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adra ASSOCIATION OF DEBT RECOVERY AGENTS

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# BOARD MEMBERS



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# ADRA IN MOTION

How time flies! We are at the start of a brand new year and trust all had a welcome rest, time to reflect on the past year and returned safe from your travels, refreshed and eager to tackle the challenges the new year will offer.

2016 Has been a year of exceptional challenges and are all indications that 2017 will be as challenging, if not more so. A fast changing legislative and regulatory landscape coupled with poor financial growth forecast, increased unemployment, household consumer financial pressure and increased consumer protection awareness compels our industry to rethink our business modules and proactively adapt.

2017 Started on a positive note with the Appellate Division judgement on the interpretation and application of section 126B of the National Credit Act providing much needed industry certainty. The Kaknis judgement is dealt with in detail elsewhere in this publication.

### Authenticated Collections Implementation Strategy Adopted

During late September 2016 the Payment Association of South Africa (PASA) and the South African Reserve Bank (SARB) finally approved the much awaited Authenticated Collections ("AC") new strategic implementation plan. The entire credit industry welcomes this more considered, strategic and phased implementation process and the abandonment of the potential devastating 1 October 2016 all-in big-bang implementation strategy without any testing or a fall-back position. The official implementation strategy is discussed in a separate article herein.
ADRA remains deeply concerned about the lack of any non-face-to-face real time AC solution. The debt collection industry has developed into a predominantly call centre based industry with hardly any face-to-face contact with consumers. The lack of any acceptable real-time non-face-to-face authentication solution is a priority of the PSSF as well as the PASA AC Task Team and Steering Committee. Connectivity and the accuracy of mobile telephone numbers held by the various paying banks remains the biggest stumbling blocks.

Extensive testing is being conducted on so-called face-to-face hand held card and pin authentication devices and should this technology be considered by members.

We call on members not to view the adoption of the new implementation strategy and abandonment of the original 1 October 2016 implementation date as temporary avoidance of AC but rather a realistic opportunity for a considered and measured transition from NAEDO to AC. Our industry need to form part of the pilot phase so as to ensure that all unique industry challenges posed by AC are identified and, in so far as possible, accommodated in future regulatory planning of AC. For the industry to benefit from the pilot phase we need as many members as possible to gear themselves towards AC readiness and to participate in the pilot phase set to commence on 1 April 2016.

### NAEDO

Since February 2016 various initiatives implemented by individual banks had a particularly negative effect on the success rate of NAEDO mandates presented for payment. This threat to this crucial income stream to our industry was successfully taken up with relevant banks via the appropriate official channels. The outcome was that FNB resolved not to invite disputes via electronic applications/messages on NAEDO mandates with an instalment value of R200 or less. We trust that other banks will

follow suite and do we receive reports from members of a decrease in disputes and reversals of NAEDO payments received. We will monitor the fail rates of the various banks and, where justified, will act in protection of member's interests.

### Stellenbosch Case: Constitutional Court Judgement

On 13 September 2016 judgement was delivered by the Constitutional Court in the landmark case on court procedures relevant to obtaining emoluments attachment orders. ADRA's motivation for participation in this case was the real threat of EAO's being declared unconstitutional and the retrospective effect thereof not being limited, as was the judgement in the court-a-quo. To the great relief of the credit and debt collection industry, ADRA succeeded in the Constitutional Court and was this risk to the industry averted. The judgement is dealt with in a separate article elsewhere in this publication.

ADRA intends hosting an event during the first quarter of 2017 at which this judgement and the practical implications thereof will be discussed in detail. Adv. Danie van Loggerenberg (SC), the author of arguably the most authoritative publication, Jones & Buckle, The Civil Practise of the Magistrates' Courts in South Africa, has tentatively agreed to address the audience and field all questions.

Adv. Van Loggerenberg (SC) was also ADRAs lead Counsel during proceedings in the High Court and formed an integral part of our legal team during the Constitutional Court proceedings.
Other relevant litigation such as the Lonmin application and legislation such as the Courts of Law Amendment Bill will also be discussed. ADRA will inform the industry of the final date and venue for this event.

**Lonmin and Others vs Steyn's Attorneys Inc and Others**

Just as we thought the EAO saga and the year is coming to a quiet end, QLink served a High Court application on ADRA. ADRA is cited in its capacity as the recognised representative of the debt collection industry with a material interest in the outcome of the application. QLink, mandated by a number of employers, including government, are in essence apply for two declaratory orders. In the first they argue that not all relevant information is placed before a court when considering the scale of costs to be awarded in favour of the judgement creditor and that orders granted without such comprehensive information being placed before court, must be set aside as null and void. In the second, the applicants apply for the confirmation of their interpretation of section 103(5) read with section 101(1)(g) of the National Credit Act, the so-called statutory in duplum rule . They argue that all legal costs, pre and post judgement, incurred in enforcing an EAO must be included in the calculation. They further request that where EAO's are set aside all funds recovered on such EAO's be refunded. Where EAO's do not conform to the interpretation as adopted by the court in this application, that costs be accordingly recalculated, that balances be adjusted and where credit balances exist, that consumers be refunded.
The application is opposed by several parties and will we keep members advised of the outcome.

**Courts of Law Amendment Bill**

In an attempt to rectify the problems and perceived problems identified in the EAO process, the Department of Justice and Constitutional Development drafted and published The Courts of Law Amendment Bill for comment in April 2016. ADRA is very actively participating in this legislative process and is making progress in positively influencing this Bill so as to ensure the retention of a practical, cost effective and sustainable EAO consent process. The Bill and progress made is discussed in more detail elsewhere in this publication.

**Debt Collectors Act Amendment Bill**

Although the Courts of Law Amendment Bill took centre stage on the parliamentary agenda, The Debt Collectors Act Amendment Bill is not forgotten. The two Bills are closely connected and is the Debt Collectors Act Amendment Bill set to be placed on the agenda for the first quarter of 2017. Rumour has it that the Bill will be presented to parliament with the retention of the controversial provisions including attorneys in the definition of "debt collector" but with the exclusion of the proposed further ***in duplum*** rule.
The interim provisions of the Bill compelling a revision of all tariffs and codes relevant to debt collection will be a challenging exercise in which ADRA will participate. All challenges presents opportunity and will ADRA embrace the opportunity to enhance the legislative framework defining our industry.

**National Credit Act proposed amendments**

On 8 December 2016 the Trade and Industry Parliamentary Portfolio Committee officially made their intention clear to enter a so-called Committee Bill in an attempt to amend the National Credit Act. In previous editions we reported on the National Credit Regulator and Credit Industry Forum's inability to impose a universal interpretation on section 126B (prescription) and section 103(5) (the statutory in duplum rule). These have been contentious issues for some time. In the aforesaid notice the committee informs parliament that it intends drafting urgent amendments in order to create clarity in the interpretation of these provisions.

In the notice the committee states that it intends amendment section 126B so as to prohibit the collection of prescribed debt all together and in all circumstances.
Debt forgiveness/relief has been another contentious parliamentary debate during 2016 and is it the intention to at least grant the National Credit Regulator the authority to declare such consumer relief programs. In-line herewith the notice makes brief mention of an attempt to further clear negative consumer listings from the credit bureaux.
The Bill introducing these proposed amendments has not yet been drafted, but from the nature of the Bill to be introduced and recent criticism levelled against the National Credit Regulator is it clear that this Bill will receive priority.

**POPIA**

POPIA has been looming for many years without much progress being made. Finally the regulator (Adv. Pansy Tlakula as chair and 4 other permanent members) has been appointed and has National Treasury created a budget for the office of this regulator. The wheels are therefore set in motion and is it speculated that the office of the regulator will be set up by April 2017 and will the implementation of the interim provisions of the act be formally announced shortly thereafter.

The industry will be allowed a 1 year implementation phase where after full compliance will be enforced. The implementation of POPIA does pose a challenge and is compliance a journey, not a destination. It does take time and a considerable effort to become compliant and remain compliant. Those who have not devised and implemented a sound strategy in becoming and remaining compliant will now have to do so as matter of urgency.

### Credit Industry Code of Market Conduct

ADRA is actively participating in an industry effort to gage the desirability and viability of a combined industry market conduct code of conduct under the National Credit Act. The idea is to consider the wider credit industry and not only consumer credit and attempt to align the numerous codes relevant to the various sectors of the greater credit industry. This initiative will commence with a two day conference scheduled for 15 and 16 February 2017 at the Indaba Hotel and facilitated by Corporate Rebels. The initiative has the potential to be an industry defining event.

From the program distributed to members one will glean that all sectors of the credit life cycle embrace this initiate. The list of presenters is impressive indeed and does the event promise to be the biggest gathering of the credit industry yet. This is an opportunity to directly influence the regulatory environment in which we function and are ADRA members encouraged to attend and participate. In the words of our former president, Charl van der Walt "If you are not at the table, you are on the menu."

### ADRA Member Events

The ADRA Annual Roadshows hosted in Durban, Cape Town and Pretoria during July and August 2016 were a huge success with record attendance figures double that of previous years. For the first time the Gauteng event was a full-day event. In line with our approach of keeping ADRA events as interactive as possible and to involve stakeholders of the entire credit life cycle, the events were dominated by panel discussion during which members could pose pertinent questions and obtain response from the perspective of leading credit providers, attorneys, regulators, industry service providers and debt collectors. ADRA once again thanks Real Pay for their support as anchor sponsor at all three events and CPB for their support as co-anchor sponsor with Real Pay at the event hosted in Pretoria.

The Annual General Meeting was successfully hosted at the Blue Valley Golf Estate on 2 November 2016. Besides attending to the order of business, members were held in awe by keynote speaker Sean Wisedale. Sean was the first person from Africa to summit all the highest peaks on all continents, including Mount Everest. The audience was privy to footage not previously seen on the numerous documentary programs and news broadcasts following his progress and challenges on his numerous expeditions. One could not help but wonder at the spirit of man and man's ability to overcome the impossible.

Honourary Membership was granted to Arnold Olivier for his invaluable contribution to ADRA and the debt collection industry over a period of two decades. Homage is paid to Arnold in a separate article herein.

We once again thank Real Pay for their anchor sponsorship of this prestigious event and Ver-Tex and Intercon for their sponsorship of our keynote speaker.

### The ADRA Board of Directors

ADRA thanks the individuals and the member-companies they represent who made themselves available to serve on the board of directors for the 2016/17 financial year. As can be gathered from the summary of challenges above, 2017 will be another challenging year in which the industry will look to these individuals and the ADRA board as a collective to direct the industry and serve the ADRA membership.

| Director | Portfolio |
|---|---|
| Marius Smith* | *President* |
| Oscar Koster* | *Vice-President and Media Liaison & Brand Building* |
| Stephen Lindsay* | *Legal Officer & Member Discipline* |
| Marina Short* | *Treasurer* |
| Jurgens Wessels | *Commercial Interests & Income Streams* |
| Rene Sunkel | *Court Enforced Collection and Law Firm Interests* |
| Riandi Mare | *Member Benefits* |
| Tracey Swart | *Member Training* |
| Mkuseli Fipaza | *Public Sector Industry Liaison* |
| Charl van der Walt | *Private Sector Industry Liaison* |

***Note:*** *Executive committee members are indicated with an "*" next to their names.*

ADRA wish to thank all members for their support during the year and wish all a safe, relaxing and blessed holiday season with family and friends and a prosperous 2017.

**Marius Smith**
**(ADRA Chairperson)**

# ADRA PAYS TRIBUTE AND AWARDS HONOURARY MEMBERSHIP TO ARNOLD OLIVIER

ADRA Honourary Membership is not easily bestowed as evidenced by the fact that it was last bestowed on two of the founding members of ADRA (Eugene Joubert and Clive Johnston) during the mid-1990's. When Arnold Olivier's name was raised in this context during 2016, the full board unanimously and without much debate voted in favour of the motion that this, the highest honour ADRA can bestow upon a member, be bestowed upon Arnold Olivier for his two decades of service to ADRA and the immense impact he has had on the industry which improved and continue to benefit the industry as a whole and individual ADRA members. Justice cannot be done to Arnold and the legacy he leaves behind in one short article, but it is appropriate to provide a short overview of his career and the unselfish contribution he made to the industry.

Arnold Olivier was born on 6 November 1949 in the small Eastern Cape town of Elliott. He matriculated at Generaal Hertzog High School in Witbank in 1967 where after he entered into employment with Highveld Steel Industries occupying various positions. During 1979 he joined Grinaker Transvaal (Pty) Ltd as accountant. From 1983 to 1987 he held the position as company secretary at Grinaker Transvaal (Pty) Ltd, Grinaker Botswana (Pty) Ltd and Grinaker Swaziland (Pty) Ltd. In 1987 he joined Megapower (Pty) Ltd as financial manager and the following year Sefalana Employee Benefits Organisation (SEBO) as financial officer.

With a strong accounting and financial management background, Arnold entered into the debt collection industry during 1990 by founding VeriCred Credit Bureau (Pty) Ltd in Bophuthatswana. Since that humble start in the credit industry, Arnold has grown from strength to strength and founded a number of enterprise in our industry, including Miles Ahead (Pty) Ltd (Bophuthatswana – 1991), Vericred Botswana (Botswana 1996), AfriCred Collections (Pty) Ltd (SA– 1999), MSB Management CC (SA -2001),VeriShare Software (Pty) Ltd (SA – 2007), VeriCred Namibia (Pty) Ltd (Namibia – 2012), AfriCred Collections 2 (Pty) Ltd (SA – 2012), AfriCollect (Pty) Ltd (SA – 2012). During 1996 he moved VeriCred Credit Bureau (Pty) Ltd into South Africa and in 2012 renamed it VeriCred Collections (Pty) Ltd. The VeriCred group has grown into one of the industry leaders with offices across the country and employing in excess of 1000 people.

Throughout Arnold's career in the debt collection industry he has been involved in ADRA. Arnold was first appointed as ADRA director during the late 1990's. In serving with Arnold on the ADRA board one is left with the overwhelming impression of a man with unwavering ethical standards, a passion to uplift and advance the industry and support especially the small members and start-up enterprises. Arnold was always perplexed by the reluctance of industry participants to share knowledge and experience and led by example by always sharing his vast knowledge and experience with whomever cared to listen.

After serving a couple of years on the ADRA executive committee, Arnold was elected as president of ADRA at the 2006 AGM. He held this position until he stepped aside at the end of 2013. As such he was the longest serving president. During his last two terms as president he had to convinced to make himself available for the position as he attempted to hand over the reins to young blood. After stepping down as president, Arnold remained on the ADRA board as immediate past president and treasurer until the 2015 AGM when he quietly stepped down.

Arnold unselfishly contributed an astronomical amount of time and resources to ADRA and the industry. ADRA cannot thank him enough for his vision, leadership and the numerous sacrifices made over a period spanning two decades. Amongst his many achievements, the most profound was to change the relationship between the regulator and ADRA. Those who were in the industry in the early days of the Council for Debt Collectors will recall the extremely hostile relationship the regulator had with industry. Debt Collectors literally lived in fear of the regulator. The regulator was seen as the persecutor of the industry with no interest in advancing the interests of the industry. During those early days, ADRA's numerous attempts to approach the Council failed. We were simply informed that the regulator refuse to meet with us or discuss pertinent industry interests and should we wish to engage with the regulator, we were to put our concerns in writing. Left with no other option ADRA obliged but were we informed on several occasions that our concerns were scrapped from the agenda of Council meetings. The regulator at the time refused to provide any guidance on how the Debt Collectors Act, Regulations, Code of Conduct and/or Annexure B was to be interpreted and applied but, should a member conduct itself in a manner which the Council, in its interpretation, felt was non-compliant, an aggressive prosecution ensued. Members rightfully asked the question, "Why do they call it the Council for Debt Collectors".

Arnold made it his mission to change this hostile approach and to build a bridge between industry, as represented by ADRA, and the industry regulator. Today we all enjoy the benefit of his vision and labour. The Council for Debt Collectors has developed into one of the most effective industry regulators. ADRA has an open door to its Chief Executive Officer and the ear of its board of directors. In all decision affecting the industry, the Council consults with ADRA and we experience tremendous support from our regulator. As CEO of ADRA I often visit the offices of the regulator and on a regular basis bump into members who simply stopped at the office of the regulator to say hallo.

Whilst struggling with a hostile regulator, the industry was portrayed in an extremely negative light by the media. We were portrayed as a bunch of exploitive thugs with a total disregard for the law and humanity. Here too Arnold intervened. I recall the first media days initiated and attend too by Arnold. We invited all consumer journalists to this event and ADRA paid their flights from across the country and hosted them at the Inter-Continental Hotel at OR Tambo Airport. The first meeting was all about putting out fires. In their ignorance consumer journalists made wild and unfounded allegations against the industry and individual companies and demanded answers. By the end of the meeting the entire atmosphere changed with consumer journalists realising that their interpretation of relevant law was incorrect and that they had a complete misconception of the industry and the critical role we fulfil in the economy. Since that first meeting, the ADRA office receives regular enquires from consumer journalist requesting clarity on relevant laws and even request our approval of articles prior to publication. Many articles were withdrawn by journalists following discussion with ADRA. As a result of this initiative by Arnold, the industry as such receives a fraction of the negative press it used to. Lately, negative reporting is limited to instances of abuse or perceived abuse by individual industry stakeholders and the industry as such is not castigated as was the case prior to this initiative.

Arnold was also central to the ADRA effort to amend Annexure B by having additional items added to the tariff. The end result hereof was that we are now allowed to charge fees for SMS's, credit bureau searches and so-called tracing fees. The item on receipting fees/collection commission was also amended as the wording at the time allowed for an interpretation to the effect that a debt collector was only allowed to charge 10% on the last instalment paid in settling a debt and not all instalments received. These additions and amendment continue to have a positive impact on profit margins.

Arnold and VeriCred did not hesitate to make resources available to ADRA. After the ADRA office was moved from Port Elizabeth to Gauteng, the ADRA office was for 3 years housed at VeriCred's Randburg offices. Arnold's staff attended to the day-to-day accounting function of ADRA, set up and maintained our computers and provided Colin with extensive training. Whilst president, Arnold hosted all ADRA board meetings at their offices in Randburg causing ADRA a substantial cost saving. Arnold also made numerous substantial financial contributions towards ADRA to fund specific projects.

Although semi-retired, Arnold continues to serve the industry as director (nominated by ADRA) on the board of directors of the Council for Debt Collectors and aggressively represents the best interest of the industry at that forum.

ADRA and the debt collection industry is truly indebted to Arnold for the lasting positive impact he has made on the industry. His legacy continues to directly benefit your business and the environment in which you practise. Honourary Membership is but a small token of appreciation to someone who has given and achieved so much to the benefit of the ADRA membership and the industry at large.

ADRA salutes Arnold Olivier.

# Appellate Division clarifies section 126(B)1(b) and prescription

## PANTELIS KAKNIS versus ABSA BANK LIMITED and ANOTHER (08/16) 2016 ZASCA 206 (15 December 2016)

**(The content hereof is not to be construed as legal opinion or an official ADRA stance on the subject matter. The full disclaimer as published on the ADRA website at** www.adraonline.co.za **applies)**

On 15 December 2016 the appellate division delivered judgement clarifying various aspects relevant to prescription and in particular, the controversial interpretation and application of section 126B(1)(b) of the National Credit Act ("the NCA"). This provision was the subject of much industry debate since its enactment on 13 March 2015. Even industry regulatory authorities differed in their interpretation of this controversial provision. Most magistrate's courts have taken a conservative and pro-consumer stance which made it near impossible to obtain judgements in those courts. Existing judgements and also emoluments attachment orders have been set aside on what now appears, to have been an incorrect interpretation adopted. All credit providers and debt collectors adapted their business modules in accordance with their interpretation of this section and managed demands for the setting aside of judgements and refunds accordingly. Prescription and section 126B obviously does not only affect legal action and this provision impacted soft collections as well. This provision also had a dramatic impact on the outsourcing of debt by credit providers (and common law creditors) who tended to err on the side of caution due to legislative and industry uncertainty.

The judgement goes a long way in clarifying the true interpretation and application of section 126B and the judgement is welcomed. The majority judgement delivered by Van Der Merwe AJ is binding on all courts and regulators. The judgement also pronounces on a fundamental concept relevant to all prescribed debt and not only debt originating from the NCA.
In discussing this judgement and for ease of reference, the judgement debtor and appellant, Mr. Kaknis is hereinafter referred to as the "debtor" and the judgement creditors and respondents in the appeal, ABSA Bank Limited and Man Financial Services SA (Pty) Ltd (MFS) are jointly referred to as the "creditors".

### The Facts

During 2006/2007 the debtor entered into various instalment sale agreements regulated by the National Credit Act in terms whereof the creditors sold to the debtor various moveable assets. The debtor experienced financial hardship and the last payment made to the creditors by the debtor was on 8 July 2011. It is common cause that the debts payable to the creditors became prescribed on 8 July 2014 as, in terms of section 11(d) of the Prescription Act, 3 years has passed since the last payment. No other form of interruption of prescription occurred during that period.

On 3 October 2014 (3 months after the debts prescribed) the debtor entered into an acknowledgement of debt ("AOD") with the creditors in terms whereof he was to repay the debts in specific instalments. The debtor did not make any payment in terms of the AOD and also did not surrender the assets purchased in terms of the instalment sale agreements as agreed to in the AOD.
On 30 April 2015 and based on the breached AOD the creditors issued summons against the debtor claiming confirmation of the cancellation of the instalment sale agreements, return of the assets to the creditors and leave to prove and recover damages (outstanding balance of valuation of the assets) at a later stage. The debtor entered an appearance to defend the action but did not enter a plea whereupon the creditors applied for summary judgement alleging that the debtor had no bona fide defence.

### The Legal Arguments

The debtor opposed the summary judgement applications by averring that the claims became prescribed on 8 July 2014 and that in terms of section 126B(1)(b) of the National Credit Act, which came into operation on 13 March 2015 (8 months after the debts prescribed and 5 months after the AOD was entered into), the creditors were precluded from "continuing to collect" the debt by relying on the AOD entered into on 3 October 2014 as it was entered into after the debt prescribed on 8 July 2014. The debtor further argue that he was not aware of the defence of prescription and, was he aware thereof would not have entered into the AOD.

The debtor argued that section 126B has retrospective effect as it must be read with Schedule 3, and in particular item 4(2) thereof. In essence Schedule 3 to the NCA contains the interim provisions to the NCA which provides that certain provisions of the NCA, including sections 124 to 133 dealing with debt recovery, apply to agreements which conform to credit agreements as defined in the NCA but which were entered into prior to the NCA coming into effect on 1 July 2007. The argument goes that as Schedule 3 makes these provisions retroactive, that such retroactivity also applies to any future amendment of any of the sections of the NCA affected by Schedule 3, including section 126B which was inserted during 2015.
The creditors argued that the AOD revived the prescribed debt; by signing the AOD the debtor renounced his right to rely on prescription as a defence and; section 126B(1)(b) has no retrospective or retroactive effect.

### The Court-A-Quo

The court-a-quo (Eastern Cape Local Division of the High Court, Port Elizabeth) agreed with the creditors and stated that should the legislature have intended any retrospective effect to section 126B, the legislature should have expressly stated so in the section and that on a plain reading of the words no retrospectivity is intended by the legislature.

### The Appeal

The crux of the appeal was whether the court-a-quo was correct in finding that section 126B applied retroactively but not retrospectively.

> ***Note: Retroactive*** *operation of legislation refers to legislation which amends the* ***procedure*** *by which rights are enforced without affecting the* ***substantive rights*** *of the parties. In other words, if existing legislation prescribed that the procedure by which a substantive right (for example, the right to payment of an outstanding debt) is to be enforced is procedure ABC and the existing legislation is amendment in that the new procedure by*

*which that substantive right is to be enforced is procedure BCD, then it is presumed in law that the amended procedure, BCD, applies retroactively in enforcing substantive rights which existed prior to the amendment of the procedure. In other words, the old rights must be enforced by means of the newly created procedure and not the procedure as it stood when those rights became vested.*

***Retrospective** operation of legislation is the term used in the context of amendments affecting existing **substantive rights** (as opposed to matters of procedure). Where a legislative amendment has the effect of impairing pre-existing substantive rights and/or obligations under the law as it stood when the cause of action arose (when the agreement was entered into in this instance), there is a presumption that (unless the legislature expressly states otherwise in the legislation itself or in ambiguous provisions the rules of interpretation of statutes are applied and it is found that it was the legislature's intention to make such provision retrospective), such legislation does not affect the pre-existing substantive rights and obligations of the parties. In the current context, if the creditor had the substantive right to recover a prescribed debt (which the creditor had in terms of the Prescription Act), an impairment of such substantive right by the introduction of section 126B after the right to recover that prescribed debt arose (date the AOD was entered into), is presumed not to affect the creditor's pre-existing substantive right to recover that prescribed debt. Courts are unwilling to interfere in vested rights and/or obligations unless clearly instructed to do so by legislation.*

Where the meaning of a statutory provision is ambiguous on a plain reading of the words, the rules of interpretation of statutes must be applied to determine what the legislature's true intention was. The afore-explained two presumptions are merely aids in determining the true intention of the legislature.

In the **minority** judgement it was found that the overriding purpose of the NCA and, thereby the legislature, is to protect consumers wherefore ambiguous provision contained in the NCA must be interpreted in favour of consumer protection. As such the protection granted by section 126B should be retrospective so as to be in favour of extended consumer protection.

In the **majority** judgement however, the judges ruled that although the overriding purpose of the NCA is consumer protection, such protection may only happen in a manner which balances the interests of both consumer and credit provider. Ambiguous provisions of the NCA cannot simply be interpreted in a manner most favourable to the consumer. The intention of the legislature must be determined in considering all relevant rules of interpretation and the intention of the legislature so as to create a balanced and sustainable credit market.

The majority judgement confirms that Schedule 3 is only applicable to agreements entered into before the NCA came into effect on 1 July 2007 and therefore does not make section 126B retrospectively applicable to substantive rights which arose prior to its enactment. The court ruled that an AOD on a debt which prescribed before section 126B came into effect is completely valid and not affected by section 126B. The court went further and ruled that an AOD signed whilst a debt is prescribed, **revives** the debt. Should the AOD be entered into on a debt which arose from the NCA after the date that section 126B was enacted (13 March 2015), section 126B must be complied with. In this regard the minority and majority judgement reads that the prohibition against the collection of prescribed debt as contained in **section 126B is not absolute and does not prohibit the collection of a prescribed debt** where the requirements of section 126B are met. The following extract by of the minority judgement delivered by Shongwe JA appears to be adopted in total by Van Der Merwe JA in the majority judgement. Critical statements are highlighted in bold by the writer.

> "[19] It is well known that the Act has brought about implementation challenges. In turn these challenges have created uncertainty in the credit market place. To ensure better and proper implementation and interpretation of the Act, the National Credit Act Amendment became necessary to address implementation challenges that have materialised and also to ameliorate the implementation. **For us to understand the import of the provisions of s 126B of the Act, it is of paramount importance to unpack the jurisdictional factors of the section.** This process of unpacking will enable us to determine whether or not the jurisdictional factors have been complied with before applying the principles of interpretation. **The prohibition of collection or re-activation of debt is not absolute**, certain requirements have to be present for instance.
>
> [20] The **defence of prescription ought to be raised in response to a demand by the credit provider,** it can be raised during the proceedings, as in the present case, when it was raised in opposition to a summary judgement application. If the consumer was aware of the defence of prescription, he should raise it, but if he or she was not aware **the consumer** must show that he or she would reasonably have raised it."

Following a short exposition of other factors affecting prescription in terms of the Prescription Act, the Shongwe JA continues:

> "Lastly, that the consumer did not waive the defence of prescription. Section 126B(1)(b)(ii) in essence extends the protection of the defence of prescription to consumers who are not aware of the existence of the defence. **If the consumer was made aware, for instance by the credit provider, this protection falls away, as they would have waived the defence."**

In the writer's view, the following conclusions can be drawn from the above pronouncement by Shongwe JA and Van Der Merwe JA apparent concurrence therewith.

1. The prohibition contained in section 126B(1)(b) is not absolute. A creditor may continue to collect such debt if the requirements stated in section 26B (1)(b)(ii) are present.
2. The onus is on the consumer (not the credit provider) to show that he/she was not aware of the defence and that should he/she have been aware of the defence would reasonably have raised it.
3. If the consumer was aware of the defence of prescription and did not expressly raise the defence of prescription, the consumer is deemed to have waived the defence of prescription.
4. In further elaboration on 3 above, if the consumer was made aware of the defence of prescription (by the credit provider, debt collector or any person for that matter) and the consumer does not raise the defence of prescription, the protection of section 126B(1)(b) falls away. Prescription therefore remains a defence the consumer must raise.

Another issue which has been the topic of debate for many years, and not just in the context of section 126B of the NCA, is whether an AOD of a prescribed debt revives that debt or not? Some were of the view that an AOD signed by the consumer after a debt has prescribed, does not revive the debt and, although payments received on such prescribed debt are legally received, the AOD itself cannot be enforced through court. Stated differently, once a debt has prescribed it always remains prescribed and an AOD does not reverse prescription. In this judgement the appellate division creates the binding president that an AOD on a prescribed debt is completely valid and enforceable through court and that the previously prescribed debt is revived and enforceable anew through court as if it never prescribed. The argument whether an AOD revives a previously prescribed debt does not emanate from the NCA but from the Prescription Act itself. As such the findings on the revival of prescribed debt will apply to all debt, not only causes of action which are founded in the NCA.

**Note:** *A properly drafted section 57 and 58 undertaking obviously constitutes an AOD.*

*Prescribed debt may be collected pre and post the enactment of section 126B. Where an AOD on prescribed debt was signed before 13 March 2015, section 126B does not apply at all even if a court is approached for an order on that EAO post 13 March 2015.*

*Debt which prescribed post 13 March 2015 may also be collected with the proviso that the consumer has the extended protection of section 126B(1)(b). If the consumer was aware of the defence of prescription when he/she acknowledged his/her indebtedness, the debt is revived and enforceable afresh and the consumer cannot raise the defence of prescription prior to the AOD itself prescribing again. The acknowledgement is a waiver of the right to raise the defence of prescription and that waiver is irrevocable for the duration of the new prescription period. Education of the consumer on the defence of prescription prior to the consumer entering into an AOD or committing an act which can be construed as an AOD (such as payment of an instalment) is therefore critical post 13 March 2015.*

*The authority provided by this appellate division judgement is binding on all courts. The judgement is in direct conflict with the interpretation published and favoured by the National Credit Regulator and numerous magistrates' courts. A number of entities purporting to act on behalf of debtors in recovering funds paid on ostensibly prescribed debt also base their business module on this now refuted interpretation of section 126B. Many of them focus on the setting aside of judgements and/or emoluments attachment orders based on this incorrect interpretation of section 126B and/or prescription in general. Numerous applications by credit providers for judgement has been rejected by magistrates based on their incorrect interpretation of section 126B. This applies to both debts which prescribed before and after the enactment of section 126B.*
*The judgement clarifies the interpretation and application of section 126B and brings about legal certainty on a provision which has been the subject of industry uncertainty.*



**Marius Jonker**
**Chief Executive Officer**

# FASSET; MAKING THE FUTURE COUNT

*"You are the next big thing!" – this statement adorns the cover of the Finance and Accounting Services Sector Education and Training Authority's (Fasset) Annual Integrated Report 2015 – 2016, and encompasses a message of hope, reward for hard work, and the inevitable result of focusing on skills development.*

At the Seta's Annual General Meeting (AGM) and Thank You function, which was held on the 15th of September 2016 at La Toscana, Montecasino, one consistent theme wound its way through the festive proceedings – leave a lasting legacy. Putting aside the quiet, reserved and desk bound connotations of the word "accountant", Fasset once again proved it is vibrant, alive and ready to tackle South Africa's skills development challenges. Arranged by Zandile Skosana, Fasset's Marketing and Communications Manager, attendees of the AGM and Thank You Function were treated to a scrumptious breakfast, a distinctly African atmosphere, a polished hostess, Patricia Stock, insightful speeches and a breathtaking, high energy musical production by the Mahuma Group.

The proceedings were opened with an African dance themed video, which was both entertaining and enlightening; giving attendees a glimpse into the passion that Fasset's staff, stakeholders and leadership have for their industry. The Mahuma Group then took to the stage, wowing guests with their incredible voices. Once the welcomes had been made by Stock, Mr Shahied Daniels, Fasset Acting Chairman, delivered his address.


Inspired by the opening song performed by the Mahuma Group, Daniels confirmed that Fasset is indeed striving for an *African Dream*. "Cast your mind back to 1995; the first year of democracy and South Africa is hosting rugby world cup. This was the theme song," recalls Daniels. "It is a dream that we have to convert into reality and I want to take a few words out of this song – *in my African dream there is a new tomorrow*. In my Fasset dream, there is a new tomorrow. It is a dream that we can all follow. A lot has been done in terms of where we come from in South Africa, and a lot still needs to be done; progress has been made, but we need to take it to the next level."

According to the Acting Chairman, Fasset's desired legacy is to ensure that all stakeholders continue on the path of skills development, regardless of what the future Seta landscape may look like in South Africa. Although there is much uncertainty herein, Daniels has a positive outlook, confirming that the Minister of Higher Education and Training has re-established Setas until March 2018.

The Annual Integrated Report reflects the fruits of another successful year for the Seta. To achieve its objectives, and with its 16th consecutive clean audit, Fasset prides itself with inculcating sound corporate governance practices and the sound allocation of available funds to achieve the greatest impact. For the past two years, Fasset's Annual Integrated Report has been awarded the best integrated report in the public sector in the Chartered Secretaries Southern Africa (CSSA) and the JSE Integrated Reporting Awards. "This is evident in our approach of ensuring that necessary structures, policies and practices are in place, taking into account industry standards," confirms Daniels.

By facilitating partnerships between all stakeholders in the skills development pipeline, Fasset effectively adds

value to the South African economy, ensuring that learners have the skills needed to secure sustainable employment. For Daniels, one of the most noteworthy highlights for the year is the 25 partnerships established with TVET colleges and universities. "Fasset supported 2 937 learners on the Bridging Programme for Academic Support and the completion of qualifications and/or professional designations; it also administered the 4 322 learners registered on high-level learnerships. These are great successes – and we have only named a few," says Daniels.

In addition, the continued discretionary funding, directed at driving transformation, has certainly made an impact in the year under review. Since 2001, the number of African Black Managers has increased by 78%, Indian by 33%, and coloured by 50%. "We have seen the profile changing over time, with increased representation by African Black professionals across all levels in the sector. In this financial year, a breakthrough has recently been achieved with the change in Fasset's strategy, which now supports Coloured learners in the Western and Northern Cape as well," reports Daniels.

He concluded his speech with the commitment to making employability the ultimate goal. "Skills development is our forte and our primary responsibility, but what goes with that is employability. Every workspace must become a training space. We must steer the Fasset ship in a new direction to comply with this Ministerial directive. To achieve this, we must ensure that the funds allocated for skills development affect our sector and the broader economy."

After the Acting Chairman thanked the former Chairman, Sipho Sono, Chief Executive Officer, Cheryl James, Chief Operating Officer, Lesego Lebuso, and the rest of the Fasset staff, Stock invited James to the stage to present her address.

James welcomed the mix of new and old faces, and thanked them for the contributions to Fasset's successes. "To the old faces, thank you for your commitment shown and the impact that you've had. To the new faces, you show the widening Fasset net and we are grateful for your commitment to join us in the process. Hopefully, together we can all strive to make Fasset the next big thing."


The CEO confirmed that it had been another successful year for the Seta. “However, we still need to be conscious of the challenges and see how we can make these work best in our sector,” she confirmed. As one of the most notable successes, she listed the Seta's journey towards achieving best practice in the creation of the Annual Integrated Report, a project which Lebuso has led in excellence.

As a Seta, Fasset prides itself on its clean track record. “For the 16th year in a row we have achieved a clean audit. “Fasset is very proud to have achieved another clean audit. This shows our staff's commitment to ensuring funds are used efficiently and effectively. All levy funds have been committed/allocated to interventions that Fasset supports, and these funds will only be dispersed when deliverables have been met. The Auditor General's report confirms Fasset's commitment to good governance and the delivery of targets.”

James confirmed, however, that due to an administrative error on the part of the DHET and the Auditor General, Fasset's name was not reflected on the list of clean audits published in the DHET eBulletin on 31 March 2016. The issue has been addressed, and the error will be rectified. “Rest assured that our clean audit is, in fact, a reality.”

Despite the various challenges faced, such as instability in the post-school education and training environment, the Fees Must Fall campaign, and the lack of qualified Mathematics educators at high school level, Fasset placed over 1 000 learners in the last year, and assisted 2 900 learners to get to the next level of their academic studies. James confirmed that the TVET programme was probably not as successful as expected, and this was due to learners dropping out before they had finished. “However, the reason why they dropped out is because they received full time job offers, so while this wasn't a 'direct win' for Fasset, it was definitely a win for those individuals.”

According to James, the key to success is seeing challenges as opportunities, and acting on these

opportunities to achieve success. “Innovation is one of our values, as such we are implementing a new strategy, entitled #LastingLegacy.” Through placement and academic support, professional development and career awareness, a real difference can be made.

After presenting the Annual Financial Statements, the Auditor General's Report and presenting the Seta's Annual Budget and Business Plan, the CEO said her thanks, and the hostess returned to the podium. She was interrupted by an adamant young girl, looking for the Fasset AGM – an entertaining part of the showcase entitled "The Time is Now!".

The theatrical showcase was humorous, pulsating, and answered the questions; Who is Fasset? What does Fasset do? How can Fasset help the communities grow? The over-arching message was that it is time for young people to stand up and make South Africa proud, with an understanding that it is "my life, my future, my responsibility – so let's impress our future!".




Intecon ALLPS along with Ver-Tex Solutions were the Co-Sponsor of the Key Note speaker Sean Wisedale at the ADRA AGM held on 02 November 2016 at the Blue Valley Golf Estate in Midrand.

Sean Wisedale is a 7 summits mountaineer and motivational speaker.

# MEDIA RELEASE 2016

## ENTREPRENEURSHIP & SKILLS CRITICAL TO FINANCIAL SERVICES SECTOR

SETAs in the Finance and Accounting Services Sector traditionally focus their efforts on career awareness and skills development. As part of this focus, and with the recognition that the economy is no longer driven by conventional employment alone, it is essential that skills are geared towards promoting entrepreneurship. This avenue has been lauded as one of the answers to unemployment, a key element of job creation, and a driving factor in the inspiration of the country's youth.

Trading Economics reports that the South African unemployment rate increased to 26.7 end March 2016, from 24.5 percent at the end of the last quarter of 2015. This was above market expectations of 25.3 percent, and marks the highest unemployment reading since September 2005.

When asked whether entrepreneurship could solve the youth unemployment crisis, Maria Pinelli, Ernst & Young Global Vice Chair of Strategic Growth Markets, reportedly told The Huffington Post that; “Sadly, the youth unemployment problem won't be solved quickly, or easily, and it requires a range of responses. Along with shorter-term macroeconomic and fiscal policies to help drive job growth, embedding entrepreneurship at the heart of the education system is a key, long-term initiative that will help provide an environment where the dreams of millions of young people to make an impact and start their own enterprises can be realised.”

Cheryl James, Chief Executive Officer at the Finance and Accounting Services Sector Education and Training Authority (Fasset), concurs. “As a SETA, Fasset drives career development guidance, assisting candidates in identifying which career within in the sector would best suit them. Apart from earning capabilities and professional status, one must be passionate about your career – and if entrepreneurship is the route you choose, entrepreneurial skills are essential to success.”

The reality is that young South Africans face a constantly evolving macro- and micro-economic environment, a consistently shifting job market, and a high demand for skills people. “Cognisance must be taken of the importance of making an informed decision when choosing a career. This is the first step in assisting South Africans to shape their future, and encourage the development of entrepreneurial skills.”

After all, “There's lots of bad reasons to start a company. But there's only one good, legitimate reason, and I think you know what it is: it's to change the world,” Phil Libin, Chief Executive Officer of Evernote.

# SAFARI into the Credit Industry

## 15 and 16 February 2017

### Indaba Hotel Fourways Johannesburg

Are we going to build a bridge

… or are we going

to write a


## Credit Industry collaboration to ensure economic success for SA

A dysfunctional relationship between business and government, both very far from being unified entities with coherent views and policies, is one of the reasons why South Africa's economy continues to perform sub-optimally and fails the SA Credit Industry. Knee-jerk interventions and challenging regulations, both with unintended consequences, and stakeholder reactions, to save turf, are the order of the day and create fertile ground to "divide and rule".

**PROGRAM and BOOKING FORM**

# Authenticated Collections (AC) Revised Implementation Plan

The highly anticipated SARB pronouncement on the *Authenticated Collections Project* was received by PASA and a summary released in the form of a *PASA Communique.*

The pronouncement confirms that the previously communicated 1 October 2016 AC implementation and compliance date is officially revoked by the SARB and replaced with a gradual phased-in approach. Through the phased-in approach AC will first be piloted and then gradually ramped-up and phased-in. This approach allows Users to continue collections in EDO (NAEDO and AEDO) in the Early Processing Window until final migration to AC and achieving AC overall compliance during 2019. Refer to Table 1 (attached) for an extract of key dates and phases communicated.

The phases are distinguished in the following way:

- **Reset and Consolidation Phase:** Current – 31 October 2016;
  Simplification of the solution, approval of the TRS, interbank connectivity
- **Testing Phase:** 1 November 2016 – 31 May 2017;
  Interbank testing on an agreed upon schedule
- **Pilot Phase:** 1 June 2017 – 31 January 2018;
  Low volume operational pilot phase with Users to stabilise systems and monitor uptake.
- **Ramp-up Phase:** 1 February 2018 – 31 January 2019; &
  Users adopt and integrate the system
- **Migration Phase:** 1 February 2019 – 31 October 2019.
  All current mandates are migrated to the AC stream. Disqualifying criteria applies.

It is clear from the phased-in approach that all existing NAEDO transactions initiated on the EDO stream will

continue to be processed in the existing fashion and that no action is required from the Users in respect of 1 October 2016. Furthermore, NAEDO transactions (mandates) will be allowed to be originated for a further period up until AC is fully phased in during 31 January 2019. Form this date onwards no new NAEDO or AEDO collections will be allowed and only AC processed in the Early Processing Window. More detail on the migration of NAEDO to AC will follow in due course.

It is important to highlight that the Revised AC Implementation Plan is cognisant of the importance of mandates (transactions) originated in the Non Face-to-Face business environments and requiring Real Time Authentication. Given its importance a separate work stream has been established to enable the Real Time Non Face-to-Face solution running till the end of January 2018.

The phased in approach affords all participants in the NPS the opportunity to gear up, develop and implement the necessary new AC technology with a minimised impact on the NPS. It is aligned with the drive to modernise payments on the ISO 20022 standard following global best practise.

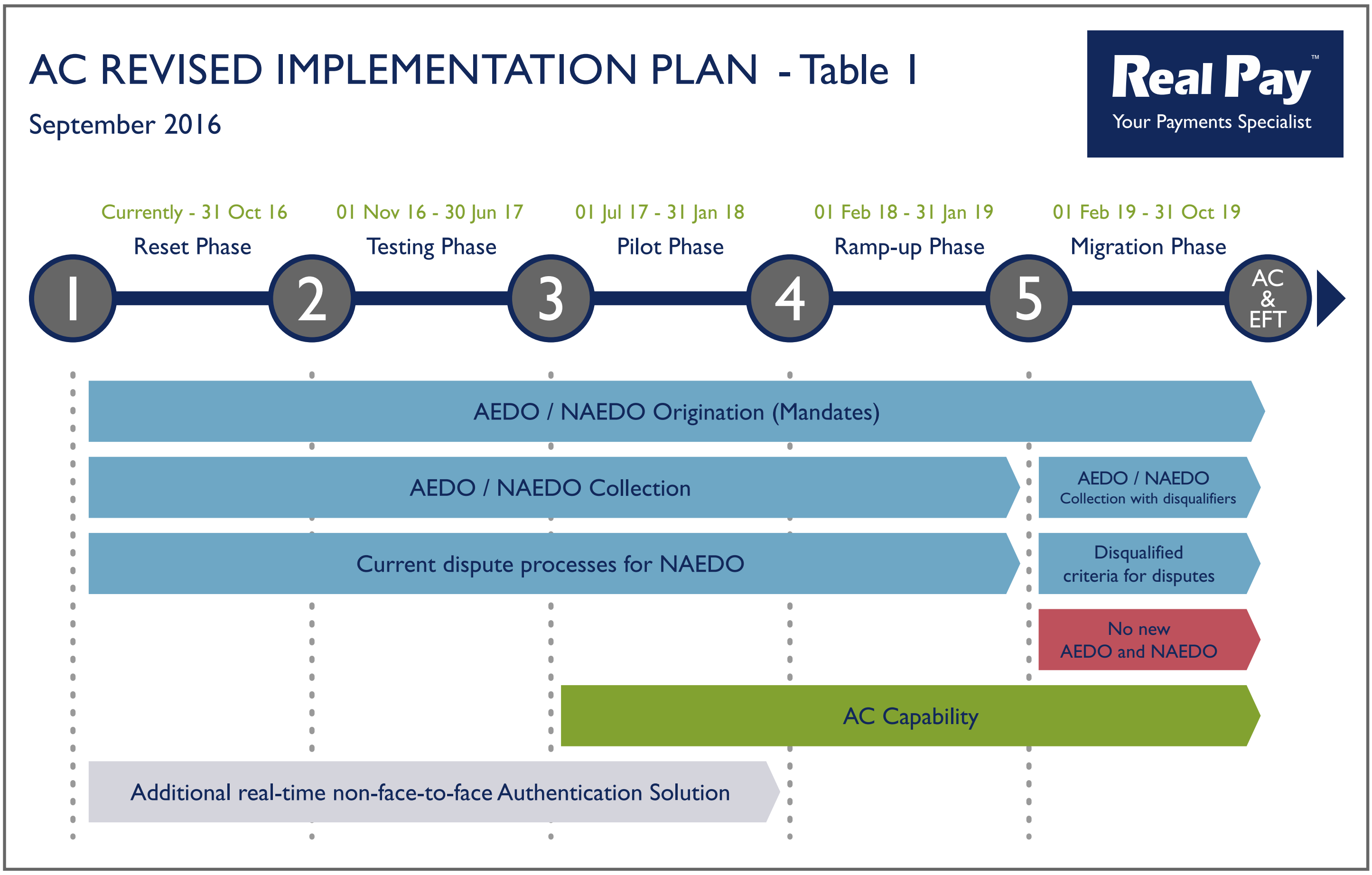
A key objective of AC remains curbing of abuse in the NPS. AC is associated with significant levels of certainty achieved in collections by addressing abuse in the NPS and restoring the balance between Users (businesses) and Account Holders (Payers) in the NPS.

Real Pay actively contributes to the AC project via the established AC project structures, most notably the EDO PSSF. In addition our immediate focus remains on working closely with both our Sponsoring Banks towards the AC Testing- and AC Pilot Phases. Real Pay would like to reiterate that it has been formally accepted as the test AC service provider by both it's supporting banks, FNB and ABSA.

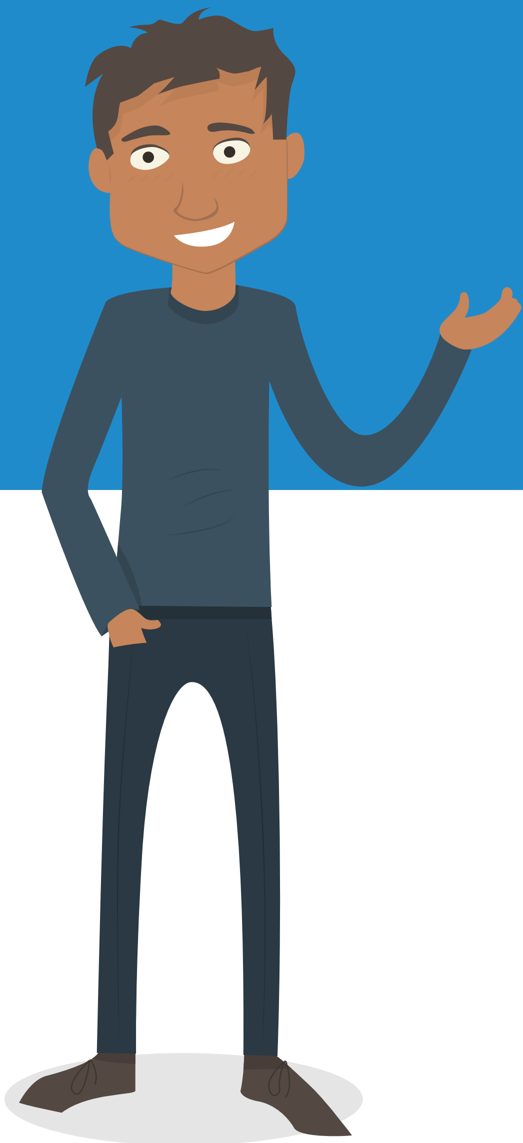
Real Pay has been a payments partner adding value to our Users and their industries over many years. It supports initiatives aimed at the safety and efficiency of the NPS whilst maintaining focus on the provision of innovative payment solutions to its users meeting the requirements of time sensitivity.

With payments systems reform on the horizon, talk to us to partner your payments strategies.

Should you have any queries regarding AC or the implication of the current projected timeline, please contact Luan Cloete on 083 657 9136 or alternatively send an enquiry to info@realpay.co.za.




# DEBTOR PROFILES



## WILL YOUR CUSTOMER KEEP PAYING?

Understanding your debtor means understanding their propensity to roll.

Propensity to roll is the likelihood of a delinquent balance rolling from one delinquent state (e.g. one month in arrears) to a worse delinquent state (e.g. two months in arrears).

Delinquent balances are segmented into a Low Propensity to Roll, a Medium Propensity to Roll and a High Propensity to Roll with the High Propensity to Roll showing a **greater likelihood** of a delinquent balance rolling to a worse state.

Principa
A Transaction Capital Company

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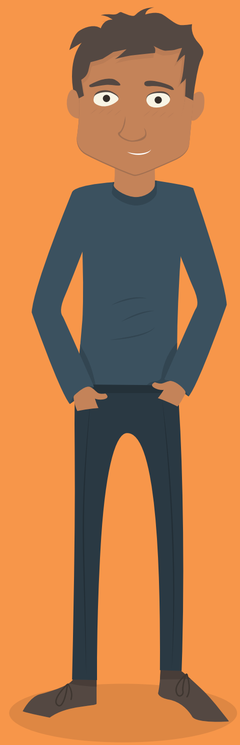
## THE GOOD

## THE BAD



## THE UGLY

## PROPENSITY TO ROLL

LOW ------------------------------------------------------ HIGH

The stats below are based on a profile created from a risk segmentation model recently developed for a South African based micro lender. Each risk segmentation will yield a different result for a different profile. To understand which profile a debtor belongs to, one would need to view all three profiles in comparison to find the value in the data.

### ESTIMATED GROSS MONTHLY INCOME

| The Good | The Bad | The Ugly |
|---|---|---|
| R9 148 | R7 683 | R7 507 |

The average monthly income of a Low Propensity to Roll debtor is 22% more than their High Propensity equivalent.

### BUREAU NLR SCORE

| The Good | The Bad | The Ugly |
|---|---|---|
| 637 | 609 | 601 |

A Low Propensity to Roll debtor has a far better credit rating at the credit bureau.

# PROPENSITY TO ROLL

LOW ---------------------------------------------------- HIGH

## NUMBER OF JUDGMENTS IN THE LAST 5 YEARS

| | | |
|---|---|---|
| 0.09 | 0.21 | 0.29 |

A Low Propensity to Roll debtor is 68% less likely to have had a judgement compared to their High Propensity equivalent.

## VALUE OF JUDGMENTS IN THE LAST 5 YEARS

| | | |
|---|---|---|
| R1 404 | R2 749 | R3 686 |

Total value of judgements in the last 5 years for High Propensity to Roll is just 2.5 times higher than Low Propensity to Roll.

## CURRENT DELINQUENCY LEVEL

| | | |
|---|---|---|
| 0.2 | 2.2 | 2.9 |

A High Propensity to Roll debtor is 70% more likely to be delinquent across all trade lines than their Low Propensity equivalent.

## PERCENTAGE OF MONTHS WHERE PAYMENTS WERE >0 IN THE LAST 6 MONTHS

| | | |
|---|---|---|
| 57% | 33% | 10% |

On average, a Low Propensity to Roll debtor displays more regular payment behaviour.

# PROPENSITY TO ROLL

LOW ------------------------------------------------------------ HIGH

MAXIMUM DELINQUENCY IN THE LAST 12 MONTHS

| LOW | | HIGH |
|---|---|---|
| 1.6 | 5.7 | 7.5 |

The severity of delinquency in the last 12 months is far greater for the High Propensity to Roll debtor than for the Low Propensity to Roll debtor.

NO. OF OPEN TRADELINES OPEN FOR MORE THAN 24 MONTHS

| LOW | | HIGH |
|---|---|---|
| 2.9 | 1.4 | 1.0 |

The Low Propensity to Roll debtor has a more stable and extensive good long-term credit history.

MAXIMUM NO. OF MONTHS WITH A CONSECUTIVE DECREASE IN BALANCE

| LOW | | HIGH |
|---|---|---|
| 2.2 | 1.3 | 0.3 |

Historically, Low Propensity to Roll debtors have been able to make consecutive payments 8x more than High Propensity to Roll debtors.

NO. OF TIMES DEBTOR REACHED A DELINQUENT STATE ACROSS ALL TRADELINES (LAST 6 MONTHS)

| LOW | | HIGH |
|---|---|---|
| 1.9 | 5.7 | 6.3 |

A High Propensity to Roll debtor is 3 times more likely to miss payments compared to a Low Propensity to Roll debtor.

Once you have a better understanding of which profile your debtor belongs to, the next step is to understand what treatment framework to apply in order to get the best from your collections eorts. Here we look at three areas in your Collections and Recoveries practices, namely Type , Tone and Timing.

## TYPE

Apply media related treatments such as SMS, MMS, IVR, Email or letter followed by a telephone campaign where appropriate.

Emphasise repayment alternatives and bene ts of rehabilitation and restoring client into a current position.

A hybrid of telephony and media related treatments such as SMS, MMS, IVR, Email or letter.

The telephone campaign should be prioritised behind that of the High propensity to roll segment.

Emphasise repayment alternatives and bene ts of rehabilitation and restoring client into a current position but tilt treatment framework to make some reference to the potential consequences of non-payment.

A hybrid of telephony and media related treatments such as SMS, MMS, IVR, Email or letter.

The telephone campaign should be the rst campaign priority in any given billing cycle. Intensity of both telephone and media campaigns should mirror roll, mill and cure tolerances.

Emphasise repayment alternatives and bene ts of rehabilitation and restoring client into a current position but tilt treatment framework to make reference to the potential consequences of non-payment.

## TONE

| | | |
|---|---|---|
| Soft | Soft/Medium | Strong although not overtly harsh |

## TIMING

| | | |
|---|---|---|
| Media campaigns to client to commence early in the billing cycle followed by a telephony campaign later in the billing cycle where client has failed to cure. | Media campaigns to client to commence early in the billing cycle followed by a prioritised telephony campaign early in the billing cycle where client has failed to cure. | A prioritised telephony campaign first thing in the billing cycle supported by appropriately scripted media campaigns to client. A second or third round of tilted treatments to be completed within the given billing period. |

Risk segmentation models are often used in Collections strategies to prioritise and tilt customer treatments best aligned with a debtor profile.

Speak to one of Principa's credit lifecycle consultants to reduce your cost to collect and lift your collection rates!

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# OUTSOURCING OF DEBT AND THE REQUIREMENT TO MANAGE DATA CORRECTLY


As an introduction to this article, I would like to reflect on a number of extracts from a few pieces of legislation in the South African Debt Collection space. The first is the ***National Credit Act of 2005***.

**Section 100 (1)** (Prohibited charges) provides that "A credit provider must not charge an amount to, or impose a monetary liability on, the consumer in respect of-

(a) a credit fee or charge prohibited by this Act;

(b) an amount of a fee or charge exceeding the amount that may be charged consistent with this Act;

(c) an interest charge under a credit agreement exceeding the amount that may be charged consistent with this Act; or

(d) any fee, charge, commission, expense or other amount" allowed for by the NCA.

**Section 101 (1)** (Cost of credit) provides that "A credit agreement must not require payment by the consumer of any money ..., except-

(a) the principal debt...

(b) an initiation fee ...

(c) a service fee ...

(d) interest ...

(e) cost of any credit insurance ...

(f) default administration charges ...

(g) collection costs, which may not exceed ...

Then **Section 103 (5)** (Interest) provides that "Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in S101 that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs"

In **Section 110 (1)** (Statement of account) the NCA provides "At the request of a consumer, a credit provider must deliver without charge to the consumer a statement of all or any" transactions on his or her account.

Still related to customer statements, **Section 125** (2) (Right to settle agreement) provides that a consumer is entitled to settle the credit agreement at any time and to receive the calculations and details on all the transactions that make up the final balance.

The next Act to look at is the ***National Credit Amendment Act of 2014***.

Section 31 inserts ***section 126B*** into the National Credit Act (Prescription), which provides "No person may sell a debt ... that has been extinguished by prescription ..." and that "No person may continue the collection" thereof.

Thereafter, the ***Debt Collectors Act of 1998***, in **Section 19** (Recovery of money), provides that "A debt collector shall not recover from a debtor any amount other than- (a) the capital amount ...and (b) necessary expenses and fees prescribed by the Minister ..."

The same section provides that "A debt collector shall deliver to a debtor, upon request and against payment of a prescribed fee, a settlement account containing a complete exposition of all debits and credits" on the debtor's account.

Let's read the above Acts together with the ***Debt Collectors Amendment Bill*** (assuming it is enacted in the near future) where **Section 1** includes attorneys in the definition of 'debt collector'.

**Section 15** (Improper conduct by debt collectors) provides that "A debt collector may be found guilty of improper conduct if he ... charges collection costs, ... other charges which exceed the unpaid balance of the principal debt at the time of default;" and/or "contravenes the provisions of section 126B of the NCA".

All the above pieces of legislation speak to the requirement that a debt collector and/or the creditor must be able to supply accurate details to the debtor when he or she asks for it. It speaks to transparency and to the fact that the debtor is the 'owner' of the information on his or her statement of account.

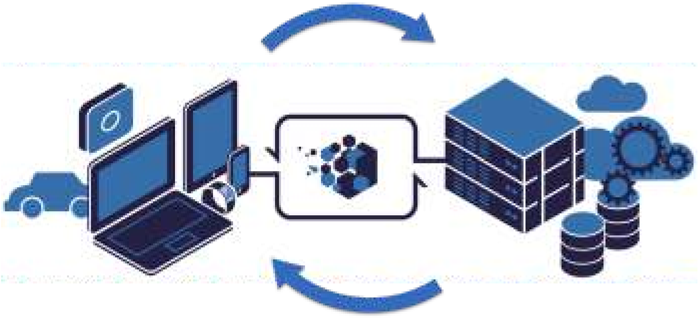
## THE RELATIONSHIPS IN A DEBT COLLECTION MATTER

Traditionally, there are three parties involved in a debt collection matter. The first two parties are the credit provider and the debtor. These two enter into an arrangement of which the outcome is that the debtor needs to repay certain moneys to the credit provider. After defaulting on his repayment arrangement, the credit provider introduces a third party to the relationship by handing the matter over to a debt collector. The debt collector initiates recovery procedures and in many cases, the debtor starts to make payments to the debt collector. This is perfectly normal and happens every day.

At a stage, the debt collector may falter in his performance and the credit provider recalls the claim from the debt collector and hands it over to a different debt collector (the fourth party to the relationship). The second debt collector, in turn, initiates fresh recovery procedures and in many cases, the debtor continues to make payments to the second debt collector. This also happens every day.

## SYNCHRONISING DATA BETWEEN PARTIES

Many debt collectors do not synchronise their transactions back to the credit provider and believe that the amounts it charges has nothing to do with the latter. In many cases, debt collectors simply pay over the amount



available after the debt collector has deducted its fees from the payment received. By way of example, the debtor pays R1 000 towards his debt and the debt collector deducts R400 (a 10% receipt fee plus the fee for a few calls and letters; plus Vat) and only pays over R600 to the credit provider.

There is nothing wrong with this as long as the debt collector provides the credit provider with the details of all the transactions it charges to the debtor's statement of account. If, however, the debt collector is unwilling or unable to supply these details to the credit provider, the latter will find it impossible to comply with the aforementioned provisions of the various pieces of legislation as it simply doesn't have the data to do so.

## QUESTIONS RELATED TO COMPLIANCE

**Scenario 1:** Let us assume that the debt collector doesn't supply comprehensive details related to every transaction to the credit provider. The questions that the credit provider needs to ask when it inspects its own compliance to the legislation, will include the following questions:

1. Can the creditor supply an accurate statement?
2. Can the creditor supply accurate settlement figures when asked to do so?
3. Can the In Duplum Rule (or rather Section 103(5)) be applied accurately?
4. Can prescription be applied correctly?
5. Can the fee caps provided for in the DCA be applied correctly?

The answer to all these questions will be NO.

Even if the debt collector provides the transactions, but does so on a monthly or a weekly basis, the answer at the moment that the statement is requested, will remain NO.

The credit provider can only comply with the abovementioned legislation if the transactions are synchronised on a daily basis.

**Scenario 2:** Let us assume that the credit provider continues to levy charges such as a service fee, an administration fee or the cost of any credit insurance (which it is legally entitled to do in terms of S101 of the NCA ... but reduces the balance available to the debt collector to charge collection fees before it reaches the maximum allowed for in terms of S103). Let us assume that the credit provider does not synchronise these transactions back to the debt collector.

1. Can the debt collector supply an accurate statement?
2. Can the debt collector supply accurate settlement figures when asked to do so?
3. Can the In Duplum Rule (or rather Section 103(5)) be applied accurately?
4. Can the fee caps provided for in the DCA be applied correctly?

**Scenario 3:** Let us assume that the credit provider recalls the matter from the first debt collector and hands it over to another. Let us assume that the first debt collector did not synchronise its transactions back to the credit provider.

1. Will the 2nd debt collector receive the correct balance at time of hand-over?
2. Can the 2nd debt collector calculate the correct balance going forward?
3. Can the 2nd debt collector provide an accurate statement of account to the debtor when asked for one?
4. Can the 2nd debt collector apply the rules of prescription accurately?
5. Can the 2nd debt collector apply the In Duplum Rule (or rather Section 103(5)) accurately?
6. Can the 2nd debt collector apply the fee caps provided for in the DCA correctly?

**Scenario 4**: The need to synchronise data back to the credit provider does not only relate to financial transactions, but critically expands to notes related to legal steps already performed. In this scenario, assume that the first debt collector has taken judgment against a debtor but does not pass that information back to the credit provider. Thereafter, the credit provider recalls the matter from the first debt collector and hands the matter over to another with a mandate to proceed with legal steps. The scary questions are:

1. What is the possibility that the second debt collector will take judgment against the debtor, and, in so doing, duplicate the judgments against the debtor?
2. How many judgments can there be in circulation that are effectively duplications?

These scenarios need to be prevented and the only way in which to do so, will be to ensure that all transactions and notes are synchronised between the credit provider and the debt collector(s). This needs to be a dual-way flow of information.

If there is an unwillingness by either party to synchronise data, they will eventually find themselves in a position of non-compliance.

If the software used by both parties is unable to cope with the synchronisation of data, it is time to consider a change in software.

Mr. Peter Rafferty
CEO
FutureSoft

# Three ways to Manage Credit Risk Governance in a Volatile Economic Climate

Credit companies are facing an increasingly volatile global financial climate. A person has to look no further than the impact the unexpected Brexit results have had on the global market. And if that's not enough, the highly accelerated pace of technological development means that companies need to always be prepared to update their processes and methodologies to accommodate ever-changing client needs and to mitigate risk.

With this in mind, here are three ways to manage credit risk governance in today's highly unpredictable business climate:

## 1) Pay attention to both the economic and political climates

No organisation exists within a vacuum. This is especially the case for companies that have a loan scheme or credit options for their clients, as they are more vulnerable to market variables like currency strength, commodity prices and overall economic climate. Managing credit risk governance effectively, therefore means having a clear understanding of both local and international economic and political events and trends.

This understanding should ideally extend to a pragmatic conclusion, including:

· Defining possible scenarios and the associated likelihood of each scenario.

· The impact each scenario could have on your business and its credit performance metrics, cost metrics and growth and revenue metrics. The impact each scenario could have should be analytically identified and defined at the lowest possible performance indicator (e.g. the flow into collections or the impact on debt sale prices) rather than top-line metrics (net loss rates or provision coverage). The top-line metrics would be a modelled forecasting output based on overriding the performance metrics.

· After understanding the performance impacts by risk grade agree on the alignment of strategies to ensure ongoing compliance to the defined risk appetite and profit hurdles.

A tumultuous economy increases credit risk and the likelihood of defaults – being aware gives you time to prepare through measures like alignment of credit strategies and policies, careful cash flow management, diversity of funding and contingency plans.

## 2) Maintain effective internal policies and organisational structure

Another key way to manage credit risk governance in an unpredictable world is to have internal infrastructure in place that's able to handle the unexpected and to weather suboptimal credit conditions.

The board should have clear risk appetites and profit hurdles that are effectively communicated and implemented, but that are also flexible enough to adapt should the need arise.

It is important to have these clearly defined not only for the overall portfolio, but also for new business vintages and the marginal accepts (highest risk accept population). These parameters should then be sufficiently conveyed through the company policy in a way that is not ambiguous or leaves room for erroneous interpretation. Clearly defined organisational roles and responsibilities make it far easier to manage credit risk governance while simultaneously reacting and adapting to an ever-changing business environment.

These governance foundations would include:

- A credit risk management committee with strong attendance by the wider business;
- A full suite of reporting across the credit lifecycle that goes beyond credit performance and includes complaints, reputational risk, extremes, overrides, exception reporting and operational performance;
- Regular reviews of a comprehensive credit policy document that is supported by a detailed procedure document;
- Daily and weekly operations and performance reporting with intra month outlooks avoiding month-end surprises;
- Scorecards monitoring across the credit lifecycle at least quarterly;
- Strategy performance that is tracked against a control, champion and other challenger strategies;
- A change and event log that is maintained and trusted;
- Provision calculation is understood by all rather than a selected few;
- Credit staff who understand their roles and responsibilities with measurable KPI allowing real-time performance feedback and are handsomely rewarded for top performance (cascaded from the overall business plan);
- Defined and monitored regulatory and reputational risk;
- Quality controls;
- Costs tracked to activity level; and
- Profit models that are standardised and that underpin all credit policy decisions.

## 3) Boost your credit risk governance response time with advance data analytics

Lastly, it's important to make use of available data analytical tools and skills to boost your company's durability and limit exposure. Machine learning is a great example, as it allows credit risk managers to use algorithms that take a vast number of variables into account to minimise risk exposure for a client, while continuously adapting to changing performance trends potentially caused by external variables like economic and political factors. Machine learning involves using pattern recognition, optimisation of variables and continuous learning to achieve the best results for a client - all while working within the limitations of your risk appetite and credit policy framework.

Machine learning and predictive analytics allow credit managers to maximise profitability while minimizing risk exposure. Furthermore, with the vast increase of mobile devices and client information available, an approach like machine learning has a far wider and deeper data pool to draw insights from – leading to a more accurate model and better results.

Visit www.principa.co.za to find out how predictive analytics and machine learning can give better insights into your credit management strategies and mitigate risks in a highly volatile climate.

**ABOUT THE AUTHOR: EDWIN CROSS**

Prior to joining Principa in December 2013, Edwin had 13 years' consumer credit (credit cards, revolving credit and personal loans) experience in Barclays Bank and Standard Bank SA with 10 years' specialised in credit risk management across South Africa and Europe in particular United Kingdom, Spain, Germany and Italy of which over 3 years with Chief Risk Officer accountabilities. Edwin is considered an expert across the full customer life cycle and has lead and implemented a number of highly successful credit, marketing, collections, scoring and provisioning initiatives. Since joining Principa, Edwin continued to successfully deliver risk-based and profit-based initiatives to key clients (specialised lenders, large retail banks and retailers). He holds a M.Comm degree from Stellenbosch University.

# The Courts of Law Amendment Bill.

**What does the Bill entail, what progress has ADRA made and what does the future hold**

The Magistrates' Court Act Amendment Bill of 2013 was abandoned with the publication for comment in April 2016 of the Courts of Law Amendment Bill 8 of 2016. Besides attempting to synchronise debt recovery processes between the Lower Court, Regional Court and High Court, the Courts of Law Amendment Bill deviates conceptually from the emoluments attachment order ("EAO") regime as contained in the Magistrates Court Act and the 2013 amendment bill.

As a last resort, a practical and cost effective EAO process remains the only practical court enforced debt collection process in recovering unsecured debt. By its nature in the recovery of unsecured credit there is no asset which affords the creditor a measure of security for payment by the debtor of his/her obligations. The identification and attachment and subsequent sale in execution of unsecured assets (unencumbered assets of which ownership is not reserved in favour of the creditor or over which the creditor has no preferential rights) has proven to be problematic. Besides being an extremely invasive process for the consumer and his/her family which often only serve to dramatically increase legal cost and the indebtedness of the consume, it has proven to be an extremely expensive and high risk exercise for creditors. In lieu of any other effective court enforced debt collection process, especially in enforcing obligations in unsecured debt, the collapse of the last resort will no doubt also have a devastating effect on amicable, negotiated so-called soft collections. The old adage apply - without the stick the carrot has no effect. Consumers will soon learn that creditors and their debt collection agents are wholly dependent upon the voluntary cooperation of the consumer as court enforced debt collection no longer poses a realistic threat. The preservation of court enforced debt collection therefore has a direct effect on soft collection. The preservation of an effective court enforced debt collection mechanism (and debt collection in general) is not only crucial to the debt collection and credit industry, but also the macro economy of South Africa.

## Why does the current provisions of the Bill pose a threat?

In overview, the design of the original bill will result in a number of high level unintended consequences and negative outcomes, including the following:

1. It places an onus of proof on the creditor which is practically impossible to satisfy making it practically impossible to obtain a consent judgement and EAO.
2. The process is extremely time consuming and expensive, something consumer and creditors can ill afford.
3. The process will exhaust already over-extended court capacity resulting in an unacceptably long delay and thereby denial of justice, not only in debt enforcement matters but in all spheres of administration of justice.
4. The cap system as introduced in the bill does not achieve the intended objectives and infringes upon judicial discretion and is based on a misconception of the use thereof in foreign jurisdictions.

It is not our intention to deal with each and every counter-productive provision herein but rather by way of examples only demonstrate the basis for our contentions.

## Onus of Proof

The original bill requires of the creditor to file with the section 57 or 58 undertaking and application for EAO 0the usual income and expense statement, an exposition of other EAO's and agreements with creditors to pay debts due to such other creditor in instalments or otherwise and an exposition of the consumer's assets and liabilities. It is not sufficient for the consumer to provide a statement containing this information as was the case in the past. In addition to such statement, the credit must file written proof that the consumer can afford the instalment in the form of a statement by the consumer's employer or a bank statement not older than three months as well as documentary evidence in support of all three elements. The bill therefore requires of the creditor to provide three layers of proof, namely a statement, written proof and documentary evidence.

In some aspects the information and evidence required does not at all assist in the determination whether the consumer can afford the agreed instalment or not. Information and documentary evidence of a consumer's assets does not advance the investigation into affordability of a periodic instalment. How and at what cost to the consumer is the second hand value of all the consumer's assets to be determined by a qualified evaluator and how does a credit provider facilitate such valuation without the consumer's active participation? Likewise an employer is in the same position as the creditor with no first-hand information on the consumer's ability to afford the instalment, so what purpose does a written proof in the form of a statement by the employer serve in determining the consumer's ability to afford the agreed instalment. A bank also does not provide proof of affordability. A bank statement contains limited information. The amount of individual debits can be determined from a bank statement but not the nature of such debits or what the consumer's necessary expenses are. Expenses paid in cash is also not reflected on a bank statement. Bank account particulars is arguably the most sensitive personal information and is it an offence in terms of the Protection of Personal Information Act to make a consumer's bank account detail public. Court files are in the public domain and accessible to everyone who wish to view the file or make copies thereof. Placing such information in the public domain (especially for no justifiable purpose) is unconscionable.

The onus placed on the credit provider is in ADRA's view an unreasonable and even impossible onus. It is a matter of physical impossibility to obtain documentary evidence of all the consumer's expenses. Even should a consumer receive documentary evidence when making each and every purchase, no consumer preserves all such documentation? In many instances documentary evidence simply does not exist, for example, expenses incurred in making use of public transport which constitutes a substantial portion of monthly expenses for the majority of consumers. The same apply to numerous other day-to-day expenses.

All the information, written proof and documentary evidence required is in possession of the consumer (in so far as it does in fact exist) and is the entire process based on the misguided assumption that consumers are willing and able to assist creditors in obtaining all the information/documentation required. No court enforced process can be entirely dependent upon the person against whom the process is instituted as it renders such process ineffective from the outset.

It was the undisputed evidence in the Stellenbosch matter that it takes on average more than 7 months from date of filing of the section 57/58 application for consent judgement and EAO for the court to consider the application. The Bill requires that the documentary proof be not to older than 3 months and grant the court the discretion to, when it considers the application, to request the latest documentation. As applications are inevitably heard more than 3 months after the date the application is filed, the creditor will never be able to comply with this requirement. Due to a lack of court capacity, documentation will invariably be older than 3 months and will the creditor never obtain the relief for which it approached the court.

## Court Capacity

Prior to 28 July 2014 amendment of Rule 12(5), the vast majority of applications for section 57 and 58 consent judgement and section 65J consent EAO's were attended to by the clerk of court as expressly prescribed for by legislation at the time. As stated above, due to a lack of capacity it took on average more than 7 months for clerks to attend to these consent process matters. Since 28 July 2014 this already unacceptable and arguably unconstitutional delay in administering justice has increased dramatically. Many members report that they are still awaiting the outcome of applications for judgement and EAO filed in 2014. Since the July 2014 Rule amendment, the majority of jurisdictions limit the number of applications it will receive from creditors per motion court day. The majority of such limitations is between 5 and 10 applications per motion court roll. The imposition of such limitation by itself clearly demonstrate an existing lack of capacity. The Bill, if passed in current form, will have the practical result that most EAO's are considered in formal financial enquiries where the physical appearance of the consumer is required. Most jurisdictions are experiencing a shortage of magistrate and will this additional and very substantial workload exacerbate the existing capacity deficit and delay in the administration of justice. The budget of the Department of Justice was recently cut leaving no scope for the appointment of additional magistrates.

## Cost

It is one of the objectives of the Bill to reduce the cost of legal action in debt enforcement matters, yet the Bill lends itself to a substantial increase in costs. Obtaining all the information (some of which is irrelevant), written proof (which does not demonstrate the consumer's ability to afford the instalment) and support the information with documentary evidence (which might not exist) will increase costs which the consumer is ultimately liable to pay. Obtaining and filing the same information for a second time when the magistrate considers the application more than 3 months after the application was brought will duplicate the already increased legal costs. Because of the onus in applying for consent judgements and EAO's the process will invariably involve motion court proceedings with the consumer present in court. More often than not the consumer either does not appear or is unable to provide the information and/or documentation required when he/she does appear, which will, as is the case currently, result in multiple physical appearances in court by the consumer and the creditor's legal representative. Due to the capacity deficit, matters are often postponed simply due to over-crowed court rolls. In an outcome directly opposed to one of the objectives of the Bill, legal costs will soar.

In an attempt to lessen the burden on the consumer, the Bill diminishes the right of the creditor to obtain a cost order on a scale agreed to and in some instances provide that the court may not, irrespective of the outcome of the proceedings, grant any cost order whatsoever. Such limitation, and especially the prohibition on granting cost orders in review proceedings and proceedings aimed at reducing the amount of the instalment previously granted or in setting aside a judgement or EAO will lend itself to abuse by consumers.

## Cap

The application of a cap in the format contained in the bill frustrates the financial enquiry. After having satisfied this unreasonable, if not impossible onus in assisting a court to exercise a judicial discretion in determining what amount a consumer can afford to pay on an EAO instalment, the court's execution of its actual finding is curtailed in that an EAO instalment, together with all other EAO instalments may not exceed 25% of the consumer's salary. If after having jumped through all these hoops the court finds that a consumer can afford an instalment amount higher than 25% of his/her salary, the court may not grant an EAO instalment in-line with its findings but, is the court limited to 25% only.

The cap in practise serves to protect only high income earners and not the vulnerable lower income earners, which is the objective of the Bill. Why undergo a comprehensive affordability assessment but then limit the execution of the findings of such assessment? Low income earners will not be able to meet their monthly necessary obligations if 25% of their salary is attached whereas high income earners can afford to pay substantially more than 25% of their salary towards arrear debt.

In applying the cap, a creditor will be limited in the amount of the instalment it can recover from the consumer based on the consumer's perceived inability (the basis for the cap) to afford the instalment amount. Yet, the same consumer will qualify to incur new credit in terms of the compulsory affordability formula promulgated in the regulations to the NCA. This is so notwithstanding the underlying principle that in determining an affordable instalment for purposes of repayment of existing debt, only necessary expenses are to be considered whereas the criteria in determining what instalment on new credit a consumer can afford all expenses are included in the calculation.

Why would a consumer apply for debt review if he/she can limit his/or debt repayment to a maximum amount of 25% of his/her salary? In restructuring a consumer's debt under debt review, consumers repay a substantially higher percentage of their salary towards repayment of debt.

## Progress made

As a result of the impracticality and the array of unintended consequences which would render the EAO process ineffective, ADRA was compelled to aggressively oppose the bill in original form. ADRA provided substantial written submissions to the Justice and Correctional Service Parliamentary Portfolio Committee and on 31 August 2016 addressed the committee during the portfolio committee's public hearing. At the request of the chairperson of the parliamentary portfolio committee ADRA provide further written submissions on the merits of the bill and detailed statistics demonstrating the existing lack of capacity in our courts.

ADRA's submissions follows a two-pronged approached. Firstly, ADRA submits that the manner in which the cap is applied is incorrect. The idea of a cap has its origins in foreign law as argued by the South African Human Rights Commission during the Stellenbosch case. Many countries apply a cap, but does so in an entirely different manner. In brief, the process in foreign jurisdictions entails the following. Once a creditor obtains a judgement against a consumer, whether by consent (similar to section 57 or 58) or following a full court process (summons or motion proceedings), the creditor informs the consumer of such judgement by registered letter. The notice informs the judgement debtor that judgement was obtained and that that should the judgement debt not be satisfied in full within a specified period (in most foreign jurisdictions 10 days) the judgement creditor may obtain an EAO (wage attachment writ). If the consumer still does not settle the debt in full, the creditor applies to court for the EAO by simply filing a certificate or affidavit informing the court that the notice was forwarded to the judgement debtor and that the judgement debt or part thereof remain unpaid. The EAO is granted by court without any financial enquiry or determination of an instalment. The EAO is served on the garnishee (employer), who determines the instalment by applying the statutory formula (cap).

The employer provides the judgement creditor and debtor with the completed prescribed form setting out the judgement debtor's salary, other EAO instalments and the balance available for attachment and does deductions of that amount commence with any further legal process. Only in circumstances where, due to extraordinary financial obligations the judgement debtor will not be able to meet his/her maintenance requirements and those of his/her dependents after the deduction of the instalment so determined and, the judgement debtor service an notice to this effect on the judgement creditor, is the matter referred to court for a full financial enquiry and application of the sufficient means test. The onus is placed on the consumer to prove exceptional circumstances why he/she cannot afford the instalment in the capped amount. A capped system in foreign jurisdictions is therefore intended to replace a full financial enquiry and sufficient means test and all the negative consequences occasioned by such protracted legal process. As such EAO's are implemented within a month of being applied for and without incurring legal costs.
The cap as contained in the Bill is in addition to the “sufficient means” test and whilst retaining all the negative consequences of a full financial enquiry in court.

ADRA further proposed that the German example be followed of a progressive sliding scale cap. The higher the monthly income, the higher the percentage of the cap. In doing so, higher income earners do not receive undue protection and benefit.

Although the portfolio committee recognises the advantages and desirability of such system, the portfolio committee is extremely loath to entertain substantial amendments to the Bill as such change in direction will result in the legislative process having to start from scratch which will cause a delay of several months in its implementation. Based purely on the time factor, this solution was rejected.

ADRA's second approach was to object to specific provisions contained in the Bill and to suggest improved wording for the relevant sections of the Bill. The most prominent objections are discussed above.

On 13 September 2016 the Department of Justice forwarded a report to the portfolio committee in which the submissions and oral arguments of various institutions are evaluated. The response to ADRA's submissions are favourable and on most critical points do the department agree that there is merit in ADRA's submissions and did the department propose further amendment of the Bill aligned with the ADRA submissions and proposed re-wording of such provisions.

The full report by the department is available in the Members Area of the ADRA website. In brief the further amendments proposed by the department and subsequently accepted by the portfolio committee includes the following.

- The provision compelling information on the consumer's assets is abandoned.
- The provision requiring written proof in the form of a statement by the consumer's employer or a bank statement not older than 3 months is abandoned.
- The provision compelling documentary proof of all relevant information is abandoned and replaced with a requirement that such information is filed where such information is in possession of the consumer and can reasonably be obtained by the creditor.

- The provision in terms whereof the court may request the latest documentary evidence when considering the application is abandoned and replaced with a provision allowing the court to request further information in determining the consumer's financial position at the time the application was filed and which was not contained in the original application.
- Cost provisions are amended to allow for reasonable costs order in all proceedings.

At a further meeting on 25 October 2016, the department introduced a further proposed amendment. In terms hereof a court must when considering an application for judgement and/or EAO first consider whether such order is “just and equitable”. The newly proposed section 55A reads as follows:

**“55A.** For purposes of Chapters VIII and IX of this Act, the factors a court must take into account when considering whether an order is just and equitable, include, but are not limited to—

*(a)* the size of the debt;
*(b)* the circumstances in which the debt arose;
*(c)* the availability of alternatives to recover the debt;
*(d)* the interests of the plaintiff or judgment creditor;
*(e)* the rights and needs of the elderly, children, persons with disabilities and households headed by women;
*(f)* social values and implications;
*(g)* the amount and nature of the defendant's or judgment debtor's income;
*(h)* the amounts needed by the defendant or judgment debtor for necessary expenses and those of the persons dependent on him or her and for the making of periodical payments which he or she is obliged to make in terms of an order of court, agreement or otherwise in respect of his or her other commitments; and
*(i)* whether the order would, in the circumstances of the case, be grossly disproportionate.”.”

***Footnote:*** *The footnote below demonstrates the context in which this proposed provision is to be read.*

All factors with the exclusion of subsections © and (f) form part of the sufficient means test and appear to be a repetition. Subsections © and (f) are factors not within the judgement creditors knowledge. Subsection (f) is highly subjective and is it not sure how a court will determine what the “social values and implications” are and what effect it will have on the judgement and/or EAO. This provision further confuses two very distinct aspects of the legal process, namely the determination of liability (judgement) on the one hand, and after the determination of liability the appropriate relief in remedying such liability (the EAO). It cannot be justified that these factors has any influence on whether judgement is granted against a consumer or not.

The proposed section 55A was introduced without any notice and without stakeholders being granted any opportunity to comment thereon.

Chapter VIII deals with the recovery of debts and consists of sections 55-60. Chapter IX deals with execution and consists of sections 61-79. Sections 57, 58, 65, 65E, 65J and 73 which are amended in the Bill, will therefore be covered by the suggested umbrella provision in section 55A

## The way forward

The legislative process is not completed. The bill will in all likelihood be tabled before the National Assembly during the first quarter of 2017 and referred to the Council of Provinces. Limited opportunity to influence the bill remain and is little further change envisaged. ADRA remains involved in this legislative process and will continue to strive to secure a balanced and sustainable outcome accommodating the interest of its members, consumers, creditors, the administration of justice and the economy at large. It is envisaged that the bill will finally be signed into law during the second term of 2017. ADRA will keep its members informed of all relevant developments.

**Marius Jonker**
**(ADRA Chief Executive Officer)**

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