





PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

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Amendment to Clause 2

Gauteng:

“Amendment of Section 17, substitution of (5)(a) “[**may negotiate agreements**]” by “must enter into a valid agreement with the NCR”.

B 47B-2013 reads:

“(f) by the substitution in subsection (5) for paragraph (a) of the following paragraph:

“(a) [**may negotiate agreements**] must enter into a valid agreement with the National Credit Regulator, as anticipated in subsection 4(b); and”.

Recommendation: The Bill already reads as per the proposal.

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Clause 12 (insertion of s44A)

KwaZulu-Natal: Referred to submission made by Transaction Capital:

1. The authority or scope of functions to be performed by Payment Distribution Agents (PDAs) are not set out;
2. The manner in which distribution of amounts by PDAs to creditors are to be remitted has not sufficiently been set out (propose prescribed calculation and time limits);
3. Costs to be charged by PDAs to be prescribed.
4. PDAs hamper and negatively impact on the whole debt review process.

Recommendation:

-Re 1-3: Clause 13(b) provides that the Minister may prescribe criteria for registration, duties and obligations of PDAs and the fees that may be charged by a PDA ("registrant" used in clause 13 includes PDAs)

-Re 4: Policy decision

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Amendment to Clause 13

Free State:

"The Minister may prescribe the duties and obligations of a person when applying for registration in terms of section 45".

KwaZulu-Natal: Referred to submission by Transaction Capital and Bayport:

- "compelling grounds", "fit and proper" and criteria to be prescribed in consultation.

Clause 13: "(3) If an application complies with the provisions of this Act and the applicant meets the criteria set out in this Act for registration, the National Credit Regulator, after considering the application, must register the applicant [,] **subject to section 48 unless the National Credit Regulator** after subjecting the applicant to a fit and proper test or any other prescribed test, is of the view that there are other compelling grounds that disqualify the applicant from being registered in terms of this Act."

...
(5) The Minister may prescribe—

... (b) the duties and obligations of a registrant;" (i.e. A person who has been registered in terms of the Act)"

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Amendment to Clause 13

Re: KwaZulu-Natal:

The decision of the NCR is administrative in nature. Should the NCR's decisions be unfair, the decision can be challenged under the Promotion of Administrative Justice Act, 2000 (act No. 3 of 2000). All aspects to be prescribed must be made after publication for comment and consultation with the NCR and Provincial Regulatory Authorities.

Re: Freestate: Section 171 provides that the Minister may make regulations relating to the functions of the NCR, including forms, time periods, information required, filing fees and any other ancillary / incidental matter necessary for the proper implementation / administration of the Act.

- Policy decisions

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Clauses 15 and 24 - Affordability Assessment Regulations

Eastern Cape: The affordability assessment regulations should have the same legislative oversight as the removal of credit bureau information.

Section 73(3): "Any regulations to be made in terms of this section must be submitted to the relevant Parliamentary Committee for the necessary consultation prior to their promulgation".

- Policy decision

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Deletion in Clause 26(b)

Gauteng: "Delete section 86(10)(b)"

"(b) No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal."

-Rationale for the clause is to assist the debtor against unscrupulous creditors who, despite a debt review process being underway, would terminate same and claim payment from the debtor.

- Policy decision

KwaZulu-Natal: Refers to the submission by Transaction Capital:

-No amendment required to sections 86(10) or (11). Debt Counsellor's remuneration should be structured as incentive for a successful debt review.

Clause 13 provides that the Minister may prescribe the fees charged by all registrants.

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Clause 29

KwaZulu-Natal: Referred to the submission by Transaction Capital:

-Ill considered and unnecessary

Clause 29: "Section 100 of the principal Act is hereby amended by the addition of the following subsection:

"(3) A person who contravenes this section is guilty of an offence."

- Rationale: Mere deterrent of NCR not sufficient to curb excessive costs and interest (Section 100 refers to all costs of credit).

- Policy decision

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Clause 30 – Credit Insurance

Eastern Cape: "...to remove the word "life" from the phrase "credit life insurance" resulted in the clause having much broader applicability... If this clause remains in the Bill the National Credit Act, 2005 ...would be so amended without stakeholder engagement."

Free State: "It is not appropriate for the Minister to regulate premiums as there are sufficient industry rules and practices in place which regulate the determination of premiums."

KwaZulu-Natal: Refers to submission by MLB Attorneys, Transaction Capital and Bayport.

- Removal of "life" from phrase without consultation.

- Sufficient industry rules and practices in place – may cause uncertainty, discrepancies and unfairness.

Clause 30: "Section 106 of the principal Act is hereby amended by the addition of the following subsection:

"(8) The Minister may, **in consultation with the Minister of Finance**, prescribe the limit in respect of the cost of credit insurance that a credit provider may charge a consumer."

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Clause 30 – Credit Insurance

- **Rationale:** Credit insurance premiums are (ab)used to recover costs that can no longer be claimed under other credit administration costs or interest.
- Whether the Minister must be able to prescribe a limit is a policy decision (Free State)
- As for public involvement (Eastern Cape):
 - The Act does not refer to "credit life insurance", but to "credit insurance". Omitting "life" from the phrase was as a result of the comments made by the public during the second round of public submissions.
- Also see slides on public involvement

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Clause 31 – Insertion of section 126B

Eastern Cape:

- There is a concern that clause 31 of the Bill in its current form, will prohibit collection of prescribed debt

KwaZulu Natal: Referred to submissions from:

- MBD, Transaction Capital and Bayport: This Clause amends well established legal principles contained in the Prescription Acts of 1943 and 1969 [note: Act 19 of 1943 has been repealed].

Western Cape:

- The provisions do not take cognisance of the workings of the credit industry;
- This provision will counter and nullify fundamental objectives of the National Credit Act
- The rationale for this clause is to prohibit creditors from continuing to contact debtors after the debt has prescribed.
- Policy Decision

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Clause 31 – Insertion of section 126B (2)

"Application of prescription on debt

126B. (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 No. 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 No. 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."

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Clause 31 – Insertion of section 126B (3)

Prescription Act, 1969 (Act No. 68 of 1969):

- Payment of a prescribed debt is valid (s10).
- Period of prescription (s11):
 - 30 years: A debt secured by a mortgage bond; judgement debt;
 - 6 years: Bills of exchange (including cheques);
 - 3 years: Other debts, including credit transactions.
- Prescription is delayed (s13) by a year after the circumstance has lapsed, if--
 - the creditor is insane, a minor, under curatorship;
 - the debtor is outside the Republic or married to the creditor, in a partnership with, or on a governing body of the creditor; or
 - the debt is the object of a dispute / subject to arbitration, the debtor / creditor is deceased; the debtor is liquidated / insolvent.
- Prescription is interrupted by--
 - express or tacit acknowledgement of liability – starts running afresh (s14);
 - service of legal process to claim payment (s15).
- Prescription is not automatic – must be pleaded (s17).

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Clause 32: Delivery

Free State:

"Proposed that the delivery method should be stipulated in the National Credit Amendment Bill, but also when delivery to the consumer has taken place..."

- Rationale: Clause 32(c) inserted to address the Constitutional Court judgment in *Sebola and Another v Standard Bank of South Africa Ltd and Another* (CCT 98/11) [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (7 June 2012):
 - S129(1)(a) is a prerequisite for litigation, thus the "may" is a "must";
 - S130 requires the Credit Provider to prove that the notice was delivered;
 - Accepting that it will increase cost of credit, the court required (if it is sent by post) registered mail with track and trace (i.e. must be able to determine the letter reached the relevant post office chosen by the consumer).
- Policy decision

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Clause 32: Delivery

KwaZulu Natal: Referred to a submission from Transaction Capital and Bayport:

- Should only apply prospectively;
- Remove the "in writing" requirement as some agreements are telephonically.

Rationale: "Writing" requirement inserted as consumers are often tricked by unscrupulous creditors.

Recommendation:

- Legislative is deemed to be proscriptive unless stated otherwise;
- Re writing: Policy decision

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Clause 37 – Training

Free State:

"Proposal to the introduction of requirements and standard for training employees and agents, provided that such requirements are reasonable and take into account the practical implications of rolling out programs and the costs involved in doing so."

KwaZulu Natal: Referred to a submission from Bayport:

- Must allow for public participation.

Clause 37(1A): "(1A) The Minister must prescribe the requirements and standards for the training contemplated in subsection (1)."

Recommendation: "prescribe" triggers section 171 (see slide on amendment of clause 23(1)), which requires publication for comment and consultation with the NCR and provincial regulatory authorities on all regulations.

- Policy decision

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FACILITATION OF PUBLIC INVOLVEMENT

Concerns:

Eastern Cape: "...to remove the word "life" from the phrase "credit life insurance" resulted in the clause having much broader applicability... If this clause remains in the Bill the National Credit Act, 2005 ...would be so amended without stakeholder engagement."

KwaZulu-Natal: Referred to comments made by MBD Credit Solution Holdings, MLB incorporated , Transaction Capital and Bayport.

Western Cape: "...the credit industry and relating private stakeholders were not afforded a reasonable opportunity to comment on particularly the amendments to the new section 126B to the National Credit Act..."

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FACILITATION OF PUBLIC INVOLVEMENT (2)

DUTY: Sections 59(1)(a) and 72(1)(a) of the Constitution, 1996 requires the National Assembly and National Council of Provinces to "facilitate public involvement in the legislative and other processes of the Assembly / Council and its committees".

HOW?: *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC): "(w)hat is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process".

- FACTORS TO DETERMINE "LEVEL" OF INVOLVEMENT:

- the nature and importance of the legislation
- the intensity of its impact on the public;
- practicalities such as time and expense (related to the efficiency of the law-making process).

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FACILITATION OF PUBLIC INVOLVEMENT (3)

Public involvement process to date:

-4 days of public hearings by the Portfolio Committee, resulting in further amendments;

-On 11 amendments the Portfolio Committee sought further inputs:

- Five days were provided for further inputs and more submissions were received with the second round than with the first;
- Based on the second round of public inputs, 4 proposed amendments were rejected, 4 amended and only 3 accepted unchanged.

-Taking the factors provided by *Doctors for life* into account, sufficient involvement was facilitated: It cannot be expected of any Committee to continuously go back to the exact same public that it has consulted and whose proposals it is now giving effect to, when effecting further amendments.

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Thank you

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