24 JANUARY 2018

DISPUTE RESOLUTION ALERT

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Various interested parties have been working closely with the Portfolio Committee for over a year regarding this draft Bill. Written comments on the Bill were due by 15 January 2018 and public hearings are scheduled to take place on 30 and 31 January 2018 and 1 February 2018. The annual Christmas holidays and the fact that most people took some time off in December did not seem to deter the Portfolio Committee calling for comments on the draft bill by 15 January 2018. However, after some deliberation the Portfolio Committee graciously granted one week's extension for written comments.

The preamble to the National Credit Act states unequivocally that the purpose of the National Credit Act was to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and an accessible credit market industry. What this draft amendment Bill seeks to achieve is to provide a mechanism for, among other things, debt intervention. At first blush, the purpose of the draft Bill seems innocuous. After all, debt intervention could perhaps be interpreted as a mechanism aimed at assisting consumers, but not necessarily intervention to such extent that obligations owed by consumers to credit providers are extinguished. The preamble to the Bill does not provide for debt extinguishment, but this is exactly what this draft Bill seeks to achieve.

In simple terms, the draft Bill permits a person who as at 24 November 2017 earns less than R7,500.00 per month and who owes less than R50,000 in unsecured debt relating to Credit Agreements to make an application to the National Credit Regulator for debt intervention. The National Credit Regulator is tasked with determining whether the debt intervention applicant should be assisted or not. If the National Credit Regulator is of the view that the applicant requires assistance, a single member of the National Credit Tribunal can suspend all qualifying Credit Agreements in part or in full for a period of 12 months. If the financial circumstances of the applicant do not improve, the Tribunal can declare the debt under the qualifying Credit Agreements extinguished. All or part of the debt under the qualifying Credit Agreements can be extinguished.

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CONTINUED

This Bill in its current form will have far reaching consequences for credit providers in terms of the National Credit Act.

This Bill in its current form will have far reaching consequences for credit providers in terms of the National Credit Act.

It cannot be disputed that a significant number of consumers are over-indebted. This is borne out by the fact that in excess of R40 billion was the subject matter of debt review in terms of the National Credit Act as at December 2016. Financial Institutions, during the 2016 calendar year, granted interest rate concessions in excess of R3 billion. Arising from the amendments to the National Credit Act in March 2015, debt in excess of R9 billion had been expunged and/or discharged.

This Bill has a second debt intervention aspect which is totally separate to the debt intervention referred to above. The Minister of Trade and Industry may prescribe debt intervention measures to alleviate household debt where an occurrence has constituted a significant exogenous shock that caused widespread unemployment, or there has been a regional natural disaster or something similar that is of enormous public interest. This debt intervention by the Minister is only applicable to indigent persons, consumers who earn less than R7,500, or persons who suffered unforeseen loss of income or who are subject to adverse conditions in a sector that has been identified by the Minister.

While this Bill seeks to assist a certain segment of the population that is over-indebted, one wonders what the reaction would be of a person who earns R7,510 and has debt marginally in excess of R50,000 who will not be assisted by the measures contemplated through this Bill. Similarly, the cut off line of 24 November 2017 will not be welcomed by a person, who on the 25th November 2017, earned less than R7,500 and had unsecured debts less than R50,000.

Eugene Bester and Luanne Chance

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.

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SURROGACY - TOO MUCH TO BEAR?

Should the legal aspects of surrogacy be influenced by social, political or geographical factors?

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Section 295 of the Act details the requirements applicants need to satisfy before a court can confirm a SMA.

Surrogacy is not a concept or practice foreign to South Africa. The Children's Act of 2005 prescribes that all surrogacy arrangements are to be governed by a "surrogacy motherhood agreement" (SMA), the validity of which must be confirmed by a court. A recent decision handed down by the Johannesburg High Court highlighted a few requirements for such confirmation. The judgment arguably opens the door to social, political and or geographical discrimination.

Section 295 of the Act details the requirements applicants need to satisfy before a court can confirm a SMA. For example, a surrogate mother is not allowed to use surrogacy as a source of income, she must have a documented history of at least one pregnancy and viable delivery, and she must in all respects be a suitable person to act as a surrogate.

Reasonable requirements, one may argue. But, with most legal issues, interpretation is key.

What of the word "suitable"? This is not a legal construct - it is a subjective determination of appropriateness. Very importantly, this "appropriateness" is a requirement to act as a surrogate. But what does "suitable" mean? Are social factors relevant? Does a surrogate have to be educated to a certain level to be regarded as suitable? Or does she need to belong to a certain class of citizen? Does income potential have any bearing on this determination?

What is clear is that the "suitable" requirement does not relate to any physical attributes - this is made clear in s295 of the Act.

So where does a potential surrogate stand in this regard?

In *Ex Parte KAF and Others* (14341/17) [2017] ZAGPJHC 227 (10 August 2017) the court, when asked to confirm the SMA, scrutinised the potential surrogate mother. The court highlighted the fact that she had "dropped out of school" in grade 10, that she did not have a job other than raising her two toddlers and that the court was not satisfied that she had the "maturity to appreciate the implications of her decisions". In addition, it appeared that she faced R14,000 in arrear municipality charges on her primary residence.

The potential surrogate was in a committed relationship with the father of her two children and had been for seven years. She was a full-time mother to her two children. A qualified psychologist attested to her suitability as a surrogate. This notwithstanding, the court dismissed the application.

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CONTINUED

As things stand, this new standard of suitability may be too much to bear, all to the detriment of many deserving couples, unable to bear their own children.

In South Africa, it is a common occurrence for children to leave school after completing grade 9. We are facing an unemployment rate which is alarmingly high. Most of the population is facing some form of debt. But should these factors influence "suitability" to be a surrogate?

A secondary education or a 9 to 5 job surely should not determine "suitability" of a surrogate.

The ambiguity of the wording of the Act has exposed potential surrogates to uncertainty as to whether they will "make the cut" in a court's eyes. Perhaps our courts need to reconsider the interpretation of the Act to ensure that no potential discrimination comes to the fore. As things stand, this new standard of suitability may be too much to bear, all to the detriment of many deserving couples, unable to bear their own children.

Jonathan Ripley-Evans and Elizabeth Sonnekus

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LITIGATION

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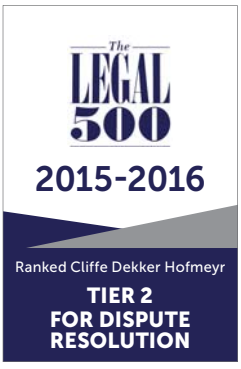

CHAMBERS GLOBAL 2017 ranked us in Band 1 for dispute resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2017 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2017 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 in Band 2 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016–2017 in Band 4 for construction.

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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