



PARLIAMENT  
OF THE REPUBLIC OF SOUTH AFRICA

# DEBT RELIEF: NATIONAL CREDIT AMENDMENT BILL

## Applicable legal principles



**5<sup>th</sup> DEMOCRATIC  
PARLIAMENT**

[www.parliament.gov.za](http://www.parliament.gov.za)

PC Trade and Industry  
2017.09.13



# Legal questions to be answered

1. Is debt property for purposes of section 25 of the Constitution?
2. If it is property, would a debt relief measure constitute deprivation (25(1)) or expropriation (25(2))?
3. If either, what would be required to ensure the right is legally limited?

## Q: Is debt property?

- No specific case or law that confirms whether it is property for purposes of section 25 or not.

– *National Credit Regulator v Opperman 2013 (2) SA 1 CC*

Par 63: “Intangible property has become important in modern-day society and property should not be so narrowly interpreted as to diminish the worth of the protection given by section 25. In *Law Society of South Africa v Minister for Transport* this Court stated that “the definition of property for purposes of constitutional protection should not be too wide to make legislative regulation impracticable and not too narrow to render the protection of property of little worth.”

- Constitutional Property Law – *AJ vd Walt PP96*

“Debts and claims that sound in money have been recognised as constitutional property in most jurisdictions.” (India, Australia, Germany and USA)

**A: Likely to be found to be property for purposes of section 25**



## Q: Section 25(1) or (2)?

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

(2) Property may be expropriated only in terms of law of general application-

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.”

### ***Agri SA v Minister for Minerals and Energy CCT 51/12 [2013] ZACC 9***

“[48] Deprivation within the context of section 25 includes extinguishing a right previously enjoyed, and expropriation is a subset thereof. Whereas deprivation always takes place when property or rights therein are either taken away or significantly interfered with, the same is not necessarily true of expropriation. Deprivation relates to sacrifices that holders of private property rights may have to make without compensation, whereas expropriation entails state acquisition of that property in the public interest and must always be accompanied by compensation. ... [58] To prove expropriation, a claimant must establish that the state has acquired the substance or core content of what it was deprived of.

## A: Section 25(1) - deprivation



# Q: What is required to deprive within the limits of the Constitution?

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

- What is a law of general application?

“It does not... literally mean that the law must apply to everyone.”

1. The law must ensure equal treatment:
  - it must treat similarly situated persons alike; and
  - it must impose the same penalties on the governed and the governors, and accord them the same privileges
2. Those who enforce the law must do so in terms of a discernible standard (non arbitrary);
3. The law must be precise enough to enable individuals to conform their conduct to its dictates.
4. The law must be *accessible* to the citizenry.

(Constitutional Property Law – AJ vd Walt)

## A: A law of general application

# The Bill as a Law of General Application that is not arbitrary in its application

- Category of persons affected must include all persons who are in a similar situation, and must treat them the same (both debtors and creditors)
- The execution of the debt relief measure must be against a discernible standard: power granted to government officials must be constrained by identifiable legal standards (non-arbitrary)
  - Application process (creates legal certainty)
  - Investigation: hearing both sides (e.g. NCR)
  - Decision: separate body (e.g. NCT)
- Precise and clear: Debtors and creditors must know what will be expected of them, what they are allowed to do or not allowed, what rights they are given and what the outcome will be of decisions taken.
- Accessible: Law must be published.



# Framework Bill – high level decisions needed to produce a draft Bill

The framework Bill currently proposes:

- The debt relief measure starts with an application process;
- The application will be investigated by the NCR who will make a recommendation to the NCT;
- The NCT will make a decision to grant the measure or not and in this regard is given a discretion to order one of a number of measures as may be determined by the circumstances of the debtor (including suspension and extinction)
- Other measures may be prescribed by the Minister, but under strict conditions.



# Other decisions required

- These decisions could be agreed on once the draft Bill is before the Committee:
  - Category of debtor qualifying (max salary; max value of assets; max debt);
  - Exact steps and requirements of the application process;
  - Requirements iro the investigation by NCR;
  - Orders that the NCT may grant iro the debt relief measure;
  - Consequences of receiving debt relief.
  - Criteria for the Minister to prescribe