

DISPUTE RESOLUTION ALERT

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THE FINAL VOYAGE - THE AMENDMENT TO THE NATIONAL CREDIT ACT: DEBT RELIEF

Previous articles written on this subject matter dealt with the Bill, its objectives and to some extent, the process that has been followed in getting the Bill to where it is now. After Parliament's public hearings into the Bill at the end of January and early February this year, the Portfolio Committee on Trade and Industry has been hard at work taking into account the numerous concerns many industry role players raised during the public hearings.

MINE YOUR OWN BUSINESS

Tailing Mineral Resources (TMRs) is a term that often pops up in the mining of historical tailings. What follows are questions pertaining to what TMRs are, whether its residue deposits or stockpiles and is it regulated by the Mineral and Petroleum Resources Development Act, No 28 of 2002, as amended (MPRDA)?

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The debt relief Bill, as it has become known, seeks to assist over indebted consumers, who earn between R0 and R7,500 per month and have a total unsecured debt owing to credit providers of no more than R50,000.

If the mandate of the Portfolio Committee is to develop legislation that balances the right of consumers and the private sector, and the purpose of the National Credit Act is to promote fairness in and accessibility to the credit market industry, then perhaps both the mandate and purpose have been misstated.

Previous articles written on this subject matter dealt with the Bill, its objectives and to some extent, the process that has been followed in getting the Bill to where it is now. After Parliament's public hearings into the Bill at the end of January and early February this year, the Portfolio Committee on Trade and Industry has been hard at work taking into account the numerous concerns many industry role players raised during the public hearings.

Towards the end of May 2018 further amendments to the Bill were gazetted, and the public once again had the opportunity to comment on certain of the amendments. Certain members of the Portfolio Committee also visited the United Kingdom to do a comparative study on the debt relief measures in place in the United Kingdom.

In the introductory remarks of the Portfolio Committee's Report to the National Assembly on the comparative study trip, the following is said: "The mandate of the ...Committee ...covers ...the development or processing of legislation that effectively balances the rights of both consumers and the private sector". In the preamble to the Bill, the following is mentioned: "Whereas the purpose of National Credit Act ...is to promote a fair, sustainable, responsible ... and accessible credit market industry " and "whereas to give effect to the purpose..., all consumers must be afforded protection through, transparent, sustainable and responsible processes".

The debt relief Bill, as it has become known, seeks to assist over indebted consumers, who earn between R0 and R7,500 per month and have a total unsecured debt owing to credit providers of no more than R50,000. The over-indebtedness can be caused by a change in personal

circumstances such as retrenchment, death of a breadwinner or other circumstances. Typical examples of unsecured debt include an account at a retailer (clothes, food, appliances and so on), an overdrawn bank account, a credit card account and a personal loan account. Underpinning the debt is a credit agreement as defined in the National Credit Act. Some households owe significant amounts to municipalities for rates, taxes, electricity and the like. In these instances, no credit agreement was ever concluded.

If the mandate of the Portfolio Committee is to develop legislation that balances the right of consumers and the private sector, and the purpose of the National Credit Act is to promote fairness in and accessibility to the credit market industry, then perhaps both the mandate and purpose have been misstated. Take for example a clothing retailer who follows the process to conclude a credit agreement with a consumer. Based on the outcome of the credit affordability assessment, the consumer qualifies for credit. The consumer uses the credit and walks away with the latest in fashion wear and is now indebted to the retailer. Shortly after the transaction, the consumer is retrenched. The retailer has parted with its merchandise and now faces the prospect,

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The private sector role players that will be affected by this legislation will price in the Bill's effect into the cost of credit, and credit will become more expensive and less consumers will be able to afford credit. This notwithstanding, it is believed that the Bill will soon be on its final voyage to being signed into law.

assuming the consumer applies for and is granted debt intervention, of having its credit agreement extinguished. There appears to be no balancing of rights in this example.

Numerous articles have been written on various platforms highlighting the impact that this Bill is going to have on the credit industry. The private sector role players that will be affected by this legislation will price in the Bill's effect into the cost of credit, and credit will become more

expensive and less consumers will be able to afford credit. This notwithstanding, it is believed that the Bill will soon be on its final voyage to being signed into law.

Many many years ago, despite several warnings about the proximity of ice bergs during the voyage, the behemoth struck the iceberg, split in two, and sank deep into the frigid waters of the North Atlantic.

Eugene Bester



Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.



Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.



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MINE YOUR OWN BUSINESS

Debris or waste as a result of mining for minerals that is left in dumps or spread on the surface of the property being mined, in an area used as a tailings disposal site, commonly referred to as floors.

Section 5A of the MPRDA prohibits the unauthorised mining or the commencement of any work incidental thereto of any "mineral" without complying with the requirements as envisaged in the MPRDA.



Tailing Mineral Resources (TMRs) is a term that often pops up in the mining of historical tailings. What follows are questions pertaining to what TMRs are, whether its residue deposits or stockpiles and is it regulated by the Mineral and Petroleum Resources Development Act, No 28 of 2002, as amended (MPRDA)?

As a starting point, TMRs in the case of *Ekapa Minerals (Pty) Ltd and Others v Seekoei and Others (2057/2016) [2017] ZANHC (Ekapa)* have been defined as debris or waste as a result of mining for minerals that is left in dumps or spread on the surface of the property being mined, in an area used as a tailings disposal site, commonly referred to as floors. TMRs consist of both the tailing dumps and the floors. In most instances, the TMRs contain valuable material which was previously not processed and consequently attract further mining activity to recover such mineral remains.

Section 5A of the MPRDA prohibits the unauthorised mining or the commencement of any work incidental thereto of any "mineral" without complying with the requirements as envisaged in the MPRDA. The prohibition in s5A of the MPRDA is defined with reference to "any mineral" meaning that the MPRDA will only regulate the mining of a mineral if

such a mineral qualifies as "minerals" for the purpose of the MPRDA. A "mineral" is defined in s1 of the MPRDA to mean:

Any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes:

- (a) water, other than water taken from land or sea for the extraction of any mineral from such water;
- (b) petroleum; or
- (c) peat.

The definition of a "mineral" in s1 of the MPRDA requires, firstly, that the substance occurs naturally in or on the earth. Secondly, the definition of a "mineral" in



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Until the MPRDA has been amended, the minerals contained in TMRs and/or old tailings constitute a "mineral" as defined in the MPRDA and these minerals are therefore not subject to the custodianship of the State in terms of the MPRDA.



s1 of the MPRDA includes any substance that occurs in "residue stockpiles" and in "residue deposits". "Residue stockpiles" and "residue deposits" have been specifically defined in the MPRDA to mean:

Any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of a mining right, mining permit, production right or an old order right.

Thus, only debris, discard, tailings, slimes, screening, slurry, waste rock foundry sand, beneficiation plant waste, ash or any other product which was disposed of by someone who is the holder of a mining right, mining permit, production right or an old order right, will be "residue stockpile" as contemplated in the MPRDA.

The terms "mining right", "mining permit" and "production right" are all defined in s1 of the MPRDA to refer to such rights granted in terms of the MPRDA, however, the term "old order right" was inserted with the commencement of the Mineral and Petroleum Development Amendment Act 49 of 2008. An "old order right" is a newly created statutory right that came into

existence on 1 May 2004. TMRs that were created before the commencement of the MPRDA, can therefore not fall within the definition of a "residue stockpile" as they were not created by the holder of an "old order right".

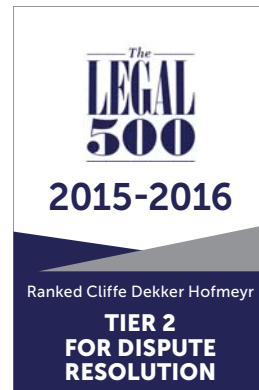
In the *Ekapa* case it was not disputed that TMRs had come about as a result of over 130 years of open cast mining and that the debris or waste left over was as a result of mining for diamonds left in dumps or spread on the floors of the mining area. The court held that an "old order right" is a newly created statutory right that came into existence on 1 May 2004. TMRs that were created before the commencement of the MPRDA, can therefore not fall within the definition of a "residue stockpile" as they were not created by the holder of an "old order

By introducing the 2013 MPRDA Bill, the legislature intends to bring TMRs or old tailings created before the commencement of the MPRDA within the ambit of the MPRDA. However, until the MPRDA has been amended, the minerals contained in TMRs and/or old tailings constitute a "mineral" as defined in the MPRDA and these minerals are therefore not subject to the custodianship of the State in terms of the MPRDA.

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