purpose of section 25?
- b. Has there been a deprivation of such property?
- c. If there has, is such deprivation consistent with the provisions of section 25(1)?
- d. If not, is such deprivation justified under section 36 of the Constitution?

In this regard, the Constitutional Court, in Wesbank held that dispossessing an owner of all rights, use and benefit to and of corporeal movable goods, is a prime example of deprivation in both its grammatical and contextual sense.^{17 18}

¹⁶ FNB of SA Ltd t/a Wesbank v CSARS; FNB of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) at par 46.

¹⁷ At para 61.

¹⁸ In Wesbank the Constitutional Court held: “[57] The term ‘deprive’ or ‘deprivation’ is, as Van der Walt (1997) points out, somewhat misleading or confusing because it can create the wrong impression that it invariably refers to the taking away of property, whereas in fact ‘the term “deprivation” is distinguished very clearly from the narrower term “expropriation” in constitutional jurisprudence worldwide’.

In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If s 25 is applied to this wide genus of interference, ‘deprivation’ would encompass all species thereof and ‘expropriation’ would apply only to a narrower species of interference.”

In **Mkontwana**¹⁹, Yacoob J held:

“Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. . . . (S)ubstantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.”

In **Off-It**²⁰, the Constitutional Court held:

“[41] Our jurisprudence is clear that the physical taking of property is not required to constitute a deprivation, and it suffices for one or more of the entitlements of ownership to be impacted upon. Whilst direct or physical interference is not necessary, the impact must be of sufficient magnitude to warrant constitutional engagement. A court must give consideration to the extent to which the use and enjoyment of the land have been diminished. As stated by the Appellate Division in a different context, '[s]ubstantial interference is a matter of duration and degree'.”

In **Opperman**²¹ the Constitutional Court held:

1. Section 25(1) of the Constitution protects against the arbitrary deprivation of property. The primary function of the section has been described as “striking a proportionate balance between the right of property holders and the interests of the public.”²²
2. Whether there has been a deprivation depends on the extent of interference with the use, enjoyment or exploitation of the constitutionally protected property. Interference significant enough to have a legally relevant impact on the rights of the affected party amounts to deprivation.²³

¹⁹ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) at par 32.

²⁰ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC).

²¹ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC).

²² At par 65.

²³ At par 66.

3. A deprivation of property is arbitrary when the law does not provide sufficient reason for the particular regulatory deprivation in question, or when it is procedurally unfair. A complexity of relations must be considered in testing whether there is sufficient reason for the regulatory deprivation. These include the relationship between the means employed and the ends sought by the legislative scheme; the relationship between the purpose of the deprivation and the nature of the property; as well as the extent of the deprivation in respect of that property. 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.²⁴

THE EXTINGUISHMENT OF A DEBT RESULTS IN DEPRIVATION OF PROPERTY

In **Cool Ideas 1186 CC**²⁵ at par 38 the Constitutional Court interrogated the question of whether there had been a deprivation of property. The facts underpinning the challenge were as follows: Ms Hubbard appointed Cool Ideas to build her a house. Cool Ideas was not, however, registered as a home builder under the Housing Consumers Protection Measures Act 95 of 1998, section 10(1)(b) of which provided that only registered builders were entitled to payment. Hubbard discovered structural defects, refused to make final payment, and instituted arbitration proceedings for the costs of remedial work. Cool Ideas counterclaimed for the balance of the contract price.

Against this background, the Constitutional Court found that it was common cause that there has been deprivation of property in that Cool Ideas would not be able to enforce a claim based on unjustified enrichment, the result of which was that the outstanding balance of R550 000 would remain unpaid.²⁶

In **Oppermann**, the Constitutional Court found that the 'purported rights' of a credit provider under a credit agreement to recover any money paid or goods delivered, referred to in section 89(5)(c), must indeed be property within the meaning of section 25.²⁷ The Constitutional Court recognised that it has not specifically found that personal rights emanating from contract, delict, or enrichment are indeed property under section 25, but found that our constitutional jurisprudence accepts that deprivation of ownership of corporeal property constitutes deprivation for purposes of section 25.²⁸ According to the Constitutional Court, the right to claim restitution on the basis of enrichment is a personal right. It can only be

²⁴ At par 68.

²⁵ Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC).

²⁶ At par 38.

²⁷ At par 57.

²⁸ At par 61.

enforced against a specific party or parties, in this case the consumer who received the money.²⁹ The recognition of the right to restitution of money paid, based on unjustified enrichment, as property under s 25(1) is, according to the Constitutional Court, logical and realistic and accords with developments in other jurisdictions where personal rights have been recognised as constitutional property.³⁰ The Court ultimately concluded that the enrichment claim falls within the scope of section 25 of the Constitution.³¹

In the present instance, there can be no doubt that by extinguishing a debt that is due and owing to a credit provider pursuant to a credit agreement amounts to a deprivation of the credit provider's right to property. Simply put, the credit provider has a contractual right to repayment of a debt owing to it; the extinguishing of which constitutes a deprivation of property.

The next question that arises is whether the deprivation is arbitrary. According to the jurisprudent of the Constitutional Court, arbitrariness may be determined with reference to: (a) the fairness of the process followed; and (b) whether there is sufficient reason for the deprivation. We address each of these in turn hereunder.

APPLICATIONS FOR DEBT INTERVENTION: THE DEPRIVATION IS PROCEDURALLY UNFAIR

In Tshwane City³² the Constitutional Court found that a provision was "procedurally arbitrary" on the following basis:

"[64] ... The section authorises the licensee to enter private land and build its electronic infrastructure without notice to and permission of the landowner. The landowner's property rights are rendered subservient to the licensee's. The section places the rights it creates for the licensee above the constitutional rights of the landowner without a procedurally fair process. In fact it does so without any process at all. This is not in line with our Constitution which does not rank any of the rights it guarantees above other rights. On the contrary, the Constitution seeks to ensure that rights in the Bill of Rights reinforce one another so as to promote human rights generally. Where two rights are in conflict, a balance must be found that results in the protection of both rights. What makes matters worse in this case is the

²⁹ At par 61.

³⁰ At par 62.

³¹ At par 64.

³² *Tshwane City v Link Africa* 2015 (6) SA 440 (CC)

fact that rights created by a statute are placed higher than property rights guaranteed by the Bill of Rights.”

In Mkontwana³³ the Constitutional Court held that procedural fairness is a flexible concept and that the requirements that must be satisfied to render an action or a law procedurally fair depends on all the circumstances.

Section 88B provides for the evaluation of an application for debt intervention. The following aspects thereof warrant highlighting:

1. First, the application for debt intervention consists exclusively of information from the applicant for debt intervention to the total and absolute exclusion of any opportunity for the credit provider to provide any information. This is apparent from section 88A(1) read with section 88B(1).
2. Second, while the Bill provides for notification to the credit provider of a debt intervention application and allows for the NCR to make requests for information to both the credit provider and the debt intervention application, the Bill: (a) does not entitle the credit provider as a matter of right to provide any information; and (b) does not stipulate the nature of the information that may be requested at the discretion of the NCR.

The result of the foregoing process is that an application for debt intervention may be determined completely independently of any information from the credit provider. This notwithstanding the fact that the effect of such an application is to deprive a credit provider of rights in respect of repayment.

The effect, we submit, is to place the rights of the applicant for debt intervention above the rights of the credit provider. This, as referred to above, the Constitutional Court has already found “is not in line with our Constitution which does not rank any of the rights it guarantees above other rights”.

In the circumstances, we submit that the process by which debt intervention may be granted is a procedurally unfair one, which will not withstand constitutional scrutiny.

³³ Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005 (1) SA 530 (CC)

APPLICATIONS FOR DEBT INTERVENTION: THE DEPRIVATION IS SUBSTANTIVELY UNFAIR

In Reflect-All 1025 CC³⁴ the Constitutional Court held (with reference to earlier case law)³⁵ that considerations relevant to the determination whether the deprivations constitute arbitrariness for the purpose of s 25(1) are as follows:

“(I)t is concluded that a deprivation of property is arbitrary as meant by s 25 when the law referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question. Sufficient reason is to be established as follows:

- (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.
- (b) A complexity of relationships has to be considered.
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
- (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
- (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some

³⁴ Reflect-All 1025 CC v MEC for Public Transport, Roads & Works, Gauteng Prov Govt 2009 (6) SA 391 (CC) at par 48.

³⁵ First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) at par 100.

incidents of ownership and those incidents only partially.

- (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of the deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.
- (h) Where there is sufficient reason to warrant the deprivation is a matter to be decided on all the facts of each particular case, always bearing in mind that the enquiry is concerned with arbitrary in relation to the deprivation of property under s 25.”

We submit that the principle of extinguishing a debt as provided for in the Bill is arbitrary for the following reasons:

1. First, it ignores and disregards in its entirety the rights of the credit provider in respect of repayment. Despite the fact that the credit agreement accords with the prescripts of the NCA, the consequence of extinguishing of debt is that the credit provider is deprived rights of repayment pursuant to the credit agreement.
2. Second, the applicant for debt intervention faces no adverse consequence of whatsoever nature. On the contrary, the applicant is in a position where that person retains possession and ownership of the goods that were acquired pursuant to a credit agreement and is simultaneously released of any repayment obligations.
3. Third, the Bill uses R 7500 as the determining threshold which is entirely arbitrary. Reference is also been made to the vagueness of the criterion in respect of “realisable asset” which is addressed elsewhere in this submission.
4. Fourth, the Bill makes it peremptory for the Tribunal to declare the debt under the qualifying credit agreement as extinguished, unless certain requirements have been met.³⁶ One such requirement is where the applicant’s financial circumstances have improved sufficiently to justify an order releasing him / her from the debt intervention process. However, the Bill provides no guidance as to what constitutes a sufficient improvement in financial circumstances.

³⁶ Section 88C(4).

5. Fifth, the Bill disregards in its entirety the circumstances that may have led to an applicant not being in a position to satisfy its repayment obligations. For instance, the predicament of a person who voluntarily resigns from work for no apparent reason is treated in exactly the same way as a person who is retrenched from work.
6. Sixth, no consideration of whatsoever nature is given to the impact of the extinguishment of the debt on the rights of the credit provider. For instance, multiple debtors who are granted an extinguishment of a debt may have a dire cumulative effect on a single credit provider.
7. Seventh, these provisions of the Bill are arbitrary and irrational because the Legislature / Executive have imposed criteria for the granting of credit and consequences for non-compliance therewith. The result of this is that even if a credit provider has complied with the prescribed criteria for the granting of credit; it may nevertheless be deprived of rights to repayment of a debt. There is a manifest arbitrariness and unfairness in this regard.
8. Eighth, the credit provider is deprived of its rights to repayment notwithstanding the fact that it bears no responsibility whatsoever for the predicament that the debt intervention applicant finds itself in. In this way, there is no nexus between the deprivation and the reason for the extinguishment of the debt.
9. Ninth, these provisions of the Bill ignore the sanctity of a contract that is concluded between two contracting parties and that is compliant with the law.
10. Tenth, it draws an arbitrary distinction between unsecured credit providers and all other creditors whose cause of action does not arise from a credit agreement as defined in the NCA (including debt due to the various local and/or national government institutions) and secured credit providers. Only unsecured credit providers as contemplated in the NCA face the prospect of an extinguishment of debt. This is particularly so as unsecured credit as provided for in the NCA forms only a small fraction of the total credit exposure of the average consumer and as such will not achieve its stated objective of alleviating the over-indebtedness of consumers.

As stated in the introduction to the Memorandum on the Objects of the National Credit Amendment Bill, 9.69 million credit consumers has impaired credit records. The figure stated appear to be obtained from the NCR and data reflected on credit bureaux. This figure however is reflective of less than 50% of consumer total debt exposure. The NCA require of only credit providers registered as such with the NCR to submit consumer profile data. Other private and public sector creditors which account for substantial household/consumer debt exposure, including but not limited

to the insurance industry, municipal services, primary and tertiary education, healthcare and various tax authorities are not required to and do not submit consumer/consumer profile data. The number of consumers with arrear accounts therefore exceeds the 9.96m reflecting on credit bureaux and does the total value and volumes of arrear accounts far exceed the figures reflecting on credit bureaux. Unsecured credit, which is a percentage only of the credit exposure reflected on credit bureaux is therefore only a fraction of the total credit exposure (not limited to debt originating from the NCA) of the average consumer.

11. Finally, the inevitable consequence of these provisions of the Bill (if adopted) would be that credit providers will be inclined to refuse to conclude credit agreements with persons who earn R 7500 or less.

APPLICATIONS FOR DEBT INTERVENTION: VAGUENESS

In Affordable Medicines Trust³⁷ the Constitutional Court held:

“The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is the foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of Government to further legitimate social and economic objectives and should not be used unduly to impede or prevent the furtherance of such objectives.

We submit that there are various aspects of the provisions dealing with applications for debt intervention that are vague and inconsistent with the Rule of Law. By way of example:

1. The definition of “realisable asset” is central to the criteria for an applicant for debt intervention. Yet, the Bill defines “realisable asset” as an “asset that can swiftly be

³⁷ Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) at par 108.

converted into cash at a value that reasonably reflects the second hand market value of that asset”.³⁸ It is unclear as to what is meant by reference to:

- 1.1 A “swift” conversion into cash.
 - 1.2 How the reasonable reflection of the second hand market of an asset is to be determined.
2. One of the instances where a debt under a qualifying credit agreement becomes extinguished is when the applicant’s financial circumstances have “improved sufficiently” to justify an order releasing him / her from the debt intervention process. However, no guidance is given as what constitutes a sufficient improvement.

The provisions of the Bill dealing with applications for debt intervention are potentially unconstitutional on the grounds of vagueness too.

DEBT INTERVENTION TO BE PRESCRIBED BY THE MINISTER

Section 88F of the Bill empowers the Minister to prescribe a debt intervention measure to alleviate household debt in accordance with section 171 of the NCA.

There are several difficulties with this provision:

1. First, it is intended to benefit, as a category of persons, indigent persons. Yet, the term “indigent” is not defined. Based on the jurisprudence of the Constitutional Court, we submit that this criterion is vague and potentially unconstitutional.
2. Second, it allows for a debt intervention measure in respect of inter alia: (a) indigent persons; and (b) persons with an income of less than R 7500. This, despite the fact that the NCA (and its Regulations) permits credit to be extended to such persons. In these circumstances, it is submitted that the deprivation sustained by the credit provider is arbitrary.
3. Third, it applies to persons who have suffered an unforeseen loss of income and to persons who are subject to “adverse conditions”. Yet, no definition or clarity is provided as what constitutes “adverse conditions”, what the actual impact of such

³⁸ Section 88A(1)(b).

“adverse conditions” are on the debtor’s ability to meet his or her financial obligations, or what constitutes an unforeseen loss of income.

4. Fourth, no provision is made for repayment of the debt irrespective of the circumstances of the debtor improving. The Bill also imposes no impediment to this category of persons incurring further debt; this is irrational.
5. Finally, its purpose is to “alleviate household debt in accordance with this section read with section 171”; yet, there is no definition of the term “household debt”. There is also no correlation between the measures contemplated in the section and the household debt referred to.

For all of these reasons, section 88F of the Bill is also potentially unconstitutional in addition factors rendering debt intervention in general unconstitutional as dealt with *supra*.

Part 2

RECOVERY OF PRESCRIBED DEBT

Introduction

It is ADRA submission that:

1. The criminalisation of a contravention of section 126B of the NCA and its subsequent sanction might not meet constitutional muster.
2. The interests of credit provider and consumer are not balanced in criminalising a transgression of section 126B and in that the provision is not reflective of the purpose of prescription and its underlying morality.
3. That the criminalisation of a contravention of section 126B of the NCA and its subsequent sanction is disproportionate to the relevant interests and is not justifiable on a policy basis.

The Bill proposes the insertion of a new section 157A into the NCA. Subsections (2) and (3) thereof provide as follows:

- “(2) Any person who sells a debt under a credit agreement to which this Act applies and that has been extinguished by prescription under the Prescription Act, 1969 (Act No 68 of 1969) as contemplated by section 126B(1)(a) commits an offence.
- (3) Any person who continues the collection of or reactivates a debt under a credit agreement to which the Act applies under the circumstances contemplated in section 126B(1)(b) commits an offence.”

Section 126B of the NCA provides as follows:

“126B Application of prescription on debt

(1) (a) No person may sell a debt under a credit agreement to which this Act applies and that has been extinguished by prescription under the Prescription Act, 1969 (Act 68 of 1969).

(b) No person may continue the collection of, or re-activate a debt under a credit agreement to which this Act applies-

- (i) which debt has been extinguished by prescription under the Prescription Act, 1969 (Act 68 of 1969); and
- (ii) where the consumer raises the defence of prescription, or would reasonably have raised the defence of prescription had the consumer been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise.”

Constitutional Concerns

In terms of the Prescription Act, prescription is a defence which the consumer must raise. This is so particularly as some of the facts upon which the legal question whether a cause of action has in law prescribed or not may only be in the knowledge of the consumer. An example hereof is that the running of a prescription period is stayed whilst the consumer is abroad. There is no source other than the consumer from which the credit provider can determine whether the prescription period has been so stayed.

It is a constitutional right to have disputes adjudicated in a court of law and is the dispute in respect of whether a debt has prescribed or not no different. Should a transgression of section 126B be criminalised, it will have the absurd result that, should the court find that the claim has not prescribed, the claim remains enforceable and are there no additional consequences for the consumer who unsuccessfully raised the defence. If the court finds that the cause of action has in fact prescribed, the credit provider is by definition guilty of a criminal offence, which is punishable by a fine of up to R1m or 10% of the credit provider’s annual turnover, whichever is the greatest.

Criminalising such a transgression and the proposed sanction are both disproportionate to the interests The Bill seek to protect.

The severe consequences of a criminal prosecution and conviction and the accompanying minimum sentence (which operate against credit providers only) will have the further result that credit providers will be very hesitant to enforce their contractual rights as the benefit of success is totally overwhelmed by the consequences of pursuing claims which might later prove to have prescribed. Claims which has in fact in law not prescribed may be abandoned due to this fear of prosecution.

This imbalance might well amount to a constructive infringement upon the constitutional right of access to court.

The Purpose of the Defence of Prescription

The purpose of prescription is to create legal certainty and to allow parties a fair opportunity to exercise their rights.

Debt originating from the NCA are based on contract and the NCA place an onus on the credit provider to file at court all documents relevant to the cause of action, including the pre agreement quotes, affordability assessment and explanation of rights, the credit agreement itself, a statement of balance and/or a detailed statement reflecting all debits and credits, the demand and section 129 notice etc. This is a unique onus created by statute and rests on the credit provider to provide all evidence required. Unlike in delict, the existence or need for further witnesses and/or documentary evidence does not exist. The Defendant in claims founded in the NCA is not placed in the same precarious position as for example Defendants in claims based on delict or undue enrichment. The credit consumer is not prejudiced by lapse of time in the preparation and presentation of his/her defence, if any.

It must further be considered that a Defendant in a claim for payment of an outstanding balance on a credit agreement seldom defends the action as the Defendant seldom has a defence other than that of prescription. The credit consumer is aware of the cause of action from the outset, and in the norm has made several payments towards settlement of the claim, has received regular statements reflecting all debits and credits and the outstanding balance (including periodic compulsory statements) of the account and has received a letter of demand and a notice in terms of section 129. All other documents upon which the claim is based are readily available.

The credit consumer is not prejudiced in his defence by a lapse of time and must the policy to criminalise a contravention of section 126B be questioned. To the contrary, an attempt to enforce a cause of action not arising from the NCA and where the potential for actual prejudice does exist, is not criminalised.

The Morality of the Concept of Prescription

In considering the morality of prescription, a number of perception need to be addressed.

With insignificant exceptions, credit providers diligently endeavour to ensure due payment of accounts. A credit provider has no benefit to gain from not pursuing payment of accounts or allowing claims to prescribe. This is especially so as interest and other section 101 (b)-(g) permissible charges are limited in terms of section 103(5).

Due to insufficient time provided for comment as set out in more detail *supra*, ADRA was unable to obtain detailed data from its membership and external sources on the factors contributing to the prescription of claims. From extensive experience it is however clear that in the vast majority of matters that do prescribe, the main contributing factor is the *mala fide* conduct of the credit consumer. Consumers very seldom honour their contractual and statutory obligation to notify their credit providers when they relocate and/or change employment. Often such credit consumers cannot be traced for some considerable time or at all and is this the most prominent reason why the credit provider and debt collection industry is unable to recover debt or why it takes considerable time to do so.

Where contact is established or re-established, *mala fide* credit consumer employ a vast array of innovative avoidance tactics to delay or avoid their contractual responsibilities. Prescription terms are often viewed by consumers as a target rewarded with absolution of liability.

It must further be considered that if a claim did in fact prescribe, the trigger which caused the prescription term to commence is the breach of contract by the credit consumer. If the consumer did not breach his contractual and legally enforceable obligation the prescription term will not commence.

ADRA safely venture to state that, should scientific research be conducted on the causes of prescription, it will support our statements *supra*.

In considering the criminalisation of a contravention of section 126B and the prescribed sanction, the morality thereof is a central theme and must it receive due consideration.

Is criminalization justified on a policy basis?

It is doubtful, to say the least, that the collection or attempted collection of a debt that has become prescribed should be made a crime, for which a sentence of a hefty fine or imprisonment of up to 10 years, or both, could be imposed. This appears to be an example of over-criminalisation - the use of criminalisation as a blunt instrument to control debt collection.

In this regard the following extract from **LAWSA Vol 11 CRIMINAL LAW** (3rd ed), para 9, titled "Criminalisation, its limits, and over-criminalisation", is worth quoting extensively:

"One of the most serious problems facing criminal law today is the fact that legislatures have abused the criminal sanction to such an extent that over-criminalisation has taken place. The criminal sanction, which should have been the ultimate weapon against

assaults threatening societal coexistence, has become a blunt instrument through its having been used indiscriminately by legislatures as a device to censure any kind of deviant conduct or as a convenient disciplinary tool to secure obedience to any kind of legislative prescription. This has brought about a number of detrimental consequences:

(a) The establishment of too many criminal prohibitions, leading to the creation of too many criminals, is threatening the whole criminal justice system with collapse. An overworked and understaffed police force and overcrowded courts and prisons can no longer cope with the inflation of crimes and the consequent flood of criminals effectively. The dark figure of crime has risen to alarming proportions.

(b) As a result of (a), the deterrent effect of the threat of punishment and of punishment has been severely affected.

(c) Over-criminalisation, especially as regards conduct which does not excite any moral disapproval and condemnation, has impaired the criminal law's image and has led to an erosion of respect for criminal law. Moreover, the indiscriminate use of criminal sanctions has led to vast numbers of persons being theoretically equated with hardened criminals, since all qualify – technically at least – as criminals. This has contributed to the weakening of respect for the stigmatising function of criminal law and to confusion as to who are really criminals. In fact, if morally neutral conduct is criminalised, the tendency for society is not to view the offender as a criminal, even if labelled as such by the criminal justice system. This has detrimentally affected the efficacy of criminal law and respect for the system. Such over-criminalisation has had a detrimental effect both upon law-abiding citizens (see (d)) and upon potential offenders (see (b)).

(d) Due to the fact that over-utilisation of criminal sanctions has overstrained the process of law enforcement, resources are spread too thinly to combat serious crime effectively. This, in turn, has led to feelings of insecurity among law-abiding citizens.

(e) The random use of the criminal sanction as an enforcement device to effect compliance with almost every legal provision may have the effect of deluding society into falsely believing that, since such legislation has been promulgated, its interests are adequately protected.

(f) In addition to the foregoing, it should be realised that there may often be alternative sanctions available which may be more effective and less costly than the criminal sanction. However, the almost automatic reach by the legislature for criminal sanctions precludes a search for alternatives.

It is submitted that the appropriate approach to criminalisation is that which is espoused by Ashworth and Horder, based on the principles of autonomy and welfare. Taking into account the harm principle, the authors adopt the minimalist approach to criminalisation, the components of which are:

- (i) the principle of respect for human rights;
- (ii) the right not to be subjected to state punishment;
- (iii) the principle that the criminal law should not be invoked unless other techniques are inappropriate (in other words, criminalisation should be a last resort); and
- (iv) the principle that conduct should not be criminalised if the effects of doing so would be as bad as, or worse than, not doing so.”

Conclusion

ADRA respectfully submit that the criminalising of a contravention and the subsequent sanction is:

1. Unconstitutional
2. Disproportionate to the interest it protects
3. Not justifiable on a policy basis.

Part 3

FAILURE TO MEET THE OBJECTIVES OF THE NCA AND THE BILL

Introductory Comments

In evaluating legislation one must consider potential unintended consequences which may detract from the stated objectives and the purpose of the Act of the legislation or which potentially frustrate other protectable interests.

The objectives of the Act are to create a fair and sustainable credit market and industry which protects both the rights of the consumers and the credit provider. This is to be achieved by enforcing the following fundamental principles entrenched in section 3 of the NCA:

- Access to credit by all citizens.
- Promotion of responsible borrower behaviour.
- Promotion of responsible lending.
- The balancing of rights of credit providers and consumers.
- Consumer obligation to satisfy all lawful obligations arising from a credit agreement.
- Establishment of consumer protection legislation.
- Consensual resolution of disputes
- Consumer education to correct imbalances in negotiating power between credit provider and consumer.

On page 36 of the Memorandum of the Objects of the National Credit Amendment Bill, 2008 as included in Government Notice 41274, the first objective is stated as follow:

“The Bill aims to provide for capped debt intervention to promote a change in borrowing and spending habits of an over-indebted society.”

It is assumed that the “...change in borrowing and spending habits...” implies a positive change and that the objective of debt intervention is to promote responsible consumer borrowing and spending as provided for in section 3 (c) (1) of the Act.

Following a review of comparable initiatives undertaken in foreign jurisdictions (summarised below) we submit and argue the following:

1. Debt intervention as contemplated is unique and differ in fundamental aspects from all interventions applied in foreign jurisdictions.
2. Debt intervention does not support the objectives of The Bill of promoting sustainable alleviation of household over-indebtedness and responsible consumer credit behaviour.

3. Debt intervention introduces moral hazard and a resulting increase in default rates.
4. Debt intervention deprive consumers who potentially qualify for such intervention in future from access to formal credit and compel them to access credit through alternative non-regulated high risk avenues.

International Experience

Debt intervention as provided for in The Bill is a first for South Africa and is there naturally no local experience to research or rely upon.

In the absence of any local experience of “debt intervention” it can be useful to benchmark the experiences of foreign jurisdictions in implementing comparable consumer interventions.

On 15 March 2016 the Parliamentary Monitoring Group: Trade and Industry Committee requested the office of the National Credit Regulator (“The NCR”) to present a report to the Parliamentary Monitoring Group on the desirability of writing off implementing a form of “debt intervention” yet to be determined. The report titled **The Feasibility of a Debt Forgiveness Program in South Africa**, dated April 2015, as prepared by Eighty/20 on instruction of the NCR was submitted to the Parliamentary Portfolio Committee.

In the introduction to the report the objective of the report is stated to be, “...to conduct a study into the feasibility of debt forgiveness in South Africa based on international experience.” The brief report reflect on debt intervention mechanisms implemented in various foreign jurisdictions and touch on the outcomes of such interventions of Croatia and India.

From the outset it must be emphasised that “debt intervention” as applied in all foreign jurisdictions differ fundamentally from “debt intervention” as provided for in the Bill. There appears to have been no program implemented in any foreign jurisdiction which closely resemble “debt intervention” as provided for in the Bill.

To illustrate fundamental differences between The Bill and international precedent we compare and summarise each below.

Comparative analysis: Foreign Jurisdictions compared to The Bill

Jurisdiction	Type of Debt	Creditor Rights Protected	Application made to	Frequency of Intervention	Appropriate Benchmark
Croatia ³⁹	Various, included governmental	Voluntary process for creditors compensate	Creditor (regulator audits creditor)	Once-off	Not comparable
India ⁴⁰	Secured agricultural land	Creditors compensate	Creditor (regulator audits creditor)	Once-off	Not comparable
USA ⁴¹	Government Student Loans	Government & creditor same party	N/a	Once-off	Not comparable
New Zealand ⁴²	All debt included, including government	Court driven process. Full creditor participation	Courts process. Quasi sequestration	Ongoing	Similarities
England, Wales, Northern Ireland	All debt included, including government	Court driven process. Full creditor participation	Court process Quasi sequestration	Ongoing	Similarities

³⁹*Predrag Bejaković: Personal Over-indebtedness in Croatia and Measures for its Reduction* Zagreb International Review of Economics & Business, Vol. 19, No. 1, pp. 45-58, 2016. This research document is extensively referred to herein and further cited for sake of brevity as Dr. *Predrag Bejaković*.

⁴⁰ Only creditors who granted credit secured by agricultural land to small farmers for farming operational purposes were included.

⁴¹ In the instance of the USA, the sole creditor was the state in writing off or partially writing off student loans granted by government. As it was the USA government abandoning its rights to enforce debt due and payable to itself we do not deem this example relevant to the current debate and herein further do not comment thereon.

⁴² New Zealand's No Asset Procedure ("NAP") forms part of the Insolvency Act (2006) and the process is implemented through the courts where creditors are afforded normal rights to oppose the application. The NAP encompasses debt in its entirety including unsecured and secured and does not only apply to credit agreements making it broader and more inclusive. Onus on the consumer proving an inability to meet his/her financial obligations. Consumer is held criminally liable for non-disclosure.

Scientific Studies into the Outcome of Foreign Debt Intervention Programs

As the NCR Report referred to above correctly state, debt intervention in Croatia and India failed in that it did not achieve its stated objectives. In fact the opposite was achieved. Consumers who benefitted from such programs did not change their borrowing and spending behaviour; credit was directed away from consumers who qualified for past interventions or who did not receive relief from a past intervention but who fell within a risk category which made them eligible for similar future debt interventions. Such consumers experienced difficulty in gaining access to credit and were compelled to following high risk informal avenues to credit. The socio-economic circumstances of households and geographical areas which experienced a high exposure to debt intervention did not improve, nor did the economy in general benefit. Default rates increased, especially in election years as consumers anticipated further debt intervention programs being announced.

Xavier Giné & Martin Kanz finds in their study:

“First, we show that the bailout led to a significant reallocation of bank lending away from districts with greater exposure to the bailout. A one standard deviation increase in the share of credit waived under the program leads to a 13-16% decline in new bank lending in the district after the program...””

and

“Second, we find that the program had no positive impact on productivity, consumption or labor market outcomes, but led to significant moral hazard in loan repayment. These results indicate that the program had a significant moral hazard cost that is not offset by a positive impact on productivity, consumption or the rural labor market. Importantly, we show that the increase in defaults is concentrated among borrowers that were previously in good standing, and is not driven by greater bank risk-taking or a change in the debt levels of existing borrowers. Moreover, the relationship between defaults and the electoral cycle - which exists in normal times and has been documented in earlier studies– is magnified by the bailout, suggesting that the anticipation of future credit market interventions is an important channel through which moral hazard in loan repayment is intensified.”

These researched findings brings into serious question whether The Bill will achieve its stated objectives.

The provisions pertaining to debt intervention will not support the stated objectives of The Bill and Act and will in fact have the exact opposite effect of further eroding consumer credit behaviour, including the behaviour of credit consumers who did not benefit from the once-

off intervention as contemplated in sections 88A to and including 88C. The natural expectation will always exist for similar future interventions to be implemented and will introduce significant moral hazard and a corresponding increase in credit consumer default rates, which increase will be exaggerated in national election years. This introduces systemic risk to the credit industry.

Ad hoc debt interventions to be announced by the Minister as contemplated in section 88F further strengthens the public expectation of future intervention and will motivate credit providers to direct new lending away from consumers within a risk category which might in future qualify for prescribed debt intervention as contemplated in section 88F of The Bill.

A further natural consequence of debt intervention will, as illustrated *supra*, be a divergence of credit away from high risk consumers (i.e. consumer whose income does not exceed R7500pm) and will effectively frustrate the objective of making credit available to all sectors of society. It will drive credit consumers to the high risk and already very substantial and unregulated underground money lenders and strengthen this criminal industry to the detriment of credit consumer well-being.

An unintended consequences of The Bill will ultimately be to infringe socio-economic rights designed to protect the integrity of individuals as entrenched in The Constitution itself.

In conclusion, the objectives of the Bill and Act will be frustrated by the implementation of debt forgiveness as provided for in the Bill as the following principles underpinning its objectives will be eroded.

1. Access to credit will be denied as credit will be directed away from consumers considered to now be high risk for future debt interventions.
2. Moral hazard is introduced which erodes the promotion of responsible borrower behaviour.
3. The balance between the protection of credit providers and consumers rights are disturbed.
4. Consumer obligation to satisfy all lawful obligations arising from a credit agreement is ignored in totality.
5. The unilateral interference in the contractual relationship between credit provider and credit consumer and the denial of the credit provider to be heard puts pay to the principle of the promotion of consensual dispute resolution.

Part 4

Unintended Consequences

Besides the unintended consequences dealt with *supra*, numerous other unintended consequences may ensue. Many of potential unintended consequences could not be researched in detail or quantified due to the unreasonable time-line allowed for submissions.

Depreciation of Asset Value

Consumer debt is an asset and reflected as such on the balance sheets of business entities. The value of arrear debt placed at risk by the provisions creating debt intervention amount to several billion rand. Should this debt be placed at risk in that the recovery thereof is delayed or the value thereof is diminished, the asset value of a substantial number of business entities and employers will be substantially devalued. In many instances it will render such entities insolvent. The consequences thereof on an already depleted labour market, economy and viscus will be distressing.

Legal Action

ADRA has long since promoted the value that legal action must be reserved as absolutely last resort and in the event of legal action becoming unavoidable, that the consequences *viz-a-viz* the consumer must be tempered. The promulgation of The Bill will result in industry being compelled to resort to this most aggressive of collection processes as a much earlier stage. Legal action will be the only process through which a credit provider and debt collector can protect itself from debt becoming unenforceable through its potential prescription and the disproportionate consequences of criminal prosecution ensuing as a result of a contravention of section 126B. The issuing and service of summons prevents prescription and does such dramatic action safeguard a credit provider and debt collector from transgressing section 126B and its severe consequences of criminal prosecution and the disproportionate sanction it attracts.

The outcome hereof will include:

1. Legal action will be instituted against a substantial portion of the 9m+ consumers who has an account/s in arrears.
2. An already over-extended court system being flooded with debt enforcement matters to the detriment of the administration of justice, consumers and the credit provider.
3. Arrear amounts escalate exponentially due to the addition of legal costs, which is ultimately for the account of the consumer.

4. Judgements being obtained which effectively exclude consumers from the credit market.
5. As a result of civil judgements, affected consumers ability to secure employment and/or advance in employment will be impaired.
6. Judgements can only be enforced via the attachment of a portion of the consumer's salary and/or assets, which intrusive outcome the Bill should not encourage.

Part 5

Proposed Solution

Following his detailed study, Dr Predrag Bejaković makes the following remarks:

Due to the insufficient financial literacy and consumers' hunger for various goods and services that is inadequate to the national economic development and personal income capacity, a significant number of citizens are in an unfavourable social position because they have significant over-indebtedness problems. It is important to emphasise that Croatian citizens have a lack of experience in dealing with and using financial products in a liberalized market and that access to credit modified their economic behaviour."

and offers the following solution:

1. "There is a need to develop and/or improve consumer protection measures. Of particular importance are disclosure guidelines for product terms and pricing.
2. Furthermore, there is a need to promote further financial literacy training so that individuals can make better informed decisions about the products and services they use."

The recommendations following debt intervention programs initiated in foreign jurisdictions and a study of the aftermath of such programs is that such interventions did not achieve its stated objectives and that the solution is rather to be found in:

1. Strong consumer protection legislation, and
2. Consumer education.

ADRA submit that:

1. In the NCA, Consumer Protection Act and a number of related legislation provide a strong consumer protection legislative framework.
2. The due enforcement of this already developed consumer protection legislative framework is essential.
3. A structured and concerted national education plan needs to be devised and implemented.

The principles underlying the findings of the aforementioned studies has long since been recognised in South Africa and form an integral part of the objectives of the NCA and must be implemented as matter of urgency.

Should any additional intervention be required, we submit that the following principles be given effect to in such solution::

1. The intervention must meet constitutional muster.
2. All forms of debt must receive equal treatment in such intervention process, including
 - a. Private and public sector debt
 - b. All causes of action, not only causes of action originating from the NCA or specific credit products originating from the NCA.
 - c. No creditor may be preferred.
3. The cause of the consumer's indebtedness must be considered and only *bona fide* consumers must benefit from the intervention.
4. Intervention must not be curtailed by a snapshot of the historic over-indebtedness or income at a past date but must be dependent upon the actual over-indebtedness of the household (not only a single income earner in such household) and the ability of the consumer to meet his/her/their obligations in future whether in full or in part.
5. The debtor must not benefit/be enriched by such intervention and must at least secured assets be attachable.
6. The *audi alteram partem* rule must be adhered to and the parties must have the opportunity to present their respective cases in favour or opposition of such intervention in full.
7. The outcome of such application must be subject to the normal rules and opportunity of review and/or appeal.
8. Particular attention must be given to the sustainable rehabilitation of distressed consumers.
9. Consumer abuse of the process (i.e. false, misleading or incomplete info provided) must be sanction so as to protect the integrity of the intervention.
10. Mechanisms through which the impact on credit providers can be minimised must be investigated.

INFORMATION RELATING TO THE AUTHOR

The Association of Debt Recovery Agents (“ADRA”) herewith provide written submissions on the Draft National Credit Amendment Bill of 2018 (“The Bill”) as published in Parliamentary Notice 922 published on 24 November 2017 in Government Gazette Vol 629, No 41274. ADRA further accept the invitation to participate in the public hearings.

ADRA is a registered non-profit company and a professional association representative of approximately 230 registered debt collection entities, law firms and credit providers. Due to the short notice period for providing submissions and the timing of such notice period over the festive season, it was practically impossible for ADRA to determine the volume and value of credit agreements within the industry potentially affected should the Bill be implemented. By definition however it can safely be assumed that the majority of arrear accounts as reflected on credit bureaux are in some or other form of debt recovery process and managed by participants in the debt recovery industry. The ADRA membership therefore has a vested interest in subject matter provided for in The Bill.

In terms of cause 2.1.3 of the Constitution of ADRA our stated objectives includes:

“To promote the debt recovery occupation and the broad interest of the public and debtors in general and in particular the interests of credit grantors and its Members.”

Our auxiliary objectives includes:

“2.2.2 To actively participate in the promulgation and/or amendment of legislation whether existing or proposed insofar as it affects the best interests of its Members.

2.2.3 Be materially representative of the debt recovery occupation, to inform and lobby Government on matters relevant to the occupation.”

In the above premises ADRA has a vested interest in the subject matter dealt with in the Bill and is mandated by its membership to represent their interests herein.

ADRA recognise the need for urgent intervention to assist over-indebted consumers who are unable to escape their debt spiral. ADRA is however cautious to ensure that such intervention achieves its stated objective whilst not destabilise industry. The credit industry has been subjected and continue to be subjected to industry insecurity as a result of legislation being challenged due to its perceived unconstitutionality and/or interpretive uncertainty. This instability comes at great cost to industry whilst the implementation of often noble objectives are frustrated.
