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**ATTENTION: THE CHIEF EXECUTIVE OFFICER  
THE NATIONAL CREDIT REGULATOR**

**Our Ref: KB11/068**

**EMAIL: nmotshegare@ncr.org.za  
EMAIL: tmlaba@ncr.org.za**

**Your Ref: The NDMA**

**27 June 2012**

Dear Madam

**RE: THE NATIONAL DEBT MEDIATION ASSOCIATION**

We act on behalf of Ms D Solomon, an adult female duly registered debt counsellor (NCRDC 689) who practices within the Western Cape.

Our client has grave concerns regarding the establishment of the National Debt Mediation Association (hereinafter referred to as "the NDMA") and the implementation of a pilot project which it intends to launch on 1 July 2012.

Our client's concerns are as follows:

**1. THE FORMATION OF THE NDMA**

1.1. The NDMA was borne from a credit industry established multi-party steering committee named the National Credit Industry Steering Committee (NCISC) which

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was to investigate and give effect to the establishment of an *“Industry Code of Conduct for Dealing with Over-Indebted Consumers”*.

- 1.2. The Code would enable credit providers to comply with their National Credit Regulator (hereinafter referred to as the “NCR”) registration condition that stipulates that credit providers are *“required to develop debt management solutions in a voluntary space that would be complementary to and add to the statutory provisions in the National Credit Act (NCA)”*.
- 1.3. The NCISC comprised of representatives from the Credit Providers Association (CPA), Banking Association (BA), Furniture Traders Association (FTA), Micro Finance SA (MFSA), National Clothing Retailers Federation (NCRF) and Motor Financing Association (MFA).
- 1.4. The NCISC recommended to its constituent members (listed above) that the NDMA be established, supported by an Industry Code of Conduct, to which credit providers could subscribe by affiliating with the NDMA on a voluntary basis.
- 1.5. The Industry Code of Conduct was recognised by the NCR in June 2008 under Section 48(1)(b) of the National Credit Act 34 of 2005 (hereinafter referred to as the “NCA”)
- 1.6. In October 2009, the NCR set up a task team to consult with major stakeholders and establish blockages in the debt review process. The task team resulted in a new **Credit Industry Code of Code to Combat Over-indebtedness** which became effective on 1 January 2011 (hereinafter referred to as the **“2011 Code”**).
- 1.7. Our client does not believe that the NDMA is a body or organisation which can be formed in terms of the NCA. The NDMA relies on Section 48(1)(b) as the basis for its establishment which reads as follows:

**48.** (1) If a person qualifies to be registered as a credit provider, the National Credit Regulator must further consider the application, relating to the following criteria:

(a) to the extent ...

(b) the commitments, if any, made by the applicant or any associated person in

connection with combating over-indebtedness, including whether the applicant or any associated person has subscribed to any relevant industry code of conduct approved by the regulator or regulatory authority; and

1.8. The portion of the NCA, with respect refers to an assessment of registration and does not allow for credit providers to form a mediation association in order to implement a code of conduct to which they subscribe. The NDMA is nothing more than an organisation formed by credit providers for credit providers.

1.9. It is our client's submission that the establishment of the code of conduct is all that Section 48 (1)(b) allows and it is thereafter up to registered debt counsellors to assist consumers (as provided for in terms of the NCA) with the NCR approved credit provider's code in mind.

## **2. THE COMPOSITION OF THE FOUNDING MEMBERS & THE BOARD**

2.1. The Founding members of the NDMA are:

2.1.1. The Banking Association of South Africa (BASA),

2.1.2. Consumer Goods Council of South Africa (CGCSA),

2.1.3. Credit Providers Association (CPA),

- 2.1.4. National Motor Financing Association (NMFA),
- 2.1.5. National Clothing Retailers Federation (NCRF), and
- 2.1.6. Micro Finance SA (MFSA).

2.2. It is to be noted that the founding members are all directly or indirectly associations which represent the interests of credit providers and are all subscribers to the **2011 Code**. All of the founding members are represented on the board. Mr Johan de Ridder (CEO of African Bank) is the Acting Chairperson.

2.3. There are four independent Board members.

2.4. The credit providers therefore have a majority of 6 out of 10 board members and our client verily believes that the composition of the board will not enable the board of the NDMA to make decisions in an unbiased manner due to the inherent interests of the associations which the board members represent.

2.5. The Partners of the NDMA are:

- 2.5.1. The Ombudsman for Banking Services
- 2.5.2. The South African Reserve Bank,
- 2.5.3. The National Credit Regulator (NCR),
- 2.5.4. Credit Ombud,
- 2.5.5. Financial Services Board, and
- 2.5.6. National Consumer Tribunal (NCT).

2.6. None of the partners are, however, represented on the board.

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**3. THE PILOT PROJECT WHICH IS TO BE INITIATED IN 1 JULY 2012**

3.1. Our client has become aware, via the attached document that the NDMA intends to launch a pilot project called Voluntary Debt Mediation Service (hereinafter referred to as "VDMS").

3.2. Our client has the following concerns regarding this pilot project:

3.2.1. The implementation of the VDMS has not been properly communicated or been open and transparent, particularly with regard to information to the debt counsellors and other interested industry participants.

3.2.2. The enhancement of the rights that consumers have under the statutory process will not occur, but to the contrary there will be an undermining thereof. Our client does not believe that:

3.2.2.1. Offering a service endorsed and supported by the industry provided that there is good faith on the part of the consumer enhances the protection afforded to the consumer by Section 86 of the NCA in that the consumer:

- no longer has an independent assessment of their over-indebtedness (it is performed by someone appointed by and/or paid for by credit providers). The initial pilot project indicates that only three debt counsellors will be appointed to this task in the first 6 to 12 months,
- is unable to have someone investigate and/or allege reckless credit,

- has to act in good faith but there is no such requirement placed on the credit providers, who would simply have to act in accordance with the **2011 Code**, which was drafted by them,
- judicial decisions and changes as they take place in the industry will not be implemented in the **2011 Code**, either as they occur or for a substantial period of time thereafter.

3.2.2.2. The current **2011 Code** does not allow for Section 103(5) exclusion (commonly known as the *in duplum* rule) or allow for a consumer to have more than two immovable properties or two motor vehicles. This means that consumers will not be entitled to rearrange “all” their debts, but would have to exit and/or cancel and/or continue with certain credit agreements to their detriment.

3.2.2.3. There is a real possibility that other credit providers who do not subscribe to the NDMA may still proceed with legal action against the consumer and there is no protection afforded to the consumer in these circumstances.

3.2.3. Considering the composition of the Board and that of the steering committee it is respectfully submitted that the conditions imposed by the NCR and the Department of Trade and Industry have not been met as there is no “neutral and representative governance structure”,

3.2.4. That the VDMS pilot project has not been properly explained or canvassed and it appears to be conflict with the provisions of the NCA, the role of debt counsellors in the pilot project is not clear (particularly as it might affect their right to be registered as debt counsellors), the criteria for appointment of the

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debt counsellors in terms of the pilot project (the Debt Counsellor Rules Engine is a system created by the credit providers which restructures debts according to the **2011 Code** and is used by less than 100 debt counsellors) and there is not enough overview from the NCR, in particular there is no monitoring or report back procedure as contemplated in terms of Section 16 (1)(f) of the NCA.

4. **THE POTENTIAL CONFLICT OF INTERESTS BETWEEN THE VARIOUS PARTIES AND THEIR DEALINGS WITH ORDINARY CONSUMERS**

- 4.1. Due to the structure of the NDMA, the role of debt counsellors and the application of the **2011 Code** our client believes that there will be a conflict of interest between the various participants and that this will be to the detriment of the consumer.
- 4.2. The NDMA board is dominated by credit providers. The NDMA obtains the details of potential consumers from credit providers (who presumably share particular consumer information), alternatively select consumers will be referred to the NDMA by credit providers.
- 4.3. Debt counsellors obtain work from the NDMA, who in turn obtain it from credit providers. The consumer to be identified by the credit provider are to be provided to the debt counsellor with a guaranteed inflow. This will obviously make the work exceptionally lucrative for debt counsellors associated with the NDMA and the more consumers they can "get agreements on" the more they get paid. This is not in the interests of the consumer.
- 4.4. The debt counsellors who use the Debt Counsellor Rules Engine limit their ability to negotiate for the consumer by subscribing to the **2011 Code**.

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5. **UNFAIR BUSINESS PRACTICES WILL DEVELOP TO THE DETRIMENT OF DEBT COUNSELLORS GENERALLY**

- 5.1. The exclusion of debt counsellors unless they agree to the **2011 Code** and/or employ the Debt Counsellors Rules Engine in making proposals is an unfair business practice.
- 5.2. It amounts to excluding debt counsellors from legitimate negotiations and proposals provided for in terms of the NCA with credit providers. Those debt counsellors who do not conform to the rules of the credit provider are not able to negotiate and do not get settlements with credit providers. This is contrary to the "good faith" requirement contained in the NCA and would place a potential unfair pressure on over-indebted consumers to "voluntarily" use the services of the NDMA.

Our client verily believes that there is a potential for substantial harm in the event of the pilot project going forward, not only for debt counsellors directly, but also the consumers.

It is accordingly our client's instructions to demand that the NCR and the Department of Trade and Industry address correspondence to the NDMA:

- a) in order to clarify the above issues and ensure that the VDMS pilot project will not be in conflict with the NCA and other enacted legislation, and
- b) to insist that it not institute the VDMS pilot project on 1 July 2012 until the necessary clarification has been received.

Our client respectfully submits that given the nature of the concerns raised above there is the likelihood of irreparable harm occurring to the debt counsellors and consumers who participate in the VDMS project as well as the NCR and the Department of Trade and Industry, whom are the NDMA allege support the program.



The potential harm to the NDMA in delaying the implementation of the VDMS pilot project until the above issues have been clarified is with respect minimal and in any event, it is respectfully submitted that the clarification of the issues will be in the interest of the NDMA.

Our client requests a copy of the aforesaid correspondence from each of the NCR and the Department of Trade and Industry as a matter of urgency and reserves her rights to take such steps as may be necessary to ensure that the anticipated prejudice does not occur.

We trust that you will find same in order.

Yours faithfully  
**K J BREDEKAMP**  
ATTORNEYS

  
K. BREDEKAMP

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