


LEGAL NEWSLETTER

Quarter 2 of 2023



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**In this edition of the
Legal Newsletter, the
following is included:**

1. Legal Opinion | On the Deferred Amount and how this Impacts the Definition of a Short-Term Credit Transaction
2. Guidance Note 01/2023 | SASSA Proof of Income
3. Guidance Note 02/2023 | Debt Review Withdrawal Guidelines

INTRODUCTION

MFSA, together with our service providers, compiled this Legal Newsletter, to provide members with insights and information regarding certain compliance matters in the industry. This Newsletter does not replace, amend or aim to circumvent the requirements and obligations vested in any legislation dealt with herein, but should merely be utilized as an informative document.

DISCLAIMER

Wording contained in the legislation dealt with herein must take preference to such analogue wording contained in the Legal Newsletter. The Newsletter does not constitute any form of legal advice, only if stated otherwise, and should you face any non-compliance issue, MFSA advises you to seek the appropriate and qualified legal assistance.

The MFSA is not promoting or endorsing specific service providers or products. Members must make their own decisions regarding these services or products. The information is provided to members to raise the levels of awareness and the MFSA does not accept responsibility for the content of the material. Interested members must contact the service provider directly.



Legal Opinion

*On the Deferred Amount
and how this Impacts the
Definition of a Short-
Term Credit Transaction*

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CONSULTANT:
MICROFINANCE SOUTH AFRICA

IN RE:
LEGAL OPINION ON THE DEFERRED
AMOUNT AND HOW THIS IMPACTS
THE DEFINITION OF A SHORT-TERM
CREDIT TRANSACTION

THE CONSULTANT:

1. My consultant is Micro Finance South Africa (“MFSA”), a non-profit company and a membership-based organisation, which represents some 1300 micro finance lenders, who are its members. These members are registered credit providers in terms of the National Credit Act 34 of 2005 (“the Act”), who are regulated by the National Credit Regulator (“NCR”).

The members subscribe to an industry code of conduct, which ensures and facilitates professional, legal, and ethical conduct in the market in which they operate, being the short term and unsecured credit market.

Bosch Marais & Associates Inc.

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Senior Associate

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Legal Opinion

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LEGAL OPINION ON THE DEFERRED AMOUNT AND HOW THIS IMPACTS THE DEFINITION OF A SHORT-TERM CREDIT TRANSACTION

THE MANDATE:

2. My consultant has approached me with a mandate to provide an opinion on the deferred amount, how this impact the definition of a short-term credit transaction and the effect thereof on our consultant's members.

3. The above request stems from the declaratory order handed down in the matter of MFSA v NCR under case number 64646/2016 on 14 August 2020 as well as various queries raised on the impact of the above on the definition of a short-term credit transaction.

4. I will refer to the applicable extracts of legislation and declaratory order more fully hereinbelow.

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APPLICABLE LAW

5. The following Regulations are applicable and have been considered specifically for this opinion:

Regulation 39 - Definitions

In this Chapter-

(1) **"Deferred amount"** means any amount payable in terms of a credit agreement the payment of which is deferred and upon which interest is calculated, or any fee, charge or increased price is payable by reason of the deferment, and

a. the deferred amount includes

i. any obligation of the consumer that is deferred as per section 8(3) and section 8(4) of the Act;

ii. ...

iii. the amounts referred to in section 101(1)(b) to section 101(1)(g) inclusive;

iv. the amounts referred to in section 102(1)(b) to section 102(1)(f);

b. the deferred amount is reduced by any amount paid towards the settlement of the deferred amount, or an amount credited to the deferred amount, at the time that such payment is made, or credit falls due, and

c. the date from which an amount becomes part of the deferred amount, is the date upon which such an amount becomes due or may be levied, subject to the limitations specified in the Act and these regulations.

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(2) "short-term credit transaction"

a. means a credit transaction

i. in respect of a deferred amount at inception of the agreement not exceeding R8,000; and

ii. in terms of which the whole amount is repayable within a period not exceeding 6 months; and

b. in terms of which an amount of money was disbursed to the consumer, to be utilised at the sole discretion of the consumer, and

c. includes pawn transactions,

d. but does not include credit transactions in respect of which the agreement is conditional upon

i. the amount deferred being paid by the credit provider directly or indirectly to a person or juristic person that is related to the credit provider; or

ii. the amount deferred being paid by the credit provider to a person or juristic person other than the consumer, except where such condition is introduced by the consumer.

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EXTRACTS OF DECLARATORY ORDER

6. The declaratory order handed down by the Honourable Davis, J on the issue of levying interest on the deferred initiation fees is well known and comprehensive exploration of the order is not necessary for this opinion, apart from the fact that interest may be levied on the initiation fee if same is deferred.

7. I merely want to highlight the important extracts hereinbelow:

8. Paragraph 3.21 of the declaratory order:

"... In my view, regulations 40(2) (providing for the charging of interest on deferred amounts and 39(1)(a)(ii) (which defines deferred amounts as including initiation fees) put the issue beyond doubt. Initiation fees which are deferred may therefore attract interest."

9. Paragraph 3.24 of the declaratory order:

"The interpretation of the NCA and its regulations contended for by the applicants in therefore the interpretation to be preferred in order to give a business-like and purposive interpretation on the issue of the charging of interest on deferred initiation fees in the context of the NCA as a whole, in respect of short-term unsecured loans."

10. Paragraph 6.1 of the declaratory order:

"It is declared that credit providers of short-term and unsecured loans may charge interest upon an initiation fee charged on such loans as allowed by the National Credit Act, 34 of 2005, where payment of such fee is deferred in terms of a credit agreement."

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INTERPRETATION OF APPLICABLE LAW AND DECLARATORY ORDER

11. It is evident from the declaratory order that when payment of an initiation fee is deferred by a credit provider in short-term and unsecured loans, such initiation fee can be added to the deferred amount and attract interest.

12. The above declaratory order has, however, a direct impact on what constitutes a **short-term credit transaction**. As is evident from the definition referred to hereinabove, a short-term credit transaction is a credit transaction where the deferred amount at inception of the agreement does not exceed R8,000 (Eight Thousand Rand) and in terms of which the whole amount is repayable within a period not exceeding six (6) months.

13. Should a credit provider thus defer payment of the initiation fee, where it is not paid up-front, the deferred amount i.e., the principal debt plus initiation fee, cannot exceed R8,000. If the above does exceed R8,000 the credit agreement does not constitute a short-term credit transaction anymore and the interest rates of 5% and 3% per month are also not applicable. In such instances the agreement will be classified as an unsecured credit transaction and the maximum permissible interest rate cannot therefore exceed the Repo Rate + 21% per annum, even if the repayment term falls within the six-month period from the date of the agreement.

14. Similarly, if a credit provider does not defer payment of the initiation fee and it is paid up-front by the consumer, the deferred amount i.e., the principal debt, cannot exceed R8,000 repayable within a period not exceeding six months, for it to remain within the confines of the definition of a short-term credit transaction.

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CONCLUSION

15. It is therefore imperative that credit providers, who defer payment of the initiation fee, ensure that the deferred amount (principal debt plus initiation fee) does not exceed R8,000 should it still want the credit agreement to fall within the confines of a short-term credit transaction. Thus, if a credit provider defers the initiation fee, the principal debt cannot exceed R7,200, e.g. R7,200 plus R785 (initiation fee) equals R7,985 (deferred amount), repayable within six (6) months.

16. It is further imperative that credit providers ensure that its loan management system is correctly set up to avoid charging incorrect interest rates.

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**Guidance
Note
01/2023
SASSA Proof of
Income**

GUIDANCE NOTE 01/2023: SASSA PROOF OF INCOME

When a consumer applies for credit, a credit provider must not, in accordance with the provisions of Section 81(2)(a) of the National Credit Act 34 of 2005 ("the Act"), enter into a credit agreement with a consumer without conducting an affordability assessment. The provisions of Regulation 23A(3) of the Act further requires the credit provider to take practicable steps to assess the consumer's discretionary income to determine if the consumer has the financial means and prospects to pay the proposed credit instalments.

Therefore, the first step in assessing a consumer's discretionary income is to obtain proof of the consumer's income.

Obtaining proof of income for SASSA grant recipients seems to present various challenges for credit providers and the need for practical guidance for credit providers was expressed.

Acceptable proof of income is the consumer's latest bank statement reflecting the SASSA grant deposit. The consumer can obtain his/her bank statement from either his/her branch or from an ATM. If a full statement cannot be obtained from the ATM, the consumer can request a mini statement. The mini statement must reflect the SASSA deposit. Since the mini statement only reflects the last 4 digits of the consumer's account, the credit provider must be able to validate same against a previously obtained bank statement from the consumer.

A trend that has been prevalent in the credit industry is credit providers obtaining a cash withdrawal slip from a SASSA consumer.



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GUIDANCE NOTE 01/2023: SASSA PROOF OF INCOME

This is not acceptable proof of income. It merely shows that the consumer has money in the bank and a withdrawal was possible. It does not indicate where the funds originated from.

According to the Proposed Guidelines issued by the National Credit Regulator (“NCR”) on 18 April 2018, it is stated as follows: *“For consumers who are self-employed, informally employed or consumers that have income other than from formal employment and which is not evidenced by payslips or bank statements, credit providers should use such other verification of the consumer’s income that will provide validation of income sufficient to meet the consumer’s payment obligations in respect of the proposed credit.”*

In light of the above, should a SASSA grant recipient not receive his/her SASSA grant in a bank account, it is advisable that the credit provider obtain a SASSA confirmation letter from either the consumer or SASSA itself. This will provide confirmation that the consumer is a registered SASSA grant recipient and the amount that he/she receives monthly. It is further advisable that such confirmation letter is obtained annually and kept on a consumer’s file. Whether this will be acceptable to the NCR is not guaranteed, however it will show that the credit provider has taken steps to assess the consumer’s income at the time of application for credit.

Please note that the above does not constitute legal advice as each form of documentation obtained to verify income can only be assessed on a case-by-case basis. Should you require a formal legal opinion please contact the offices of Bosch Marais & Associates.



**Guidance
Note
02/2023
Debt Review
Withdrawal
Guidelines**

CLICK HERE

**NCR Debt Review
Withdrawal Guidelines**

GUIDANCE NOTE 02/2023: DEBT REVIEW WITHDRAWAL GUIDELINES

This guidance note deals with the Debt Review Withdrawal Guidelines, highlighting the important points for credit providers to consider. The guidelines referred to will be made available by the MFSA to all its members.

1. Debt Review Withdrawal Guidelines

In May 2021, the NCR published guidelines for the withdrawal from Debt Review following legal clarity obtained from the full bench in the High Court matter of Van Vuuren v Roets & Others (3 September 2019).

The above judgment sets out clearly in which circumstances a consumer can exit the debt review process, which can be summarised as follows:

1.1 In the instance where a consumer is not yet the subject of a debt re-arrangement order i.e. where the consumer has not yet been declared over indebted by a Magistrates Court, the consumer can approach the Magistrate Court when new facts arise which indicate that the consumer's circumstances have changed and is no longer over-indebted. The consumer will present the debt counsellor's initial proposal of over-indebtedness together with the additional facts to the Magistrate, who can, on good cause shown, reject the debt counsellor's proposal and declare that the consumer is not over-indebted. Once this order is obtained, every credit provider and credit bureau must be notified, and the debt review flag must be removed from the consumer's credit report.

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GUIDANCE NOTE 02/2023: DEBT REVIEW WITHDRAWAL GUIDELINES

1.2 In the instance where a Magistrate has already granted a debt re-arrangement order against the consumer i.e. an order declaring a consumer over-indebted, the consumer **CAN ONLY** exit the debt review process when all his/her debt has been repaid (excluding home loans) and a clearance certificate is issued.

NOTE: It is very important to note that the NCA does not make provision for voluntary withdrawal from debt review once the consumer has applied for debt review in the prescribed manner and form.

2. Debt Counsellor fails to follow debt review application correctly

In the event that a consumer alleges that he/she did not apply for debt review, the consumer can lodge a complaint to the NCR by completing a Form 29 and submitting it to the NCR at complaints@ncr.org.za.

The NCR will investigate the complaint by obtaining the relevant proof of application for debt review from the debt counsellor together with all associated evidence. Should the NCR make a finding that the incorrect debt review process was followed, it will be deemed that the consumer did not apply for debt review, the process will end, and the debt review listing must be removed from the credit bureaus.

Until such time as the NCR makes its finding, the consumer's debt review listing will remain, and a credit provider should not provide any credit to such a consumer.

For any further information, please contact Bosch Marais & Associates.

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