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OUR REF:
YOUR REF:

21 November 2012

To: **The Secretary of Parliament**

Dear Sirs,

Notice 941 OF 2012 (GOVERNMENT GAZETTE 35876) PUBLICATION OF AND INVITATION TO COMMENT ON THE DRAFT NATIONAL CREDIT ACT AMENDMENT BILL

The submission make herein are those of the writer in his personal capacity and not on behalf of any client or clients.

It is respectfully submitted that the proposed changes to the National Credit Act No 34 of 2007 ("the Act") contained in the National Credit Act Amendment Bill ("the Bill"):

1. Are ad hoc and fail to address the larger problems surrounding the deficiencies of the Act, particularly those relating to debt counseling;
2. Are grammatically vague;
3. Fail to fully grasp the purpose of the original Act;
4. Fail to address all the changes necessary to achieve their objectives;
5. Could potentially cause further confusion and "unintended consequences" for the Act

The National Credit Act has been described by Malan JA's statement in **Nedbank Ltd and Others v The National Credit Regulator and Another 2011 (3) SA 581 (SCA)** at para 2:

'Unfortunately, the NCA cannot be described as the "best drafted Act of parliament which was ever passed," nor can the draftsman be said to have been blessed with the "draftsmanship of a Chalmer."

In addition the words "unintended consequences" referred to in the Background of the Memorandum on the Objectives of the Bill have all too often been negatively associated with the Act. However the proposed changes contained in the Bill do not achieve their objectives and in addition they further confuse an already muddled piece of legislation, and, it is submitted, cause further "unintended consequences".

The issues that are raised are not an in-depth analysis of all the issues that arise out of the proposed amendments but those that immediately strike the writer as problematic.

The Amendment to the Definition of Consumer

In the Background of Memorandum on the Objectives of the Bill it is stated that:

"In the Act the definition of "consumer" is unclear and has had the unintended consequence of extending the application of the Act also to business-to-business transactions and to other situations, such as credit agreements incidental to the purchase of goods by distributors from manufacturers and whenever the person concerned does not acquire the money, goods or services to consume them rather to on-sell (sic) them."

The objective as stated above is vague in that it is not clear whether it is to simply exclude "business-to-business" transactions from the ambit of the Act, or whether also to exclude incidental credit agreements (see section 1 definitions of Act for the definition of such agreements). It would appear the former, as "credit agreements incidental to the purchase of goods by distributors from manufacturers and whenever the person concerned does not acquire the money, goods or services to consume them rather to on-sell (sic) them", appears to fall within the general understanding of "business-to business" transactions.

The proposed amendment to deal with this is the addition of the following words in the definition of "consumer" in Section 1 of the Act:

"a person who acquires money, goods or services for such a person's intended consumption in a transaction other than a business-to-business transaction and who is –
"

The problems that arise out of the proposed amendment are:

- a. while the writer is personally in favour of the exclusion of business transactions from most of the protection of the Act (save the charging of usurious interest, the one aspect they are not currently protected from), it is quite clear from the Act that it DID intend to cover at least some "business-to-business" transactions and it is not an unintended consequence.

This is evidence by the provisions of the Section 1 definition of "juristic person" and more specifically the provisions of Section 4(1)(a), which reads as follows:

"Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except a credit agreement in terms of which the consumer is-

(i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1);"

(* currently the annual turn-over determinant is that exceeding R 1million in terms of Section 7(1)(a) as read with Govt Gazette GG 28893 of 1 June 2006, Schedule 2)

In addition Section 5 of the Act limits the application of the Act relating to "juristic persons" in certain instances, most notably to exclude the charging of interest provisions of the Act.

But assuming that this proposed amendment is to change an intended consequence of the Act, then it fails to achieve that in that it has failed to amend sections such as Section 4(1)(a) and 5 amongst others.

- b. The words "for such a person's intended consumption" are vague and could create confusion. This term, by its position in the sentence, seems to be as an alternative to "business-to-business" transactions and therefore seems to imply its application to instances where the consumer is a private individual. In which case it could be argued, if the Act was amended as suggested, that it does not for example apply to a person who obtains money, goods or services not for their own consumption but that of a third party, like a parent obtaining a loan for their child's tuition, or a person who gets services for his wife's consumption. This would lead to the exclusion of certain private individuals in certain circumstances, which is surely not the intention.
- c. The term "business-to-business transaction" is not defined in terms of the Act or the proposed amendment and may cause confusion as to its exact definition. Furthermore it is submitted that if the intention were to exclude business transactions from the ambit of the Act, this should be done by way of amending inter alia Section 4(1)(a) to exclude all "juristic persons" and not simply those that meet the specified criteria currently set out in the Act, amending Section 5 and perhaps even looking at the definition of juristic person in Section 1.

The Amendment of Section 86

In the Background of Memorandum on the Objectives of the Bill it is stated that:

"to provide economic relief to deserving consumers under debt rearrangement by giving the discretion to a Magistrate acting on the recommendation of a relevant debt counsellor to suspend the accrual of interest on the debt(s) concerned for a period of up to five years, if granted under circumstances of the case, so as to avoid the cost of serving such a debt becomes beyond the debtor's financial capabilities, especially in the case of increased interest rates or diminished earnings on the debtor's side on account of the current economic downturn."

The proposed change being to add the following to Section 86(7)(c)(ii) of the Act:

"(ee) suspending the accrual of interest for a period of up to five years"

Any issues relating to the cost of implementation of this amendment to credit providers is best addressed by creditor providers and their representative organisations such as the Credit Providers Association and the Banking Association of South Africa.

What the writer can point out is that:

- (a) There are numerous problems with the operation of the debt counselling provisions of the Act which need urgent attention before the system as a whole can operate effectively (see for example the writer's article which appeared in the August 2012 edition of the official SA attorneys' magazine **De Rebus**, available for viewing at <http://www.bentleylaw.co.za/news-a-articles/21-debt-counselling-challenge-and-proposed-solution.html>);
- (b) Debtors who are private individuals, do have protection against usurious interest charges in terms of the provisions of Section 103 to Section 105 of the Act (albeit that these Sections are in themselves vague and open to interpretative problems) and it's arguable that these provisions give a debtor sufficient respite from interest without completely prejudicing the credit providers;
- (c) The amendment fails to address an issue where the Act is weak, namely the early termination or default by a debtor under debt rearrangement and this could lead to abuse of the debt re-arrangement process to obtain not only a payment holiday but also the benefit of having a court order giving an up to five year "interest holiday";

- (d) The amendment will favour debtors who use the debt counseling process over those that honour their debt commitments and in that way encourage irresponsible debt behaviour which will further aggravate the consumer debt problems in the country;
- (e) It is submitted that a major contributing factor to the consumer debt problem in South Africa arises from elements within the unsecured lending industry, which are still allowed, in terms of the Act and it's regulations, to charge very high interest rates (See the thesis by Prof Jonathan Campbell titled "The Cost of Credit in the Micro-finance Industry in South Africa", particularly Chapter 7 available for download <http://eprints.ru.ac.za/899/1/Campbell-LLM-TR07-87.pdf>.) and engage in reckless credit granting practices unchecked because of the Act's vagueness on this aspect and the inability of the National Credit Regulator to properly police this area of the Act.

The aim of this amendment is remedial rather than preventive and it is submitted that the proposed remedy will adversely affect those credit providers who charge reasonable interest rates and do not engage in reckless credit granting practices equally with those credit providers who do. This is would be an unfair practice.

In concluding it is submitted that the proposed changes would be ad hoc amendments which would not only fail to address all the issues that plague an already ill-drafted Act but could themselves potentially add further confusion and "unintended consequences", with their underlying incomplete grasp of the true provisions of the Act, and the potentially confusing and unfair proposed amendments.

Yours faithfully



Brett Bentley
BENTLEY ATTORNEYS