

National Credit Amendment Bill

Petition to the President of the Republic of South Africa, Mr. Cyril Ramaphosa

By: Dean Macpherson MP (DA)

Introduction:

On 6 December 2016, the Portfolio Committee on Trade and Industry requested the permission of the House in terms of Rule 273(1) for an amendment to the National Credit Act to be developed by the Committee. This was agreed to by all political parties with the aim of the bill to amend the National Credit Act of 2015 so as to provide for—

- (a) simpler and more rigorous enforcement of the Act;
- (b) criminal prosecution of lenders who contravene the Act;
- (c) legal certainty on *in duplum* debt accumulation;
- (d) an effective debt counselling framework for low-income workers; and
- (e) capped debt relief to promote a change in the borrowing and spending habits of an over indebted society.

The Committee decided that a sub-committee made of representatives from different parties, Chaired by the Honourable Adrian Williams MP (ANC) would engage with stakeholders, industry experts and the public on the technical points of the Bill and report to the Portfolio Committee on its findings.

The committee also engaged the services of Parliamentary Legal Services through Advocate, Charmaine van der Merver to guide the committee in drafting and matters of Constitutional concern.

Process:

Following public hearings on the propose Bill, the Democratic Alliance (DA) submitted a nine (9) page document to the Committee to propose and consider a framework for the implementation of debt forgiveness. The document sought to bring to the committees's attention the current legislation that exists within the National Credit Act to deal with reckless lending and understand the various forms of credit available to consumers, as well as the requirements on lenders with respect to affordability assessments before granting credit.

The document went further to propose a framework for the implementation of Debt Relief Intervention.

Regrettably, the Committee chose not to allow the author of the document, the Honourable Dean Macpherson MP (DA) to present it to the committee nor engage on it's contents or recommendations. It is also not clear if any member of the committee read the proposals.

The committee was of the view that Debt Relief Intervention would be made available to individuals who earned less than R7 500.00 per month and with total unsecured debt agreements totalling R50 000.00. These individuals also should not have any prospects of repaying the debt and have no realisable assets.

There was however no real explanation of how these figurers were arrived at and how a person earning R7 500.00 per month could be considered 'indigent'. There was a concern that these amounts may be considered arbitrary in nature. While the argument is made that no effective debt counselling measures are available to people who earn less than this amount, this is only true because it is not economically viable for debt counsellors to assist consumers in this bracket. It was felt by some members of the Committee that a full scale review of debt counselling should be undertaken to make debt counselling more available. This was not carried by the majority of the Committee.

An application would be made through the National Credit Regulation (NCR) on a prescribed form. A notice would be sent to the credit provider notifying them of an application for Debt Relief allowing the credit provider to either agree or oppose the application. The NCR could then either send the application to the National Consumer Tribunal (NCT) who adjudicate the application and make one of the following orders:

- 1 - Reject the recommendation or application
- 2 - Make an order declaring any credit agreement that forms part of the application to be reckless
- 3 - Extend the period of the agreement and reducing the amount of each payment due
- 4 - Postponing during a specified period the date on which the payment are due
- 5 - Determine the maximum interest, fees or other charges which the maximum may be zero

A first round of public hearings were held with stakeholders after the publishing of the bill with some agreeing to it and others recommending changes and or deletion of certain clauses. These concerns were raised in written submissions as well as through direct engagement with the stakeholders in the hearings. The Committee took these into account with some being taken on board while others being rejected.

Resulting from further deliberations, the bill was published again resulting from changes to Sections 12(b), 29(a) and 29(b) of the National Credit Amendment Bill. A number of written submission were received from stakeholders and sent to Members of the Portfolio Committee however direct engagement with stakeholders through further public hearings was rejected by the majority of members.

A legal opinion on two clauses of the Bill were requested from Advocate Wim Trengove SC. The first being if the cancellation of debt, and thus of the claims of creditors, is a permissible form of deprivation of property under section 25(1) of the Constitution, and whether the power conferred on the Minister of Trade and Industry to prescribe other

measures for household debt relief by regulation is a constitutionally permissible delegation of legislative power to the Minister.

In the opinion provided to the Committee, he concluded that the debt forgiveness mechanism is permissible and lawful under section 25(1) of the Constitution, but that the power conferred on the Minister to introduce new debt intervention measures constitutes an unconstitutional delegation of power.

However, a legal opinion on whether the Bill in its entirety is considered Constitutional was never obtained by the Committee. Adv Trengove went on to further comment in his findings to the committee that in draft 6, ‘ I accordingly merely urge that its formulation be carefully reviewed. The current formulation is extremely complex and bears all the hallmarks of patchwork drafting “made up as we go”. The Bill is very hard to decipher and understand and is replete with inconsistencies, omissions and vaguenesses. The outcome is a Bill which is not user-friendly and may well be vulnerable to constitutional attack for its contradictions and vaguenesses.’ A number of these points remain to be true.

The Committee appears to have dealt with all matters raised in the original memorandum to the House in 2016 except one, point (d) *an effective debt counselling framework for low-income workers*.

At no point in the process was this attempted by the Committee which seems to render the Bill lacking in its ability to assist poor South African's looking for debt counselling. This means they are excluded from Debt Relief and Debt Counselling. This seems to be an extraordinary outcome from this process and one that calls into question the Committee's ability to truly make effective debt counselling available to all South African's.

Enforcing regulation for illegal lenders by the NCR:

The NCR through its enforcement powers and capabilities must clamp down illegal and unregistered rogue lenders who take advantage of consumers on.

The current provisions contained in this Bill do not apply to illegal lenders by virtue of their status as unregistered credit providers.

Therefore while the intention of such clauses are understood, the desired objective may not be reached in respect of achieving recourse for the most vulnerable and assisting those in need of debt interventions to alleviate their financial distress and circumstances.

Moreover, the provisions catering for offences does not appropriately address the problem as it is only an offence if reported by consumers and if those who are guilty of the offence may be located and found guilty of being an unregistered and thus illegal lender.

Moreover, the act of illegal and reckless lending must be criminalised and an offence.

The review of the principal Act should urgently address this matter. Furthermore, Ministry of Police and Justice must support the classification of illegal and reckless lending as crimes and entrench the criminalisation of these acts, which are punishable by law.

Financial Implications for the State:

The Committee consulted the Department of Trade and Industry on the cost to implement the Bill. Only estimates were presented to the Committee for both The National Credit Regulator and the National Consumer Tribunal. It is also not clear how soon a financial

literacy program could be rolled out by the National Credit Regulatory which would severely undermine the spirit of the Bill to assist South African consumers with better credit habits.

Despite repeated requests of an actual expenditure business plan as well as plan of implementation, this was never presented to the Committee in any great detail. It was simply noted that requests for budget allocation from National Treasury would have to be made without any firm commitments that they will be agreed to.

Financial Implications for the credit market:

In March 2018, the Department of Trade and Industry had committed to the Committee that it would undertake a Socio-Economic Impact Assessment Study (SEIAS) on the Bill including the impact on the credit market for consumers, credit providers as well as the implementation of debt interventions as provided for in the Bill.

The Committee had accepted their request to undertake such a study inclusive of considering the impact post-implementation so as to provide an evidence-base for assessing the legislation going forward.

To date, the Committee has not received a status update or progress report on this study even though this was requested by the Committee and agreed to by the Department of Trade and Industry.

Despite being a Committee Bill, this Bill requires the appropriate and accurate assessment of its impact, in order to:

- Mitigate and guard against any substantive and adverse consequences for consumers, credit providers and the credit market eco-system
- Further shape future legislation affecting the sector
- Cater for and consider any amendments to this Bill, which may enhance and

strengthen provisions

- Inform the review of similar legislation including the review of the principal Act in its entirety.

Without this information which is mandatory to accompany an Executive Bill, the Committee has sought to create legislation in an information vacuum which could have disastrous consequences for consumers including the increase in the cost of credit as well as the restriction of credit for low income South African's.

Relief sought:

1 - The President should send the Bill back to Parliament on the basis that no economic study had been produced by the DTI on the costs to the state or the credit market which could have adverse implications for both sectors as well as credit provision for lower income South African's

2 - The President should seek an opinion on the Constitutionality of the Bill in its entirety

Kind Regards

Dean Macpherson MP

Member of the National Assembly

