Parliamentary committee - 14 March 2018 - Debt Relief minutes

The Subcommittee deliberated on items where consensus had not been reached. They agreed on the following issues, comments and questions:

• Debt intervention would be available to everyone living in South Africa because the Bill of Rights protects human beings living in South Africa, not only the citizens.

• Joint estate applications for debt intervention would be considered as one application.

• On whether 'over-indebtedness' should be removed as a criteria because the word was not limited to the targeted group – Members said there were adequate processes to ensure consumers outside the target group who qualify for either debt review or sequestration would not qualify for debt intervention.

• The asset criteria should be struck out the Bill as the NCR be unable to verify if the person actually has assets. Assets would only be considered when the applicant was in the debt intervention process.

• The NCR would need to be capacitated and strengthened for the debt review.

• The NCR would apply a similar process as debt review, but in the Bill this would be referred to as debt intervention to avoid the perception that the NCR was attempting to close down debt counsellors.

• Retrospectivity was struck out of the Bill.

• On the concern whether a single NCT Member would be able to consider suspension or extinguishing of debt, this would suffice because Tribunal Members prescribed to statute and did not adjudicate matters based on experience or expertise.

• The measure should be a continual process.

Meeting report

Mr A Williams (ANC), Subcommittee Chairperson, said they would address the clauses where consensus had not been reached.

National Credit Amendment Bill flagged clauses
Adv Charmaine van der Merwe, Parliamentary Law Advisor, took the Subcommittee through the items:
1. The first that needed to be considered was debt intervention applicants who must be South African citizens. She said the National Credit Act is open to any person, whether they are South African citizens or not. She only recommended that persons that apply and qualify, should be natural persons but not juristic persons.

Adv van der Merwe stated that legal opinion from the DTI was that debt intervention should be available to everyone, including joint estates, perhaps the NCR (National Credit Regulator) can provide guidance on how debt review worked in joint estates. If the measure was available under debt review, it should apply to joint estates as well and not be limited to just natural person who are citizens.

Ms Mantashe stated that South Africa is very liberal to people from other nations; however, that was

not the case for South Africans living in other countries.

Adv A Alberts (FF+) suggested that the point needed to be considered from a constitutional point of view because the intention of the Committee was not to have the Bill taken to court on the basis of unconstitutionality. He suggested that the DTI consider looking at the economic impact that excluding foreigners from the Bill would have, and proceed to its constitutionality.

Prof J Maseko, Executive Chairman at the National Credit Tribunal, stated that the Bill of Rights applies to everyone in South Africa and it did not distinguish amongst human beings. Coming to citizenships that would exclude people who are permanent residents that have access to all these services. The other portion would be to look at people like refuges and asylum seekers, since the law allows them to work in the country and have access to credit. Thus; excluding them might bear constitutional implications.

The Chairperson asked Members whether this should be accepted because the Bill of Rights does not exclude anyone foreigners living in South Africa. Thus; they should not be separated from the process.

Ms Mantashe said that the Committee does not want the Bill to be challenged; thus, it was only on that basis she agreed to the proposed comment.

Adv Alberts stated that foreigners should be afforded the same protection as South African because the Bill of Rights does not discriminate on anyone living in South Africa.

Adv van der Merwe stated that the NCR could provide some light on joint estates on debt review.

Ms Nomsa Motshagare, Chief Executive Officer at NCR, responded that joint estates were considered to be one person or one application under the current system of debt review, so she did not envisage that changing.

Adv van der Merwe recommended that if people are married in community of property, it should be clear on the bill that there would be one application from the joint estate.

Members agreed.

Adv van der Merwe said that another question that came up was should the measure be available to persons over-indebted. When the committee started looking into who qualifies for debt intervention, R7500 was the criteria that was agreed upon by the Committee, in addition to over-indebtedness. The Committee then removed the word ‘indebted’, and various formulas to determine affordability were considered. It was also agreed upon that the qualifying criteria was the R7500 income. However, recent statistic indicated that about 50% of the consumers that are earning less than R7500 were actually paying their debts. It is only about 21% of those people who were in arrears in their debts.

She recommended that it must just be clear on the Bill that you must be over-indebted before you can qualify, in addition to the R7500 income.

Adv Alberts stated that the interpretation is good but there must be some sort of criteria regarding over-indebtedness of applicants.

Mr S Mbuyane (ANC) agreed with the wording of ‘over-indebtedness’ to be included on the Bill.

The Chairperson wanted to know what’s to stop a person who is earning R7500 who would actually qualify if they were over-indebted from refraining to pay their debts if a person with a similar profile who’s over-indebted gets assistance on settling their debt. The former would be encouraged to

stop because of the incentive available to person within the same income group.

Ms Mantashe wanted to know whether the term ‘over-indebted’ would not spill over to people who earn more than R7500 who were actually over-indebted. She said rich people can also be over-indebted.

Mr Siphamandla Kumkani, Director: Policy and Legislation at DTI, stated that in response to the Chairperson’s question, he said that when people apply for debt intervention, they must provide evidence why they were unable to pay their debts. There are sufficient measures to ensure that people do not exploit the system, and the unintended consequences would be dealt with.

Mr Mbuyane stated that when people apply there must be a process that is conducted to ascertain whether the consumer should be granted debt intervention or not.

Members conceded.

The Chairperson stated that the clauses are in the Bill but the Bill also says that you must earn less than R7500, and that has not yet changed, so over-indebtedness and R7500 income go hand-in-hand.

Ms Mantashe asked about what should be done to ensure that people earning less or about R7500 continue to pay their debts because the objective of the Bill is to not discourage those who were paying their debts.

Adv Alberts stated that the principle was fine but there would be unintended consequences. The Committee needs to consider measures that are currently in place to ensure that a person is honest and would not wilfully default to take advantage of the system.

Ms Evelyn Masotja, Deputy Director-General: DTI stated that the DTI and the Committee need to establish a criteria to ensure that there are no unintended consequences, there is potential for abuse. Hence; the provisions must be tightened.

Mr Kumkani stated that if the principle is adopted in the Bill and it becomes an Act, he believed that for areas of implementation regarding the ‘over-indebted’ principle, it could be strengthened on a regulation level to ensure that every one that applies would have to qualify on the basis of the principle or criteria. The regulation would enforce this.

Adv Alberts suggested that the regulation should be co-designed with the DTI because regulation may place some obstacles that were not intended by the Parliament.

Adv van der Merwe stated that over-indebtedness as a criteria was absolutely intended, the comments submitted on this principle were not attacking the R7500 criteria but there were questions on the R7500 criteria in the committee. The question was whether should the Bill include ‘over-indebtedness’.

She indicated that there is criminal offence in the Bill if a consumer structures their finances in such a way that would make them qualify for debt intervention. Currently the penalty is ten years, but it was considered whether it was too harsh. There was consensus that indeed the penalty was too harsh. She believed that there are enough measures in place to counter people who would abuse the system.

Adv van der Merwe stated that the Bill sets up a separate measure but it is envisaged as debt review but it is part of the debt intervention process. The idea is that the NCR would follow the same system that is followed by debt counsellors. However, the problem was that the public felt that this was not the least interference that could be done when you are depriving a person of their

property. The opinion supported that the existing measures i.e. debt review should be put to good use, and it should be applied.

She recommended that the Committee should make use of the current debt review system in the NCR. The NCR is empowered to allow people earning less than R7500 go through debt review through its on functions but this must be created by the NCR. If the NCR employs the debt review process, all the other constitutional issues that have come up as result of debt counsellors feeling that the NCR is trying to step into their territory would be eliminated because the credit provider will now participate in the process.

In a situation where a consumer got retrenched or lost a job and find themselves in a situation where they were struggling to make payments within reasonable time. The consumer would be referred to the Tribunal by the NCR for an order to suspend their debt until they manage to get a job. We can add on the debt review system the additional things such as suspending the debt, but another question was to ask how long can the debt be suspended until the consumer can get on their feet. As a result, the question also came up whether Parliament should continue making use of the existing measures or continue this as a separate process. She recommended that it is made clear that the Bill is importing this measure into the existing system, and this would address the constitutionality issue previously raised by the public.

Mr Kumkani stated that the idea is quite the same but he cautioned the Committee around the wording, if the word ‘debt review’ is being used. If reference is made to debt review it will create an impression that the NCR is trying to close the debt review process through the counsellors as opposed to a debt intervention process. The Bill might be challenged in a manner that the NCR is trying to step into the debt review process and potentially closing the debt review system.

The Chairperson stated that the point was taken and it can be redrafted.

Adv van der Merwe said it can be redrafted, and the name will be changed to debt intervention process but the system is still the same as the debt review system.

Ms Mantashe stated that the poorest of poor do not have access to debt review, and so where are these people accommodated in the discussion?

The Chairperson responded that in the new system being put in place those people will go through the debt intervention system or process through the NCR.

Adv van der Merwe stated that the Committee should be co-creator of the process, if it is accepted that there will be a debt review through the NCR. The number of proposals came forth questioning whether the NCR had adequate capacity, or whether it would utilise outsourcing or there will be a subsidy. This might affect issues that come out of the bill, it seems that Members should add to the functions of the NCR personnel that would attend to the debt review process. If Members feel there is a need to outsource this function, this is already catered for in procurement so it has no constitutional implication. If the Committee feels that there should be a subsidy, the DTI does have incentives programmes. The question was simply whether there would be a need to add to other provisions in the Bill if there will be addition to the functions of the NCR.

Ms Motshagare stated that the NCR would need to be capacitated, and a system would need to be built as well as establish a registrar; this will have costs implications. Whilst the NCR is still setting itself up, some of the work could be outsourced. Preferably, the NCR would need to build its own capacity.

Ms Mantashe said that she was anti-outsourcing, she did not agree with it. NCR indicated previous engagements how it would prefer to be capacitated. Public services should not be privatised.

Ms Masotja stated that the DTI fully supported the strengthening of the NCR, and if its approved it will be taken forward to the budgetary appropriation level.

The Chairperson also supported building capacity within the NCR.

Adv van der Merwe advised whether assets should be part of the criteria or not for people to qualify, the concern raised was about how will the NCR be able to verify if the person actually has assets. And how do we know that the asset values are legitimate. A lot of comments submitted that second hand values were subjective. One of the comments indicated that, if you look at the R7500 group, you will find that there will be a small group of people that have any assets, so rather determine whether the person can pay their debt or not, if not the process is taken forward. However, there also a concern that this would be moving away from the NINA (no-income-no-asset) group, but this can be addressed by finding something that will say that the debt counsellor must look at the assets of the consumer to see if those assets can be realised only when the consumer is already in the debt intervention process. Members should note that debt counsellors are already doing that.

The principle was to take the asset criteria out of the Bill altogether. It will cause a lot of problems and fraudulent claims.

Ms Mantashe agreed with Adv van der Merwe.

Adv Alberts also agreed with the proposal.

The Chairperson stated that the assets would be a factor once the consumer is in the process, but it can be removed on the Bill.

Adv van der Merwe stated that there were concerns raised about the retrospectivity of the bill, and because the Bill addresses a civil matters, constitutionality on the basis of retrospectivity is not a factor. However, normal constitutional principles still applied. The concern raised was that the bill deprives someone property retrospectively, but the other side of the coin is that the bill is assisting people with no debt intervention measure to get out of indebtedness.

People who earn more than the prescribed criteria (R7500) and qualify for sequestration are allowed to have a fresh start but NINAs do not have the same opportunity for a fresh start. This gap was deemed unconstitutional. If the Bill is addressing an unconstitutional matter, then it will most likely pass constitutional muster, provided that processes are fair and clear on the Bill.

If we look at the retrospectivity aspect as well as the proposed retrospective date of 27 November 2017, the bill will most likely be passed towards the end of 2018 and already a year would have lapsed between the date (27 November 2017) and when the Act is signed. Therefore, systems would need to be put in place by all the relevant institutions for the implementation of the bill. That would be another 12 months down the line, then you sitting with the cut off date being two years in the past which is really not effective because you do not want people going out now to incur debt knowing in the near future it will get extinguished. She recommended that the Bill be retrospective without a cut of date, but that will raise the question about whether there should be an end date. So if the cut off date is struck, the question is whether we would want to have an end date. She recommended that this measure should be brought into the Bill the same way debt review is brought into the Bill; thus, debt intervention should be an on-going measure.

Adv Alberts stated that she concurred with Adv van der Merwe because other income earners (those above the R7500 mark) have a system in place that assists them when they are over-indebted. Ideally there is no problem with the principle, but the question that needed to be answered was the effect it would have on micro-loans institutions, banks and other credit providers, and how it would impact on those structures if it is an on-going process. If there is no reboot system, you will end up in a situation where the system implodes. From an equity point of view, Adv

van der Merwe's proposal made sense.

Ms Mantashe stated that she would love the process to be continuous because there are no improvements in the economy that accommodate the poor, and the rest can be modified going forward.

The Chairperson asked Adv van der Merwe to confirm and elaborate on this - is it only the date that is making the process continuous? If it becomes continuous, what would be the implications on the financial sector? From inception this Bill initiated to be a once-off measure, but now with the suggestion to make it continuous based on a date changes the processes.

Adv van der Merwe responded that it is not just about the date, the date just sets the wheels in motion. There was a request for people to apply more than once because there is a need for this measure, and there will be a need for people to do it more than once. As a result it was required to be a continuous process.

Adv Alberts asked when the public hearings were held, was there an impression given that this would be a once-off measure? If so, that would create a problem because the stakeholders would argue that they were misled or not properly informed. Secondly, if people are going to be able to apply more than once, the Committee will need to consult the public as well.

The Chairperson stated that it we take the date away, is it not possible to consider the date when the department is ready?

Mr Kumkani stated that when the Bill was initially tabled it had two phases, the once-off phase and the second phase which would be prescribed by the Minister. Following the discussions, the DTI conceded on the phase that would be prescribed by the Minister. He advised the Committee to consider taking the date away if retrospectivity is going to bring an end date to the Bill.

In all the efforts of the DTI to curb reckless lending, there are still people out there that continue to do so. It has been raised many times before that when credit providers grant credit, they need to ensure that thorough affordability assessments were conducted. One of the problems the DTI sought to address was to curb the targeted group from being granted credit recklessly. In looking at the Bill to attempt to balance the systematic nature of the credit market, credit providers need to take accountability and some responsibility.

Adv van der Merwe proposed to say that the Bill needs to come into operation on the date that it is promulgated by the President, so if the Bill is in place people can start applying but that cannot happen if the DTI is not ready. Once the Bill has been signed and the department is ready, the Minister can then send a letter to the President and the President can sign a promulgation to say when the Act will come into effect.

In response to the consultations or public hearings, there were sufficient comments about the date, retrospectivity, and the Minister's powers to make this a permanent measure that the Committee does not need to consult again. It is always open to the public, but the Committee can put out certain clauses for public comment without holding a public hearing. The Bill is yet to go through the NCOP and every single province to comment and provide some input on the bill, and there will be inputs and proposed amendments and it will then come back to the Committee for consideration. The Bill as it stands now, it has substantially considered comments from the public.

The Chairperson stated that the Committee will remove the date (27 November 2017) and when the DTI is ready it will send a letter to the President and he will promulgate a date for when the Bill becomes effective. Within that period, the Committee will put in the 24 months period for debt extinguishing to take place, at the same time, the debt review process through the NCR will be on-going, so that the gap between people that did not qualify for debt review is covered through debt

intervention.

Members reached consent on this.

Adv van der Merwe stated that it also came up whether should the role of credit providers be explicit or implicit? She indicated that the Committee should not worry too much about clause if existing measures were going to be applied, because it is clear how the credit providers can be part of the process.

Members agreed with the suggestion.

Adv van der Merwe stated that there were concerns about a single NCT Member whether they will be able to consider suspension or extinguishing of debt. Currently, a magistrate can do it but the concern was that not all Members of the Tribunal are legally trained. She counter argued that the Tribunal has the responsibility to adjudicate the matters and ensure that their Members were duly trained, and those that specialised in other fields should not be assigned. The Act provides for the qualification of Tribunal Members, and the NCT would make sure that a person that sits as the single Tribunal Member will have the necessary skill or support to do that.

The Chairperson wanted to know whether this question was raised by the public or by Members.

Adv van der Merwe said it was raised by the public.

Prof Maseko stated that it was also raised by Mr Macpherson, he said that the Tribunal Members are already adjudicating certain matters as single Members. Those decisions of the single Members are appeal-able to a panel of three Members, so people do not have to go through the court processes and incur legal costs to appeal such decisions. It was because of the appeal safety net that the Tribunal felt that this could be done.

The fact that some Members are not qualified legally does not really hold because these Members operate within the Statute, its prescribed; hence, the NCT recommended to the committee that if it feels there might be some bias in the process, it should build some criteria to safeguard the Members. Codes of Good Practise could be put together by the Committee for Members to apply when deciding on matters, especially when there is none in existence.

Adv Alberts stated that Members were not allowed to intervene in the discretion of the Tribunal Member to prescribe what the Member of the Tribunal should do. However, there should be guidelines on proportionality of the debt, and in this way extinguishing takes place but it does not necessarily wipe off the entire debt. This would favour both the applicant and the credit provider.

The Chairperson stated that on this matter, by the time it gets to the NCT surely the process that's been conducted is a recommendation from the Regulator. There is a whole process that takes place before the final decision is taken by the NCT. One person is adequate and the appeal process for three people was also adequate; therefore, it should be left as is.

After Advocate Alberts excused himself as he was the only Member from an opposition party, the Chairperson declared the meeting adjourned and schedule another meeting the following day to continue with the deliberations.

The meeting was adjourned