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Transaction Capital Group

NATIONAL CREDIT ACT AMENDMENT BILL COMMENTARY

1. Introduction

The National Credit Act aims to provide for the debt restructuring of a consumer who is over-indebted, which is implemented by the debt review provisions contained in section 86 of the National Credit Act 34 of 2005, as amended ("NCA").

Shortcomings have been identified in the NCA and the proposed amendments attempt to address these shortcomings.

On the 16th of November 2012, the Draft National Credit Act Amendment Bill ("the draft bill") was published for commentary.

2. Proposed Amendments

The draft bill contains two proposed changes:

1. To change the definition of "consumer" so that the NCA only applies to consumers at retail level by excluding business-to-business transactions, consumers acting as re-sellers and consumers who make use of credit for reasons other than personal consumption.
2. To assist consumers under debt review by allowing for the suspension of interest on money due for a period of up to 5 years.

3. Comments to proposed Amendments

3.1 Amendment of Section 1 of the Act 34 of 2005

The amendment clarifies the definition of a **"consumer"** to exclude business-to-business transactions and persons who purchase for purposes other than personal consumption.

Amendments that clarify definitions contained in the NCA are welcomed.

We do not foresee that the amendment will have an adverse impact to the business.

3.2 Amendment to Section 86 of Act 34 of 2005

3.2.1 "Suspending the accrual of interest for a period of up to five years"

The proposed amendment affords the Magistrate a very wide discretion to suspend the accrual of interest to allow the consumer to rehabilitate sooner.

This proposed amendment will negatively affect credit providers, particularly as credit providers themselves receive credit (on which interest must be paid) to advance credit to consumers. Accordingly, the proposed amendment, in its current form, is hereby opposed and alternative solutions are set out below. In this regard, consideration must be given to section 3(d) of the NCA, which provides "[t]he purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by - ... (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers are consumers; ..." (our emphasis). The proposed amendment may –

(i) result in more stringent scoring models being applied, thereby excluding certain segments of the market that currently enjoy access to credit which is contrary to the purpose of the NCA; and
(ii) alter the very sensitive balance between the rights and responsibilities of credit providers and consumers. In this regard, consideration should be given to the fact that the NCA already provides ample protection to consumers - one need only look at sections 103(5) and 105 of the NCA and regulation 42, which deal with *in duplum* and maximum interest rates respectively.

It is doubtful whether this amendment will pass constitutional muster. In this regard, one needs to examine the case of *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* (234/10) [2011] ZASCA 45 (30 March 2011). In this matter, the SCA considered common law rule of interest, and considered whether it is inconsistent with the spirit, purport and objects of the Constitution. It found that it was not. Below, a few passages from the judgment that are of particular importance:

"At common law there is no fixed customary rate that can be described as a standard rate beyond which it can be said that a transaction becomes usurious. Rates of interest vary with the nature of the financial transaction, the social and economic standing of the parties, the risks and so on. In the absence of any proof or allegation to the contrary, it must be assumed, I would imagine, that the loan was worth the rate of interest fixed to the borrower. Once looks in vain for a declaration by a court that at common law any particular rate of interest is the only legal rate. For, the rate of interest levied depends on various factors, not least the risk to the lender, which in turn is usually dependant on whether the creditor is well or ill-secured. And, it can hardly be disputed that in as much as profit varies and fluctuates, so too must interest, which by its very nature is representative of profit. I thus hesitate to say that a court by a mere decision or a series of mere decisions can authoritatively declare what shall be the rate of interest which, without more, upon being exceeded, shall amount to usury. To declare to be usurious a bargained interest beyond a certain rate may well amount to a court legislating by judicial decree.

The CC's attack invites us to reconsider the correctness of the common law principle endorsed by Merry. *We are obliged to do so in terms of the Constitution. To that end we have to undertake the first enquiry postulated by* Thebus. *I do not believe that the attack by the CC can succeed. Weighty considerations of commercial and social certainty render the common law principle as sound today as it was when first articulated over a century ago. Constitutional considerations far from detracting from it appear to enhance it. For as I have attempted to show, what comes to be branded with the opprobrious appellation 'usurious' may well depend on the whim of a particular judge. That, I dare say, would run counter to the sprit, purport and objects of our Constitution. Harms JA made precisely that point in Bredenkamp (para 39) when he said:*

'A constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made, is the principle of legality. ***Making rules of law discretionary or subject to value judgments may be destructive to the rule of law'".*** (our emphasis)

Although this case considered usurious interest, the same argument can be made for interest in terms of the NCA.

Furthermore, uncertainty exists regarding;

- On what grounds will a Magistrate be allowed to declare that the accrual of interest should be suspended?
- What factors need to be taken into account?
- How wide will the Magistrate's discretion be?
- What right of recourse, if any, will be afforded to credit providers who wish to take the decision on review?

3.2.2 Recommended approach

We submit that a cascading approach should be adopted to attempt to resolve the debt and that other remedial actions should be implemented before the interest rate is simply suspended, namely -

Step 1: Extend the period of the agreement, thereby reducing the amount of each installment;

Step 2: If Step 1 does not reasonably resolve the issue, reduce the interest rate to allow the consumer to rehabilitate within a reasonable period; and

Step 3: If Steps 1 and 2 do not reasonably resolve the issue, suspend the accrual of interest for such period of time as will allow the debtor time to rehabilitate his/her position.

As and when any of the debts are repaid during the implementation of the plan, the amount available for repayment as a result of the settlement of a debt must be taken into account, particularly when considering the duration for which any of the measures contemplated in the steps above is set to apply.

4. Conclusion

The credit industry has already accepted the principle of reduced interest rates in terms of the DCRS rules.

Currently, the larger banks accept proposals with a reduced interest rate (up to 0% on unsecured debt and up to Repo on secured debt).

We are of the view that if our recommended approach is adopted, the primary objectives of the NCA will be met, whilst a balance between the interests of credit providers and consumers will be maintained. .