

**RECKLESS CREDIT UNDER THE NATIONAL CREDIT ACT:**

**A COMPARATIVE ANALYSIS**

by

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## **ABSTRACT**

This dissertation considers the possible impact certain requirements of the National Credit Act 34 of 2005 (hereafter NCA) has on reckless credit lending by credit providers. The dissertation will identify problem areas created by the provisions of the NCA and the impact thereof on security or partial performances linked to the credit agreement.

“Reckless credit lending” used to be a new terminology introduced in the credit market to increase consumer spending, but it is currently a well-known practice in the credit industry. The NCA aims at protecting consumers, especially against present ever-increasing reckless-credit practices. However, certain provisions relating to reckless credit are mostly ambiguous and vague.

The NCA is silent on the development and implementation of guidelines and policies relating to the prevention of reckless credit and the consequences of such an order on security and/or performances (whether there was partial or full performance). This study will discuss the prevention and consequence of reckless credit by referring to the NCA, articles written by various authors, as well as court decisions where related concerns were addresses by the judges concerned with this issue.

Although the provisions stipulated in the amended NCA improve the position of the consumer in the credit market, the legislature should have drafted certain applicable provisions with more care and detail. A more detailed draft could circumvent vagueness in particular areas of concern.

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# PART I: INTRODUCTION

## CHAPTER 1: GENERAL INTRODUCTION

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### 1.1. Background Information

The National Credit Act<sup>1</sup> has been under discussion since November 2001<sup>2</sup> when a draft bill was presented to the credit lending industry, which indicated that the way in which credit has been provided to consumers in the past was about to change. The NCA came into full operation on 1 June 2007.<sup>3</sup>

The Department of Trade and Industry (DTI) drew up the draft bill in response to a number of consumer concerns. The DTI was of the opinion that credit was either too freely given without consideration of a consumer's overall repayment ability, that credit was not easily available to all consumers (leading to a perception of discrimination in the credit market) and that credit was over-priced and exploitative. Not only did this grim picture reflect the inattentive behaviour of the credit providers, but it also indicated the likelihood of consumers to overspend easily as a matter of course.<sup>4</sup>

During the last decade, this reckless behaviour almost became the norm in the global credit industry. The ensuing worldwide economic meltdown during 2008 is the expensive price that credit providers and consumers are currently paying for their irresponsible behaviour.<sup>5</sup>

South Africa was also affected by the economic meltdown, which is noticeable in the statistical data released by Statistics South Africa. In 2007 the South African credit

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<sup>1</sup> 34 of 2005 (hereafter "NCA").

<sup>2</sup> Kelly-Louw *Consumer Credit Regulation in SA* 3

<sup>3</sup> The President assented to the NCA on 10 March 2006 and the NCA came into effect incrementally on 1 June 2006, 1 September 2006 and 1 June 2007: See Proc 22 of 2006 in Government Gazette 28864 of May 2006

<sup>4</sup> Technical Committee, *Credit Law Review*, DTI 2003, also see Renke S & Roestoff M "The Consumer Credit Bill – A Solution to Over-Indebtedness?" 2005 (68) *THRHR* 115

<sup>5</sup> Coetzee H by dissertation "The impact of the National Credit Act on civil procedural aspects relating to debt enforcement" 2009 (1)

market amounted to approximately R800 billion.<sup>6</sup> A year later, consumers owed credit providers an estimated amount of R1,12 trillion in house debt<sup>7</sup>, which resulted in a 15,6% increase in civil summonses for the period February to April 2009 compared to the same period in 2008<sup>8</sup>.

Statistics South Africa recorded the following data in August 2008<sup>9</sup>:

<b>Actual estimates</b>	<b>August 2008</b>	<b>% change between August 2007 to August 2008</b>	<b>% change between June to August 2007 and June to August 2008</b>
Number of civil summonses issued for debt	107 490	0.3	0,9
Number of civil judgments recorded for debt	52 845	-20,8	-13,8
Number of civil judgments recorded for debt (R million)	497,4	-4,8	4,6

It appeared from the data that the number of civil summonses increased while the number of civil judgements decreased. The decrease in judgements could be the result of debt counselling because by the end of June 2010 approximately 184 000 consumers applied for debt counselling since the NCA became operational in 2007.<sup>10</sup>

By 2012 the number of civil summonses issued for debt showed a 14,1% decrease compared with 2011. The fourth quarter of 2012 reflected a 20,6% decrease compared with the fourth quarter of 2011. Overall, a 20,8% year-on-year decrease was recorded in December 2012.<sup>11</sup>

<sup>6</sup> NCR *Annual Report (2007)* at 9 and Kelly-Louw *Consumer Credit Regulation in SA* 6  
<sup>7</sup> NCR *Annual Report (2008/2009)* at 16 and Kelly-Louw *Consumer Credit Regulation in SA* 6  
<sup>8</sup> Statistics South Africa on Statistics of Civil Cases for Dept (April 2009).  
<sup>9</sup> Statistics South Africa on Statistics of Civil Cases for Dept (August 2008).  
<sup>10</sup> Kelly-Louw *Consumer Credit Regulation in SA* 8  
<sup>11</sup> Statistics South Africa on Statistics of Civil Cases for Debt (December 2012).

However, this situation changed again when the total number of civil summonses issued for debt increased by 0,3% in the three months ending November 2013 compared with the three months ending November 2012. The total number of civil judgements recorded for debt continued to decrease by 7,8% in the three months ending November 2013 compared with the three months ending November 2012. A decrease of 9,3% was recorded year-on-year in November 2013. This is reflected in the data published by Statistics South Africa<sup>12</sup>:

<b>Actual estimates</b>	<b>November 2013</b>	<b>% change between November 2012 to November 2013</b>	<b>% change between September to November 2012 and September to November 2013</b>
Number of civil summonses issued for debt	66 603	-6,5	0,3
Number of civil judgments recorded for debt	32 377	-9,3	-7,8
Number of civil judgments recorded for debt (R million)	438,2	7,7	2,1

Comparing this statistical information to the recent published information<sup>13</sup> there are a decrease of approximately 6 976 summonses issued for debt and 6 007 less judgements records for debt, which is a fortunate event in the credit market:

<sup>12</sup> Statistics South Africa on Statistics of Civil Cases for Dept (November 2013).

<sup>13</sup> Statistics South Africa on Statistics of Civil Cases for Dept (February 2014).



<b>Actual estimates</b>	<b>February 2014</b>	<b>% change between February 2013 and February 2014</b>	<b>% change between December 2012 to February 2013 and December 2013 to February 2014</b>
Number of civil summonses issued for debt	59 627	-1,8	-1,9
Number of civil judgments recorded for debt	26 370	-8,0	-4,6
Number of civil judgments recorded for debt (R million)	402,7	-1,3	-1,8

The National Credit Regulator continuously published statistics, which is a requisite from the credit bureaux. This information compared over a two-year period interval shows an increase:

<b>Description</b>	<b>As at December 2011<sup>14</sup></b>	<b>As at July 2013<sup>15</sup></b>
Number of credit active consumers	19,34 million	20.08 million (increase of 0.4%)
Number of consumer that are three or more months in arrears/adverse information	46%	47,5%
Number of consumer that are one or two months in arrears	14,7%	52,5%

In June 2015, the NCR, Ms. Nomisa Motshegare, released updated consumer credit-activity statistics to the media. The data was determined in March 2015 and published in

<sup>14</sup> NCR *Registration and Compliance Division* (May 2012).

<sup>15</sup> "National Credit Regulator urges youth to harness their financial power early on", Media release, July 2013

the Consumer Credit Report (CCMR).<sup>16</sup> From the report it is evident that there are 23,11 million credit-active consumers in South Africa, an increase of 3,03 million compared to two (2) years previously. According to the NCR, it is also an increase of 1,2% compared to the 22,84 million of the previous quarter. Quarter-on-quarter the number of consumers with an impaired record has increased with 0,1%.

In the above-mentioned media release, the NCR urged consumers to exercise the necessary caution by living within their financial means and to borrow responsibly.<sup>17</sup> At the same time, the NCA also appealed to credit providers to advise consumers who are in default under a credit agreement that they are permitted to apply for debt counselling with a debt counsellor.<sup>18</sup> Thereby it is possible for consumers to seek relief prior to the issuing of summonses and/or granting of civil judgments, which could influence the decrease in the number of civil summonses and civil judgments.<sup>19</sup>

The NCA is consumer credit legislation<sup>20</sup> and focusses on levelling the playing field between credit providers and consumer debtors. The majority of the South African population consists of low-income consumers who do not have cash readily available. They often make use of credit for their essential needs but sometimes extend their credit activities to luxury wants they cannot afford.

The NCA now aims at protecting consumers who lease or buy durable consumer goods, enter into money loans, and to who services are rendered on a credit basis. Using plain language, these protections are imposed by introducing new concepts and mechanisms that prevent over-indebtedness, reckless credit extensions, and mandatory disclosures to consumers. Protection is aimed at regulating cost and marketing practices,

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<sup>16</sup> “*Credit extensions slow down*”, Media release, June 2015

<sup>17</sup> Which advice is in accordance with section 3(c)(i) of the NCA.

<sup>18</sup> Section 129 (1) (a), also see a media release in July 2013 “*National Credit Regulator urges youth to harness their financial power early on*”

<sup>19</sup> In the CCMR (released to the media in June 2015), the NCR advised the consumers who are experiencing financial distress to arrange with their credit providers or to seek the assistance of registered debt counsellors.

<sup>20</sup> *Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another* (98/10) [2010] ZASCA 148; 2011 (2) SA 266 (SCA) ; [2011] 2 All SA 471 (SCA) (29 November 2010)

compulsory credit assessment prior to granting credit, improved consumer education, establishment of regulatory bodies, compulsory registration, and regulations of the important role players, and prohibition on the waiver of consumer rights.

It is clear that the legislature intended to leave no stone unturned when the NCA was drafted, the intention of which is admirable. However, several sections in the NCA remain vague and unclear, especially regarding the provision of reckless credit lending. For example, the NCA does not state that credit agreements giving rise to reckless credit lending are *ab initio* null and void, as is the case with unlawful credit agreements in terms of section 89 of the NCA<sup>21</sup>. Therefore, the NCA is not clear as to how the courts should exercise their discretion in respect of reckless credit agreements.<sup>22</sup>

## 1.2. Problem statement and research objective

Reckless credit lending is, conceptually, new to the South African legal system. Credit providers in South Africa must now take cognizance of legislation that gives guidance in terms of the particular actions that could class them as being reckless lenders, thus avoiding practices that may lead them to suffer the legislative consequences.<sup>23</sup> Prior to the inception of the NCA, this concept has never before been dealt with by South African legislation, and credit providers could not rely on precedent to guide their actions.<sup>24</sup> Subsequently there have been various court cases dealing with a number of the aspects of reckless credit lending, some of which will be discussed in this study.

In terms of section 3<sup>25</sup> of the NCA the purpose of the Act include, *inter alia*:

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<sup>21</sup> Section 89 deals with unlawful credit agreements, but this section does not indicate reckless credit agreements as being unlawful.

<sup>22</sup> Boraine & Van Heerden 2010a (73) *THRHR* 651.

<sup>23</sup> See Vessio 2009 *TSAR* 274

<sup>24</sup> “The concepts of ‘reckless credit’ and ‘over-indebtedness’ and the accompanying preventative measures, sanctions and debt relief are new to South African credit legislation as these issues were not addressed in either the Usury Act 73 of 1968 or the Credit Agreements Act 75 of 1980” – Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-1.

<sup>25</sup> s 3(1) and (c)

- the promotion of responsibility in the credit market by encouraging responsible borrowing; and
- the discouragement of reckless credit-granting by credit providers and contractual default by consumers.

The NCA proceeds by stating in section 80 that a credit agreement is reckless if, at the time that the credit agreement was prepared, or at the time when the loan amount was approved or increased, the credit provider:<sup>26</sup>

- failed to conduct the required evaluation;
- entered into an agreement despite the fact that the consumer did not appreciate the nature of the obligations, or
- entered into an agreement that resulted in the consumer being over-indebted.

Section 81 and section 82 read together state how reckless credit can be prevented through the credit provider's assessment mechanisms to determine whether a consumer can afford the credit, that is, the evaluation to prevent reckless credit lending. The NCA has also been amended, and the Amendment Act came in operation in March 2015. The amended NCA provides for criteria to conduct the affordability assessment<sup>27</sup>, the subject matter of which will be discussed in Part II of this study.

Section 83(2) of the NCA states the type of court orders that can be granted should a credit agreement be found to be reckless lending in terms of section 81(1)(a) or 80(1)(b)(i):

- (2) If a court declares that a credit agreement is reckless in terms of section 80(l) (a) or 80(l) (b) (i), the court may make an order-
  - (a) Setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances;

Or

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<sup>26</sup> Also see *ABSA Bank Ltd v Lowting and Others* (39029/2011)[2013] ZAGPPHC 265 (19 August 2013) par 41 and Kelly-Louw 2014 (26) *SAMLJ* 29-31

<sup>27</sup> Chapter 3, Part D of the Regulations was amended by the insertion of regulation 23A,

- (b) Suspending the force and effect of that credit agreement in accordance with 45 subsection (3) (b) (i).

Section 89 deals with instances when a credit agreement will be considered an unlawful credit agreement as well as the consequences of such instances of unlawful credit agreement. Guidance as to the application of the reckless credit sections of the Act for both practitioners and the courts will have to come from the Act itself, as well as from reported and unreported precedents. The following comments are thus supported:

To achieve these goals, the act has added a new dimension to credit regulation by introducing measures aimed at preventing reckless credit-granting, sanctions to be applied in certain instances of reckless credit and debt-relief measures to deal with the problem of over-indebted consumers.<sup>28</sup>

Many of these provisions will have to be interpreted by the courts to give meaning and practical import to their content. The *Oxford English Dictionary* defines “reckless” as “disregarding the consequences or danger etc.; rash”, which describes the activity by a credit provider when she or he rashly enters into a credit agreement with a consumer without considering the consequences or taking the necessary steps to prevent reckless credit lending. The legal meaning of words such as the “rights” and “obligations” of the consumer as well as those of the credit provider should also be considered as it is affected by the sanctions for reckless credit lending.<sup>29</sup>

In an unreported magistrate’s court case held in Port Elizabeth, the applicant, Mr De Kock (the debt counsellor for the first and second respondent), brought an application against ABSA Bank Ltd<sup>30</sup> to declare the credit agreement reckless lending. The magistrate found that ABSA Bank Ltd (the third respondent) granted a home loan mortgage recklessly to the first and second respondent and that the loan should be

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<sup>28</sup> Van Heerden (n 2) 11-1

<sup>29</sup> See s 83(2) where the consumer’s rights and obligations can be set aside under the reckless credit agreement.

<sup>30</sup> *G de Kock v LJJ Gerber & others*, Case nr. 9035/2010 (Magistrate Court of Port Elizabeth) heard during April 2010

“scrapped”. The consumer, Mr LJJ Gerber, was released from his obligation to repay the loan of R350, 000 and it was ordered that he could keep the immovable property. Because this appears to be the only judgment of this kind to date and to boot unreported, the matter needs to be deliberated to determine whether future loans with similar facts are also to be deemed reckless lending. In the cited case, the intention of the legislator in determining the ownership and possession of the property in this case should also be scrutinised.

The NCA does not provide for discretion or a clear statement as to how the court may deal with the security in a loan, that is, should the moneys or goods received or paid for be forfeited or should such moneys or goods remain the property of the consumer or credit provider.<sup>31</sup> Therefore, an analysis is necessary to compare the purpose and aim of the NCA to what is just and reasonable. A legal comparison with other countries where a similar principle has been adopted regarding international legislation, for example Great Britain, is essential.

A further analysis will also be made of the law of contracts pertaining specifically to the following legal concepts:

- restoration;
- unjustified enrichment;
- unlawful provisions, and
- considering illegal contracts that are void.

The private law consequences are twofold regarding an illegal contract that is declared void: Firstly, the parties will be prevented from claiming performance from each other.<sup>32</sup> Secondly, where a party has performed in terms of an illegal contract, the *par delictum*

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<sup>31</sup> In this dissertation reference will also be made to the cases of *Opperman v Boonzaaier & others* (unreported WCC case number 24887/2010 of 17 April 2012), *Cool Ideas 1186 CC v Hubbard & Another* (CCT 99/13 [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) of 5 June 2014) and *Chevron SA (Pty) Ltd v Wilson t/a Wilsons’s Transport and others* (CCT 88/14) [2015] ZACC 15 (decided on 5 June 2015).

<sup>32</sup> Boraine & Van Heerden 2010a (73) *THRHR* 650; Hutchison *et al Law of Contract* (2009) 187 and Christie *et al Law of Contract in SA* (2007) 406

rule may prevent it from claiming the return of performance based on unjustified enrichment where the parties are equally blameworthy.<sup>33</sup>

The concept of reckless credit is well concretised by the NCA; therefore, the application thereof has far-reaching implications for the credit provider. The credit providers need to be aware of these implications in order to avoid entering into a reckless credit agreement.

### **1.3. Purpose of this dissertation**

The purpose of this study is to determine, by means of a comparative analysis of the NCA and other relevant literature, a recommended standard to be applied by the South African courts when dealing with reckless credit applications and the consequential orders that the Court has discretion to grant. The aim of the comparison is to identify the gaps in the NCA and to compare these gaps to the court's viewpoints and decisions as well as with published research articles by various authors regarding these issues.

The comparative method used in this study is to explore the different legal principles and systems by interpreting the text, principles, and procedures to determine the problem areas within the NCA pertaining to the provisions relating to reckless credit. The analysis will duly compare the NCA, and more specifically reckless credit, with the consumer credit legislation in Great Britain. The comparative analysis will interpret the law bearing in mind the changing social conditions in South Africa as well as internationally.

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<sup>33</sup> See Van der Merwe *et al Contract General Principles* (2007) para 7.3.2; Boraine & Van Heerden 2010a (73) *THRHR* 650; Christie *et al Law of Contract in SA* (2007) 413 – 416 and *Trustees of the Insolvent Estate of Grahame Ernest John Whitehead v Dumas & another* (2013) JOL 30865 (SCA); Sonnekus *Unjustified Enrichment* 2008 (130).

#### 1.4. Structure of the dissertation

This dissertation will consist of four parts to meet the objective of analysing the impact of the status quo of reckless credit on a credit agreement, whether complete or partial performance took place and/or goods were delivered.

- Part I is a general introduction and orientation to establish a firm basis for determining the application of the NCA, the end-to-end process, by providing an outline of the credit procedure and to provide an overview of the law of contracts.
- Part II deals specifically with the application for credit, assessment of affordability, prevention of reckless credit and the consequences of an order for reckless credit lending by dealing with a comparative analysis of the reckless credit process in the South African law together with the regulations that are used to protect credit consumers.
- Part III will initially entail the comparative analysis of internationally developed financial sectors by providing a brief overview of the international trend regarding the introduction of consumer protective legislation. Subsequently, the development of the consumer protection legislation of Great Britain will be considered in more detail as this country was the forerunner vis-à-vis the development of consumer credit legislation. Furthermore, the development of the South African common law and the law of contracts developed between the Roman-Dutch law and the English law will be subjected to scrutiny.<sup>34</sup>
- Part VI contains a general conclusion, which will include consideration of the achievement of the Amendment Act, and recommendation that more steps would be needed to address the gaps in terms of reckless credit.

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<sup>34</sup> Christie *Law of Contract* 8 where it is stated that on recommendation of the Biggs and Colebrook report of 1826 that the English law should gradually be adopted for the concepts of contracts instead of the Roman Dutch Law.



## 1.5. Definitions

The abolished Credit Agreements Act<sup>35</sup> used to refer to a credit receiver and a credit grantor, while the NCA refers to the main role players as a consumer and a credit provider.<sup>36</sup> The NCA also regulates a number of transactions, that is, credit agreements, instalment agreements, leases, mortgages, pawn transactions, secured loans, and credit insurance. A “credit agreement” can be a credit facility, a credit transaction, or a credit guarantee.<sup>37</sup>

It is necessary to understand the meaning of the following defined terminology used throughout this dissertation as defined by the NCA of 2007:<sup>38</sup>

“**agreement**” includes an agreement or understanding between, or among, two or more parties, which purports to establish a relationship in law between those parties.

“**consumer**”, in respect of a credit agreement to which this Act applies, means

- (a) The party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement;
- (b) The party to whom money is paid or credit granted under a pawn transaction;
- (c) The party to who credit is granted under a credit facility;
- (d) The mortgagor under a mortgage agreement;
- (e) The borrower under a secured loan;
- (f) The lessee under a lease;
- (g) The guarantor under a credit guarantee; or
- (h) The party to whom or at whose direction money is advanced or credit granted under any other credit agreement.

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<sup>35</sup> Act 75 of 1980, which Act together with the Usury Act was repealed in June 2006 and replaced by the NCA

<sup>36</sup> s 1

<sup>37</sup> s 8(1)

<sup>38</sup> Derived from s 1 of the NCA

“Consumer” in the context of the Act includes an individual or a small juristic person. It means the person to who credit (a loan) is extended or granted in any form of credit agreement.

“**credit**”, when used as a noun, means

- (a) A deferral of payment of money owed to a person, or a promise to defer such a payment; or
- (b) A promise to advance or pay money to, or at, the direction of another person.

“**credit agreement**” means an agreement that meets all the criteria set out in section 8 of the NCA. This broad definition includes:

- (a) a credit facility;<sup>39</sup>
- (b) a credit transaction;<sup>40</sup>
- (c) a credit guarantee<sup>41</sup>, or
- (d) any combination of the aforementioned transactions.

“**credit provider**”, in respect of a credit agreement to which the NCA applies, means

- (a) The party who supplies goods or services under a discount transaction, incidental credit agreement, or instalment agreement;
- (b) the party who advances money or credit under a pawn transaction;
- (c) the party who extends credit under a credit facility;
- (d) the mortgagee under a mortgage agreement;
- (e) the lender under a secured loan;
- (f) the lessor under a lease;
- (g) the party to whom an assurance or promise is made under a credit guarantee;
- (h) the party who advances money or credit to another under any other credit agreement, or

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<sup>39</sup> s 8(3)

<sup>40</sup> s 8(4)

<sup>41</sup> s 8(5)

- (i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into.

**“debt counselling”** means performing the functions contemplated in section 86 of the NCA.

**“debt counsellor”** means a neutral person, who is registered in terms of section 44 of the NCA, offering a service of debt counselling.

**“instalment agreement”** means a sale of movable property in terms of which:

- (a) all or part of the price is deferred and is to be paid by periodic payments;
- (b) possession and use of the property is transferred to the consumer;
- (c) ownership of the property either –
  - (i) passes to the consumer only when the agreement is fully complied with; or
  - (ii) passes to the consumer immediately subject to the right of the credit provider to repossess the property if the consumer fails to satisfy all of the consumer’s financial obligations under the agreement; and
- (d) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred.

**“juristic person”** includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if

- (a) there are three or more individual trustees; or
- (b) the trustee is itself a juristic person, but does not include a stokvel.

However, in certain sections of the NCA, a juristic person is exempted from the application<sup>42</sup> of the Act if the particular juristic person’s section 25 of the Amendment Act amended section 83 or annual turnover<sup>43</sup> is more than a million rand.<sup>44</sup>

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<sup>42</sup>

s 4

<sup>43</sup>

s 4(1)(a)(i) and 4(1)(b) also see Quince Property Finance (Pty) Ltd v Jooste and other (unreported) 2015 JOL 33336 (WCC)(decided on 2 June 2015)

<sup>44</sup>

GN 713 in GG 28893 of 1 June 2006

“**Magistrates’ Courts Act**” means the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944).

“**mortgage**” means a pledge of immovable property that serves as security for a mortgage agreement.<sup>45</sup>

“**mortgage agreement**” means a credit agreement that is secured by a pledge of immovable property.<sup>46</sup>

“**prohibited conduct**” means an act or omission in contravention of this Act other than an act or omission that constitutes an offence under this Act, by –

- (a) an unregistered person who is required to be registered to engage in such an act; or
- (b) a credit provider, credit bureau or debt counsellor.<sup>47</sup>

“**reckless credit**” means the credit granted to a consumer under a credit agreement concluded in circumstances described in section 80.

On 15 May 2015, the NCA was amended.<sup>48</sup> The Amendment Act introduced new definitions, amended some of the definitions, and deleted some definitions. The purpose of these amendments was to align the definitions with South African law, following the criticism by the courts, academics, and stakeholders.

Otto wrote in his book (2010) about the “... badly worded and embarrassing definitions [for example] “mortgage agreement” and “secured loan” ...”<sup>49</sup> He also referred to certain new terminology, which is meaningless in the South African context, for example “incidental credit agreements”.<sup>50</sup>

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<sup>45</sup> Also see the amended definition below

<sup>46</sup> Also see the amended definition below

<sup>47</sup> Also see the amended definition in Chapter 7 of this study

<sup>48</sup> Also, see paragraph 2.4 of this study on a discussion regarding the background that lead to the amendment of the NCA.

<sup>49</sup> Otto *The NCA Explained* p 4 and 22

<sup>50</sup> Otto *The NCA Explained* p 5

Not all of the amended and/or deleted definitions are applicable to this study, therefore only the related definitions will be discussed in this study.

**“mortgage”** means a mortgage bond registered by the registrar of deeds over immovable property that serves as continuing covering security for a mortgage agreement.<sup>51</sup>

**“mortgage agreement”** means a credit agreement that is secured by [a pledge of immovable property] the registration of a mortgage bond by the registrar of deeds over immovable property.<sup>52</sup>

**“prohibited conduct”** means an act or omission in contravention of this Act [other than an act or omission that constitutes an offence under this Act, by –

- (a) an unregistered person who is required to be registered to engage in such an act; or
- (b) a credit provider, credit bureau or debt counsellor.<sup>53</sup>

There are additional definitions in the NCA of 2007 that are also important. However, these definitions will be referred to when a particular matter is discussed in the following chapters if the need arises.

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<sup>51</sup> s 1(d) of the Amendment Act  
<sup>52</sup> s 1(e) of the Amendment Act  
<sup>53</sup> s 1(g) of the Amendment Act

## CHAPTER 2: NATIONAL CREDIT ACT<sup>54</sup>

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### 2.1. Introduction

Together, the Usury Act, No. 73 of 1968 and the Credit Agreements Act, No. 75 of 1980 regulated consumer credit in South Africa for more than a quarter of a century. Since 1 June 2007, the abovementioned acts were abolished and the NCA was introduced<sup>55</sup>, which provides for comprehensive consumer protection<sup>56</sup>. Legislation protecting consumers is an international phenomenon that differs from country to country, depending on the needs, political agenda, economic philosophy, and history of a particular country.<sup>57</sup>

The South African credit industry is huge. During June 2012, in a media release<sup>58</sup> by the Chief Executive Officer of the National Credit Regulator<sup>59</sup>, Nomsa Motshegare, announced that the recent statistics of the National Credit Regulator<sup>60</sup> indicate the number of credit applications received from consumers as at March 2015 was 10,39 million for this quarter. From December 2014 to March 2015 an amount of R107,54 billion of new credit was granted to consumers.

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<sup>54</sup> Act 34 of 2005

<sup>55</sup> Otto *et al* *Guide to the National Credit Act* (2013) 1-8 & 2-1 and Kelly-Louw *Consumer Credit Regulation in SA* 4

<sup>56</sup> Otto *et al* *Guide to the National Credit Act* (2013) 1-1, also see *Standard Bank of SA Ltd. v Kruger & Other*; *Standard Bank of SA Ltd. v Pretorius* (2009/45438 & 2009/39057) [2010] ZAGPJHC 28; 2010 (4) SA 635 (23 April 2010) 5; *SA Taxi Securitisation (Pty) Ltd. v Nako & Others* (19/2010, 21/210, 22/2010, 77/2010, 89/2010, 104/2010, 842/2010) [2010] ZAECBHC 4 (8 June 2010) 18 and *Kubyana v Standard Bank of SA Ltd.* (CCT 165/13) [2014] ZACC 1 (20 February 2014)

<sup>57</sup> Otto *et al* *NCA Explained* (2010) 1, also see *Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another* (98/10) [2010] ZASCA 148; 2011 (2) SA 266 (SCA) ; [2011] 2 All SA 471 (SCA) (29 November 2010)

<sup>58</sup> "Credit extension slow down", Media Release, June 2015

<sup>59</sup> Jansen <http://www.ncr.org.za> [Retrieved on 20 June 2012]

<sup>60</sup> Hereinafter referred to as the NCR

Further statistics indicate there are 5,724 credit providers<sup>61</sup> in South Africa as per the last annual report for 2013/2014 issued by the NCR.<sup>62</sup> This number as at the end of March 2014 has increased with 5% from 2013.

Of the approximately 21,7 million credit active consumers, 9,6 million (44,2%) had impaired records.<sup>63</sup> Consequently, per month on average 9100 consumers apply for debt counselling.<sup>64</sup> This statistical information indicates that consumers are not managing to pay off their debts, which is disturbing given interest rates are at a historical low.<sup>65</sup> The NCA seeks to prevent and remedy over-indebtedness as well as reckless lending.<sup>66</sup>

This chapter provides a general overview of the purpose and application of the NCA. It also serves as the background for the next chapter where over-indebtedness and reckless lending will be discussed in more detail. The focus of this chapter is to take a closer look at specific concepts in the NCA underpinning the comparison regarding reckless lending.

## 2.2. Aim of the NCA

The preamble to the NCA provides the main purpose of the Act:

- To promote a fair and non-discriminatory marketplace for access to consumer credit, and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information;

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<sup>61</sup> See paragraph 2.4 for discussion on registered credit providers.

<sup>62</sup> NCR Annual Report, 2014 on page 9

<sup>63</sup> NCR Annual Report, 2014 on page 14

<sup>64</sup> NCR Annual Report, 2014 on page 14

<sup>65</sup> Mail & Guardian <http://www.mg.co.za/article/2011-03-18-consumers-are-struggling-to-get-out-of-debt> [Retrieved on 20 June 2012]

<sup>66</sup> Ss 3(c) and 3(g); Scholtz, Otto, Van Zyl, Van Heerden and Campbell (hereafter Scholtz *et al*)(2008) 12-1; Van Heerden & Otto 2007 *TSAR* 655; Renke, Roestoff & Haupt (hereafter Renke *et al*) 2007 *Obiter* 229-230, Van Loggerenberg, Dicker & Malan (hereafter Van Loggerenberg *et al*) 0008 January/February *De Rebus* 40.

- to promote black economic empowerment and ownership in the consumer credit industry;
- to prohibit certain unfair credit and credit-marketing practices;
- to promote responsible credit granting and use, and for that purpose to prohibit reckless credit granting;
- to provide for debt re-organisation in cases of over-indebtedness;
- to regulate credit information;
- to provide for registration of credit bureaux, credit providers and debt counselling services;
- to establish national norms and standards relating to consumer credit;
- to promote a consistent enforcement framework relating to consumer credit;
- to establish the national credit regulator and the national consumer tribunal; to repeal the Usury Act (1968) and the Credit Agreements Act (1980), and
- to provide for related incidental matters.

Section 2(1) of the NCA provides explicitly that the NCA must be applied in a manner that gives effect to the purpose of the act as set out in section 3.

Section 3 of the National Credit Act states the objectives of the act affirming the aim of the NCA to promote and advance the social and economic welfare of South Africans; to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective, and accessible credit market and industry; and to protect consumers<sup>67</sup> by:

- a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
- b) ensuring consistent treatment of different credit products and different credit providers;

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<sup>67</sup> *Sebola & another v Standard Bank of South Africa Ltd and Another* 2012 (8) BCLR 785 (CC), *ABSA Bank Ltd v Lowting and Others* (39029/2011)[2013] ZAGPPHC 265 (19 August 2013) par 48 and *Kubyana v Standard Bank of SA Ltd.* (CCT65/13){2014}ZACC 1; 2014 (3) SA 56 (CC); 2014 (\$) BCLR 400 (CC)(decided on 20 February 2014) par 20



- c) promoting responsibility in the credit market by:<sup>68</sup>
  - (i) encouraging responsible borrowing, avoidance of over-indebtedness, and fulfilment of financial obligations by consumers, and
  - (ii) discouraging the granting of reckless credit by credit providers, and through the granting of reckless credit by credit providers the contractual default by consumers;
- d) Promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
- e) Addressing and correcting imbalances in negotiating power between consumers and credit providers by:
  - (i) providing consumers with education about credit and consumer rights;
  - (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
  - (iii) providing consumers with protection from deception as well as from unfair or fraudulent conduct by credit providers and credit bureaux;
- f) Improving consumer credit information and reporting, and regulating credit bureaux;
- g) Addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
- h) Providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
- i) Providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.”

The Wallis Report (1997) on the “purpose of regulation” stated:

The first purpose (of regulation), which applies in all sectors of the economy, is to ensure that markets work efficiently and competitively. Regulation for this purpose includes rules designed to promote adequate disclosure, prevent fraud or other

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<sup>68</sup> Also see Kelly-Louw 2014 (26) *SAMLJ* 25

unfair practices, and prohibit anti-competitive behaviour such as collusion or monopolisation. This type of regulation does not materially alter or prescribe the nature of products or services, but simply aims to ensure that they are traded in fair and efficient markets.<sup>69</sup>

Although section 3 of the NCA clearly aims to promote and advance the social and economic welfare of South Africa and to protect the consumers, there are various court decisions that voice concerns regarding the errors that occurred in the NCA<sup>70</sup>, for example:

Unfortunately, the NCA cannot be described as the best drafted Act of Parliament, which was ever passed, nor can the draftsman be said to have been blessed with the craftsmanship of a Chalmers. Numerous drafting errors, untidy expression and inconsistencies make its interpretation a particularly trying exercise.<sup>71</sup>

In addition:

A court is forced to go round and round in loops from subsection to subsection, much like a dog chasing its tail. Indeed, the language used in the Act from time to time suggests that foreign draftspersons rather than South African lawyers had a strong hand in preparing the text.<sup>72</sup>

In addition<sup>73</sup>, “It has become a notorious fact that cases requiring the interpretation of the NCA result in a scarcely muffled cry of exasperation resounding from the leathered benches of the judiciary.”

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<sup>69</sup> Goodwin-Groen November 2006 *FinMark Trust*

<sup>70</sup> Van Heerden *Section 85 of the NCA* De Jure on page 968 the author stated that the NCA has introduced changes into the credit landscape, which resulted in various interpretational issues due to poor draftsmanship.

<sup>71</sup> *Nedbank v NCR* 2011 ZASCA 35

<sup>72</sup> *FirstRand Bank Ltd v Seyfert* [2010] ZAGPJHC 88

<sup>73</sup> *Renier Nel Inc. & Another v Cash on Demand (KZN) (Pty) Ltd.* [2011] ZAGPJHC 20 and Kelly-Louw *Consumer Credit Regulation in SA* 5

Therefore, it is emphasised that the courts have to use a balancing process when interpreting the NCA in the application thereof and not to use an automatic bias in favour of the consumer.<sup>74</sup> This was concurred in the statement by Malan J in the case of *Collett v First Rand Bank Ltd*<sup>75</sup>. The judge stated that the NCA serves the interest of the consumers; however, the courts are required to balance the interests of the consumer against that of the credit provider.<sup>76</sup>

### 2.3. Application of the NCA

The NCA applies to all credit agreements between parties<sup>77</sup> and does not prescribe any artificial monetary ceiling for natural persons concerned<sup>78</sup>, and includes credit agreements relating to all goods and services. However, in terms of section 6 of the NCA, certain provisions of the Act do not apply to a consumer if the particular consumer is a juristic person, that is, Chapter 4, Part C,<sup>79</sup> and D<sup>80</sup>. From this section of the NCA, it is clear that the purpose of the NCA is to protect the consumer if such consumer is a natural person. Provisions regarding the restrictions for juristic persons will be discussed in paragraph 2.4 hereunder.

The intention of the legislature is clear that in order for the purposes of the NCA to be achieved the Act will apply as follows:

- To all credit agreements and transactions, for example, money-lending transactions, irrespective of the amount, between parties dealing at arm's length<sup>81</sup>, and made within South Africa or having an effect within South Africa;<sup>82</sup>

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<sup>74</sup> Scholtz in Scholtz (ed) *Guide to the National Credit Act* par 2.4

<sup>75</sup> 2011 (4) SA 508 (SCA) par 10

<sup>76</sup> *Sebola & another v Standard Bank of South Africa Ltd and Another* 2012 (8) BCLR 785 (CC), *Kubyana v Standard Bank of SA Ltd. (CCT 165/13) [2014] ZACC 1 (20 February 2014)* and *Nedbank v NCR* 2011 ZASCA 1 also seen in Kelly-Louw *Consumer Credit Regulation in SA* 23 s 4(1)

<sup>77</sup> Monetary caps is only applicable to juristic persons as stated in s 4(1)(a)(i) and s 7(1)(a)

<sup>78</sup> Credit marketing practices (sections 74 to 77)

<sup>79</sup> Over-indebtedness and reckless credit (sections 78 to 88)

<sup>80</sup> s 4(2) (b), also see Otto (2011) *TSAR* 547 and Van Zyl in Scholtz (ed) *Guide to the National Credit Act* par 4.2.

<sup>81</sup> s 4(1)

<sup>82</sup> s 4(1)

- NCA will control the cost of credit by determining the interest percentage rates and charges;
- NCA will monitor and track reckless lending by stating that it is an offence if a credit provider grants credit recklessly and that certain sanctions will be imposed if the credit provider is found guilty by a court,<sup>83</sup>
- NCA will regulate and control credit bureau activities;
- Establishment of regulatory bodies such as the National Credit Regulator<sup>84</sup> and the National Credit Tribunal.<sup>85</sup>

In the unreported court case of *Quince Property Finance (Pty) Ltd v Jooste and others*<sup>86</sup> the court held that the NCA applies to a credit agreement when the particular credit agreement is regarded as a credit agreement for the purpose of the NCA if it is a credit facility, credit transaction, credit guarantee or a combination of it all. Once it is determined that the agreement in question is a credit agreement, the next question to ask is whether the particular agreement was entered into between the parties dealing at arm's length, if not, then it is not a credit agreement. The NCA does not apply in respect of credit agreements where the consumer is a juristic person whose asset value or annual turnover equals or exceeds R1 million.<sup>87</sup> The implication hereof is that a major shift in power took place in that the power was removed from the credit provider and more protection was given to the consumer.

On 11 April 2011 the Constitutional Court delivered judgment in *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC). It stated the practice of allowing the registrar to declare immovable property specially executable when ordering default judgment in terms of rule 31(5) "to the extent that this permits the sale in execution of the home of a person" unconstitutional.

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<sup>83</sup> s 83(1) of the NCA states that it could be during any court proceeding in which a credit agreement is being considered.

<sup>84</sup> s12 of the NCA (hereafter "NCR")

<sup>85</sup> s 26 of the NCA (hereafter "NCT")

<sup>86</sup> 2015 JOL 33336 (WCC)(Judgement date: 2 June 2015)

<sup>87</sup> s 4(1)(a)(i) and 4(1)(b)

In *FirstRand Bank Ltd v Folscher*<sup>88</sup> the court held that a practice directive is issued, that: ... if the summons is preceded by a notice in terms of section 129 of the National Credit Act 34 of 2005, such notice is to include a notification to the debtor that, should action be instituted and judgment be obtained against him or her, execution against the debtor's primary residence will ordinarily follow and will usually lead to the debtor's eviction from such home.<sup>89</sup>

From these abovementioned court cases, it appears that the credit provider is obliged to give notice of cancellation of the credit agreement.<sup>90</sup> The notice of cancellation should provide certain information to the debtor before execution on a writ. The notification should include information such as informing the debtor that legal action will be taken, judgement obtained and that the debtor's primary residence will become executable and such debtor will be evicted from such residence.<sup>91</sup>

The protection of the consumer has subsequently been reiterated in the case of *Standard Bank v Bekker*<sup>92</sup> where the court stated that the NCA affords a measure of protection to mortgagees who are natural persons.<sup>93</sup>

The NCA substantiated the protection of the consumer by clearly stipulating consumer's rights in Chapter 4, Part A, that is:

- i. the right to apply for credit;
- ii. the right to reasons for credit being refused;
- iii. the right to information in official language;
- iv. the right to information in plain and understandable language;

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<sup>88</sup> 2011(4) SA 314 (GNP)

<sup>89</sup> Van Heerden 2011 *Northern Law* 5

<sup>90</sup> s 129(1)(a)

<sup>91</sup> Van Heerden in Scholtz (ed) *Guide to the National Credit Act* par 12.18

<sup>92</sup> 2011 (6) SA 111 (WCC)

<sup>93</sup> Other related cases where consumer protection has been concurred includes *Nedbank Ltd v Fraser and another and four other cases* 2011 (4) SA 363 (GSJ), *Sebola & another v Standard Bank of South Africa Ltd and Another* 2012 (8) BCLR 785 (CC), *Kubyana v Standard Bank of SA Ltd. (CCT 165/13) [2014] ZACC 1 (20 February 2014)* and *Nedbank v NCR* 2011 ZASCA and *Barko Financial Services (Pty) Ltd v NCR & Another* 2014 JOL 323105 (SCA) (unreported case, n 415/13, date of judgement 18/9/2014). This is also concurred in section 6 of the NCA, which limits application of certain provisions of the NCA to juristic persons.

- v. the right to receive documents, and
- vi. the right to confidentiality.

However, the NCA also provides for the rights and protection of the credit providers. The South African courts may not apply the Act in a manner that will only keep the consumers' interest and rights in mind. The court's role will continue to be impartial and objective in that it will consider the facts of the case, legislation, intention of the legislature and the reported precedents. This consideration was clearly depicted in the case of *Standard Bank of South Africa Ltd v Hales*.<sup>94</sup> The facts were, briefly, that the defendants were in arrears on the mortgage loan. The plaintiff issued summons and during the summary judgment process, the defendants alleged that they were over-indebted and that they have commenced engagement with a debt counsellor as contemplated in section 79 and 85(a) of the NCA. The plaintiff subsequently filed a declaration. In their plea, the defendants admitted to all the allegations contained in the plaintiff's claim. The only defense raised by them was the previously mentioned over-indebtedness and that they applied for relief from such over-indebtedness in terms of section 85 and that the sole purpose of the NCA is to provide protection for consumers.

Gorven J held that an admission of over-indebtedness *per se* would be inadequate to convince the court to exercise its discretion favourably. However, the court rejected the submission on behalf of the defendants that the sole, or at least chief, purpose of the Act is to provide protection for consumers.

The court indicated that no prioritisation is provided and that in the circumstances where the credit provider took all reasonable steps to advise the defendants of their option to apply for debt counselling, the defendants only did so a month after the delivery of the application for summary judgement. Therefore, the court held that the plaintiff had scrupulously complied with the provisions of the Act.

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<sup>94</sup> 2009 (3) SA 315 (D) 322B-C

Whilst consumer protection is a clear object, it is but one factor, albeit a very important one, in the purposes of the NCA.<sup>95</sup> For this reason, it is clear that even though there is some vagueness in the NCA, the aim is understandably to consider all parties in a credit agreement in a fair and reasonable manner.

#### **2.4. Recent amendments to the NCA**

Due to the criticisms published against the NCA and practical problems that have arisen since the inception of the NCA, the DTI decided to publish the draft National Credit Act Policy Review Framework Amended Bill in the Government Gazette.<sup>96</sup> The policy document attempted to examine the flaws of the NCA, to identify remedial actions necessary to address problems that impede the effectiveness of the NCA<sup>97</sup> and to close loopholes in the legislation. Moreover, noteworthy is that this policy document acknowledged that one of the key areas requiring attention is reckless credit.<sup>98</sup>

On 19 May 2014, the National Credit Amendment Act (hereafter referred to as the Amendment Act) was assented by the President, Mr Jacob Zuma.<sup>99</sup> The purpose of the Amendment Act is to amend and clarify certain provisions of the NCA to ensure that the aims set out in section 3 of the NCA can be achieved. The policy document also emphasised that "... the NCA is in essence credit legislation where both the policy and legislation have always attempted to create a balance of rights, to ensure a sustainable consumer credit market."<sup>100</sup> On 13 March 2015, these amendments became effective and operational.<sup>101</sup>

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<sup>95</sup> This view of the courts was restated in *Rossouw & another v First Rand Bank Ltd t/a FNB Home Loans* 2010 (6) SA 439 (SCA), *Nedbank v National Credit Regulator* 2011 (3) SA 581 (SCA) and *Collett v FirstRand Bank Ltd* 2011 (4) SA 508 (SCA)

<sup>96</sup> GG no 36504 & 36050, 29 May 2013, Vol 575 page 14

<sup>97</sup> Part 2 of policy document, p 11

<sup>98</sup> Par 2.3.2.1.3, p 24

<sup>99</sup> GG no 37665, Vol 587, no. 389

<sup>100</sup> Par 1.3.9, p 14

<sup>101</sup> Green Gazette no 38557, 13 March 2015

Throughout this study, reference will be made to both the NCA of 2007 as well as the Amendment Act of 2015. The purpose thereof is to compare the original state of affairs with the amendments and the effect thereof on the credit market.

## 2.5. Credit agreements

The NCA defines the word “credit” when used as a noun as “a deferral of payment of money owed to a person, or a promise to defer such a payment; or a promise to advance or pay money to or at the direction of another person”.<sup>102</sup>

An agreement is a credit agreement for the purposes of the NCA if two elements are present<sup>103</sup>, namely:

- there is some deferral of repayment or prepayment of money, and
- there is a fee, charge or interest imposed with respect to a deferred amount<sup>104</sup> payable, or a discount is given when prepayments are made.

In the case of *Carter Trading (Pty) Ltd v Blignaut*<sup>105</sup> the court determined that “charge” even includes the imposing of the cost to draft the document (the agreement between the parties).<sup>106</sup>

In an unreported court case, *Asmal v Essa*<sup>107</sup> the respondent advanced loans to the appellant or to a third party, even though the contractual relationship between the parties in this case was in dispute. Appellant paid by means of cheques that were dishonoured. The matter was taken on appeal where the appellant argued that the loans constituted credit agreements, which were subject to the provisions of the NCA. The appeal court held that as per s 8(3)(a)(ii) and 8(4)(f)(ii) the requirements for a credit

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<sup>102</sup>

s 1

<sup>103</sup>

Also see *Asmal v Essa* (38/2013) [2014] ZASCA 62; [2014] 3 All SA 115 (SCA) (14 May 2014)

<sup>104</sup>

Reg 39(1) provides the definition for a “deferred amount”

<sup>105</sup>

2010 2 SA 46 (ECP)

<sup>106</sup>

See also *Evans v Smith* 2011 4 SA 472 (WCC); *Otto* 2012 *De Jure* 161

<sup>107</sup>

(2014) JOL 31866 (SCA)(case nr. 38/2013, judgement date 14/5/2014)



agreement includes the payment of a “charge”, “fee” or interest”<sup>108</sup>. In this particular case no such charges were attached to the loans; therefore, they were not credit agreements as per the provisions of the NCA.

The NCA creates three types of credit agreements:

- **Small credit agreements:** a pawn transaction, credit facility or credit transaction (excluding Mortgage) of less than R15 000;<sup>109</sup>
- **Intermediate credit agreement:** a credit facility or credit transaction (excluding a pawn transaction or mortgage) of between R15 000 and R250 000;<sup>110</sup>
- **Large credit agreement:** a mortgage agreement or credit facility or credit transaction (excluding a pawn transaction) equal to or more than R250 000.<sup>111</sup>

Credit agreement includes the following:<sup>112</sup>

- a credit facility (for example credit cards);<sup>113</sup>
- a credit transaction (for example an instalment agreement, a mortgage agreement, secured loan, a pawn transaction or an incidental credit agreement);<sup>114</sup>
- a credit guarantee (for example a suretyship);<sup>115</sup>
- developmental credit agreement<sup>116</sup>;
- public interest credit agreement<sup>117</sup>, and
- Acknowledgment of Debt (AOD).<sup>118</sup>

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<sup>108</sup> Also see *Janse van Rensburg v Mahu Exhaust cc & another* (2015) JOL 33123 (NCK) (unreported case nr. 1338/2013, judgement date 21/02/2014)

<sup>109</sup> s 9(2) read with GN 713 in GG 28893 of 1 June 2006

<sup>110</sup> s 9(3) read with GN 713 in GG 28893 of 1 June 2006

<sup>111</sup> s 9(4) read with GN 713 in GG 28893 of 1 June 2006

<sup>112</sup> Otto 2011 TSAR 547 and Otto 2012 *De Jure* 162 and Kelly-Louw *Consumer Credit Regulation in SA* 28

<sup>113</sup> s 8(1) & (3), also see Van Heerden & Boraine 2011(Vol 2) *De Jure* 5

<sup>114</sup> s 8(1) & (4), also see Van Heerden & Boraine 2011(Vol 2) *De Jure* 5

<sup>115</sup> s 8(1) & (5), also see Van Heerden & Boraine 2011(Vol 2) *De Jure* 5

<sup>116</sup> s 10

<sup>117</sup> s 11

<sup>118</sup> The Eastern Cape High Court in Port Elizabeth (in the case of *Carter Trading (Pty) Ltd. v Blignaut* 2010 (2) SA 46 (ECP)) concluded that an Acknowledgement of Debt (AOD) falls within the borders of s 8 of the NCA to be considered a credit agreement as envisaged by the NCA

However, the following agreements, irrespective of their form, are not credit agreements:<sup>119</sup>

- a policy of insurance or credit extended by an insurer solely to maintain the payment of the premiums on a policy of insurance;
- lease of immovable property, or
- a transaction between a stokvel member and a member of that stokvel in accordance with the rules of that stokvel.

To determine whether an agreement constitutes a credit agreement as per the NCA, can prove to be difficult. In the case of *Renier Nel Inc. v Cash on Demand (KZN) (Pty) Ltd*<sup>120</sup>, Wallis J made the following statement considering whether an agreement is a credit agreement as per the ambit of the NCA. The court must "... look at the nature of the transactions and have regard mainly to their substance rather than their form, as well as the whole course of the parties' dealings."<sup>121</sup>

Section 80(1) of the NCA starts with "A credit agreement is reckless ...". It includes all categories of credit agreements, irrespective of the amount. The only exceptions will be those agreements that do not constitute a credit agreement, as stated in section 8(2) of the NCA and those provisions of the Act that will not apply to a credit agreement if the consumer is a juristic person.<sup>122</sup>

Different rules apply to each category, for example regarding the content of the agreement<sup>123</sup>, the disclosure<sup>124</sup> (which is required before an agreement may be concluded) the form or format in which the agreement must be concluded, and the cancelation<sup>125</sup>, rescission<sup>126</sup> and alterations<sup>127</sup> of a credit agreement. The credit provider

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<sup>119</sup> s 8(2).

<sup>120</sup> 2011 (5) SA 239 (GSJ).

<sup>121</sup> Kelly-Louw *Consumer Credit Regulations in SA* 51.

<sup>122</sup> s 6, also see paragraph 2.4 for more information.

<sup>123</sup> s 93 and Regulations 30 and 31

<sup>124</sup> s 92 and Regulations 28 and 29.

<sup>125</sup> s 122 and 123

<sup>126</sup> s 121

must provide the credit agreement to the consumer in the consumer's official language. This is the language that she or he reads or understands to the extent that this is reasonable, bearing in mind usage, practicality, expense, regional circumstances and the needs and preferences of the population ordinarily served by the person who deliver the document.<sup>128</sup>

Ease of language use is important to prevent reckless credit lending.<sup>129</sup> If the consumer received the credit agreement documentation and did not have a general understanding and appreciation of the risk and costs of the proposed credit, and of the rights and obligations of a consumer under that specific credit agreement, the agreement can be considered by the South African courts to be a reckless credit agreement. The credit provider must take all reasonable steps to assess and prevent reckless credit lending.

## **2.6. Limited application of the NCA**

The NCA is limited in its application to incidental agreements and to all credit agreements in respect of which the consumer is a juristic person. The exceptions are too many to list, therefore only the main applicable exceptions will be reviewed.<sup>130</sup>

Incidental credit agreements are exempt from the provisions dealing with:

- i. pre-agreement disclosure;
- ii. the form and content of agreements;
- iii. unlawful agreements and unlawful provisions in agreements;
- iv. reckless credit;
- v. registration requirements<sup>131</sup>;
- vi. marketing practices;
- vii. the surrender of goods;

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<sup>127</sup> s 116 and 117

<sup>128</sup> s 63(1)

<sup>129</sup> s 81(2)(a)(i)

<sup>130</sup> s 5(1) and 6

<sup>131</sup> See discussion on page 25

- viii. the consumer's cooling-off right, and
- ix. the dispute settlement mechanisms of the NCA.

Juristic persons<sup>132</sup> do not enjoy the protection of the parts and sections that deals with:

- i. marketing practices;<sup>133</sup>
- ii. negative option agreements;<sup>134</sup>
- iii. reckless credit;<sup>135</sup>
- iv. debt review and rescheduling of debts;<sup>136</sup>
- v. the requirement that a variable interest rate be linked to a reference rate<sup>137</sup>, and
- vi. rules relating to fees, charges, maximum interest rates and credit insurance.<sup>138</sup>

As stated under paragraph 1.5 and in section 1 of the NCA, a "juristic person" includes partnerships, any association or body of persons corporate or unincorporated (except stokvel) and trusts with three or more trustees or trusts whose trustee is a juristic person. Evidently, companies and close corporations are also included in the definition of a juristic person.

Furthermore, the NCA has limited application as set out in section 6 of the NCA and therefore a juristic person may not be able to raise the issue of reckless credit. Consequently, Part D of Chapter 4 does not apply to juristic persons and thus a juristic person cannot rely on reckless credit granting as a defence under the NCA<sup>139</sup>. The question is, does this exclusion or limited application of the NCA not discriminate against juristic persons?

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<sup>132</sup> With an asset value or annual turnover of more than R1 million also see Kelly-Louw *Consumer Credit Regulation in SA* 36

<sup>133</sup> s 6(a)

<sup>134</sup> s 6(b) and (c)

<sup>135</sup> s 6(a)

<sup>136</sup> s 6(a).

<sup>137</sup> s 6(d).

<sup>138</sup> Charging of interest remains purely a matter of agreement between the credit provider and the juristic person in its capacity as a consumer. In principle, the credit provider can stipulate any interest rate subject only to the common law. See Otto *et al NCA Explained* (2010) 30.

<sup>139</sup> s 6(a), s 78(1) and Van Heerden & Boraine 2011(Vol 2) *De Jure* 44.

In *Standard Bank of South Africa Ltd v Hunkydory Investments and Another 194 (Pty) Ltd (No 1)*<sup>140</sup> the debtor-company and surety was defending the summons based on the grounds that ss 4(1)(a), 4(1)(b) and 4(2)(c) of the NCA are unconstitutional in that the Act does not apply to juristic person. The defendants' arguments were based on s 9(1) of the Constitution<sup>141</sup> in that the provisions of section 4 of the NCA infringed on their constitutional right to equality. The court found that the differentiation or discrimination was not unfair and the exclusion from the protection of the NCA was not unreasonable.<sup>142</sup>

Continuing on limitations that needs to be mentioned is the sections in the NCA pertaining to the registration of credit providers. Not all persons who grant credit are required to be registered as a credit provider in terms of the NCA. According to section 40 of the NCA, a person who has more than 100 credit agreements on the books (irrespective of the value of these loans) or to whom an aggregate principal debt of more than R500 000 is owed (irrespective of the number credit agreements) must register as a credit provider in order to be able to grant credit lawfully,<sup>143</sup> with the exception of incidental credit agreements.<sup>144</sup>

The Amendment Act altered section 40(1) to substitute the subsection (a). Therefore, a person or associated person must register as a credit provider irrespective of the number of credit agreements as long as the principal debt owed exceeds the threshold prescribed by the Minister.<sup>145</sup> The existing threshold remains at R500,000 as per the original Act, but may be reduced to zero to bring about compulsory registration for all credit providers dealing at arm's length.

Comparing section 40(4) with section 89(2)(d) it is clear that the legislature intended that any credit agreement entered into by a credit provider who is not registered (and

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<sup>140</sup> 2010 (1) SA 627 (C).

<sup>141</sup> *The Constitution of the Republic of South Africa*, 1996.

<sup>142</sup> Kelly-Louw *Consumer Credit Regulation in SA* 39.

<sup>143</sup> s 40(1) & (2) read with GN 713 in GG 28893 01-06-2006; Otto 2011 (3) TSAR 550 and Van Zyl in Scholtz (ed) par 5.2.2.

<sup>144</sup> s 40(1)(a)

<sup>145</sup> s 42(1)

should have been registered in terms of section 40(1)), would be considered an unlawful credit agreement.<sup>146</sup> This was supported in the case of *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC*<sup>147</sup> when the plaintiff entered into an agreement with the first defendant in terms whereof the plaintiff would sell fabric to the defendant on credit. In the agreement, the credit limited was termed as “R50 000/R100 000”. At that point, the first defendant was liquidated and the two sureties were sued for payment of amounts owed and payable in terms of their suretyship. The defendants consequently raised the defence *in limine* that the plaintiff was not a registered credit provider; therefore, the credit agreement was unlawful and void.<sup>148</sup> The court concurred.

Therefore, the study will only focus on natural persons who tend to rely on reckless credit lending and not juristic persons and/or their sureties, because reckless lending does not apply to juristic persons.<sup>149</sup> For the purpose of this study, a consumer will be a natural person and a credit provider will be considered a duly registered credit provider as per the NCA.

## **2.7. Reckless credit lending**

### **2.7.1. Overview**

Regarding reckless lending, section 3 of the NCA clearly states that one of the aims of this act is to encourage the consumer as well as the credit provider to be responsible and accountable in the credit market.<sup>150</sup> On the one hand, the consumer must be responsible when borrowing money to avoid over-indebtedness, to fulfil his/her financial commitments of consumers, and to deter the consumers from breach of their

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<sup>146</sup> See *NCR v Wieland Cash Loans* (NCT/3867/2012/57(1)) [2013] ZANCT 5 (decided on 5 February 2013) page 4.

<sup>147</sup> 2010 6 SA 173 (KZD), also see other relevant cases such as *Black v Stroberg* (8960/12) [2013] ZAKZPHC 16 (decided on 15 April 2013) and *Seaworld Frozen Foods (Pty) Ltd b Thomas Classen t/a TPC Plumbing* (591/2010) [2014] ZAGPPHC 523 (decided on 13 June 2014)

<sup>148</sup> Otto 2011 (3) TSAR 550-553

<sup>149</sup> See s 79(1) of the NCA

<sup>150</sup> Kelly-Louw 2014 (26) SAMLJ 25

contractual obligations.<sup>151</sup> On the other hand, credit providers must avoid granting credit recklessly.<sup>152</sup> Should the credit provider fail to be proactive, the credit provider will suffer serious consequences.<sup>153</sup>

Over-indebtedness and reckless credit lending are two new terms that were introduced by the legislature, although the practical implications are not unknown to the credit industry. Over-indebtedness and reckless credit are interlinked but not interchangeable. Part D of Chapter 4 (ss 78-79) deals with these aspects, which came into operation on 1 June 2007.

The first sentence of the relevant part of the NCA states that these aspects only apply to credit agreements where the consumer is a natural person and not a juristic person<sup>154</sup>. A natural person will be a human being of flesh and blood who have passive legal capacity; yet their status may differ depending on their attributes (for example age) and circumstances (for example insolvency).<sup>155</sup> In effect, this means that business proprietors may not seek financial assistance when faced with over-indebtedness and reckless credit practices.<sup>156</sup>

Therefore, consumers have full protection in cases of over-indebtedness and reckless credit if they are a natural person. In order to support the protection, the credit provider must ensure that adequate procedures are in place to prevent the granting of reckless credit by means of assessment mechanisms that should be used in assessing the obligations of the credit consumer by the credit provider.<sup>157</sup> Should a credit provider disregard the lending risks and implementation of proper assessment mechanisms and

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<sup>151</sup> s 3(c) (i). See also Renke "Measures in South African consumer credit legalisation aimed at the prevention of reckless lending and over-indebtedness: an overview against the background of recent developments in the European Union" 2011 *THRHR* 208 209.

<sup>152</sup> s 3(c) (ii) and s 81(3)

<sup>153</sup> See Vessio 2006 *THRHR* 655. See also *Standard Bank of South African Ltd v Kelly and Another* 23427/2010 [2011] ZAWCHC 1 (25 January 2011).

<sup>154</sup> s 78(1)

<sup>155</sup> Hutchinson D *et al* *The Law of Contract in South Africa* (Oxford University Press Cape Town 2010) s 78(1). For a definition of a juristic person see s 1. The impact of this section is considerable: every juristic person will not be legislatively subject to the Part D of the NCA, which in effect means that a juristic entity's financial means, prospects and obligations need not be assessed by the credit provider before extending credit. See also Vessio 2009 *TSAR* 278.

<sup>157</sup> s 82(1) and Kelly-Louw 2014 (26) *SAMLJ* 25

practice indiscriminate moneylending to consumers who do not have the ability to pay back loans, this practice will have a chain reaction on the credit industry and result in endangering the economic growth in South Africa and ultimately worldwide.<sup>158</sup>

### 2.7.2. Over-indebtedness

Though over-indebtedness is not relevant to this study, it is import to explain the terminology. It is especially relevant when considering section 80 where it is described how reckless credit granting may have an impact on the consumer's financial prospects in that by granting a loan without considering section 80 can result in the consumer being unable to satisfy all obligations in a timely manner.<sup>159</sup> Reference is being made to this terminology throughout the NCA and particularly in this study when the different types of reckless credit lending is discussed in Part II, paragraph 5.2 of the study.

The NCA fails to define over-indebtedness in section 1 of the Act, even though "reckless credit" is defined. Section 79 of the NCA states:

A consumer is over-indebted if the preponderance of available information at the time of determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party ...<sup>160</sup>

The NCA provides guidelines to determine over-indebtedness.<sup>161</sup> The overlap between over-indebtedness and reckless credit can be explained as follows:

- i. when a credit provider enters into a credit agreement with a consumer and the consumer then becomes over-indebted<sup>162</sup> as a result of credit lending having been granted recklessly;<sup>163</sup> or

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<sup>158</sup> Kelly-Louw 2014 (26) *SAMLJ* 25

<sup>159</sup> s 79(1) and Kelly-Louw 2014 (26) *SAMLJ* 28

<sup>160</sup> s 79(1)

<sup>161</sup> s 79(3)



- ii. when the consumer is already over-indebted and has applied for debt re-arrangement and that re-arrangement still subsists, then such new credit agreement may be declared reckless credit lending.<sup>164</sup>

Over-indebtedness and reckless credit allows the consumer to engage in a number of debt relief remedies, for example debt restructuring.<sup>165</sup> However, such processes and procedures will not be discussed in this study; the purpose of this dissertation being to investigate the concept of reckless credit, the remedies proposed and the procedural implications.

### 2.7.3. Reckless credit

Reckless credit lending is, conceptually, new to the South African legal system. By this time, credit providers in South Africa should be aware of the factors that could label them as reckless lenders, and should avoid practices that may lead them to suffer the legislative consequences.<sup>166</sup> This is not an easy task since the concept has never been dealt with by South African legislation prior to the NCA. Credit providers will have to rely on legislation and precedent to guide their actions.

The following observation by Otto is relevant:<sup>167</sup> “The provisions in the National Credit Act dealing with the prevention and consequences of reckless credit are not only far reaching, but also extremely important to all concerned. The provisions contain a huge amount of detail ....”

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<sup>162</sup> s 80(1)(b)(ii)

<sup>163</sup> Van Heerden & Boraine 2011 (Vol 2) *De Jure* 4 and Scholtz *et al* par 11.1

<sup>164</sup> s 88(4) and Vessio 2009 *TSAR* 281

<sup>165</sup> s 83(3)(b)(ii)

<sup>166</sup> Vessio 2009 *TSAR* 274

<sup>167</sup> Otto & Otto *the National Credit Act Explained* 77 also see *Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another* (98/10) [2010] ZASCA 148; 2011 (2) SA 266 (SCA) ; [2011] 2 All SA 471 (SCA) (29 November 2010)

According to the *Cambridge Dictionary*, the typical meaning of the word “reckless” is “doing something dangerous and not worrying about the risks and the possible results.”<sup>168</sup> The *Oxford Dictionary* defines “reckless” as “disregarding the consequences of danger.”<sup>169</sup> Compared to section 80 of the NCA, it is clear that the legislator considered the meaning of the word. The legislator also went one step further to provide not only for the act of disregarding the consequences, but also to include the failure by the credit provider to analyse the credit potential of a potential consumer, and/or incorrectly analysing the credit potential of the consumer.<sup>170</sup>

Consequently, the following questions are raised: When is a credit agreement reckless? Moreover, how can one recognise reckless lending?

Section 80 states that reckless lending can occur in one of three ways:

- (1) the credit provider fails to conduct a proper assessment at the time of the application by the consumer<sup>171</sup> and grants the credit to the consumer; or
- (2) if a consumer is over-indebted at the time of applying for credit, and the credit provider was aware of the consumer’s financial situation and still proceeded to approve the credit agreement, or
- (3) the consumer did not understand the risk, cost, and/or obligations entailed in the credit agreement.

Such an allegation of reckless credit lending must be referred to a court for consideration and if the court finds the agreement as “reckless credit”, it may order:

- the facility to be **suspended**, during which time all rights and obligations will be frozen. Interest, cost and fees may not be collected by the credit provider, nor may the normal repayment be expected from the consumer for the duration of the suspended period as determined by the Court;<sup>172</sup> or

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<sup>168</sup> Cambridge Advanced Learners Dictionary, page 1187

<sup>169</sup> Vessio 2009 *TSAR* 274, footnote 6 (The Pocket Oxford Dictionary (1992))

<sup>170</sup> Vessio 2009 *TSAR* 274

<sup>171</sup> Assessment of creditworthiness is discussed in Part II of this dissertation.

<sup>172</sup> s 83(2)(b)

- the facility may be **partially or fully wiped** (also known as “writing back” or “setting aside”) of all rights and obligations in terms of the credit agreement by the credit provider.<sup>173</sup> The court will determine the order that is just and reasonable in the circumstances. When the credit provider attends to the order, no adverse information may be reported to the credit bureaux.

Upon declaring a credit agreement as reckless credit lending, the court must also consider whether the consumer is over-indebted at the time of the court proceedings.<sup>174</sup> Should the court have found the particular credit agreement reckless on the grounds that the granting of the credit resulted in the over-indebtedness and concludes that the consumer is indeed over-indebted at the time of the court proceedings, the sanction imposed by the court may be to suspend the particular credit agreement for a certain period of time.<sup>175</sup>

If the evidence proves that credit provider failed to conduct a proper assessment<sup>176</sup> at the time of application by the consumer and/or the consumer did not understand the risk, cost and/or obligations entailed in the particular credit agreement, the court may impose the sanction where the particular credit agreement will be partially or fully wiped or suspended.<sup>177</sup> This is the provision as per the NCA. Conversely, in a recent case the constitutional court found this provision to be unconstitutional.<sup>178</sup> A full discussion of the constitutionality of section 83(2)(c) will be discussed in paragraph 6.3.1 of this study.

Application for reckless credit is only applicable to credit agreements entered into after 1 June 2007 and in terms of section 78(2) the provisions in ss 81 to 84 do not apply to<sup>179</sup>:

- a school loan or a student loan;
- an emergency loan;

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<sup>173</sup> s 83(2)(a)

<sup>174</sup> s 83(3)(a)

<sup>175</sup> s 83(3)(b)(i) also see *Otto et al NCA Explained* (2010) 78

<sup>176</sup> Consideration needs to be taken of the amendment of the NCA by the inclusion of the criteria to conduct an affordability assessment. This amendments and effect will be discussed in Chapter 5 of this study.

<sup>177</sup> s 83(2)

<sup>178</sup> *National Credit Regulator v Opperman and Others* (CC)(unreported case no CCT 34/12)

<sup>179</sup> Stoop & Kelly-Louw 2011 (Vol 11) *Potchefstroom Electronic Law Journal* 16/35 and Reg 23

- iii. a public interest credit agreement;
- iv. a pawn transaction;
- v. an incidental credit agreement, or
- vi. A temporary increase in the credit limit under a credit facility provided that these transactions have been reported to the NCR.

All sections relating to reckless credit undoubtedly require that a credit provider must avoid entering into a reckless credit agreement with a prospective consumer. This underlines the statements in section 3(c) (ii) of the NCA affirming it as one of the purposes of this Act that discourage reckless credit lending.

However, the NCA does not state that a credit agreement granted recklessly is *ab initio* null and void as is the case with unlawful credit agreements in terms of section 89 of the NCA.<sup>180</sup> The Act only states the courts may, when declaring a credit agreement to be indeed reckless credit lending, that such particular credit agreement, depending on the type of reckless credit, *inter alia* be set aside all or part of the consumer's rights and duties in terms thereof or suspend its operation.<sup>181</sup>

The NCA is not clear in all respects as to how the courts should exercise their discretion in this regard. This vagueness is especially applicable on instances where the credit agreement before the court is a loan with security, that is, should the moneys or goods received or paid be forfeited, or remain the property of the consumer or credit provider.<sup>182</sup> During 2010, the media reported a case that was heard in the magistrate's court in Port Elizabeth<sup>183</sup>, where the magistrate acted *mero motu* in setting aside a residential mortgage bond that amounted to a reckless credit agreement, while the consumer remained the owner of the property.

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<sup>180</sup> s 89 deals with unlawful credit agreements but the section does not indicate reckless credit agreements as being unlawful – see para 2.5.3. and 2.5.4 below

<sup>181</sup> s 83(2)(a) & (b)

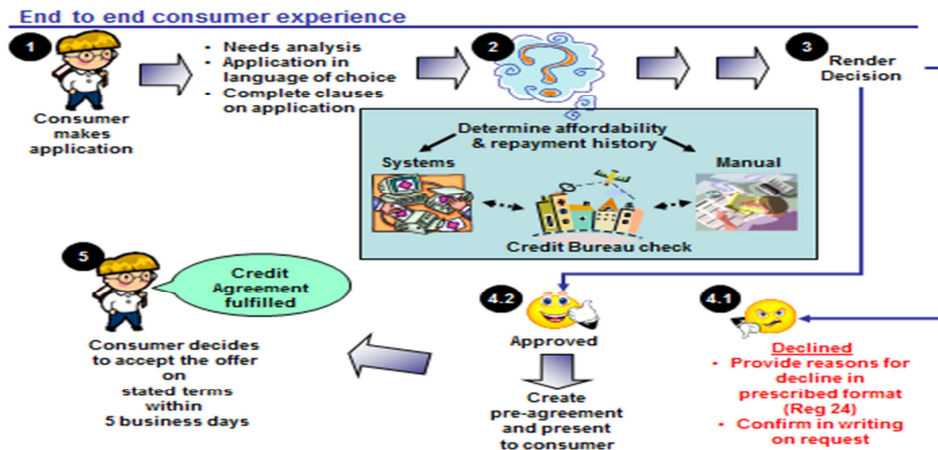
<sup>182</sup> Boraine & Van Heerden 2010a (73) *THRHR* 650

<sup>183</sup> G de Kock v LJJ Gerber & others, Case number 9035/2010

It is therefore indistinguishable whether the court may exercise its discretion in terms of section 83(2) (a) of the NCA or another NCA provision when deciding what should happen to the money or goods. Consequently, the section referring to unlawful provisions and unlawful agreements will also have to be considered in the execution of the comparative analysis. Furthermore, these provisions and the application thereof will also have to be compared with the law of contracts in South Africa, the precedents, the constitutional accuracy<sup>184</sup>, as well as with international legislation.

#### 2.7.4. Overview of the end-to-end process

In chapter 3, the legal bond created when entering into a contract is discussed. The illustration/flow diagram below puts the conception of the legal bond in perspective in terms of credit agreements as a specific contract. Therefore, the following pictorial process map illustrates each segment in the creation of a legal bond in terms of a credit agreement as per the law of contracts and the credit legislation.



The pictorial process is an introductory overview of the credit application to the credit granting process in Part II of the study, therefore each of these segments will be discussed in the relevant subsection and context. The process discussion will refer to the relevant sections of the NCA as well as the Amendment Act.

<sup>184</sup> National Credit Regulator v Opperman and Others (CC)(unreported case no CCT 34/12)

## 2.8. Conclusion

The NCA and Regulations initiated by the Department of Trade and Industry (DTI), were designed to solve specific problems in the consumer credit market properly (only credit-related issues are within DTI's mandate). In the context of the NCA, this means that creditworthy borrowers from low-income households and the small and micro sectors are not excluded from access to credit<sup>185</sup>.

The fundamental purpose of the NCA is to achieve integrity in the credit market and eliminate the multitude of unfair practices, inappropriate disclosure and anti-competitive practices from the market.<sup>186</sup> The purpose of the legislation is to create a single system of credit regulation and a national credit regulator to administer the credit industry.<sup>187</sup>

The NCA sets credit legislation in South Africa on par with similar legislation in developed countries.<sup>188</sup> The NCA is likely to reduce undesirable credit practices significantly, but it may take some time for the financial system to adjust and then to expand under the new law. The provisions of reckless credit lending are aimed at encouraging responsible borrowers of all income levels and keeping lenders accountable. However, the sanctions that have to be imposed on reckless credit agreements remain vague and uncertain in the Act.

A comparative analysis is required to note the similarity or dissimilarity of the purpose and aim of the NCA to what is just and reasonable. In this dissertation, the legal comparison needs to be done in relation with the South African legislation, as well as with the international legislation in countries where a similar principal has been adopted, before recommendation can be made as to how the courts should deal with reckless credit agreements that have security, that is money or goods.

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<sup>185</sup> Department of Trade and Industry South Africa. Making Credit Markets Work: A Policy Framework for Consumer Credit

<sup>186</sup> Boraine & Van Heerden 2010 (Vol 13) *Potchefstroom Electronic Law Journal* 1

<sup>187</sup> Otto *et al* *NCA Explained* (2010) 6

<sup>188</sup> Renke 2011 (Draft Paper) *University of Pretoria*

In this chapter, an introductory overview was given regarding the application of the NCA. The issues contained and introduced in the overview will be discussed more closely in Part II of the study.

### **CHAPTER 3: INTERACTION: NCA AND GENERAL PRINCIPLES OF CONTRACT**

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### 3.1. Introduction

In order to appreciate the nature and extent of the legal obligations to which the NCA applies, it is important to explore the origins of legal obligations generally and to make specific reference to the most significant sources thereof. The obligations where the object of performance is payment sounding in money (*pretium*) and the delivery of a thing (*merx*) are predominantly relevant to this dissertation.

The general scope of the NCA has been determined in Chapter 2 of Part I. In the chapter at issue, the general foundation of the law of contract will be reviewed, and an analysis will be done of the specific obligations to which the dissertation will apply.

It is of paramount importance to establish the principle of particular terms of the law of contract to determine the application thereof on credit agreements while taking cognisance of the principles of the NCA regarding reckless credit lending and the consequences of a reckless credit order.

### 3.2. Law of obligations

“Obligation” is a term originating from the Latin word *obligare*, which means “to tie” or “to bind together”. Thus, an obligation is a legal tie or bond (*iuris vinculum*) that binds together legal subjects in a form of a legal relationship.<sup>189</sup>

Legal consequences flow from legal facts, and a legally recognised obligation is an example of such a legal fact.<sup>190</sup> An obligation is a legal bond between two or more persons. It comprises both a right and a duty<sup>191</sup>, which means that a legally recognised debtor-creditor relationship would exist where the parties acquire rights and duties, before it can be referred to as an enforceable personal obligation.<sup>192</sup> The debtor bears a

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<sup>189</sup> Van Der Merwe *et al Contract* 2; Christie *Law of Contract* 3 and Kerr *Law of Contracts* 3 and 342

<sup>190</sup> Van Der Merwe *et al Contract* 3; Christie *Law of Contract* 3 and Kerr *Law of Contracts* 3 and 342

<sup>191</sup> Hutchinson *et al Contract* 232

<sup>192</sup> Van Zyl & Van der Vyver *Regswetenskap* 3 and 360



duty to make the performance agreed upon and the creditor has a right to claim that performance. The creditor's right is the converse of the debtor's duty.<sup>193</sup>

The types of obligations found in law are natural and civil obligations, differentiated as follows:

- A **natural obligation** is rights and duties that are recognised in law, but not enforceable through a court of law<sup>194</sup>, for example a wager.
- A **civil obligation** is rights and duties that are legally recognised and enforceable<sup>195</sup>, for example a contract.

This study is only concerned with civil obligations. A few examples of legal facts giving rise to obligations are contracts, delicts as well as various other causes like *negotiorum gestio*<sup>196</sup> and unjustified enrichment. A credit agreement is a specific type of contract, applicable to civil obligations. Furthermore, the principle and operation of unjustified enrichment, is a direct consequence of the sanctions that could be imposed by a court when a credit agreement is found to be reckless credit lending. The matter of unjustified enrichment is more closely discussed in paragraph 3.3.3 of this chapter.

### 3.3. Law of contracts

According to the Roman law, *contractus* refers to an undertaking between persons, which bring about obligations and which comply with certain requirements.<sup>197</sup> These obligations include legal consequences, namely the right to claim performance and the duty to perform.

A contract is essentially an agreement between two or more parties that intends to create enforceable obligations (*animus contrahendi*). It must be borne in mind that a

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<sup>193</sup> Van Zyl & Van der Vyver *Regswetenskap* 436 to 437

<sup>194</sup> Van Zyl & Van der Vyver *Regswetenskap* 506.

<sup>195</sup> Nagel *et al Business Law* 14.

<sup>196</sup> Directly translated as "care taking".

<sup>197</sup> Fouchè *et al Contracts* 34

contract is an agreement made with the intention of creating an obligation.<sup>198</sup> In other words, when parties<sup>199</sup> conclude a contract they have the expectation that the law will acknowledge their agreement and attach legal consequences thereto.<sup>200</sup> If the parties do not envisage legal consequences, the agreement between them is not a contract. This legal fact is known as a juristic act.<sup>201</sup> In addition, a contract that exists between two or more persons is a multilateral legal act, usually two-sided because two persons or two groups of persons are in relationship with each other<sup>202</sup>.

The law of contract in South Africa is “essentially a modernised version of the Roman-Dutch law of contract”, which is itself rooted in Roman law.<sup>203</sup> Over the years, the law of contract in South Africa has developed and currently provides for a legal framework by which contractual parties can conclude business and exchange resources, knowing that the law will uphold their agreements and, if necessary, enforce the terms and conditions. Therefore, the law of contract in South Africa underpins and regulates private enterprise in the interest of fair dealing, subject to the fulfilment of the contractual requirements.

The basis of a contract is the consensus reached between the contracting parties as to their respective legally binding rights and duties (responsibilities).<sup>204</sup> This contract is a reciprocal contract in which rights and duties are created for all parties to the contract. A case in point is a bank who undertakes to advance money to a borrower, while the latter undertakes to repay the money<sup>205</sup> with interest over an agreed period. Therefore, the bank has a duty to provide the borrowed money to the borrower and the borrower has a right to claim performance from the bank. However, on the converse side, the bank has

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<sup>198</sup> Van der Merwe *et al Contracts* 8

<sup>199</sup> Or their agents

<sup>200</sup> Fouchè *et al Contracts* 34

<sup>201</sup> Nagel *et al Business Law* 14

<sup>202</sup> Fouchè *et al Contracts* 34; Christie *Law of Contract* 23 and Kerr *Law of Contracts* 41 & 45

<sup>203</sup> Du Plessis *et al Law of contract* 11

<sup>204</sup> Christie *Law of Contract* 437 and Kerr *Law of Contracts* 3, 4 & 41

<sup>205</sup> Kerr *Law of Contracts* 523

a right to receive repayment at interest, while the borrower has a duty to pay the borrowed money back with interest over the agreed period.<sup>206</sup>

The agreement between parties need not be expressed in a particular noticeable form in order to constitute a contract.<sup>207</sup> The law recognise that the agreement may either be:

- an expressed contract and terms, whether orally or in writing,<sup>208</sup> and
- tacit contracts and terms, where the intention of the parties are determined by their implied conduct and actions.<sup>209</sup>

In order to be recognised as a valid and binding contract, the formation of an agreement must satisfy the following requirements:<sup>210</sup>

- a. Consensus: the minds of the parties must meet on all material aspects of their agreement;
- b. Capacity: the parties must have the necessary capacity to contract;
- c. Formalities: where the agreement required, unusually, to be in a certain form (for example in writing and signed), these formalities must be adhere to<sup>211</sup>;
- d. Legality: the agreement must be lawful, that is not prohibited by statute or common law;
- e. Possibility: the obligations undertaken must be capable of performance when the agreement is entered into, and
- f. Certainty: the agreement must have a definite or determinable content, so that the obligations can be ascertained and enforced.

According to the law of contracts, the contractual parties has the freedom to contract, which means that the individuals who want to enter into an agreement are free to decide whether, with whom, and on what terms they want to enter into a contractual

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<sup>206</sup> Christie Law of Contract 423 & 435 -436

<sup>207</sup> Goldblatt v Freemantle 1920 (AD) 123

<sup>208</sup> Van der Merwe *et al* Contract 152

<sup>209</sup> Van der Merwe *et al* Contract 152

<sup>210</sup> Hutchison *et al* Contract 6; Otto & Otto *The National Credit Act Explained*43

<sup>211</sup> Goldblatt v Freemantle 1920 AD 123

relationship.<sup>212</sup> The terms of a contract is, however, open to abuse and it is up to the law and courts in South Africa to provide for the fair operation of the particular contract. Van Der Merwe *et al* stated as follows<sup>213</sup>:

The extent to which the legal systems accept responsibility to ensure justice by means of the principles and rules, which apply to specific areas of the law as well as through more general concepts, may vary considerably.

In *Barkhuizen v Napier*<sup>214</sup> the honourable judge made the remark that public policy "... imports the notions of fairness, justice and reasonableness ..." and that public policy would prevent enforcement of a contractual term if its enforcement would be "... unjust or unfair ..."<sup>215</sup> However, in social reality equality seldom exists and many contracts are entered into out of need.<sup>216</sup> It repeatedly occurs that the "weaker" party is powerless and may have to surrender to the terms of the "stronger" party's will without the option of negotiation.<sup>217</sup>

Consumer protection measures used to be antiquated and disorganised. South Africa needed to develop and implement a comprehensive framework of legislation, policies, and government authorities to regulate consumer protection by enhancing consumer rights and eliminate improper business practices.<sup>218</sup> As a result, the legislator has attempted to protect consumers from abuse by introducing consumer protection legislation (National Credit Act 34 of 2005<sup>219</sup> and the Consumer Protection Act 68 of

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<sup>212</sup> Van der Merwe *et al Contract: General Principles* (2007) para 1.3.4 page 11

<sup>213</sup> Van der Merwe *et al Contract General Principles* (2007) page 317

<sup>214</sup> 2007 5 SA 323 CC

<sup>215</sup> Christie *Law of Contract* 19

<sup>216</sup> Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 14

<sup>217</sup> Hopkins 2003 TSAR 153 and Hawthorne 1995 THRHR 157 and 163

<sup>218</sup> Jacobs *et al. Fundamental consumer rights* (2010) PELJ (13) 303

<sup>219</sup> See s61, 62 and 66 of the NCA dealing with unfair discrimination and Chapter 4 Part C as well as s92 that steer clear of general provisions relating to unconscionable, unfairness, unreasonableness in favour of targeting specific practices relating to the making of contract. However the NCA is not stating that reckless credit lending is considered to be a contract that is "*unconscionable, unfair and/or unreasonable*" and that is challenge with the NCA and important for the purpose of this dissertation.

2008<sup>220</sup>). For example, if a consumer wants to enter into a credit agreement with a registered credit provider, the credit agreement will be regulated by the NCA. However, if the consumer wants to purchase good and/or services from a supplier, and the transaction does not constitute a credit agreement, the Consumer Protection Act will regulate that particular agreement. The Consumer Protection Act is not applicable to credit agreements that falls within in the scope of the NCA.<sup>221</sup>

In this study, it is appropriate to focus on the general concept that motivates the rules governing the operation of a contract between the contractual parties. Such a general concept in the South African legal system is “good faith” (*bona fide*).<sup>222</sup> Good faith is a fundamental concept in all civil law systems, with a long history going back to Roman law. Yet, it is a legal system whose nature and content are controversial and gravely misunderstood. This controversy was evident in the constitutional court case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*.<sup>223</sup> The court indicated that the matter of good faith will continue to enjoy attention when addressing the role of good faith in contracts. Even the Consumer Protection Act<sup>224</sup> emphasise in section 40 that parties to a contract should act in good faith and the parties to the contract should refrain from behaving in an improper and unconscionable manner that is against the *boni mores*.<sup>225</sup>

It appears difficult to define the concept of “good faith”. A precise, positive, and unequivocal meaning seems elusive. In the long run, a merely functional definition of the concept seems to suffice; that is, good faith is the standard used to judge the behaviour of the parties to a contract, which standard includes that the parties should behave honestly and fairly when dealing with each other.<sup>226</sup> This notion is the corner stone in the law of contract on which the South African courts relay heavily and that

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<sup>220</sup> See s 8 & 9 of the Consumer Protection Act in regards to unfair discrimination. However, the term to prevent the abuse by a stronger contractual party is not applicable to credit agreements.

<sup>221</sup> Scholtz *et al* Guide to the National Credit Act 1-8

<sup>222</sup> *Brisley v Drotzky* 2002 (4) SA (1) SCA 12 and 27 *et seq.*

<sup>223</sup> 2012 (1) SA 256; 2012 (3) BCLR 219 (CC); Brand (2009) SALJ 71.

<sup>224</sup> No 68 of 2008.

<sup>225</sup> Jacobs *et al. Fundamental consumer rights* (2010) PELJ (13) 347.

<sup>226</sup> Hutchinson *et al. The law of contract* 39 & 451.

comes back to the doctrine of freedom to contract: Contractual parties must be able to negotiate freely on the terms of their agreement, and full effect should be given to the agreement – although this doctrine is not absolute.<sup>227</sup>

In *Brisley v Drotsky*<sup>228</sup> the parties entered into a standard form of a lease agreement for a residential premise. The fact that the contractual parties signed a standard form of lease agreement indicated that the parties probably not properly negotiated the contract. It gave rise to the question whether there was even a freely negotiated agreement at all.<sup>229</sup> Consequently, the courts indicated that the role of good faith was merely an underlying principle of the contract law; a principle that considers the underlying existing substantive rules and doctrines, and does not give rise to a substantive ground or defence enabling the court to set aside a contract or refuse to enforce a contractual term.<sup>230</sup>

Good faith most certainly can play a fundamental and informative role in the development of the principles of contract law, especially when entering into certain types of contracts or with certain specific contractual relationships.<sup>231</sup> It is argued that the modern law of contract should provide leniency to judges when applying the good faith principle and reasonableness in contracts between parties when ensuring fairness and protection to the weaker party.<sup>232</sup> The purpose of good faith in the law of contract is to represent a society's view of what is fair, just, and reasonable between contractual parties.<sup>233</sup> This purpose of good faith was reiterated in section 48 of the Consumer

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<sup>227</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 36; Hawthorne (2004) *THRHR* 295; Christie *et al* Law of Contract 14

<sup>228</sup> 2002 (4) SA 1 (SCA) 10.

<sup>229</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 16-17 and also see *Barkhuizen v Napier* CC 2007 (5) SA 323 (CC) 369-370

<sup>230</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 15-16; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 40-47 and *Bhana & Pieterse* (2005) *SALJ* 876.

<sup>231</sup> Brand (2009) *SALJ* 81

<sup>232</sup> Mupangavanhu (2015) 48 1 *De Jure* 120 and Brand (2009) *SALJ* 71

<sup>233</sup> Naude (2010) 124 *SALJ* 515

Protection Act<sup>234</sup> in which legislation provided the consumer with the right to fair, just and reasonable terms and conditions in terms of a contract.<sup>235</sup>

Compared with a credit agreement, which in itself is also a standard form of contract, good faith in this sense may be developed by way of a specific application or by imposing a duty on the contractual parties, that is, the credit provider, and the consumer, to act fairly and reasonably.<sup>236</sup> Hawthorne criticised the court in the Afrox-case<sup>237</sup> in that although the court acknowledged the widespread use of modern standard form contracts, the court did not consider the effect such contracts have on consensus. A contractual party, such as a consumer entering into a standard credit agreement, has no freedom to contract or to negotiate the credit agreement terms and conditions.<sup>238</sup> Such limitation of freedom to contract comes back to the statement that a consumer enters into a credit agreement because of a necessity that results in an inequality of bargaining power.<sup>239</sup> Generally, consumers are ignorant of the terms and conditions in a standard form credit agreement or they are generally unable to understand the terms and conditions. Most standard forms of credit agreements are drafted by lawyers in language that are commonly incomprehensible to the nonprofessional.<sup>240</sup>

The NCA attempted to overcome this difficulty by stating that all credit documentation must be produced in plain and understandable language<sup>241</sup>. Otto describes plain language as "... languages that enable an ordinary consumer with average literacy skills and minimal credit experience to understand the content, significance, and import of the documentation."<sup>242</sup> Generally, all contractual parties to any kind of contract should

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<sup>234</sup> No 68 of 2008

<sup>235</sup> Mupangavanhu (2015) 48 1 *De Jure* 131

<sup>236</sup> Hutchinson (2011) *SALJ* 30

<sup>237</sup> *Afrox Healthcare BPK v Strydom* 2002 (6) SA 21 (SCA)

<sup>238</sup> Hawthorne (2004) *THRHR* 299

<sup>239</sup> Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 14, Christie *Law of Contracts* 14 and Naude 2009 *SALJ* 505 529

<sup>240</sup> Sutherland 2009 *Stell LR* 61 and the minority decision of Sachs J in *Barkhuizen v Napier CC* 2007 (5) SA 323 (CC)

<sup>241</sup> s 64

<sup>242</sup> Otto *The NCA Explained* 55 and s 64(1) and (2).

demonstrate a minimum degree of respect for the interests of the other party, to the point that he does not use the contract (or in this case, the credit agreement) to protect his own interest unreasonably: good faith thus requires “ordinary business decency”.<sup>243</sup>

However, it appears that the appeal courts have been expressly unwilling to recognise good faith as a “free-floating”<sup>244</sup> basis for judicial intervention and control when considering the consensual contractual terms.<sup>245</sup> In fact, the courts have rejected the notion that they have the discretion to disregard the good faith contractual principles if said principles are regarded to be unreasonable or unfair.<sup>246</sup>

Good faith is a specific duty that will also include the concepts of public policy and public interest, as is seen with the National Credit legislation. The legislature attempted to ensure that the credit provider is not protecting its own interest over that of the consumer. Given the considerable imbalance of power between the credit providers and consumers under the previous credit legislation, the South African Law Commission attempted to level the bargaining position between the credit provider and the consumer when the NCA was introduced.<sup>247</sup> Consequently, the NCA comprises of provisions aimed at ensuring that contract terms are not unfair, unreasonable, or unjust, which will be discussed in the following paragraphs.

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<sup>243</sup> Van der Merwe *et al Contract: General Principles* (2007) page 320. See also *Standard Bank of South Africa Ltd. v Prinsloo (Prinsloo Intervening)* 2000 (3) SA 576 (C) 585, and also *Shoprite Checkers v Bumpers Schwarmas CC* 2002 (6) SA 202 (C) 215.

<sup>244</sup> Prof. Hutchinson explained the “free-floating” of the good faith principle on page 743-744 of (2011) SALJ 30.

<sup>245</sup> *Brisley v Drotsky* 2002 (4) SA (1) SCA, *Afrox Healthcare BPK v Strydom* 2002 (6) SA 21 (SCA) and *Napier v Barkhuizen* 2006 (4) SA 1 (SSA) 6-7.

<sup>246</sup> *Brisley v Drotsky* 2002 (4) SA (1) SCA, *Afrox Healthcare BPK v Strydom* 2002 (6) SA 21 (SCA) and *Napier v Barkhuizen* 2006 (4) SA 1 (SSA) 6-7

<sup>247</sup> *Stoop* 2009 (21) SA Merc LJ



### 3.3.1. Unlawful agreements

An underlying principle of the law of contract (*pacta sunt servanda* or sanctity of contract) is that agreements seriously concluded should be enforceable.<sup>248</sup> However, agreements that are clearly damaging to the interests of the community as a whole, whether they are contrary to law or morality (*contra bonos mores*), or if they are in contradiction to social or economic interest, should not be enforceable.<sup>249</sup> Said contracts are illegal on the grounds of public policy.<sup>250</sup> The law regards illegal or unlawful contracts either as void and thus unenforceable, or as valid but unenforceable. Hence, contracts of a particular kind may be prohibited in terms of legislation or may be prohibited in terms of public interest or policy.<sup>251</sup> Therefore, the NCA also included unlawful agreements, as it is part of the common law pertaining to the law of contracts.

The NCA declares certain credit agreements as unlawful, and forbids certain individual terms and provisions in credit agreements.<sup>252</sup> Section 89 of the NCA declares that an entire credit agreement will be deemed unlawful in the following circumstances<sup>253</sup>:

- agreements concluded with an unassisted un-emancipated minor;
- agreements concluded with a person who have been declared mentally unfit;
- agreements concluded with a person under an administration order, without the administrator's consent;
- agreement resulted from negative option marketing;
- agreement concluded with an unregistered credit provider;
- agreements concluded by a credit provider who was subject to a notice from the NCR or a provisional regulator to stop extending credit.

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<sup>248</sup> Christie *The Law of Contract in SA* 12, also see *Brisley v Drotsky* 2002 (4) SA (1) SCA, and *Napier v Barkhuizen* 2006 (4) SA 1 (SSA)

<sup>249</sup> Christie *The Law of Contract in SA* 12

<sup>250</sup> *Bank of Lisbon and South Africa Ltd. Venter & another* 1990 4 SA 463 (A) and *Brisley v Drotsky* 2002 (4) SA (1) SCA

<sup>251</sup> Otto 2009 TSAR 417

<sup>252</sup> Otto & Otto *the National Credit Act Explained* 46 and Scott *et al The Law of Commerce* 184

<sup>253</sup> Kelly-Louw *Consumer Credit Regulation in SA* 196-198

However, a credit agreement will not be considered unlawful if the consumer deliberately (directly or indirectly) induced a credit provider to believe that she or he has the legal capacity to enter into a credit agreement. It will also not be considered unlawful if the consumer fails to disclose that she or he is subject to an order restricting their ability to conclude a credit agreement<sup>254</sup>, that is, to say the consumer acted *mala fide*. If a credit agreement is unlawful, only an order of court must declare the agreement void<sup>255</sup> and unenforceable as from the date the credit agreement was entered into.<sup>256</sup>

Comparing these provisions of the NCA to the common law, the NCA does not grant the same discretion to the courts as the common law does<sup>257</sup>. In terms of the common law, neither party to an unlawful contract is entitled to restitution of performance if both acted improperly (the *par delictum rule*).<sup>258</sup> The party who is in possession of performance has a stronger right and both parties will forfeit their respective performances unless the court is prepared to relax the strict operations of the *par delictum rule* by doing simple justice between man and man.<sup>259</sup> However, in terms of the NCA, the court must retrospectively pronounce the particular agreement void if a credit agreement is unlawful.<sup>260</sup>

When the court has declared such an agreement void, the credit provider is required to refund all payments made by the consumer with interest to the consumer<sup>261</sup>. Furthermore, all the purported rights of the credit provider to recover money or goods delivered to the consumer are cancelled unless the court concludes that, in doing so, the consumer could be unjustly enriched<sup>262</sup>. Alternatively, the money or goods may be forfeited to the State.<sup>263</sup>

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<sup>254</sup> s 89(3)

<sup>255</sup> s 89(5)(b)

<sup>256</sup> s 89(5)

<sup>257</sup> Scholtz *et al* Guide to the National Credit Act 9-13

<sup>258</sup> Scholtz *et al* Guide to the National Credit Act 9-13

<sup>259</sup> Scholtz *et al* Guide to the National Credit Act 9-13, also see *Jaibay v Cassim* 1939 AD 537; *Boraine & Van Heerden* 2010a (73) *THRHR* 650 and *Van der Merwe et al* para 7.3.2.

<sup>260</sup> s 89(5)(a)

<sup>261</sup> s 89(5)(b)

<sup>262</sup> s 89(5)(c)(i), also see *National Credit Regulator v Opperman & others* 2013 (2) SA 1 (CC)

<sup>263</sup> s 89(5)(c) (ii). Also see *Fouché et al Contracts* 163

These consequences are indeed extensive, because whatever order the court makes, the credit provider loses his security (if goods were delivered) and/or repayment (amount borrowed with interest), while performance is restored to the consumer. The assumption is that credit providers must avoid entering into a credit agreement that could constitute an unlawful credit agreement and that the NCA wants to ensure that the *bona fide* consumer is protected.<sup>264</sup>

Section 89 of the NCA does not consider a reckless credit agreement as an unlawful agreement; thus, the debt relief afforded in respect of a reckless credit agreement is limited to the relief set out in section 83 and does not extend to the relief provided in section 89(5) of the NCA in respect of unlawful credit agreements.<sup>265</sup> However, the NCA does not state that a reckless credit agreement is *ab initio* null and void as in the instances of unlawful credit agreements, which yet again indicates, that the NCA is not written in a clear and precise manner. This will be discussed in more detail in Chapter 6 of this study.

### 3.3.2. Unlawful provisions in agreements

The NCA stipulates that a credit agreement must not contain unlawful provisions. In this regard, the NCA provides a long list of provisions deemed unlawful. Only a few applicable to the comparative analysis are mentioned:<sup>266</sup>

- defeating the purposes or policies of the NCA;
- deceiving the consumer;
- purporting to waive the consumer's rights or depriving the consumer of them;
- purporting to avoid the credit provider's statutory duties, to override the NCA, to authorise the credit provider's failure to do something required by the NCA, or to do something unlawful in terms of the NCA, or

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<sup>264</sup> Otto & Otto *The National Credit Act Explained* 47

<sup>265</sup> Van Heerden & Boraine 2011 (Vol 2) *De Jure* 12

<sup>266</sup> s 90(2) and see Kelly-Louw *Consumer Credit Regulation in SA* 200-204

- waiving common law rights prescribed by the Minister.<sup>267</sup>

As with unlawful agreements, only a court can declare such unlawful provisions in a credit agreement void<sup>268</sup>. The unlawful provisions will be void from the date that it is purported to take effect and should be removed from the rest of the credit agreement, which will remain valid and in full force and effect. Otherwise, the credit provider may alter the unlawful provision to the extent required to render it lawful, if it is reasonable to do so regarding the agreement as a whole.

Alternatively, the court may declare the entire credit agreement unlawful<sup>269</sup> and may order that the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest. Furthermore, all the rights of the credit provider to recover any money paid or goods delivered to the consumer under that agreement are:

- cancelled<sup>270</sup>, or
- forfeited to the State<sup>271</sup>, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer.

It does not appear to be desirable to declare a whole credit agreement unlawful when considering this stipulation in the NCA. Compared to the approach of the courts in the past, the courts would currently rather separate an unlawful provision from the credit agreement and enforce the remainder of the contract, unless such separation will leave the parties with a contract substantially different from the one the parties originally intended.<sup>272</sup> Surely the courts will apply the same principle<sup>273</sup> they had in the past when

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<sup>267</sup> Reg 32. The Minister has prescribed three rights or remedies that may not be waived: the defence of *except i errore calculi* (the exception of a wrong calculation), *exceptio non numeratae pecuniae* (the exception that money was not paid over), and *exceptio non causa debiti* (the exception that no cause of action exists).

<sup>268</sup> s 90(3) and also see Scholtz *et al* Guide to the National Credit Act 9-14

<sup>269</sup> s 90(4)

<sup>270</sup> s 89(5)(c)(i)

<sup>271</sup> s 89(5)(c)(ii)

<sup>272</sup> *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

<sup>273</sup> When a number of contractual terms fall foul of the dictates of public policy.

considering an credit agreement and whether the provision constitute unlawfulness and would not exploit this unusual discretion.

Unlawful provision also does not refer to, or include, reckless credit lending; therefore, the purpose of referencing this section of the NCA seems to be irrelevant. Although, in Chapter 5 of this study, reference will be made, supported by literature, that there are credit providers who include a clause in their credit applications and agreements stating that the consumer fully understands and appreciates the risks, cost and obligations under the particular credit agreement, and that the South African courts have to date not found such a clause to be an unlawful provision.

It appears that including such a clause could:

- defeat the purpose or policies of the NCA;
- deceive the consumer;
- purporting to waive the consumer's rights;
- deprive the consumer of his/her rights;
- purport to avoid the credit provider's statutory duties;
- override the NCA;
- authorise the credit provider's failure to do something required by the NCA;
- do something unlawful in terms of the NCA, or
- result in the consumer's common law right being waived.

As a result a comparative analysis was done between section 90 (unlawful provisions of credit agreements), section 80 (reckless credit) and section 81 (prevention of reckless credit). The following has been found:

- i. One of the purposes or policies of the NCA are to prevent credit providers to enter into a reckless credit agreement.<sup>274</sup> If the credit provider thus includes a clause to confirm with the consumer she or he understands and appreciates the risks, cost

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<sup>274</sup> s 3(c)(ii) also see Renke 2011 (74) THRHR 2009

and obligations under the credit agreement, the credit provider is complying with the purpose of the NCA.

- ii. The insertion of the clause is not to deceive the consumer, as it is part of the credit application form; therefore, it is clear and precise to the content and application of such a clause.
- iii. The insertion of the clause will not result in the consumer waiving any rights given to the consumer in terms of the common law of the NCA.
- iv. The clause does not result in the credit provider avoiding their statutory duties, because the credit provider will still do an assessment as required.

Hence the importance of including unlawful credit agreements and unlawful provision within a credit agreement into this study regarding reckless credit. By including such a clause, the credit provider has complied with its duties in terms of the NCA. In addition, the credit provider has taken preventative steps to avoid entering into a credit agreement that could have been declared reckless credit agreement if the consumer did not understand the risk, cost and obligations in terms of the particular credit agreement.

### **3.3.3. Law of unjustified enrichment<sup>275</sup>**

Once the court has found a credit agreement to be reckless lending, the court has discretion to make an order in terms whereof the agreement can be suspended or partially or fully wiped off.<sup>276</sup> However, the NCA is silent as to what should happen in instances where the parties have already performed in terms of the reckless credit agreement. However, what about restoration? Should the credit provider not be able to reclaim any amount of the credit granted to the consumer or the return of the goods delivered to the consumer in terms of the instalment agreement or mortgage agreement?<sup>277</sup> Moreover, on the flip side: Should the consumer not be entitled to

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<sup>275</sup> Clover *The Doctrine of Duress in the Law of Contract and Unjustified Enrichment in South Africa* October 2003

<sup>276</sup> s 83(2)

<sup>277</sup> Boraine & Van Heerden 2010a (73) *THRHR* 652

reclaim any payments made by the consumer to the credit provider? If there is no restoration, the above will result in another cause of action, which is unjustified enrichment. The law of unjustified enrichment is that branch of the law that applies, in the simplest of terms, to situations where one person's estate has been unjustifiably enriched at the expense of another person.

Eiselen and Pienaar define an obligation arising from unjustified enrichment succinctly as: "An obligation arising whenever one person's estate has been increased at the expense of another person's estate and sufficient legal ground (*causa*) for the retention of such increase is lacking."<sup>278</sup>

In conjunction with the law of contract and the law of delict, the law of unjustified enrichment constitutes the third main source of obligations in South African law. However, this was not always the case; the Roman and classical Roman-Dutch idea determined that these obligations were quasi-contractual. This view remained popular in the formative years of South African law. Conceptually this meant that cases of unjustified enrichment were traditionally not understood as a distinct type of obligation, but were treated as a peculiar sub-species of contract<sup>279</sup>. However, the trail-blazing work of especially De Vos and Scholtens in the mid-20th century led to the abandonment of the quasi-contract theory and recognition of the fact that the field of unjustified enrichment constitutes a separate source of obligations in its own right.<sup>280</sup>

The goal of the law of unjustified enrichment is either to reverse a transfer of value (usually a transfer of money or property, although enrichment can occur by consumption) that has occurred without good cause, or to restore the aggrieved party to the position the person was in, in a patrimonial sense, prior to the making of the undue

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<sup>278</sup> Eiselen & Pienaar *Unjustified Enrichment* 3.

<sup>279</sup> See on this point *Wille's Principles* 630-1; Zimmermann *The Law of Obligations* 837. This idea had a particularly strong effect on English law, after the idea was received into English law in the case of *Moses v Macferlan* [1760] 2 Burr 1005. Birks *Restitution* 29 describes this approach as the "implied contract heresy".

<sup>280</sup> Eiselen & Pienaar *Unjustified Enrichment : A Case book*; Lotz & Brand "Enrichment" *LAWSA* (2<sup>nd</sup> ed) Vol 9 207; Sonnekus "Unjustified Enrichment in SA" 63 and Du Plessis *The South African Law of Unjustified Enrichment* 217

transfer of value that has resulted in the impoverishment of her or his estate. Hutchison defines an unjustified enrichment as taking place "... when there is a shift of wealth from one person's estate to another's without a good legal ground or cause for this shift."<sup>281</sup>

There are four requirements to prove liability for unjustified enrichment, viz. <sup>282</sup>

1. The defendant must have been enriched.
2. The plaintiff must have been impoverished.
3. The defendant's enrichment must have been at the expense of the plaintiff.
4. The enrichment must be unjustified (*sine causa*).

Element four requires that, in order to institute an enrichment action for the recovery of a performance in South African law, it is necessary for the plaintiff to show, in addition to the fact that the defendant was enriched at the plaintiff's expense, that the enrichment occurred *sine causa*. This means it must be clear that there was no legally recognised ground for the enrichment.

In addition to the general elements of enrichment, the specific factors and requirements applicable to the relevant traditional enrichment action must also be proved in order for the plaintiff to have a restitutionary remedy in terms of one of the actions. The purpose of the restitutionary remedy is that the parties are entitled to be restored to their previous positions.<sup>283</sup> For example if the parties entered into a sale agreement the seller must return the purchase price to the purchaser and the purchaser must return the subject matter of the sale.

In South Africa, the Supreme Court of Appeal has been quite happy to recognise and impose liability in situations and circumstances where liability would not have existed under the traditional enrichment actions in Roman or Roman-Dutch law. However, the

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<sup>281</sup> Hutchison *Contract Law* 9

<sup>282</sup> Du Plessis *The South African Law of Unjustified Enrichment* 24, also see Koppel *Business Law* 115; *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 (3) SA 482 (SCA) at 490D and *Kudu Granite Operations* 2003 (5) SA 193 (SCA) at 202G-H

<sup>283</sup> Du Plessis *The South African Law of Unjustified Enrichment* 72, *Laco Parts (Pty) Ltd t/a ACA Clutch v Turners Shipping (Pty) Ltd*. 2008 (1) SA 279 (W) on page 8 and *Fakude Redundant or relevant?* April 2015: 36 *De Rebus* 69



court will only do so if modern circumstances and equities necessitate it, and if a particular form of traditional enrichment action is amenable, in some way, to development. The traditional actions will remain of paramount importance. It will only be extended in an *ad hoc* fashion.<sup>284</sup>

In terms of the NCA, the law of unjustified enrichment read together with unlawful agreements seemed to ignore the common law principles. Subsequently two cases will be compared to analyse the approach the courts took in terms of section 89(5)(c). For the purpose of this study, section 89 will be read together with section 40(4) of the NCA.

Section 40(4) reads as follows:

- (4) A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89.

Section 89(5) reads as follows:

**89. Unlawful credit agreements**

- (5) If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that-
  - (a) the credit agreement is void as from the date the agreement was entered into;

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<sup>284</sup> See on this point *Nortje & 'n ander v Pool NO* 1966 (3) SA 96 (A) at 137; *Kommissaris van Binnelandse Inkomste & 'n ander v Willers & 'n andere* 1994 (3) SA 283 (A) at 333; *Bowman, De Wet and Du Plessis NNO & others v Fidelity Bank Ltd* 1997 (2) SA 35 (A) at 40A-B; *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 488-9; *First National Bank of Southern African Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 971; LAWSA Vol 9 §75, *ABSA Bank Ltd. V Leech* 2001 (4) SA132 ISCAI; *Kudu Granite Operations (Pty) HO v Caterna Ltd.* 2003 (5) 193 (SCA), *Jacjuesson v Minister of Finance* 2006 (3) SA 334 (SCA) and *Leeuw v First National Bank Ltd.* 2010 (3) SA 410 (SCA)

- (b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated –
  - (i) at the rate set out in that agreement; and
  - (ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer; and
- (c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either –
  - (i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or
  - (ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.

In *Cherangani Trade and Investment 107 (Edms) Bpk v Mason NO and Others*<sup>285</sup> the Free State High Court (FSHC) held that the credit agreement was unlawful in terms of section 89, because at the time that the parties entered into the particular agreement, the credit provider was not a registered credit provider<sup>286</sup> and had not applied for registration<sup>287</sup>. The FSHC acknowledged that s 89(5) provides discretion to the court when having to decide whether the consumer would be enriched by the cancellation of the credit provider's rights. Consequently, the court held that in this case the consumer would have been enriched, and accordingly declared the credit provider's right to recover payment from the particular consumer, forfeited to the State.<sup>288</sup>

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<sup>285</sup> 2009 ZAFSHC 30 (unreported case, no 6712/2008)

<sup>286</sup> As per s 40

<sup>287</sup> As per s 45

<sup>288</sup> As per s 89(5)(c0(ii))

In the case of *NCR v Opperman*<sup>289</sup> Mr Opperman lent R7 million to Mr Boonzaaier during 2009 to assist with property development. Mr. Opperman was not registered as a credit provider. When Mr. Boonzaaier admitted that he could not repay the debt, Mr. Opperman applied for the sequestration of Mr. Boonzaaier's estate. During the proceedings concerns about the constitutional validity of section 89(5)(c) arose. The Western Cape High Court (WCHC) declared on 17 April 2012 that section 89(5)(c) was inconsistent with section 25 of the Constitution as it permits the arbitrary deprivation of a person's property. Section 25 of the Constitution states that every person has a right not to be deprived of their property. As a result, on 10 December 2012 the Constitutional Court concurred with the WCHC. The Constitutional Court found the provision to be a disciplinary measure to protect consumers against unregistered credit providers, which decision was the same as in *Cherangani Trade and Investment 107 (Edms) Bpk v Mason NO and Others*<sup>290</sup>. The provision of s 89(5)(c) compels a court to declare the agreement void and order that the unregistered credit provider's right to claim restitution based on unjustified enrichment of the consumer, be cancelled or forfeited to the state, with no discretion to a court to keep the restitution claim intact. However this provision is in contradiction to section 25 of the Constitution and therefore section 89(5)(c) is invalid.<sup>291</sup> Hence, the court held that the common law position regarding unlawful contracts would prevail until the legislature replace it.

Section 89 is aimed at protecting consumer against unregistered credit providers, which is in line with the general purpose of the NCA.<sup>292</sup> Section 89(5)(c), in its original format, prescribed to the court that the court *must* give a particular order in cases where a credit agreement was entered into by an unregistered credit provider. The court has no discretion and may only make one of the following orders:

- a. declare the credit agreement as void; and

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<sup>289</sup> *National Credit Regulator v Opperman & others* 2013 (2) SA 1 (CC), also see *Evans v Smith & another* 2011 ZAFSHC 30, *Contra Black v Stroberg* 2013 ZAKZPHC 16 and *Friend v Sendal* 2012 ZAGPPHC 62

<sup>290</sup> 2009 ZAFSHC 30 (unreported case, no 6712/2008)

<sup>291</sup> Which was concurred in *Chevron SA (Pty) Ltd v Wilson t/a Wilsons's Transport and others* (CCT 88/14) [2015] ZACC 15 (decided on 5 June 2015).

<sup>292</sup> Protecting consumers, also see section 3 of the NCA.

- b. order the credit provider to refund the consumer any money paid; and
- c. order that all the purported rights of the credit provider are either cancelled, or forfeited to the State, if the court finds that cancelling those rights in these circumstances would unjustified enrich the consumer.

The effect of this provision is to limit the credit provider's common law right to restitution. The Constitutional Court found this to be in contravention of section 25 of the Constitution and therefore held that section 89(5)(c) is unconstitutional. Therefore, if parties entered into an agreement, which is subsequently found to be void, the parties to the agreement may claim restitution based on the cause of action such as unjustified enrichment, if the requirements of the action are met. The option is to remove the second requirement in section 40 introducing the threshold of R500 000 from the NCA, and allow the court judicial discretion.

The NCA has been amended accordingly<sup>293</sup>, which included the alteration of section 40(1).<sup>294</sup> However the existing threshold remains at R500,000 as per the original Act, but may be reduced to zero to have compulsory registration for all credit providers dealing at arm's length.<sup>295</sup>

Should the court found the credit agreement to be reckless lending by the credit provider, section 83(2)(a) provides the court with the power to order the setting aside of all or any of the rights and obligations of the consumer under that reckless credit agreement. Conversely, this section of the NCA does not prohibit or limit the credit provider from claiming back the money or goods delivered (restitution) in terms of another cause of action, for instance unjustified enrichment as the case may be with unlawful credit agreements.<sup>296</sup>

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<sup>293</sup> As discussed throughout this study.

<sup>294</sup> See paragraph 2.5 of this study

<sup>295</sup> This matter is discussed in detail in paragraph 6.3.1.

<sup>296</sup> Boraine & Van Heerden 2010a (73) *THRHR* 653

### 3.3.4. Conclusion

Section 81(3) of the NCA clearly provides that a credit provider must not enter into a reckless credit agreement with a prospective consumer. Section 3(c) (ii) of the NCA also states that it is one of the purposes of the NCA to discourage reckless credit.

However, the NCA does not state that credit agreements that give rise to reckless credit lending are *ab initio* null and void as is the case with unlawful credit agreements in terms of section 89 and section 90 of the NCA. The NCA states that the Court may declare a credit agreement entered into after 1 June 2007 to be reckless and may then, depending on the type of reckless credit, *inter alia* set aside all or part of the consumer's rights and duties<sup>297</sup> in terms thereof or suspend<sup>298</sup> its operation.

The NCA is not clear in all respects as to how the courts should exercise their discretion in this regard. Where the performance in terms of the credit agreement has not yet occurred, the court may rule that the consumer has no further rights and obligations. In effect, for all practical reasons this will amount to the cancelation of the credit agreement and it will mean that the contractual relationship between the credit provider and the consumer ends.

However, what about the scenario where partial performance occurred in terms of the credit agreement as well as the performance of the *merx* in terms on the contract? The NCA does not provide a clear guideline in this regard, and the issue subsequently presents itself as to the way in which the provisions of the NCA should be applied by the court?

The NCA does not provide detailed information regarding restoration; thus, whether the credit provider will be able to reclaim any amount of the credit granted or goods delivered to the consumer, and whether will be entitled to reclaim any payments made by the consumer to the credit provider. Section 83(2)(a) states explicitly that the court

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<sup>297</sup> s 83(2)(a)

<sup>298</sup> s 83(2)(b)

may set aside all or any of the rights and obligations of the consumer **under that agreement** (reckless credit agreement), but the section does not prohibit or limit the credit provider from claiming money or goods delivered in terms of another cause of action such as unjustified enrichment.<sup>299</sup>

The mentioned common law remedies have not yet been tested in a court of law in this context, which pose some risk for the claimant/plaintiff. Due to the vagueness and uncertainty of section 83(2)(a) of the NCA a court will have to interpret it in terms of section 3 of the NCA where the purpose of the NCA is set out.<sup>300</sup>

### **3.4. Law of contracts versus credit agreements**

A credit agreement is a contract in which the financial institution enters into an agreement with a consumer, in terms of which the financial institution (known as a credit provider) will pay an amount or amounts to the consumer as applied for by the consumer.<sup>301</sup> In return, the consumer will make deferred repayment to the credit provider<sup>302</sup> for which the credit provider may charge a fee or interest.<sup>303</sup>

Consequently, a credit agreement is a contract in terms whereof the parties (both the credit provider and consumer) have reached consensus as to their respective legally binding rights and duties (responsibilities). The credit agreement is a reciprocal contract, in which rights and duties are created for both the credit provider and the consumer in the particular credit agreement.

The NCA granted many rights to consumers, though only a few rights on the credit providers. The same goes for the duties, because for every right the consumer has, the credit provider carries a duty. The rights and duties are discussed in detail in the book

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<sup>299</sup> Boraine& Van Heerden 2010a (73) *THRHR* 650  
<sup>300</sup> This will be discussed in more detail in Part II of this study.  
<sup>301</sup> s 8(3)(a)  
<sup>302</sup> s 8(3)(a)(ii)(aa)  
<sup>303</sup> s 8(3)(a)(b)

written by Otto<sup>304</sup>, of which only those rights and duties that are applicable to this dissertation will be depicted in the following table:

**Table 1**

	<b>Rights</b>	<b>Duties</b>	
<b>Consumer</b>	1. To apply for credit and non-discrimination <sup>305</sup>	1. To assess credit application using its own evaluation methods (which must be fair and objective <sup>306</sup> ) to determine whether there is a reasonable possibility that the consumer will be able to repay the loan <sup>307</sup> in order to prevent reckless credit agreements. <sup>308</sup> The credit application was also amended to provide for a more restrictive measurement. <sup>309</sup>	<b>Credit provider</b>
	2. To receive documentation in the official language that the consumer reads or understand <sup>310</sup>	2. To provide the documentation in the prescribed form in plain language <sup>311</sup> and take reasonable steps to ensure that the consumer has a general understanding of the risk, cost and obligations under the credit agreement <sup>312</sup> . If the credit provider fails to comply with this duty, the credit agreement may be considered by the court to be a reckless credit agreement. <sup>313</sup>	
	3. To apply for debt review and rearrangement of credit obligations <sup>314</sup> and whether a credit agreement appears to be reckless <sup>315</sup>	3. The credit provider is required to assist with any reasonable request by the debt counsellor to give support to the process, for example to determine the consumer's state of indebtedness, the	

304 Otto & Otto *The National Credit Act Explained* 54 - 79  
305 s 60  
306 s 82(1)  
307 s 81(2)  
308 s 81(3)  
309 Amended 81(2), also see discussion in Chapter 4 of this study  
310 s 63(1)  
311 s 64 (1) and (2)  
312 s 81(2)(i)  
313 s 80(1)(b)(i)  
314 s 78(1)  
315 s 86(6)(b)

		prospects for responsible debt re-arrangement <sup>316</sup> and investigation into the allegation of reckless credit lending. <sup>317</sup>	
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Derived from the summary in the table above, it appears that the legislature imposes a huge responsibility on the credit provider to ensure that the credit agreement entered into with the potential consumers is done in a responsible manner to make certain that the potential consumer can afford to repay the credit loan.

However, on the converse side, the only duty the potential consumer has to the application for a credit loan is to disclose fully and trustfully any request for information made by the credit provider as part of the assessment to prevent reckless credit lending and over-indebtedness.<sup>318</sup> If the consumer fails to comply with the duty imposed on her or him and the court finds that the failure of the consumer to do so materially affected the ability of the credit provider to make a proper assessment<sup>319</sup>, the failure to fulfil this duty will result in a complete defense in favour of the credit provider to an allegation that the particular credit agreement is reckless credit lending.<sup>320</sup>

If the court finds the credit agreement to be reckless credit granting, the Act states clearly that only the rights and obligations of the consumer will be partially or fully set aside.<sup>321</sup> No mention is made of the rights and obligations of the credit provider, nor does the Act make any mention to restitution.<sup>322</sup> The Act is silent in this regard.

### 3.5. Conclusion

A credit agreement is a specific type of contract to which the law of contract and the principles of a valid and enforceable contract is applicable. Without a doubt, a credit

<sup>316</sup> s 86(5)(a) and (b)

<sup>317</sup> s 80

<sup>318</sup> s 81(4)(a)

<sup>319</sup> s 81(4)(b)

<sup>320</sup> s 81(4)

<sup>321</sup> s 83(2)(a)

<sup>322</sup> The basic purpose of restitution is to achieve fairness and prevent the unjust enrichment of a party. Restitution is used in contractual situations where one party has conferred a benefit on another party but cannot collect payment because the contract is defective or no contract exists



agreement constitutes a reciprocal contract and that every right has an obligation as its counterpart. If the rights and obligations of the consumer to a reckless credit agreement are cancelled, it should imply that the rights and obligations of the credit provider will necessarily also fall away. However, the NCA does not state this clearly; in fact, the NCA is silent in this regard.

Against the general background as discussed in Chapter 3 of Part 1, the following parts will constitute a comparative analysis of the NCA and other relevant literature and legislation. Relating matters under scrutiny will be the discretion or power the South African courts have when dealing with reckless credit applications and the consequential orders that the Court may grant, particularly where either or both parties have already performed in terms of such a credit agreement, or if there is security attached to the particular credit agreement.

## PART II: APPLICATION OF THE NCA IN PRACTICE

### CHAPTER 4: APPLICATION FOR CREDIT

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#### 4.1. Introduction

In the law of contracts, the legal bond is formed by the parties themselves when determining the nature of their respective obligations, as long as the obligation(s) and bond lie within the limits of the law.<sup>323</sup> It is therefore imperative that the parties have the intention to conclude a contract that is lawful and enforceable: one party has the intention to make an offer to another party who in return accepts the offer.<sup>324</sup> Yet, not all contractual parties negotiate from a position of equality and the dominant party often takes the opportunity to lay down the terms of the contract.<sup>325</sup>

For many years, numerous South Africans have been induced into credit agreements of which they did not understand the terms and conditions and/or where the consumer could not afford to repay the credit.<sup>326</sup> Hence, the bargaining position was unequal in favour of credit providers. Many countries have adopted consumer protection legislation to regulate the credit-grantor and credit-consumer relationships because these relationships can give rise to abuse and exploitation.<sup>327</sup> Vote<sup>328</sup> substantiates the likelihood of exploitation:

A needy debtor, pressed by tightness of ready cash, will readily allow any hard and inhuman terms to be written down against him. He promises himself smoother times and better fortune before the day put into the commissary term, and thus hopes to avert the harshness of the agreement by payment; though such

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<sup>323</sup> Kerr *Law of Contract* (2002) 3

<sup>324</sup> Kerr *Law of Contract* (2002) 5

<sup>325</sup> Hopkins 2003 *TSAR* 153

<sup>326</sup> Otto & Otto *The National Credit Act Explained* 2 and Jordaan *The Credit Law of South Africa* 1

<sup>327</sup> Vessio "The Preponderance of the Reckless Consumer – The National Credit Bill 2005" 2006 (69) *THRHR* 649.

<sup>328</sup> Cited in *Graf v Buechel* 2003 (4) SA 378 (SCA) at 384A as well as in *Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another* (98/10) [2010] ZASCA 148; 2011 (2) SA 266 (SCA) ; [2011] 2 All SA 471 (SCA) (29 November 2010)

a hope, quite slippery and deceptive as it is, not seldom finds nothing at all to encourage it in the aftermath.

Some of the most important objectives of the NCA were related to the likelihood/reality of exploitation: to address the consumer's unequal bargaining position, control the use of remedies by credit providers, educate consumers, and provide consumers with relevant information regarding their credit agreements.<sup>329</sup> However, one of the important aspects of the NCA is that a consumer is entrenched with the right to apply for credit.<sup>330</sup> Any application for credit will constitute an invitation to do business.<sup>331</sup> Once the credit provider has done a proper assessment and determined whether the consumer can afford the credit agreement, the credit provider must provide the consumer with a pre-agreement statement and quotation.<sup>332</sup> Hereafter the consumer will have a five (5) business day cooling-off period<sup>333</sup> during which the consumer can decide whether she or he accepts the pre-agreement statement and quotation or not.<sup>334</sup> In terms of the law of contract, the pre-agreement, statement and quotation will represent an offer to the consumer to enter into a credit agreement with the particular credit provider.<sup>335</sup> By accepting the pre-agreement statement and quotation, the consumer will accept the offer to enter into a credit agreement with the credit provider.<sup>336</sup> Upon acceptance by the consumer, a legal bond will be created between the parties in terms whereof certain obligations will result from the legal relationship.<sup>337</sup>

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<sup>329</sup> Stoop "Disclosure as an Indirect Measure Aimed at Preventing Over-indebtedness" 2011  
<sup>330</sup> Which not necessarily means that the consumer has a right to receive credit, also see s 60 and Kelly-Louw *Consumer Credit Regulation in SA* 158 - 159  
<sup>331</sup> In Stoops article the reference where made to Grovè and Otto (*Basic Principles of Consumer Credit Law* (2002) at 27, 84-89) who also reckoned that the credit advertising and credit quotations are also a form of invitation as the credit provider is seeking business.  
<sup>332</sup> s 92  
<sup>333</sup> s 92(3)  
<sup>334</sup> *Standard Bank of South Africa Ltd. V Dhlamini* 2013 (1) SA 219 (KZD)  
<sup>335</sup> Christie states on page 31 that "A person makes an offer when he puts forward a proposal with the intention that by its mere acceptance, without more, a contract should be formed."  
<sup>336</sup> s 92(1) and (2) wording states a credit provider must not enter into a credit agreement unless the said credit provider has given the consumer a pre-agreement statement and quotation setting out the principal debt, the proposed distribution of that amount, interest rate, credit costs and the basis of any costs that may be assessed under section 121(3) if the consumer rescinds the contract.  
<sup>337</sup> Jordaan *The Credit Law of South Africa* 9-10

In this chapter, the “offer and acceptance process” between a consumer and a credit provider in a credit agreement relationship will be analysed and discussed to determine the impact that such a legal bond has on the parties to the agreement and the court’s discretion when determining that such an agreement is deemed a reckless credit granting agreement. During the study, the law of contracts will be used as a comparison. This chapter will also compare the operations of section 81(4)<sup>338</sup> with the current precedents to determine how the courts will apply this section when a consumer alleges that a particular credit agreement is reckless credit lending by a particular credit provider.

#### 4.2. Application for credit

It has been established that the aim of NCA include *inter alia*:<sup>339</sup>

- i. the promotion of responsibility in the credit market by encouraging responsible borrowing;
- ii. the avoidance of over-indebtedness;
- iii. the fulfilment of financial obligations by consumers;
- iv. discouragement of reckless credit-granting by credit providers and contractual default by consumers;
- v. addressing and preventing over-indebtedness of consumers, and
- vi. providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations.

Furthermore, as indicated, the provisions of the NCA relating to reckless credit apply only to natural persons.<sup>340</sup> Section 60 of NCA indicates that a natural person<sup>341</sup> has the right to apply for credit with a credit provider.<sup>342</sup> The right is restricted to **application**

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<sup>338</sup> Assessment mechanisms and procedures

<sup>339</sup> s 3(c)(i)-(ii) and (g), also see Van Heerden & Boraine 2011(Vol 2) *De Jure* 3

<sup>340</sup> s 78(1), also see Van Heerden & Boraine 2011(Vol 2) *De Jure* 5

<sup>341</sup> The right to apply for credit is also applicable to juristic persons or association of persons, however for the purpose of this study only reference will be made to natural persons.

<sup>342</sup> Scholtz in Scholtz *et al* Guide to the National Credit Act 6-2

only and not for credit to be **granted**<sup>343</sup> failing which the credit provider will be risking entering into a reckless credit agreement without having the opportunity to do a proper assessment of affordability.

Reckless lending is, theoretically, new to the South African legal system. Registered credit providers in South Africa have to be aware of what will turn them into reckless credit lenders. Registered credit providers<sup>344</sup> must implement processes and procedures to avoid practices that may cause them to suffer the legislative consequences.<sup>345</sup> Moreover, upon inception of the NCA, credit providers could only rely on precedent to guide their actions. Subsequently the NCA was amended to clarify certain uncertainties, which is aimed at assisting all role players.<sup>346</sup>

The South African courts have broad powers or discretion when a particular credit agreement that is in dispute, constitutes reckless credit lending<sup>347</sup> and, if so, to deal with the particular credit agreement in accordance with the provisions of the NCA. The NCA clearly states that credit providers may not enter into reckless credit agreements with consumers.<sup>348</sup> Although a vast majority of the duties lies with the credit providers to prevent the contracting of a reckless credit agreement, the NCA placed the onus on the credit consumer when applying for credit: the NCA states that the consumer must answer fully and truthfully any requests for information made by the credit provider as part of the assessment.<sup>349</sup> This is a measurement introduced by the NCA to prevent consumers from abusing the reckless lending provisions.<sup>350</sup>

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<sup>343</sup> Scholtz *et al* Guide to the National Credit Act 6-2; Jordaan *Credit Law of SA* 40 and Otto *et al* The National Credit Act Explained 54

<sup>344</sup> See provisions for the registration of credit providers as per section 40 of the NCA as well as the Amendment Act

<sup>345</sup> s 3(g), s 80 and s 81, also see Vessio 2009 *TSAR* 279

<sup>346</sup> See discussion in paragraph 5.3

<sup>347</sup> s 80(2) and s 83(1)

<sup>348</sup> s 81(3)

<sup>349</sup> s 81(1), also see *Sebola & another v Standard Bank of South Africa Ltd and Another* 2012 (8) BCLR 785 (CC)

<sup>350</sup> Kelly-Louw 2014 (26) *SAMLJ* 26

If a consumer fails to provide full disclosure, it could serve as a complete defense, raised by the credit provider, against an allegation of reckless credit.<sup>351</sup> This defense will only be successful if a court or the National Consumer Tribunal finds that the consumer's failure materially affected the credit provider's ability to make a proper assessment.<sup>352</sup>

The duty on the consumer is extended to the point that a consumer who applies to enter into a specific credit agreement with a specific credit provider, may not during the time that the credit provider is considering the aforementioned application, enter into any further credit agreements with any other credit provider. Should the consumer enter into another credit agreement during this period, the consumer has a duty to disclose the full details thereof to the first-mentioned credit provider in order to enable such credit provider to include such information in the assessment.<sup>353</sup>

In the case of *Horwood v First Rand Bank Ltd*<sup>354</sup> Judge Meyer reiterated the duty placed on the consumer to answer fully and trustfully any requests for information made by the credit provider as part of the assessment. It will only be complete defense to an allegation that a credit agreement is reckless if the failure to do so by the consumer "... materially affected the ability of the credit provider to make a proper assessment." In this case the judge went on to analyse the information provided by the applicant and the stages of credit granting, together with the assessment mechanisms used by the defendant to determine the defendant's creditworthiness. The court found, that the "... expenses which the respondent avers were presented to it by the applicant do not disclose any debt repayments under other credit agreements. The applicant's risk profile obtained from a credit bureau, according to the respondent showed the applicant to be a satisfactory credit risk."

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<sup>351</sup> s 81(4)

<sup>352</sup> s 81(4)(a) & (b), also see *Sebola & another v Standard Bank of South Africa Ltd and Another* 2012 (8) BCLR 785 (CC)

<sup>353</sup> s 81(1) and Van Heerden & Boraine 2011 (Vol 2) *De Jure* 44

<sup>354</sup> (2010/36853) [2011] ZAGPJHC 121 (21 September 2011) (unreported case) also see detailed discussion of the case in Kelly-Louw *Consumer Credit Regulation in SA* 301-303

Moreover, the judge relied on the *Reiter v Bierberg* case<sup>355</sup> where the court stated that an applicant is entitled to cite relevant evidence in a replying affidavit that serves to contest or disprove the statements made in the answering affidavit. Ms Horwood and her representative, Mr Oosthuizen, elected not to disclose true information relating to her income and expenditure to the respondent, therefore the applicant has failed to cite the relevant primary facts or evidence to contest First Rand Bank Ltd formal statements on this issue.<sup>356</sup>

It is therefore apparent that the NCA places an onus on the consumer when applying for credit and while the application of credit lending is being considered, the particular consumer must fully and trustfully answer any requests for information made by the credit provider as part of the assessment.<sup>357</sup> Vessio made an interesting observation in this regard:<sup>358</sup>

The wording of this section is interesting in that the positive responsibility appears to be on the credit provider to ask the correct information-gathering questions. The consumer is saddled with merely answering “fully and truthfully”. Accordingly, it is submitted that credit providers be fully advised as to what questions they should be posing to their potential clients and the forms that they request their potential clients to complete should be comprehensive in scope.

In the matter of *Standard Bank of SA Ltd v Kelly*<sup>359</sup>, the defendants also relied on reckless credit lending. In the formal statement of the first defendant he stated that he is not certain that an adequate assessment was undertaken, as “limited financial information” has been provided.- Apparently, the defendant shared Vessio’s view that the credit provider failed to do a comprehensive assessment. In this matter, the court

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<sup>355</sup> *Reiter v Bierberg & others* 1938 SWA 13 at pp 14-15

<sup>356</sup> *Horwood v First Rand Bank Ltd.* (2010/36853) [2011] ZAGPJHC 121 (21 September 2011)

<sup>357</sup> Van Heerden *et al* Guide to the National Credit Act 11-63

<sup>358</sup> Vessio 2009 TSAR 279

<sup>359</sup> *Standard Bank of South Africa v Kelly and Another* (2010/23427)[2011] ZAWCHC 1 (25 January 2011)

went ahead to examine whether the information provided by the defendants complied with the requirements stated in section 81(4) of the NCA as relied upon by the plaintiff's counsel. The court found that:

... the content of the credit agreement gives no basis for a finding by the court in terms of s 81(4) of the Act that the defendant answered any questions in connection with the assessment untruthfully or incompletely or that any such flaws in the information provided by the defendants materially affected the ability of the plaintiff to make a proper assessment.

In *Africa Bank v Greyling*<sup>360</sup>, the defendant also alleged that credit was granted recklessly and that no assessment was done as required by the NCA<sup>361</sup>. However, the defendant provided salary slips and completed income and expenditure statements, which she also signed and on which she provided a fictitious salary. Consequently, the court found that there was no *bona fide* defense set out by the defendant.<sup>362</sup> The court also found that the allegations made by the defendants concerning the required comprehensive assessment to be “broad-brush allegations” and that the court is unable to determine that the financial information provided by the defendants was inadequate to enable a proper assessment by the credit provider.

For this reason credit providers may develop and implement their own application forms and use their own evaluation mechanisms to assess the consumer's credit information provided the means are fair and objective; for example, it is permitted to obtain information can be obtained from a credit bureau.<sup>363</sup> The consumer has a duty to complete the application form given by the credit provider in full, giving the correct information so that the credit provider is inclined to believe the information given by the consumer to be correct and trustworthy. Failure by the consumer to comply will result in

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<sup>360</sup> (10126/2013) [2014] ZAGPHC 386 (decided on 7 November 2014)

<sup>361</sup> s 81(2)

<sup>362</sup> *Africa Bank Ltd v Greyling* (10126/2013) [2014] ZAGPHC 386 (decided on 7 November 2014) par 19-25

<sup>363</sup> *Otto et al The National Credit Act Explained* 77



a complete defense in favour of the credit provider against an allegation made by the consumer that the particular credit agreement was reckless lending.<sup>364</sup>

#### 4.3. Protection against discrimination in respect of credit

Once the credit provider has done an assessment<sup>365</sup> and established that due to reasonable commercial reasons consistent with customary risk management and underwriting practices, the consumer will not be able to afford the repayment of the credit agreement, the credit provider may refuse the application for credit.<sup>366</sup> However, the credit provider may not refuse the application for credit based on unfair discrimination against a consumer in terms of race, religion, pregnancy, marital status, ethnic or social origin, colour, gender, sexual orientation, age<sup>367</sup>, disability, language, or culture.<sup>368</sup> Section 61 of the NCA clearly states that consumers are protected against discrimination, which section is aligned with section 9(3) of the Constitution<sup>369</sup> and Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act.<sup>370</sup>

Section 66(1) of the NCA also states that a credit provider may not discriminate against a consumer or penalise the consumer for exercising his rights in terms of the NCA or an agreement.<sup>371</sup> Therefore, the credit provider must consider the application for credit fairly. Fair consideration comprise scoring processes, procedures and mechanisms or models to manage, underwrite, and price credit risk<sup>372</sup> that will prevent reckless credit lending and over-indebting a consumer.

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<sup>364</sup> Otto *et al* *The National Credit Act Explained* 77

<sup>365</sup> See par 5.2 for more details on assessment

<sup>366</sup> Otto *et al* *The National Credit Act Explained* 54 and Scholtz *et al* *Guide to the National credit Act* 6-3

<sup>367</sup> See exception in s 61(4)

<sup>368</sup> Scholtz *et al* *Guide to the National Credit Act* 6-2; Jordaan *Credit Law of SA* 40 and Otto *et al* *The National Credit Act Explained* 54

<sup>369</sup> The Constitution of South Africa, Act 108 of 1996

<sup>370</sup> The Promotion of Equity and Prevention of unfair Discrimination Act, Act 52 of 2003

<sup>371</sup> Otto *et al* *The National Credit act Explained* 55

<sup>372</sup> Scholtz *et al* *Guide to the National Credit Act* 6-3 and Vessio 2009 *TSAR* 279

#### 4.4. Conclusion

All consumers, irrespective of whether she or he is a natural person, juristic person or an association of persons, have the right to apply for credit; however, the consumer does not have the right to be granted the credit.

When applying for the credit, the consumer has a duty to disclose fully all financial information. When comparing the law cases, it is clear that the South African courts have relied on the provision of section 81(4) of the NCA to the letter. In addition, the courts also considered the facts presented by the parties and in the court documentation, fairly and in accordance with the spirit of the NCA.<sup>373</sup> The courts did so before reaching a conclusion as to whether the consumer completely adhered to her or his obligation in terms of the NCA. The Act states that the consumer must provide all information requested by the credit provider and to the credit provider. Provision must be done in a full and trustworthy manner to ensure the credit provider can conduct a proper assessment as to whether the particular consumer is able to repay the cost and obligations in terms of the particular credit agreement

In conclusion, the credit provider may not discriminate unfairly against the consumer when the credit application is considered, or question whether the consumer will be able to afford the repayment of the credit agreement. The discrimination factor was compared to relevant applicable legislation. However, the prevention of unfair discrimination will not put an end to the credit provider's duty to be aware of the granting of reckless credit.

The challenging question is whether the credit provider's application form for credit should be comprehensive in scope as well as the degree and the comprehensiveness of their assessment mechanism in determining whether the consumer will be able to repay the particular credit agreement.

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<sup>373</sup> Protection of the consumer.

## CHAPTER 5: ASSESSMENT, A STEP TO PREVENT RECKLESS CREDIT LENDING

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### 5.1. Introduction

The NCA aspires to increase access to credit to as many consumers as possible<sup>374</sup>, and at the same time aims to prevent over-indebtedness.<sup>375</sup> One of the mechanisms introduced by the NCA to counter over-indebtedness is the concept of reckless credit.

In section 81(2), the legislature obliges the credit provider to conduct a proper assessment of the ability of every consumer to meet her/his obligations, taking reasonable steps to investigate and evaluate the consumer in terms of:

- the understanding and appreciation of the obligations of the proposed credit agreement<sup>376</sup>, and
- the debt repayment history of the particular consumer under other credit agreements<sup>377</sup>, and
- the ability to meet these obligations in a timely manner, that is, the consumer's financial means.<sup>378</sup>

The assessment required by section 81 of the NCA is more comprehensive than a mere affordability assessment.<sup>379</sup> The credit provider must also ensure that the consumer has a general understanding of the risks, cost, and obligations and is able to afford the repayment of the credit agreement.<sup>380</sup>

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<sup>374</sup> s 3(a).

<sup>375</sup> s 3(c).

<sup>376</sup> s 80(1)(b)(i); Scholtz *et al Guide to the NCA* footnote 164 in para 11.4.3 and Kelly-Louw *Consumer Credit Regulations in SA* 297.

<sup>377</sup> s 81(2)(a)(ii).

<sup>378</sup> s 80(2) and Kelly-Louw *Consumer Credit Regulations in SA* 298.

<sup>379</sup> Van Heerden & Boraine 2011(Vol 2) *De Jure* 7 and Kelly-Louw 2014 (26) *SAMLJ* 32.

<sup>380</sup> Van Heerden & Boraine 2009 PER 12.

Reckless credit, in essence, penalises the credit provider who disregard the provisions of the NCA and the consequences of granting credit without proper assessment. The disregard of the credit provider could lead to a situation where the consumer becomes over-indebted because of reckless credit granting.<sup>381</sup>

This chapter will address the assessment mechanisms used by credit providers to prevent entering into reckless credit agreements. The mechanisms will also be compared with relevant literature and court cases used by the court when dealing with reckless credit applications.

## 5.2. Assessment mechanisms

The South African Law Commission<sup>382</sup> identified consumer education and the supply of information as the most important objectives of consumer credit legislation.<sup>383</sup> It stands to reason that these objectives place a duty on credit providers to grant credit to all natural persons in a responsible and accountable manner.<sup>384</sup>

Prior to entering into a credit agreement, a credit provider is compelled by the NCA to conduct a credit assessment to determine whether the consumer understands her or his risks, costs, rights and obligations under the particular credit agreement and whether the consumer can actually afford the credit.<sup>385</sup> The obligation is on the credit provider to make sure that all reasonable steps have been taken to assess the aspects as listed in section 81(2)(a) and (b), that is:<sup>386</sup>

1. the proposed consumer understands the risks and costs of the proposed credit;

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<sup>381</sup> Van Heerden & Boraine 2011(Vol 2) *De Jure* 44

<sup>382</sup> *South African Law Commission Working Paper 46, Project 67 (1993) Part III: Policy Considerations and the Essentials of Consumer Legislation* at 61 - 64

<sup>383</sup> Stoop 2009 (21) SA Merc LJ 365

<sup>384</sup> s 6(a), s 78(1) and Van Heerden & Boraine 2011(Vol 2) *De Jure* 44

<sup>385</sup> s 81, also see Vessio 2009 *TSAR* 279 and Boraine & Van Heerden 2010 (Vol 13) *Potchefstroom Electronic Law Journal* 97/508

<sup>386</sup> Vessio 2009 *TSAR* 279 also see *SA Taxi Securitisation (Pty) Ltd. v Nako & Others (19/2010, 21/2010, 22/2010, 77/2010, 89/2010, 104/2010, 842/2010) [2010] ZAECBHC 4 (8 June 2010) 6 -7* and *ABSA Bank Ltd. V Ferreira & Others (725/201) [2010] ZAECPEHC 29 (15 June 2010) 3*

2. the proposed consumer understands the rights and obligations under the proposed credit agreement, and
3. the credit provider assesses the debt re-payment history of the proposed consumer under credit agreements;<sup>387</sup>
4. the credit provider assesses the existing financial means, prospects and obligations of the proposed consumer, and
5. the credit provider has reasonable grounds to conclude that any commercial purpose may prove to be successful, if the proposed consumer stated such a purpose when applying for the proposed credit agreement.

However, the NCA fails to set out the reasonable steps to assess the relevant aspects<sup>388</sup>. Originally, section 82 merely stated that a credit provider may determine for itself the evaluative mechanisms and models or procedures to be used in meeting its assessment obligations.<sup>389</sup> Conversely, this section must also be read together with section 61(5), which states the following:<sup>390</sup>

(5) A credit provider may determine for itself any scoring or other evaluative mechanism or model to be used in managing, underwriting and pricing credit risk, provided that any such mechanism or model is not founded or structured upon a statistical or other analysis in which the basis of risk categorization, differentiation or assessment is a ground of unfair discrimination prohibited in section 9(3) of the Constitution.

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<sup>387</sup> In the unreported case of *Nkume v FirstRand Bank Ltd t/a First National Bank* 2013 JOL 30339 (ECM) the applicant applied for credit. The respondent replied to the applicant that the credit bureau showed that she had an adverse credit record. The applicant then requested reasons for the refusal of the credit (as per section 62, however the respondent refused the request. The applicant brought an application to court to compel the respondent, whereupon the respondent then provided reasons for the refusal of credit. The court then granted the applicant a cost order against the respondent because the respondent could not explain their delay to comply with the applicants request for reason.

<sup>388</sup> Van Heerden & Boraine 2011(Vol 2) *De Jure* 7, also see Chapter 7 where the legislature address amendments to the NCA by introducing Assessment Regulations

<sup>389</sup> s 82(1), also see Vessio 2009 *TSAR* 274 279; Scholtz et al *Guide to the National Credit Act* (2013) 11-64

<sup>390</sup> The Constitution of the Republic of South Africa, 1996

This was concurred in the case of *Mercantile Bank Ltd v Hajat*<sup>391</sup> when the respondent alleged that the applicant failed to conduct an assessment as required by section 81(2) of the NCA. The court noted that section 82(1) of the NCA permits the credit grantor to determine its own procedures for the conduct of risk assessment. After considering the evidence, the court found that the applicant did conduct an assessment as required by the applicable legislation and that the respondent had no merit in his defense. Judgment was granted in favour of the applicant.

Concerning developmental credit agreements, the NCR must pre-approve the mechanism prior to the implementation of the designed assessment mechanism, model, and procedure.<sup>392</sup> In respect of other types of credit agreements, the NCR may publish guidelines proposing evaluative mechanisms, models, and procedures used in terms of section 81.<sup>393</sup> The original section of the NCA also stated in section 82(3) that the guidelines published by the NCR were not binding on a credit provider.<sup>394</sup> It was submitted that the particular sections of the NCA were vague, therefore the court had pronounce and could determine whether the credit provider's assessment (evaluation) mechanism, model and procedure were fair and objective<sup>395</sup> in preventing reckless credit lending evident in the discussion of the following court cases.

In the case of *Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another*<sup>396</sup> the applicants applied for a winding-up order against the respondents. The applicants' claims against the respondents were based on suretyships that were signed by the sole member of the close corporation on behalf of the said close corporation.<sup>397</sup> The respondents questioned the *locus standi* of the

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<sup>391</sup> 2013 JOL 30499 (GSJ) (unreported case)

<sup>392</sup> s 82(2)(a)

<sup>393</sup> s 82(2)(b) also see Scholtz et al Guide to the National Credit Act (2013) 11-65

<sup>394</sup> s 82(3) and also see Scholtz et al Guide to the National Credit Act (2013) 11-65 and Van Heerden & Boraine 2011(Vol 2) *De Jure* 8. However, the Amendment Act deleted section 82(3), see discussion in paragraph 5.3 of this study.

<sup>395</sup> Otto *et al NCA Explained* (2010) 77

<sup>396</sup> 2011 (2) SA 266 (SCA)

<sup>397</sup> Kelly-Louw *Consumer Credit Regulation in SA* 86

applicants as creditors<sup>398</sup>, alleging that the applicants failed to do an assessment when Mr Eugene Ehlers applied for the loan and ceded the close corporation as security for the repayment of the credit loan. The first respondent alleged if the appellant did an assessment as required by s 81(2)(a)(i)-(iii) and (b) of the NCA, the appellants would, without a doubt, have concluded that there were no reasonable prospect of repaying the amount loaned, because both principal debtors had no employment, fixed earnings, or assets (one principal debtor was a student and the other one a housewife), except for the house that was mortgaged with the credit provider. The respondent concluded that in these circumstances the credit agreement was a reckless credit agreement in terms of 81(3) of the NCA. The Supreme Court of Appeal then fittingly refused the winding-up order. However, the court did not make any decisions on whether the debt was reckless lending, although there were strong indications that the principal debt could be reckless credit.<sup>399</sup>

In *Horwood v First Rand Bank Ltd*<sup>400</sup> the court stated that when considering whether a credit provider has or has not taken the reasonable steps to meet the assessment obligations as determined in section 81(2) and section 82(1), the court will have to determine objectively on the facts and circumstances of each case presented to court.<sup>401</sup> In this case the consumer stated that her credit agreement was reckless credit lending as per section 80(1)(a).<sup>402</sup> Fortunately, the credit provider could manage to prove that an assessment was done at the time that the credit agreement was concluded, and counter alleged that the consumer failed to answer the requested for information fully and trustfully. Therefore, the credit provider could not do a proper assessment.<sup>403</sup>

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<sup>398</sup> The respondents alleged that the one applicant was not a registered credit provider in terms of the NCA section 40(1), 42(1), 89(2)(d) and 85(5).

<sup>399</sup> Kelly-Louw *Consumer Credit regulation in SA* 296 footnote 52

<sup>400</sup> (2011) ZAGPJHC 121 (21 September 2011) par 5

<sup>401</sup> Scholtz et al *Guide to the National Credit Act* (2013) 11-65

<sup>402</sup> Failure to conduct an assessment as required by s 81(2)

<sup>403</sup> s 81(4) and also see Kelly-Louw *Consumer Credit Regulations in SA* 296

In another unreported case, *Africa Bank Ltd v Greyling*<sup>404</sup> the applicant entered into two credit agreements with the respondent for the purchase of buying vehicles. Upon failure to repay the instalments, the respondent terminated the credit agreements. During the summary judgement application, the respondent filled a defense of reckless credit lending. The court held that the applicant did indeed conduct a risk assessment, therefore the court refused to uphold the contention of the respondent. This case illustrates that though no details regarding the risk assessment was provided during the summary judgement procedure, the fact that a risk assessment was done was sufficient not to consider the defense of reckless credit lending.

The NCA states that if a credit provider repeatedly fails to meet its obligations under section 81, or if the credit provider continuously uses assessment mechanisms, models or procedures that do not result in fair and objective assessment, the matter can be referred to the National Consumer Tribunal (hereafter referred to as Tribunal) by the NCR.<sup>405</sup> The Act gives the Tribunal the power to compel a credit provider to apply the published guidelines by the NCR or any other alternative guidelines that is aligned with industrial practices and as determined by the Tribunal. This was supported in the case of the *National Credit Regulator v Rufus Alfonso Financial Consultants CC*<sup>406</sup>. The applicant brought an application to the Tribunal, stating that the respondent was contravening section 81(2) (a) (i) and (iii) of the NCA by failing to perform affordability assessments with consumers applying for credit. After considering all the facts and the law, the Tribunal found the respondent repeatedly contravened the NCA, and imposed an administrative fine on the respondent in accordance with the powers given to the Tribunal by the NCA.

The purpose of the NCA is twofold, namely (1) to discourage reckless credit and (2) the NCA is also designed to facilitate access to credit by consumers who were previously denied access. Comparing these purposes with one another appears to be conflicting. If

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<sup>404</sup> (2015) JOL 33071 (GJ) (case nr. 10126/2013, judgement date 7/11/2014)

<sup>405</sup> s 82(4), also see Van Heerden & Boraine 2009 SAFLII per 8

<sup>406</sup> (NCT/7963/2012/57(1)(NCA) [2013] ZANCT 36 (decided on 23 October 2013)



the courts were to evaluate the credit provider's assessment mechanisms (in order to prevent reckless credit granting) over-critically, it could result in credit not being readily available to the less affluent consumers of our society.<sup>407</sup>

Until April 2015, the NCR had not published any guidelines for assessment purposes, as stated in section 81, thus making the validity of the section and imposing sanctions for non-compliance difficult. However, on 13 March 2015, the Amendment Act introduced new guidelines in the amended section 24 and Regulation 23A.<sup>408</sup>

### **5.3. Amendment of the provisions for a standard affordability assessment**

The Amendment Act aims to standardise affordability assessments with the introduction of the Affordability Assessment Regulations.<sup>409</sup> Credit providers must still determine their own evaluative measures and procedures; though it must be aligned with the amended regulations.<sup>410</sup> These regulations will be applicable to all credit agreements as listed in Chapter 3, section 2<sup>411</sup>.

The amended regulations set out a comprehensive list of duties for the credit provider, i.e.:

- the credit provider must take “practicable steps” to access the consumer’s allowable income and discretionary income in order to determine whether the consumer has the financial means and prospects to repay the loan amount;<sup>412</sup>
- the credit provider is required to take “practicable steps” in order to confirm the gross income of the consumer by looking at the most recent three (3) months’ pay slips and most recent three (3) months’ bank statements of the particular consumer;<sup>413</sup>

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<sup>407</sup> SA Taxi Securitisation (Pty) Ltd v Mbatha 2011 (1) SA 310 (GSJ)

<sup>408</sup> Green Gazette no 38557, 13 March 2015.

<sup>409</sup> Chapter 3: “Criteria to conduct affordability assessment” Government Gazette No 37882 Vol 590 (1 August 2014), see also section 24(a)(2) of the Amendment Act providing the Minister to recommend affordability assessment regulations.

<sup>410</sup> s 24(a)(1) of the Amendment Act

<sup>411</sup> Of the Amendment Act as published in the GG, 1 August 2014.

<sup>412</sup> Chapter 3, Reg 23A(3) of the Amendment Regulations.

<sup>413</sup> Chapter 3, Reg 23A(4) of the Amendment Regulations.

- the credit provider must calculate the consumer's existing financial means, prospects and obligations (as per sections 78(3) & 81(2)(a)(iii) of the NCA);<sup>414</sup>
- the credit provider may accept the consumer's declared necessary expenses, subject thereto that it is lower than the Minimum Necessary Expense Norms Table<sup>415</sup>, and
- the credit provider must take into account the consumer's debt repayment history under the consumer's other credit agreements (as per section 81(2) of the NCA).<sup>416</sup>

The consumer's duty still includes that she or he must accurately disclose to the credit provider all financial obligations that will enable the credit provider to conduct an affordability assessment<sup>417</sup>, and the consumer must provide authentic documentation to the credit provider when conducting the affordability assessment.<sup>418</sup> The legislator refers to the credit provider's obligation to conduct the affordability assessment in that the credit provider must take "practicable steps". In order to consider the intention of the legislator when using these words, Eiselen drafted an opinion stating that the credit provider has some freedom to decide how to implement the reasonable steps and on the course that will result such implementation to be reasonable, practical and reliable.<sup>419</sup>

Although these regulations are a step in the right direction to combat reckless lending and assisting credit providers from entering into reckless credit agreements, this is merely the tip of the iceberg. Kelly-Louw stated that the regulations dealing with affordability assessment are the "bare minimum" and that credit providers should not think they are fully compliant if they simply comply with these regulations.<sup>420</sup> Kelly-Louw

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<sup>414</sup> Chapter 3, Reg 23A(8) of the Amendment Regulations.

<sup>415</sup> Chapter 3, Reg 23A(9) of the Amended Regulations as well as Table 1 on page 15 of the regulations

<sup>416</sup> Chapter 3, Reg 23A(11) of the Amended Regulations, as discussed above, this will prove to be a difficult duty to comply with considering that a consumer's adverse information will be cleared once the debt is settled in full by the consumer

<sup>417</sup> Chapter 3, Reg 23A(6) of the Amended Regulations, which is also aligned with s 81(4)(a) of the NCA

<sup>418</sup> Chapter 3, Reg 23A(7) of the Amended Regulations.

<sup>419</sup> Eiselen "Affordability Assessment Opinion" page 4-5

<sup>420</sup> Quoted as in Personal Finance News, 21 March 2015

recommended that the credit providers keep sufficient records of all assessments to prove in court that proper assessment was conducted before they entered into a credit agreement with a prospective consumer.<sup>421</sup>

This recommendation raised the question whether a credit provider should keep record of this additional documentation as required in the Amendment Act for the three-year period as prescribed in the NCA.<sup>422</sup>

Eiselen is of the opinion that the amended regulation 23(4) does not require from the credit provider to keep the additional documentation, because the Amendment Act merely states that the credit provider must take practicable steps to confirm the gross income from the documentation provided by the consumer.<sup>423</sup> It therefore appears that the wording used by the legislator is yet again vague and ambiguous. Eiselen concluded that the provisions should be interpreted that these amended provisions cannot reasonably require the credit provider to retain the documentation or copies thereof for three years. He is furthermore of the opinion that it should be sufficient if the credit provider implements a system:

“... where employees who work face to face with prospective consumers require the production of the documents and in their own handwriting or on an electronic system key in the fact that the relevant documents have been inspected, the nature of those documents and what the documents revealed.”<sup>424</sup>

Regulation 55 of the NCA impose a duty on registered credit providers to retain the following documentation<sup>425</sup> in respect of each consumer:<sup>426</sup>

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<sup>421</sup> Kelly-Louw *Consumer Credit Regulation in SA* 304

<sup>422</sup> Reg 55(b) and Reg 56

<sup>423</sup> Eiselen “*Affordability Assessment Opinion*” page 5

<sup>424</sup> Eiselen “*Affordability Assessment Opinion*” page 5-6

<sup>425</sup> *NCR v Credit Care (Pty) Ltd* (NCT/7751/2013/57(1))[2013] ZANCT 40 (10 October 2013) par 10.6 and 39

<sup>426</sup> Reg 55(1)(b)(i)-(vii)

- (i) application for credit;
- (ii) application for credit declined;
- (iii) reasons for decline of application for credit;
- (ii) pre-agreement statement and quote;
- (iv) credit agreement entered into with consumer;
- (iv) documentation in support of steps taken in terms of section 81(2) of the act;
- (v) record of payments made, and
- (vi) documentation in support of any steps taken after default by consumer.

The records required to be maintained must be kept in either paper or electronic format<sup>427</sup> and must be readily accessible for a period of three (3) years<sup>428</sup> from date of termination of the credit agreement<sup>429</sup>.

Section 81(2)<sup>430</sup> requires the credit provider not to enter into a credit agreement unless the credit provider has taken reasonable steps to assess the proposed consumer's existing financial means, prospects, and obligations.<sup>431</sup> The heading for regulation 23(A) subsection 3 to 7 of the Amendment Regulations reads "Existing financial means and prospects". Consequently, it appears the legislator intended credit providers to keep records of the additional documentations set out in Regulation 23A for three years from the date of the cancellation of said particular credit agreement. Such retained documents will contribute to the credit provider's burden of proving that they did not enter into a reckless credit agreement with a particular consumer.

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<sup>427</sup> Reg 55(2)(a)

<sup>428</sup> Reg 55(2)(b)

<sup>429</sup> Reg 56(1)(a)

<sup>430</sup> Section 81 deals with the prevention of reckless credit

<sup>431</sup> Section 81(2)(a)(iii)

The comparison between the NCA, the Amendment Act, Kelly-Louw's opinion, and that of Eiselen would have to be tested in a court of law to determine whether the amended list<sup>432</sup> of documentation needs to be retained as per regulation 55 of the NCA.

### 5.3. Provisions for the automatic removal of adverse information

In section 81(2), the legislator requires the credit provider not to enter into a credit agreement unless the credit provider has taken reasonable steps to assess the debt repayment history of a consumer under credit agreements.<sup>433</sup>

A consumer's repayment record is crucial for the credit market as it contributes to the smooth operations of the market. Credit providers rely on the credit information held on consumers by credit bureaux's in the assessment process of credit granting. The credit information indicates to the credit provider whether the consumer has a good or bad repayment history and it also determines the consumer's credit profile.<sup>434</sup>

Therefore, it is vital that credit bureaux keep current and accurate credit information of consumers, especially considering that the NCA requires the credit provider to determine the consumer's credit worthiness to ensure the consumer is able to afford the repayment of the prospective loan.<sup>435</sup> Should the credit provider fail to adhere to this part of its duty to prevent reckless credit granting, the consequences will be severe.<sup>436</sup>

Because of this dependency of credit providers on credit bureaux, the NCA has also introduced prescriptive provisions and regulations governing credit bureaux's. For

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<sup>432</sup> Reg 23A

<sup>433</sup> s 81(2)((a)(ii)

<sup>434</sup> Kelly-Louw 2015 *De Jure* 93

<sup>435</sup> s 81(2) – preventing credit providers from entering into reckless credit agreements with consumers.  
<sup>436</sup> s 83 & 84. Also see Chapter 6 of this study for a detailed discussion on the power of the court and the consequences of reckless lending, as well as Kelly-Louw *Consumer Credit Regulations* (2012) par 12.2.3. The Amendment Act also amended s 83 of the NCA in terms whereof the power to find a credit agreement reckless lending has been broaden to the National Consumer Tribunal (NCT). As from 13 March 2015 the NCT has the same powers as a court and therefore they may make the same appropriate orders in terms of s 83(2) and 83(3). This amendment will be discussed in par 6.4 of this study.

example, it is compulsory for credit bureaux to register<sup>437</sup> with the NCR and to record the relevant type of consumer credit information.<sup>438</sup>

Section 71 specifically deals with the removal of credit records of consumers regarding debt and judgements, the maximum retention periods of that consumer's credit information as well as the prescribed standards when maintaining the consumer credit information.<sup>439</sup> Since inception of the NCA<sup>440</sup>, credit information amnesty was published<sup>441</sup> to clarify and correct the credit information of consumers that were incorrectly recorded with the credit bureaux.<sup>442</sup> However, this removal of credit information was not a once-off amnesty. The Amendment Act now provides for an ongoing automatic removal of certain adverse consumer credit information and information regarding paid up judgements.<sup>443</sup>

Section 71A is inserted in the principal Act<sup>444</sup> after section 71, which instructs credit providers to provide to all registered credit bureaux notification, within seven (7) days after settlement by a consumer of any obligation with that particular credit provider.<sup>445</sup> The notification must inform the credit bureaux of the following<sup>446</sup>:

- (a) that the obligation under such credit agreement was the subject of an adverse classification of consumer behaviour;
- (b) that the obligation under such credit agreement was the subject of an adverse classification enforcement action against a consumer;
- (c) that the obligation under such credit agreement was the subject of an adverse listing recorded in the payment profile of the consumer, or

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<sup>437</sup>

s 43

<sup>438</sup>

ss 70 - 73

<sup>439</sup>

Kelly-Louw 2015 *De Jure* 96

<sup>440</sup>

1 June 2007

<sup>441</sup>

GN R1209 in GG 29442 of 2006-11-30

<sup>442</sup>

See detailed discussion in Kelly-Louw 2015 *De Jure* 96-97

<sup>443</sup>

Kelly-Louw 2015 *De Jure* 97

<sup>444</sup>

National Credit Act, no 34 of 2005

<sup>445</sup>

Also see the proposed Credit Information Amnesty: Notice 966 Government Gazette 36889 of 30 September 2013 and Regulations for the removal of Adverse Credit Information Gazette 37386, which came into effect on 1 April 2014

<sup>446</sup>

s 71A(1) of the Amendment Act

(d) that the obligation under such credit agreement was the subject of a judgement debt<sup>447</sup>.

The credit bureau, who receives the notification, must remove any adverse listing within seven (7) days after receipt of such notification from the credit provider.<sup>448</sup> Should the credit provider fails to send the required notification to all registered credit bureaux, the consumer may file a complaint with the NCR.<sup>449</sup> However, the Amendment Act is silent regarding the situation where the credit bureaux fail to adhere to the notification, as the Amendment Act does not stipulate which remedies will be available to the consumer and/or credit provider if the credit bureaux do not remove the adverse information as the credit provider requested. However, the consumer still remains responsible for the repayment of any outstanding credit obligation in terms of any credit agreement even though the adverse information pertaining to a specific credit obligation was removed from the credit bureaux.<sup>450</sup>

The removal of adverse information was most probably the most debated amendment to the NCA. The NCR's reason for the Amnesty Regulations, which provides for an on-going removal of credit information, is that it would benefit the low and middle-income group. This assistance will include providing them access to credit in the forms such as educational loans and home loans, but as well as increasing employment opportunities<sup>451</sup>. The NCR also motivated this amnesty by stating that it will assist those consumers who do not have the money to afford the fees for the rescission of judgment applications for those debts that have been paid in full.<sup>452</sup>

The removal of adverse information will have a severe impact on credit providers, especially considering that section 81(2)(ii) requires from the credit provider to take

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<sup>447</sup> This also means that the judgement debt information is removed from the consumer's credit history without the consumer having to apply to the Magistrate's Court in terms of section 49 (5) of the Magistrate's Court Act, no 32 of 1944 for the rescission of the judgement order. However, this discussion will not be further investigated as it is not important to this study.

<sup>448</sup> s 71A(2) of the Amendment Act

<sup>449</sup> s 71A(3) of the Amendment Act

<sup>450</sup> Reg 5 of the 2014 Amnesty Regulations

<sup>451</sup> Minister of DTI Media Statement, published on 27 February 2014

<sup>452</sup> Ackotia *GostDigest* (2014-09-12)

reasonable steps to access the debt re-payment history of the consumer under other credit agreements(credit obligations) the consumer has with credit providers. Essentially, by removing the adverse information, the consumer will have a “clean slate” and the notion of “credit history” or good and bad credit records will be non-existent. Consequently, this will have a negative impact on the credit providers. How will they be able to comply with their duty to do an assessment of the consumer’s ability to repay a loan in order to prevent the granting of reckless credit?

This concern is further raised by the fact that on 1 April 2014, all credit bureaux’s were given two (2) months in which they had to remove any adverse consumer classification from the records of those consumers who have settled their obligations with credit providers. This credit information amnesty includes all judgements debts (that were paid up subsequent to the judgement being granted by a court) as well as adverse classifications such as “default”, “legal action”, “handed over for collection” and “write-off”. This kind of amnesty is not good because it is only to the benefit of the consumer.<sup>453</sup>

## **5.5. Consumer comprehension**

On the one side of the coin the NCA aims to increase access to credit to as many consumers as possible, but on the flip side the objective of the NCA is also to prevent over-indebtedness and reckless credit lending. The Act places an obligation on the credit provider to implement mechanisms to ensure that all objectives of the NCA is met, including the conduct of a proper assessment of each consumers ability to meet the obligations in terms of the desired credit agreement.

Section 81(2)(a)(i) states that one of the reasonable steps needed to be taken by the credit provider is to access the consumers “general understanding and appreciation” of

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<sup>453</sup> And it is in contradiction to s 3(d) that’s states that the purpose of the NCA is to promote equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers



the risks and cost as well as the rights and obligations of the consumer under the credit agreement. This requires that the credit provider must have a process or mechanism that enables the credit provider to determine the ability of the consumer to understand and appreciate the credit agreement that the said consumer wants to enter into with the particular credit provider.

The NCA attempts to assist the credit provider in this regard by including the following sections in the Act:

- a. section 63(2) states that the credit provider must propose to the Credit Regulator at least two official languages that the credit provider intends to use in documentation;<sup>454</sup>
- b. section 63(1) states that the consumer has the right to receive the documentation in an official language that the consumer can read or understand considering the implications such a right has on the credit provider with regard to the financial expenses, practicality and regional areas;<sup>455</sup>
- c. section 64(1) and (2) states that the documents provided to the consumer must be in plain language that will enable the ordinary consumer with an average literacy skill to understand the content of the document.<sup>456</sup>

In the recent court case of *Standard Bank of South Africa Ltd v Dhlamini*<sup>457</sup> the respondent bought a second hand motor vehicle financed by the applicant. The respondent was a 52-year-old man who does not understand English and completed schooling up to standard one. Within four days after he bought the vehicle he returned it to the dealer, as he was not satisfied with the condition of the vehicle. He also demanded the repayment of the R15 000 deposit. The deposit was not returned to the respondent and the applicant commenced with the notice prescribed in section 129(1)(a) of the NCA. The court found the respondent to be “functionally illiterate” and found on the evidence that the salesperson of the dealer failed to explain the terms of

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<sup>454</sup> Otto *The National Credit Act Explained* 55

<sup>455</sup> Otto *The National Credit Act Explained* 55

<sup>456</sup> Otto *The National Credit Act Explained* 55

<sup>457</sup> 2013 (1) SA 219 (KZD)

the agreement to the respondent. The court also analysed the providing of the documentation in the official language, with which the applicant also failed to comply. The contract was entered into in KwaZulu-Natal where isiZulu is the predominant African language. Due to the failure of the applicant to comply with the rights of the consumer in terms of section 63 and 64 the court found in the favour of the respondent with cost.

The case in point emphasised that documentation made available by the credit provider to the consumer must be in an official language which needs to be plain to the extent that the consumer with average literacy skills could have a general understanding and appreciation of the content of the said documentation.<sup>458</sup> The case also stated that this documentation must be in the pre-required format<sup>459</sup> with the use of plain vocabulary and sentence structures.<sup>460</sup>

Furthermore, consumer protection is not only emphasized in the NCA, but a whole Act was drafted with the sole aim of protecting consumers against abuse and exploitation in the marketplace.<sup>461</sup> Du Preez points out that “vulnerable and/or illiterate consumers should not only be protected, but also empowered”.<sup>462</sup> However, the Consumer Protection Act is not applicable to credit agreements.<sup>463</sup> Nevertheless, section 2 of the Consumer Protection Act states should there be any inconsistency between this Act and any other legislation, including the NCA, the inconsistency must be interpreted concurrently.<sup>464</sup> This means that the Consumer Protection Act must be applied concurrently with the NCA, otherwise, the provisions that provides greater protection to the consumer will prevail<sup>465</sup> even if it implies the Consumer Protection Act.<sup>466</sup>

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<sup>458</sup> Campbell in Scholtz (ed) *Guide to the National Credit Act* (2008) 6-8 and 6-9

<sup>459</sup> Form 20.2 in the Regulations to the NCA

<sup>460</sup> 2013 (1) SA 219 (KZD) par 47

<sup>461</sup> Consumer Protection Act 68 of 2008

<sup>462</sup> Du Preez 2009 *TSAR* 63.

<sup>463</sup> s 5(2)(d) of the Consumer Protection Act, No 68 of 2008

<sup>464</sup> s 2(9)(a) of the Consumer Protection Act, No 68 of 2008

<sup>465</sup> s 2(9)(b) of the Consumer Protection Act, No 68 of 2008

<sup>466</sup> Otto *et al.* in Scholtz (ed) *Guide to the National Credit Act* (2008) 20-14

This will have far-reaching consequences for the credit providers. The credit provider's responsibility goes beyond just sourcing information concerning the consumer's financial situation and repayment ability, but extends to ensuring that the consumer understands and appreciate the risks and costs of the proposed credit agreement and their rights and obligations in terms of that agreement.<sup>467</sup>

### 5.6. The stage when a credit agreement becomes reckless credit

The NCA states that a credit agreement will be reckless credit lending if, at the time that the credit agreement was entered into, or at the time when the amount approved in terms of the agreement is increased<sup>468</sup> other than an increase of a credit limit of a credit facility<sup>469</sup>:

1. The credit provider **failed** to carry out an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have been at the time,<sup>470</sup> or
2. The credit provider, carried out an assessment as required by section 81(2), and continued to **enter** into the particular credit agreement with the consumer, notwithstanding the fact that the majority of information available to the credit provider indicated that:
  - 2.1. the consumer did not generally **understand** or appreciate her or his risks, costs or obligations under the proposed credit agreement,<sup>471</sup> or
  - 2.2. by entering into that agreement would **result** into the consumer being over-indebted.<sup>472</sup>

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<sup>467</sup> Vessio 2009 TSAR 288

<sup>468</sup> s 80(1)

<sup>469</sup> s 119(4)

<sup>470</sup> s 80(1)(a), also see Van Heerden & Boraine 2011(Vol 2) *De Jure* 4 and Vessio 2009 TSAR 281

<sup>471</sup> s 80(1)(b)(i) also see Vessio 2009 TSAR 280

<sup>472</sup> s 80(1)(b)(ii) also see Vessio 2009 TSAR 281

Comparing section 80(1) (a) and section 80(1) (b), it appears that the legislature intended to create three types of reckless credit<sup>473</sup> as explained in the following paragraphs.

The **first type** of reckless credit is where the credit provider fails to comply with their duty to do an affordability assessment, irrespective of the financial position of the consumer.<sup>474</sup> Thus, failure to comply with section 80(1) (a) of the NCA has the effect that the particular credit agreement is *per se* reckless.<sup>475</sup> Otto makes the following remark in this regard:

This section is penal in nature. Even if it turns out that the credit granted was not reckless in nature by any means, it will nonetheless be treated as such simply because the credit provider did not undertake a proper assessment. This is to prevent credit providers from taking short cuts by simply accepting an apparently creditworthy debtor on face value.<sup>476</sup>

In *ABSA Bank Ltd v COE Family Trust*<sup>477</sup> the credit provider failed do an assessment as contemplated in section 81(2). One debtor who signed a suretyship was a student who had no income. In this case, the court dealt with an application for summary judgment, which was opposed by the defendant/respondent on the basis that the plaintiff/applicant did not conduct a proper assessment in terms of section 81(2) of the NCA. The court did not make a decision regarding the completion of a proper assessment or not; or whether the credit was granted recklessly. The court merely stated that evidence in a trial may be relevant to determine the circumstances; therefore summary judgment was refused.<sup>478</sup>

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<sup>473</sup> Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-67

<sup>474</sup> Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-67, Boraine & Van Heerden 2010a (73) *THRHR* 651, Renke 2011 (74) *THRHR* 223 and Boraine & Van Heerden 2010 (Vol 13) *Potchefstroom Electronic Law Journal* 97/508

<sup>475</sup> Boraine & Van Heerden 2010a (73) *THRHR* 1 and Boraine & Van Heerden 2010 (Vol 13) *Potchefstroom Electronic Law Journal* 1

<sup>476</sup> Otto *et al NCA Explained* (2010) 77 (fn 47)

<sup>477</sup> 2012 (3) SA 184 (WCC)

<sup>478</sup> Otto *Recent decisions* 2012 page 8

The **second type** of reckless credit is when the credit provider conducts an assessment<sup>479</sup> and enters into a credit agreement with the consumer even though the majority of the information gathered indicates that the particular consumer does not understand or appreciate the risks, costs or obligations under the proposed credit agreement.<sup>480</sup> Van Heerden provides the following example for such a type of credit agreement. The credit provider fails to explain to the potential consumer the interest to be charged on the particular credit agreement, or the administrative costs to be charged on the monthly instalments.<sup>481</sup> In other words, this type of reckless credit implies that a credit provider has a duty to inform the consumer of his/her risks, cost, and obligations under the particular credit agreement.<sup>482</sup> Some credit providers have consequently included in their credit applications and agreements a clause that states that the consumer fully understands and appreciate the risks, cost, and obligations under the particular credit agreement. The courts have to date not found such a clause to be an unlawful provision<sup>483</sup> unless the credit provider has conducted a proper assessment as contemplated in section 81(2) of the NCA.<sup>484</sup>

The **third type** of reckless credit deals with instances where the majority of information available to the credit provider<sup>485</sup> indicated that entering into that particular credit agreement would render the consumer over-indebted, yet notwithstanding, entered into the specific credit agreement with the consumer.<sup>486</sup> This type of reckless credit is when

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<sup>479</sup> As required by the NCA in section 81(2)

<sup>480</sup> Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-67 & 11-68; Vessio 2009 *TSAR* 280; *NCR v Rufus Alfonso Financial Consultants CC* (NCT/7963/2012/57 (1)(NCA)) [2013] ZANCT 36; Boraine & Van Heerden 2010 (Vol 13) *Potchefstroom Electronic Law Journal*1, Boraine & Van Heerden 2010a (73) *THRHR* 651, Renke 2011 (74) *THRHR* 223 and Boraine & Van Heerden 2010 (Vol 13) *Potchefstroom Electronic Law Journal* 97/508

<sup>481</sup> Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-68

<sup>482</sup> Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-68 see also table 1 on page 38-39 of this study

<sup>483</sup> s 90(2) of the NCA

<sup>484</sup> *ABSA Bank Ltd. v COE Family Trust & Others* 2012(3) SA 184 WCC; Van Heerden & Boraine 2011(Vol 2) *De Jure* 9 and Vessio 2009 *TSAR* fn 42

<sup>485</sup> Considering the information, the credit providers are now obliged to collect in accordance with Reg 23A as inserted in the Amended regulations.

<sup>486</sup> s 80(1)(b)(ii), Boraine & Van Heerden 2010 (73) *THRHR* 1; Boraine & Van Heerden 2010 (Vol 13) *Potchefstroom Electronic Law Journal*1, Boraine & Van Heerden 2010a (73) *THRHR* 652, Renke

a credit provider has done a proper assessment and the assessment mechanism indicates that the consumer cannot afford the repayment of this specific credit agreement. Yet the credit provider ignores this lack of affordability and enters into the credit agreement, resulting in the consumer to become over-indebted.<sup>487</sup> Therefore, determining the stage when the particular credit agreement was reckless credit lending, will be a factual enquiry.<sup>488</sup>

Section 83 gives a court the discretion, despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, to declare a credit agreement to be reckless<sup>489</sup>. Comparing the wording of section 83 with section 85 it appears that the court may *suo motu* declare a credit agreement reckless<sup>490</sup>, whereas a court can declare a consumer over-indebted in terms of section 85 only if it is alleged that the consumer is over-indebted.<sup>491</sup> Hence, it is not a prerequisite for a consumer to allege that the particular credit agreement was reckless lending; the court may on its own discretion consider the possibility whether the credit agreement was granted recklessly by the credit provider. This discretion of the court to act *mero motu* is even extended to the clerks of the court.<sup>492</sup> According to the case law, if a clerk has reason to believe that a particular credit agreement may have been granted recklessly, the case must be referred to the to court for consideration and possible judgment.

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2011 (74) *THRHR* 223, Van Heerden & Boraine 2009 12 (3) *Potchefstroom Electronic Law Journal* 17 and Boraine & Van Heerden 2010 (Vol 13) *Potchefstroom Electronic Law Journal* 97/508

<sup>487</sup> Professor van Heerden differentiates between “general over-indebtedness” and “Reckless over-indebtedness”, which Vessio states will prove to be artificial and inconvenient. Because the deciding factor will be that the credit agreement last entered into caused the consumers over-indebtedness, which credit agreement, can be considered to be reckless credit lending by the credit provider. All so see Vessio 2009 *TSAR* 281, Renke 2011 (74) *THRHR* 224 and Stoop & Kelly-Louw 2011 (Vol 11) *Potchefstroom Electronic Law Journal* 17/35

<sup>488</sup> Van Heerden & Boraine 2011(Vol 2) *De Jure* 10

<sup>489</sup> Van Heerden & Boraine 2009 SAFLII per 12

<sup>490</sup> s 83(1) of the NCA; Otto *et al NCA Explained* (2010) 78; Vessio 2009 *TSAR* 282, Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-70 and Van Heerden & Boraine 2009 12 (3) *Potchefstroom Electronic Law Journal* 17

<sup>491</sup> Otto *et al NCA Explained* (2010) 78

<sup>492</sup> *African Bank Ltd. V Myambo NO & Others* 2010 (6) SA 298 (GNP)

Yet, a consumer may also allege that an agreement is reckless, in which instance the consumer bears the *onus* of proving the allegation. This principle was supported in the case of *SA Taxi Securitisation (Pty) Ltd v Mbatha*<sup>493</sup> when the court provided certain guidelines regarding the type of information required to be given by the consumer who alleges reckless credit granting. If the consumer alleges that it was a:

- a. type one reckless credit – the consumer must provide details of the negotiations leading up to the conclusion of the agreement, parties involved should be identified and details regarding the credit application, which the consumer signed, must be revealed;<sup>494</sup>
- b. type two reckless credit – consumer must provide evidence validating the consumer's level of education and experience at the time when the consumer entered into the credit agreement with the particular credit provider, as well as disclosing previous credit transactions entered into by the consumer;<sup>495</sup>
- c. type three reckless credit – consumer must provide evidence of all her or his indebtedness at the time when the particular credit agreement was concluded (that is the entire consumer's income and expenditure).<sup>496</sup>

In the case *Mercedez-Benz Financial Services SA (Pty) Ltd v Holtzhausen*<sup>497</sup> the defendant claimed that the credit agreement was granted recklessly; however in making this allegation the defendant failed to outline his financial position at the time when the alleged reckless credit was extended to him. The judge, AJ Dolamo, stated that in order for the court to have determined whether the defense of reckless credit is a *bona fide* defense for purposes of opposing summary judgment such an outline of the defendant's financial position at the time when the alleged reckless credit was granted needed to be

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<sup>493</sup> 2011 (1) SA 310 (GSJ), see also Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-71

<sup>494</sup> Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-71

<sup>495</sup> Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-71

<sup>496</sup> Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-71

<sup>497</sup> (13392/12) [2012] ZAWCHC

provided to the court. Consequently, determining the stage when a credit agreement became reckless is the time the credit agreement was entered into.<sup>498</sup>

### 5.7. Pre-agreement statement and quotation

The NCA requires from a credit provider not to enter into a small<sup>499</sup>, intermediate,<sup>500</sup> or large<sup>501</sup> credit agreement unless the credit provider has given the consumer a pre-agreement-statement<sup>502</sup> and a quotation<sup>503</sup> in the prescribed format.<sup>504</sup> Although this statutory pre-requisite is not a determining factor as to whether a credit provider granted credit recklessly, for the purpose of this study it is a factor to consider.

A quotation for a small credit agreement must disclose the following information<sup>505</sup>:

- credit amount;
- deposit to be paid;
- instalments;
- interest rate, and
- other fees and charges.

A quotation for an intermediate or large credit agreement is very similar in that the following information must be disclosed<sup>506</sup>:

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<sup>498</sup> Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-69, see also *Horwood v First Rand Bank Ltd.* (2011) ZAGPJHC 121 (21 September 2011) at par 10, *ABSA Bank Ltd. v Lowting and others* (39029/2011) [2013] ZAGPPHC 265 (decided on 19 August 2013) par 41

<sup>499</sup> s 9(2) read with GN 713 in GG 28893 of 1 June 2006

<sup>500</sup> s 9(3) read with GN 713 in GG 28893 of 1 June 2006

<sup>501</sup> s 9(4) read with GN 713 in GG 28893 of 1 June 2006

<sup>502</sup> Stoop “*Disclosure as an Indirect Measure Aimed at Preventing Over-indebtedness*” 2011, also see PN Stoop “*n Kritiese Evaluasie van die Toepassingsveld van die National “Credit Act” 2008 at 365-366 and Renke et al “The National Credit Act: new Parameters for the Granting of Credit in SA” 2007 at 269*

<sup>503</sup> s 92(1)-(2)

<sup>504</sup> Reg 28-29 sets out the prerequisite for the quotations for the different classes of credit agreements. Also see Form 20 of the regulations for the prescribed forms of the quotation.

<sup>505</sup> s 92(3)(b), Reg 28 and Form 20

<sup>506</sup> s 92(2)(b) and Form 20.1



- credit amount;
- deposit deducted;
- total of additional charges;
- instalments in respect of the total amount deferred;
- total cost, and
- interest rate.

Said quotations are binding upon the credit provider for a period of five business days, subject to certain conditions.<sup>507</sup> In principle, the quotation is an option created by statute, with the prospective consumer as the option holder.<sup>508</sup> This quotation and statement ensures that the consumer is able to compare cost of different credit products from different credit providers<sup>509</sup> and places the consumer in a position to make informed choices regarding credit.

Stoop<sup>510</sup> argues convincingly that the pre-agreement quotation and statement simultaneously serve as an indirect measure that can be used to prevent consumers from concluding credit agreements that will make them over-indebted "... because better-informed consumers are protected against taking up credit without proper thought."

The question is whether this argument should not also apply to matters of reckless credit lending. If the credit provider complies with the NCA requirements concerning the pre-agreement quotation, and statement of all essential information about the prospective credit agreement is fully disclosed in plain and simple language that can be considered an indirect measure aimed at preventing the consumer to enter into a reckless credit lending agreement.

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<sup>507</sup> s 92(3(a) and (b), also see s 94(4)-(7)

<sup>508</sup> Otto & Otto *The National Credit Act Explained* 44; Stoop "Disclosure as an Indirect Measure Aimed at Preventing Over-indebtedness" 2011.

<sup>509</sup> Stoop "Disclosure as an Indirect Measure Aimed at Preventing Over-indebtedness" 2011

<sup>510</sup> Stoop "Disclosure as an Indirect Measure Aimed at Preventing Over-indebtedness" 2011

Should a credit provider fail to comply with the formalities in regard to the pre-agreement disclosure, the credit agreement will still be valid but the credit provider may be fined<sup>511</sup> for up to R1 million or 10% of its annual turnover during the preceding financial year, whichever is the greatest.<sup>512</sup> If the credit provider continues to contravene the NCA and/or fails to comply with the provisions of the NCA, the NCR may request the NCT to cancel the credit provider's registration to practice as a credit provider.<sup>513</sup>

The consequences of failure to adhere to section 92 are severe for the credit providers, but they should not only consider the legislative consequences of disclosing the pre-agreement but also the possibilities of using the pre-agreement disclosure statement. This can be proof that the consumer knew and could appreciate the risks and costs of the proposed credit agreement that would have prevented the consumer from entering into a possible reckless credit agreement.

## 5.8. Conclusion

Section 81 of the NCA is possibly the most important section in the NCA because it forces the credit provider to do a three-phase assessment before entering into a credit agreement with a consumer.<sup>514</sup> This particular section undoubtedly requires the credit provider to implement a comprehensive assessment mechanism or model and not merely an affordability assessment.<sup>515</sup> Credit providers have to design, develop, and implement their own assessment mechanism, models, and procedures, as long as it is fair and objective and does not discriminate.<sup>516</sup> Prior to the Amendment Act, the credit providers had no guideline(s) when doing so and had to rely on the courts for guidance

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<sup>511</sup> Administrative fines is discussed in more detail in par 6.4 of this study

<sup>512</sup> s 151 and Kelly-Louw Consumer Credit Regulation in SA 206

<sup>513</sup> s 151 and Kelly-Louw Consumer Credit Regulation in SA 147 & 206

<sup>514</sup> Renke 2011 *THRHR* 223

<sup>515</sup> Scholtz *et al* Guide to the National Credit Act 11-64; Van Heerden & Boraine 2011(Vol 2) *De Jure* 7

<sup>516</sup> Otto *et al* *NCA Explained* (2010) 77, also see Vessio 2009 *TSAR* 279

in order to avoid the dire consequences of reckless credit granting.<sup>517</sup> Subsequently, the credit providers have some guideline(s) in the form of the assessment regulations.<sup>518</sup>

The NCA is certainly one of the most important pieces of legislation in South Africa, because it aims at protecting consumers, but also aims to balance the right of consumers with that of credit providers. Any amendment to streamline the implementation and enforcement of the NCA is appreciated, therefore the amendments as discussed in this part of the study, are much needed. However, there are many of the provisions that still need to be attended to by the legislature. For example section 89(5)(c) that has been found to be unconstitutional, as well as the gap regarding what should happen to immovable as well as movable assets during suspension periods when rights and obligations are set aside.

Three types of reckless credit lending were identified and discussed. Comparing these types with each other indicates the following:

- i. A credit provider has an obligation to conduct an affordability assessment on all credit applications in terms of section 81(2). Failure to comply with this legislative requirement will render the credit agreement reckless *per se* even if the consumer was perfectly able to afford the repayment of the loan.<sup>519</sup>
- ii. The second obligation is that the credit provider must explain the risk, cost and obligations under the particular credit agreement to the consumer to such an extent that the consumer understand and appreciate these risks, cost and obligations. The credit provider can do so by including a clause in the credit application and agreement confirming that the consumer understands and appreciate all the risks, cost, and obligations of the agreement.
- iii. The third obligation of a credit provider is not to enter into a credit agreement if the proper assessment indicates that the consumer cannot afford the repayment of the

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<sup>517</sup> Otto *et al* *NCA Explained* (2010) 85. Though the legislator has provided criteria with the amendments to the NCA, which is helpful, it is still not compressive enough as needed.

<sup>518</sup> See paragraph 5.3.

<sup>519</sup> Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-67

particular credit agreement and entering into the credit agreement will result in the consumer becoming over-indebted.

The court has the discretion to consider reckless lending without the consumer bringing same to the court's attention. In matters where a consumer alleges reckless lending, the consumer must provide evidence to substantiate the allegation. Should the court find the particular credit agreement to be reckless, the court has the discretion to impose certain prescribed sanctions, which will be discussed in Chapter 6 of this study.

## CHAPTER 6: REMEDIES FOR RECKLESS CREDIT

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### 6.1. Introduction

One of the objectives of the NCA is to prevent credit providers from granting credit reckless to consumers<sup>520</sup> by establishing pre-assessment requirements<sup>521</sup> and imposing severe sanctions<sup>522</sup> or remedies in those instances where the court finds that the particular credit provider granted the credit recklessly as per the definition. “Reckless credit” is defined as “... credit granted to a consumer under a credit agreement concluded in circumstances described in section 80”.<sup>523</sup> Section 80 of the NCA describes the three types of reckless credit, as discussed in Chapter 5 of this study.

In addition to the abovementioned objective of the NCA, the legislator made it clear that a credit provider must take reasonable steps to prevent entering into a reckless credit agreement.<sup>524</sup> In the following instances, the court may make certain orders as per the powers given to the court in section 83 of the NCA.<sup>525</sup>

- where the court determines that a particular credit agreement was indeed reckless credit granting due to the fact that the credit provider failed to conduct an assessment as required by the NCA<sup>526</sup>, or
- where the credit provider conducted an assessment and enters into a credit agreement with the specific consumer even though it was clear to the credit

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<sup>520</sup> s 5(c)(ii)

<sup>521</sup> s 81

<sup>522</sup> s 83(2)

<sup>523</sup> s 1

<sup>524</sup> s 81(2) (a)-(b). see also *Desert Star Trading 145 and Another v NO 11 Flamboyant Edleen CC* (98/10)(2010) ZASCA pars 4 & 15

<sup>525</sup> Vessio 2009 TSAR 282 and Van Heerden & Boraine 2011 (Vol 2) *De Jure* 11

<sup>526</sup> s 80(1)(a) and see par 5.2

provider that the consumer did not generally understand the risks, cost or obligations of the proposed agreement<sup>527</sup>,

- or the credit provider conducted the assessment and entered into the agreement with the specific consumer even though this particular credit agreement will render the consumer over-indebted.<sup>528</sup>

In the chapter at issue, the sanctions stated above will be discussed in accordance with each type of reckless credit. In doing so, it could be determined which sanction will be the most appropriate remedy for a particular type of reckless credit.

## 6.2. Powers of the court

In section 83(1) of the NCA it is stated that the court may declare a credit agreement reckless during any court proceeding concerning credit agreements.<sup>529</sup> Upon comparing the wording of section 83(1) with section 85<sup>530</sup> it appears that the court, to whom the credit agreement is being presented, may determine *mero motu* whether the credit agreement was reckless granting or not<sup>531</sup>. This possibility does not have to be brought to the courts attention by either the consumer or a debt counsellor, unlike situations where over-indebtedness exist and such allegation must be made clear to the court.<sup>532</sup>

Section 130(4)(a) of the NCA also states that during any debt procedure in a court, where the court has found the credit agreement was reckless lending<sup>533</sup> the particular court is compelled to make an order in terms of section 83.<sup>534</sup> In comparing the wording of section 130(4)(a) with section 83, it appears that the court has discretion when considering whether a credit agreement is reckless or not, however, the court does not

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<sup>527</sup> s 80(1) (b) (i) and see par 5.2.

<sup>528</sup> s 80(1)(b)(ii) and see par 5.2

<sup>529</sup> Supra page 19 also see Otto *NCA Explained* 78; Boraine & Van Heerden 2010a (73) *THRHR* 651 and Stoop 2009 *SA Merc LJ* 365

<sup>530</sup> s 85 deals with over-indebtedness also see *Ex Parte Ford* 2009 3 SA 375 (WCC)

<sup>531</sup> Boraine & Van Heerden 2010a (73) *THRHR* 651

<sup>532</sup> Otto *NCA Explained* 78 and Vessio 2009 *TSAR* 282

<sup>533</sup> As prescribed in section 80 of the NCA

<sup>534</sup> Van Heerden & Boraine 2011 (Vol 2) *De Jure* 12

have discretion to deviate from the power given to the court by section 83.<sup>535</sup> The court may only make those orders that are provided for in section 83.

In *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases*<sup>536</sup> the court considered the question of a defence based on reckless credit. The respondents raised a defence of reckless credit on the applicant's application for summary judgment and return of each vehicle after the respondents failed to make payments in terms of the lease agreement, which was entered into to purchase a taxi. The court held that a consumer (and/or defendant) that raise the defence of credit being granted recklessly by merely making "bald, vague, or sketchy" allegation would not be enough to fight off summary judgment. The consumer must provide details to support an allegation of reckless credit before the court can consider such a defence. The consumer, who alleges that credit has been extended recklessly, bears the onus of proof.<sup>537</sup>

In *Africa Bank Ltd v Greyling*<sup>538</sup> the judge concurred with the previous judge that defendants have the tendency to use reckless credit as a defence without the sufficient particularity to comply with the reckless credit requirements. Hence, the defence for reckless credit lending should not be "inherently and seriously unconvincing" and should contain a reasonable amount of verification detail.<sup>539</sup>

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<sup>535</sup> Van Heerden & Boraine 2011 (Vol 2) *De Jure* 12

<sup>536</sup> 2011 (1) SA 310 (GSJ)

<sup>537</sup> Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-7. In *SA Taxi Securitisation (Pty) Ltd v Xolile* 2012 JOL 29510 (ECM) (unreported case, number 1623/11, date of judgement: 26/1/2012) the court also found during the summary judgement application that the respondents defence for reckless credit had no merits.

<sup>538</sup> (2013/10126) [2014] ZAGPHC 186 (decided on 7 November 2014)

<sup>539</sup> *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011 (1) SA 310 (GSJ) par 26 and *Africa Bank Ltd v Greyling* 2013/10126) [2014] ZAGPHC 186 (decided on 7 November 2014)

### 6.3. Court orders for reckless credit agreements

Notwithstanding any provisions of law or agreement to the contrary, during any court proceedings<sup>540</sup> in which a credit agreement is being considered the court may declare the credit agreement to be reckless lending should the evidence prove that the credit provider failed to comply with section 80<sup>541</sup> of the NCA. Though “court” is not defined in the NCA, Judge Du Plessis<sup>542</sup> stated the following:

Section 83 of the NCA gives the courts the power to declare that a credit agreement is reckless. I have held that the clerk of the court is not a court as envisaged in the NCA. If clerks of the court have reason to believe that a particular credit agreement may be an instance of reckless credit as provided for in section 80 of the NCA, they must refer the request for consent judgement to the court.

For that reason, magistrates are the presiding officers who are referred to as “courts” and they have the power to decide whether a particular credit agreement is reckless lending or not.<sup>543</sup> In order for a magistrate to exercise this power the magistrate as the court may call for evidence (for example documentary evidence) to prove whether a particular credit agreement is reckless as defined in section 80 of the NCA.<sup>544</sup>

Considering section 80 and section 83, the legislator clearly states that if a court finds that a particular credit agreement is reckless lending due to the credit provider failing to conduct an assessment as required by the Act<sup>545</sup>, (first type of reckless credit as discussed in par 5.2 of this study); or the credit provider did conduct an assessment and entered into the credit agreement with the consumer, even though it was clear to the

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<sup>540</sup> *African Bank Ltd. v Additional Magistrate Myambo NO and others* (34793/2008) [2010] ZAGPPHC 60; 2010 (6) SA 298 (GNP)(decided on 9 July 2010) p 31

<sup>541</sup> Supra par 6.2.

<sup>542</sup> In the case of *African Bank Ltd. v Additional Magistrate Myambo NO and others* (34793/2008) [2010] ZAGPPHC 60; 2010 (6) SA 298 (GNP)(decided on 9 July 2010) p 31

<sup>543</sup> As provided for in s 83 of the NCA

<sup>544</sup> *African Bank Ltd. v Additional Magistrate Myambo NO and others* (34793/2008) [2010] ZAGPPHC 60; 2010 (6) SA 298 (GNP)(decided on 9 July 2010) p 32

<sup>545</sup> s 80(1)(a) and s 80(2)



credit provider that the particular consumer did not generally understand or appreciated the risks, cost or obligation of the proposed credit agreement<sup>546</sup>, (second type of reckless credit as discussed in par 5.2 of this study), the court hearing the matter has the discretion to make either of the following orders:<sup>547</sup>

- (a) setting aside all or part of the consumer's rights and obligations under that particular credit agreement<sup>548</sup>, or
- (b) suspend the force and effect of the particular credit agreement.<sup>549</sup>

It is submitted that when comparing the wording of section 83(2) (a) with section 83(2) (b) it is only with setting-aside orders that the court may do so if the said court deems "just and reasonable" under the circumstances. With suspension, the legislator omitted to indicate whether the court has the same discretion to make the order in such circumstances where the court deems it just and reasonable.

The NCA provides no guidelines as to how or when the court must decide between setting aside the rights and obligations of the consumer and suspending the credit agreement. Moreover, if the court should decide to set aside the consumer's rights and obligations, the question is how the court should exercise its discretion between setting aside such rights and obligations in part or in full. Usually the court has facts before it that will direct it as to the remedy or sanction it may impose.<sup>550</sup> What is clear though is that when the court declares a credit agreement reckless, the court may only grant a single order, not both.<sup>551</sup>

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<sup>546</sup> s 80(1)(b)(i)

<sup>547</sup> Vessio 2009 *TSAR* 282; Van Heerden & Boraine 2011 (Vol 2) *De Jure* 13; Otto *NCA Explained* 78, Jordaan *Credit Law of SA* 59, Renke 2011 (74) *THRHR* 224 and *Standard Bank of South African Ltd v Kelly and Another* (23427/2010) [2011] ZAWCHC 1 (decided on 25 January 2011)

<sup>548</sup> s 83(2)(a) also see Boraine & Van Heerden 2010a (73) *THRHR* 652 and Renke 2011 (74) *THRHR* 224

<sup>549</sup> s 83(2)(b) and s83(3)(b)(i) also see Boraine & Van Heerden 2010a (73) *THRHR* 652 and Renke 2011 (74) *THRHR* 224

<sup>550</sup> Boraine & Van Heerden 2010a (73) *THRHR* 652

<sup>551</sup> Renke 2011 (74) *THRHR* 224 as well as the use of the word "or" between s 83(2)(a) and (b)

### 6.3.1. Court order setting aside the credit agreement

The NCA only states that the court may set aside the reckless credit agreement in those circumstances where the court finds it “just and reasonable”.<sup>552</sup> No further power or criteria given by the NCA to the court to determine in which circumstances the credit agreement may be set aside completely or when the reckless credit agreement may only be set aside in part.<sup>553</sup>

It is therefore unclear which type of reckless credit granting by a credit provider will justify that the consumer’s rights and obligations under the particular reckless credit agreement can be set aside in total and which type of reckless granting will allow the setting aside of only a part of the consumers rights and obligations. Even in the last instance, according to the credit legislation it is unclear which part of the reckless credit agreement may be set aside.<sup>554</sup> Should it be the interest for a certain period (term) of the credit agreement, costs, or payments made by the consumer to the credit provider? Section 83(2) merely states the court may either set aside all or part of the consumer’s rights and obligation or suspend the credit agreement if the credit provider failed to do an assessment (typed one)<sup>555</sup>, or if the credit provider conducted an assessment but failed to ensure the consumer understood her or his rights and obligations under the particular credit agreement (type two).<sup>556</sup>

The NCA is also unclear what should happen to the performances (if any) by the consumer and the credit provider in terms of the reckless credit agreement.<sup>557</sup> For example, the consumer applies to a credit provider for an instalment agreement to purchase a motor vehicle. During the assessment phase, the credit provider fails to comply with the requirements in terms of section 80(1) and grants the instalment agreement. After six months of struggling to make payments on the instalment

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<sup>552</sup> s 83(2)(a)

<sup>553</sup> Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-72 and Boraine & Van Heerden 2010a (73) *THRHR* 652 and Renke 2011 (74) *THRHR* 227

<sup>554</sup> Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-72

<sup>555</sup> s 80(1)(a)

<sup>556</sup> s 80(1)(b)(i)

<sup>557</sup> Boraine & Van Heerden 2010a (73) *THRHR* 653

agreement, the consumer approaches the court and the court finds the credit agreement to indeed be reckless lending and impose a sanction in terms of section 83(2)(a). The NCA only states that the consumer's rights and obligations under that reckless credit agreement must be set aside in part or in total.<sup>558</sup> The legislator therefore failed to state what should happen to the payments already made by the consumer to the credit provider or what should happen to the motor vehicle(the security), that is, should restoration take place or not.

If neither the consumer nor the credit provider has performed in terms of the reckless credit agreement, it is suggested that the court could then set aside the consumers' rights and obligations in its entirety in terms of that particular credit agreement.<sup>559</sup> In effect, the contractual relationship between the consumer and the credit provider (the legal bond<sup>560</sup>) will end as the credit agreement is cancelled.<sup>561</sup> It would then be as if there has never been a credit agreement entered into between the credit provider and the consumer. However, it will become problematic in the specific circumstances where one or both of the parties (credit provider and/or consumer) have performed in terms of the credit agreement. In the absence of clear guidelines in the credit legislation, it is uncertain how the court should apply the provisions of the NCA.

A further comparison indicates that the NCA only mention that the **consumer's** rights and obligations in terms of the reckless credit agreement will be set aside, but the Act is silent about those rights and obligations of the **credit provider**.<sup>562</sup> Boraine and Van Heerden are of the opinion that the reason the NCA is silent about the credit provider's rights and obligations is that credit agreements are usually a reciprocal contract and for every right there is an obligation as its counterpart.<sup>563</sup> These authors, therefore, concluded that if the rights and obligations of the consumer (as referred to in the NCA)

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<sup>558</sup> Boraine & Van Heerden 2010a (73) *THRHR* 653

<sup>559</sup> Boraine & Van Heerden 2010a (73) *THRHR* 653

<sup>560</sup> See Chapter 3 of this study where the creation of the legal bond is discussed

<sup>561</sup> Renke 2011 (74) *THRHR* 227

<sup>562</sup> Boraine & Van Heerden 2010a (73) *THRHR* 653

<sup>563</sup> Boraine & Van Heerden 2010a (73) *THRHR* 653

are cancelled, it means by implication that the rights and obligations of the credit providers are automatically also cancelled and that the NCA does not need to state this fact explicitly.<sup>564</sup>

Should this be the case, then restoration ought to take place. The credit provider ought to be able to reclaim any amount lent to the consumer (credit amount granted) or goods delivered to the consumer and as the counterpart the consumer ought to reclaim any payments made by the consumer to the credit provider<sup>565</sup>, otherwise there will be a situation of unjustified enrichment.

However, this was not the case in the matter of *De Kock v Gerber & Others*<sup>566</sup>. Mr and Mrs Gerber were pensioners when they applied for a second mortgage loan of R350, 000 with ABSA Bank Ltd over an immovable property valued at R1,5 million. Mr Gerber received a pension of R3 777 per month, which was the only income, and their monthly expenses were R2 427. The amount available to repay the mortgage loan of R4 237 per month was R1 350. Nevertheless, ABSA Bank granted them the loan and registered the mortgage bond.

When Mr and Mrs Gerber were unable to repay the instalment, they applied for debt counselling. The debt counsellor applied to the magistrate's court in Port Elizabeth for the particular mortgage loan to be declared reckless lending. ABSA Bank failed to oppose the application. The court held that the loan was granted recklessly in terms of s 80 of the NCA and the mortgage loan was set aside in terms of s 83(2)(a). However, the court documentation made no mention of what happened to the loan of R350 000 granted to the respondents<sup>567</sup>. Consequently, the respondents remain to reside in the property and ABSA Bank had to write off the amount borrowed to the respondents. The

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<sup>564</sup> This is supported in the article by Renke 2011 (74) *THRHR* 227 and also see Nagel *et al Commercial law* 2006 24

<sup>565</sup> Boraine & Van Heerden 2010a (73) *THRHR* 653 and Boraine & Van Heerden 2010 (Vol 13) *Potchefstroom Electronic Law Journal* 98/508

<sup>566</sup> Unreported case, number 9035/10, 21 April 2010, Magistrate's Court, Port Elizabeth.

<sup>567</sup> Kelly-Louw Consumer Credit Regulation in SA 313

outcome of this case had a negative impact on ABSA Bank's reputation and risk, and caused the Bank a great deal of distress.

The NCA states clearly<sup>568</sup> that the court may set aside all or any of the consumer's rights and obligations under the credit agreement that has been found by the said court to be reckless lending. However, there is no indication or statement in the NCA that forbids, limits, or excludes the credit provider from claiming money or goods delivered to the consumer.<sup>569</sup>

In the case of *SA Taxi Securitisation (Pty) Ltd v Nako*<sup>570</sup> Kemp AJ stated the following *obiter*: "I am also satisfied that the respondents would in any event have to hand back the vehicles if the agreement is set aside or suspended." In the summary judgement application the respondents filed as a defense for their non-performance (making payments in terms of the lease agreements) that the agreements constitute reckless credit lending. Kemp AJ concurred with Plasket J<sup>571</sup> that it is not a defense for respondents (defendants) to a claim for the return of the vehicles that the credit extended had been granted recklessly.<sup>572</sup>

In *S.A Taxi Securitisation (Pty) Ltd v Chesane*<sup>573</sup> Boruchowitz J were in the same mind as Kemp AJ when Boruchowitz J held:

Even should the respondent be successful at the trial in demonstrating that the credit grant to him was reckless, then and in that event the probabilities are that

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<sup>568</sup> s 83(2)(a)  
<sup>569</sup> Boraine & Van Heerden 2010a (73) *THRHR* 653 and Renke 2011 (74) *THRHR* 227  
<sup>570</sup> (19/210, 21/2010, 22/2010, 77/2010, 89/2010, 104/2010 & 842/210) [210] *ZAECBHC* 4 (8 June 210) 15  
<sup>571</sup> In the case of *SA Taxi Securitisation (Pty) Ltd. v T Booï & Others (unreported case)* (4077/2009, 5065/2009, 4021/2009 & 5069/2009) [2010] *ZAECG* (20 May 2010) 19  
<sup>572</sup> This decision was also concurred by Judge J. Goosen in the case of *SA Taxi Securitisation (Pty) Ltd v Campher* [2012] *ZAECGHC* 9 (24 February 2012) in paragraph 15 when Goosen J stated that reckless credit is of equal application to the defence of an alleged over-indebtedness raised in terms of s 85.  
<sup>573</sup> 2010(6) S.A.559 (GSJ) at 27

the court hearing the matter will, in terms of s 83(2)(a) of the NCA, set aside all or part of the respondent's rights and obligations in terms of the credit agreements, in which event the vehicles will be returned to the applicant, and any remaining indebtedness of the respondent to the applicant will be the subject-matter of the court's discretionary re-organisation. It is highly improbable that the trial court will allow the respondent to retain possession of both vehicles, operate them for profit as taxis, and not make any payment therefore to the applicant.

Comparing the vagueness of section 80(1) to section 89(5)(c)<sup>574</sup>, where clear provisions are made for this cause of action, the NCA has omitted to make provision for the cause of action<sup>575</sup> in those circumstances where performance has been made in terms of a reckless credit agreement. Section 83(2)(a) does not prohibit or limit the rights of a credit provider to claim restitution, the section merely states that the reckless credit agreement may be set aside in full or in part.<sup>576</sup>

In the case of *Opperman and Others*<sup>577</sup> the Constitutional Court had to consider the unconstitutionality of s 89(5)(c)<sup>578</sup>. The High Court found that this particular section was contrary to s 25(1) of the Constitution<sup>579</sup> because it allows for the arbitrary deprivation of property by preventing any claim by the credit provider against the consumer for the repayment of the money and does not leave the courts with a discretion to decide otherwise.<sup>580</sup> The majority of the Constitutional Court concurred with the High Court in that the provisions of s 89(5)(c) of the NCA resulted in arbitrary deprivation, which is in contradiction of s 25(1) of the Constitution. The court further stated that the deprivation was not a reasonable and justifiable limitation of the right of the consumer. Therefore

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<sup>574</sup> Section in the NCA that deals with unlawful credit agreements

<sup>575</sup> The restrictions of the common law remedies have not been tested in respect to this vagueness in s83(2)(a), which does pose a risk for a plaintiff claiming unjustified enrichment

<sup>576</sup> Renke 2011 (74) *THRHR* 227

<sup>577</sup> Unreported case, number CCT 34/12

<sup>578</sup> s 89 must be read together with s 40. See discussion in par 3.3.3 of this study.

<sup>579</sup> The Constitution of South Africa, Act 108 of 1996

<sup>580</sup> *Opperman v Boonzaaier and Others* (WCC), unreported case no 24887/2010, also see *Cool Ideas 1186 CC v Hubbard & Another* (2014) ZACC 16 (date of decision: 5 June 2014) as well as *Troskie v Von Holdt & Others* (2704/2012)(2013) ZAECGHC 31 (date of decision: 11 April 2013) and *Chevron SA (Pty) Ltd v Wilson t/a Wilsons's Transport and others* (CCT 88/14) [2015] ZACC 15 (decided on 5 June 2015).

the common law position regarding unlawful contracts will prevail until the legislature replaces section 89(5)(c).<sup>581</sup>

In comparison are the cases relating to the Brusson scheme. In terms of this scheme, financially distressed homeowners seek financial assistance from Brusson Finance (Pty) Ltd. The latter advertised in local newspapers by inviting home owners in need of finance to contact the advertiser for help, regardless of whether the home owner have a good or bad credit rating. The homeowner was then required to sign various documentation, of which included a blank offer to purchase, a blank Deed of Sale, a memorandum of undertaking and agreement. In due course, the homeowners became aware that their property, which they did not intend to sell, was sold to a third party. In due course, Brusson Finance (Pty) Ltd was liquidated. When credit providers started executions steps against the immovable property (which form part of the security of the underlying credit agreement), the credit providers became aware of the scheme and the victims of the scheme. During the different court cases, the courts came to different conclusions, as briefly discussed:

- a) *Ditshego and two others v Brusson Finance (Pty) Ltd*<sup>582</sup>: Jordaan stated in his judgement that the Brusson scheme was a simulated transaction and that the agreements concluded therein were unlawful and void.
- b) *ABSA Bank v Boshoff*<sup>583</sup>: Goosen had to consider a summary judgement application. The defendant relied on the aforementioned case and alleged that the mortgage loan agreement of ABSA Bank Ltd should be declared unlawful. Goosen found that Jordaan did not declare the mortgage loan agreement in the Ditshego case as unlawful. Quite the reverse and Jordaan ordered the restitution of the property subject to the bondholder's (ABSA Bank Ltd) rights. Jordaan concluded that the Brusson scheme was unlawful, but the obligations that arose from the mortgage loan agreement remained enforceable. Consequently, Goosen granted summary judgement in favour of ABSA Bank Ltd.

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<sup>581</sup> Also see *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport and others* (CCT 88/14) [2015] ZACC 15 (decided on 5 June 2015).

<sup>582</sup> An unreported case, number 5144/2009 [2010] ZAFSHC 68 (decided on 22 July 2010).

<sup>583</sup> An unreported case, number 2410/2012 [2012] ZAECPEHC 58 (decided on 28 August 2012).



- c) *Radebe v Nedbank and others*<sup>584</sup>: Nicholls found that Radebe was entitled to an order setting aside all the agreements that had been concluded with Brusson and the investor. Restitution of the immovable property of Radebe was ordered on the basis that Radebe had no intention to transfer ownership of the property.
- d) *Mabusa v Nedbank Ltd. and another*<sup>585</sup>: Mavundla had to decide whether judgement obtained by Nedbank against the third party (who bought the property through the Brusson scheme) should be rescinded in terms of the common law. The judge concurred that the applicant did not intend to sell her property and therefore the property had been fraudulently transferred out of the applicant's name into the name of the third party. Consequently, the judgement obtained by Nedbank prejudicially affected the applicant's right and title to the property in question. The court granted rescission of the judgement.

There are many more cases in regards to the Brusson scheme.<sup>586</sup> Without a doubt there will be many more as credit providers seek redress in recovering credit loans that they had made to the Brusson investors. All the various judgements were passed from different approaches; in some the underlying credit agreements were held to be enforceable, while in other judgments the credit agreements were set aside because it was unlawful and therefore had no force and effect.

In *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* the court indicated that the respondents would never have entered into a credit agreement due to the credit provider's recklessness, in which case it will be "just and reasonable to set aside the agreement".<sup>587</sup> Such an order will then result in the agreement being void, as if there has never been a credit agreement. Consequently, the credit provider, who is the owner

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<sup>584</sup> An unreported case, number 31495/13 [2014] ZAGPJHC 228 (decided on 25 September 2015).

<sup>585</sup> An unreported case, number 67456/2010 [2014] ZAGPPHC 513; 2015 (3) SA 369 (GP)(decided on 26 June 2014).

<sup>586</sup> *Moore and Another v Sherriff for the District of Vereeniging and others* (22082/2013) [2014] ZAGPJHC 230 (decided on 26 September 2014), *Rigacraft CC v Ramachela and another* (6967/2014) [2015] ZAGPPHC 259 (decided on 8 May 2015) and *Goodman v Tlabimosebo and others* (46283/2013) [2015] ZAGPJHC 164 (decided on 13 August 2015).

<sup>587</sup> 2011(1)SA 310 (GSJ) par 47 and also see Kelly-Louw *Consumer Credit Regulation* in SA 311



of the vehicle in terms of the lease agreement, would be entitled to restoration of the vehicle. The consumer, who has no further obligations under the particular credit agreement<sup>588</sup>, will be relieved of any further indebtedness or deficiency claim under the reckless credit agreement.<sup>589</sup>

As discussed in Chapter 3, reckless credit agreement is not considered an unlawful credit agreement.<sup>590</sup> In terms of the common law, an unlawful credit agreement is deemed null and void. If a court was to declare the credit agreement to be reckless lending, and the same court imposes that the agreement must be set aside, it has the effect of declaring the contract null and void.<sup>591</sup> Consequently, when a court finds a credit agreement to be reckless credit granting and the said court imposes a remedy in terms whereof the consumer's rights and obligations are set aside (either all or in part), the court will still have to consider restoration not in terms of the NCA but in terms of the common law.<sup>592</sup>

### **6.3.2. Court order suspending the force and effect of the reckless credit agreement**

Comparing section 82(2)(a) with section 82(2)(b) the legislator was somewhat more precise. In this instance, the Act provided detail of the effect suspension will have on a reckless credit agreement. Should the court make an order in terms of when the reckless credit agreement should be suspended, section 84 of the NCA explains the effect or consequences of the suspension on the particular credit agreement for the period<sup>593</sup> as determined by the court ~~whæ~~ that found the credit agreement to be reckless lending.

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<sup>588</sup> s 83(2)(a)  
<sup>589</sup> 2011(1) SA 310 (GSJ) par 50

<sup>590</sup> s 89

<sup>591</sup> Boraine & Van Heerden 2010 (Vol 13) *Potchefstroom Electronic Law Journal* 98/508 and Boraine & Van Heerden 2010a (73) *THRHR* 651

<sup>592</sup> Boraine & Van Heerden 2010a (73) *THRHR* 653

<sup>593</sup> s 84(1)

The consequences include the following:

- 1) The consumer (as the other party to the reckless credit agreement) will not be required to make any payment under the reckless credit agreement.<sup>594</sup>
- 2) No interest, fee, or other charge under the agreement may be charged to the consumer<sup>595</sup> by the credit provider.
- 3) The credit provider's right(s) under the reckless credit agreement or in terms of any other applicable legislation are unenforceable.<sup>596</sup>

Upon expiry of the suspension period, as determined by the court, the force and effect of the particular reckless credit agreement will become enforceable again.<sup>597</sup> All the respective rights and obligations of the credit provider and the consumer under the particular reckless credit agreement will be "revived", and the credit agreement becomes fully enforceable except to the extent that a court may order otherwise.<sup>598</sup>

The credit provider may not charge any amount to the consumer with respect to any interest, fee, or other charge that could not be charged during the suspension period in terms of section 84(1) (b).<sup>599</sup> Nevertheless, once the credit agreement is revived, the credit provider is entitled to charge all the fees and interest applicable to the agreement.<sup>600</sup>

The following gaps are identified in section 84 of the NCA:

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<sup>594</sup> s 84(1)(a) also see Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-72, Renke 2011 (74) *THRHR* 224 and Van Heerden & Boraine 2009 12 (3) *Potchefstroom Electronic Law Journal* 17

<sup>595</sup> s84(1)(b) also see Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-72, Renke 2011 (74) *THRHR* 224 and Van Heerden & Boraine 2009 12 (3) *Potchefstroom Electronic Law Journal* 17

<sup>596</sup> s84(1)(c) also see Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-72, Renke 2011 (74) *THRHR* 224 and Otto *NCA Explained* (2010) 78

<sup>597</sup> s 84(2)

<sup>598</sup> s 84(2)(a)(i) and (ii) also see Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-72

<sup>599</sup> s 84(2)(b) also see Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-72

<sup>600</sup> s 84(2)

- What should happen to the security during the suspension period, for example does the consumer continue to reside in the immovable property<sup>601</sup> under the mortgage home loan, or may the consumer continue to use the motor vehicle under the instalment agreement?
- There is no specification or time limit indicated in the NCA for the suspension period, which could result in court orders suspending credit agreements over a considerable period.<sup>602</sup>

In *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases*<sup>603</sup>, the court actually considered whether the consumer would be entitled to keep the taxi, which is a depreciating security, while not making any payments in terms of the lease agreement if the court order the reckless credit agreement to be suspended for a specified period.<sup>604</sup> The court stated that there was no basis for reading into the NCA a provision that a consumer may continue to use security during the suspension period.<sup>605</sup> The court was of the opinion that it is "... unlikely that the legislature intended that the consumer could keep the money and the box".<sup>606</sup>

The intention of the legislator is clear on the nature of the consequences and the severity of these consequences on a credit provider who grants credit recklessly. However, what is not clear from the NCA is how the court should decide which one of the orders it should make for which type of reckless credit agreement. In fact, the Act is silent regarding this matter.<sup>607</sup> Evidently, the court has judicial discretion, which means that the court must be provided with sufficient facts to consider when making an order

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<sup>601</sup> In an article by Van Heerden & Boraine (2011 (44 Vol 2) *De Jure*), the authors argued that with movable property the credit provider could obtain an interim attachment order to secure the safekeeping of the movable financed item during the suspension period. But it will become more complicated if it is an immovable security. The inconvenience and cost of requiring the consumer to vacate the property for the suspension period would be massive.

<sup>602</sup> Van Heerden & Boraine 2011(Vol 2) *De Jure* par 2.5.3.2

<sup>603</sup> 2011 (1) SA 310 (GSJ)

<sup>604</sup> s 83(2)(b) and s 83(3)(b)(i)

<sup>605</sup> Kelly-Louw Consumer Credit Regulation in SA 310

<sup>606</sup> Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2008) 11-73, Otto *NCA Explained* (2010) 78 and Kelly-Louw *Consumer Credit Regulation in SA* 310

<sup>607</sup> Van Heerden & Boraine 2011 (Vol 2) *De Jure* 13

before the court can exercise such discretion.<sup>608</sup> This discretion should be exercised in line with the purpose of the NCA by “promoting responsibility in the credit market by discouraging reckless credit granting by credit providers and contractual default by consumers.”<sup>609</sup> Furthermore, the court must also consider the other purpose of the NCA, namely to promoting equity in the credit market by balancing the competing rights of the consumers and credit providers.<sup>610</sup>

#### 6.4. Provisions affecting reckless credit

Section 25 of the Amendment Act amended section 83 of the NCA. The Amendment Act introduces a new heading for section 83 of the NCA. The heading used to be “Court may suspend reckless credit agreement” and reads now “Declaration of reckless credit agreement”.

Furthermore, section 83 was amended to include “Tribunal” in declaration of reckless agreement. This means that not only a court but also the National Credit Tribunal is empowered to declare an agreement reckless during proceedings<sup>611</sup>, even though there has not yet been a case law where a credit agreement has been declared reckless credit lending<sup>612</sup>.

An example of a matter being referred to the NCT<sup>613</sup> is the case of Lewis Stores and Monarch Insurance. The NCR investigated the credit insurance policies offered by Lewis Stores and Monarch Insurance to pensioners and self-employed consumers that will cover the loss of employment. The NCR stated that the loss of employment cover was unreasonable and imposed unjust cost on the pensioners and self-employed

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<sup>608</sup> Van Heerden “Section 85 of the NCA 34 of 2005” 2013 page 968

<sup>609</sup> s 3(c)(ii)

<sup>610</sup> s 3(d), also see Van Heerden & Boraine 2011(Vol 2) *De Jure* par 2.5.3.2

<sup>611</sup> s 25(a)-(g) of the Amendment Act

<sup>612</sup> As Coleman stated in *Breytenbach v Fiat* that defendants have the tendency to use “over-indebtedness” and “reckless credit” easily with no supporting facts.

<sup>613</sup> As per the amended section 83

consumers because they could not claim benefits under this cover. The policy only intended to cover outstanding balances under the consumers' credit agreements in the event of the consumer being retrenched or found to be redundant, which would not be the case for a pensioner and/or a self-employed consumer.<sup>614</sup> The NCR referred the matter to the NCT to make an order in terms whereof Lewis and Monarch Insurance have to refund the policies holders and to impose administrative fines. However, it is submitted that the Lewis Store matter bears no reference to reckless credit but the policy premiums could have resulted in a consumer becoming over-indebted. This example also illustrates the power of the NCR to refer a matter to the NCT as per the NCA.

Section 134 of the NCA deals with alternative dispute resolution. The Amendment Act is amended to include that any person who refers a matter to the NCR may also have the option to refer an allegation of reckless credit as a ground for a complaint to the NCR and alternatively to the NCT with jurisdiction.<sup>615</sup> Therefore raising an allegation of reckless credit is not only limited to the court during proceedings, but can also be raised with the Regulator or Tribunal. This amended is beneficial because it will assist in swifter action against reckless credit grantors.

## **6.5. Administrative fines**

Administrative fines are also a new development in the enforcement of legislation in the new democratic South Africa, which is noticeable in the post-apartheid legislations.<sup>616</sup>

In section 151 of the NCA empowers the Tribunal to impose an administrative fine against the credit providers (and/or wrongdoers) in terms whereof they are punished in respect of their required or prohibited conduct.<sup>617</sup>

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<sup>614</sup> Statement made by the NCR company secretary, Lesiba Mashapa, as published in the Business Day on 9 July 2015

<sup>615</sup> s 34 of the Amendment Act

<sup>616</sup> The Competition Act, no 89 of 1998, the Securities Services Act, no 36 of 2004, the Consumer Protection Act, no 68 of 2008 and the NCA

Section 1 defines prohibited conduct as “an act or omission in contravention ...” of the NCA by, for example, a credit provider. Section 150 continue to provide the Tribunal with the power to make an order as to when conduct will be prohibited and what the consequence/remedies might be for such prohibited conduct.<sup>618</sup> For example, if the credit provider were to grant credit recklessly, this act or omission by the particular credit provider can be considered prohibited conduct as it is in contravention of the NCA. Consequently, the Tribunal may then impose an administrative fine on the credit provider.<sup>619</sup>

This discretion given to the Tribunal is limited to a fine that may not exceed:

- 10% of the wrongdoer’s annual turnover during the preceding financial year<sup>620</sup>, or
- R1 000 000.<sup>621</sup>

According to section 151(4)(a) annual turnover will include:

... at the time an administrative fine is assessed, is the total income of that credit provider during the immediately preceding [financial] year under all credit agreements to which the Act applies, less the amount of that income that represents the repayment of principal debt under those credit agreements.<sup>622</sup>

However, can the Tribunal impose an administrative penalty if there is no reference to annual turnover of the respondent? In the matter of *NCR v Werlan Cash Loans*<sup>623</sup> the court held that the applicant is empowered by the NCA to proceed with enforcement action against both registered and unregistered entities. In this case, the respondent did

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<sup>617</sup> It also includes prohibited or required conduct as per the Consumer Protection Act  
<sup>618</sup> s 150(a)-(i) also see *NCR v Marang Financial Services* (NCT/16157/2014/140(1)) [2015] ZANCT 3 (decided on 24 February 2015)  
<sup>619</sup> s 150(c) and 151  
<sup>620</sup> s 151(2)(a)  
<sup>621</sup> s 151(2)(b)  
<sup>622</sup> Also see Reg 16 (a) and (b)  
<sup>623</sup> (NCT/3867/2012/57 (1))(2013) ZANCT 5 (13 February 2013)

apply for registration as a credit provider. A preliminary certificate was issued, but the respondent failed to provide the subsequent information requested by the applicant to consider in order to issue the complete certificate for registered credit providers.

Subsequently the applicant approached the tribunal for an order in terms of section 40 and 151. Because the respondent was not yet a registered credit provider, the respondent also did not provide the applicant with the statutory financial returns in terms whereof the tribunal could consider the fine of 10% of the respondent's annual turnover. The tribunal held that section 151(2)(b) provides an administrative fine of 10% of the annual turnover during the preceding financial year of the respondent or payment of R1 million. Accordingly the tribunal found that where there are no evidence available regarding annual turnover, the tribunal has the option to award a penalty not exceeding R1 000 000.<sup>624</sup>

The tribunal cannot just impose such an administrative fine. The NCA provides a list of factors<sup>625</sup>, which the Tribunal must consider when determining the appropriate fine:

- The nature, duration, gravity and extent of the contravention;
- Any loss or damage suffered as a result of the contravention;
- The behaviour of the respondent;
- The market circumstances in which the contravention took place;
- The level of profit derived from the contravention;
- The degree to which a respondent has co-operated with the National Credit regulator and the Tribunal, and
- Whether the respondent has previously been found in contravention of the NCA.<sup>626</sup>

The NCA continues to state that the fine must be paid to the National Revenue Fund and if the wrongdoer fails to pay the fine, then the NCR may institute proceedings

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<sup>624</sup> NCR v Werlan Cash Loans (NCT/3867/2012/57 (1))(2013) ZANCT 5 (13 February 2013) par 32  
<sup>625</sup> s 151(3)  
<sup>626</sup> s 151(3)(a)-(g)

against the wrongdoer in the High Court within three years of the imposition of the administrative fine by the Tribunal.<sup>627</sup>

In the matter of *NCR v Vaidro 178 CC t/a Vuleka Cash Loans*<sup>628</sup> the National Credit Regulator brought an application to the Tribunal seeking deregistration of the respondent in terms of s 57(1). The NCR alleged (among others) that the respondent failed to conduct affordability assessments and engaged in reckless lending in the period between 4 January 2011 and 1 August 2012.<sup>629</sup> The respondent did not oppose the application, therefore the Tribunal found in favour of the NCR "... in the light of the unopposed evidence presented,"<sup>630</sup> and the respondent's registration as credit provider was cancelled.<sup>631</sup>

Administrative fines will thus be applicable to credit providers who grant credit recklessly. Should the NCR find that a particular credit provider failed to comply with section 80(1)(a) and or section 80(1)(b), then the credit provider's conduct can be considered to be in contravention of the provisions of the NCA as contemplated in section 150 and 151 of the NCA. The NCR or a person associated with the NCR<sup>632</sup> will issue a notice to comply on the wrongdoer in terms of section 55(1)(a)(i). If the wrongdoer fails to comply with the notice, the matter will be referred to the Tribunal for an appropriate order,<sup>633</sup> which can include the administrative fine, as discussed above. This order was also confirmed in *Barko Financial Services (Pty) Ltd v NCR & Another*<sup>634</sup>. The full bench of the Supreme Court of Appeal held that section 55(1)(a) authorises the NCR to issue a compliance notification when the NCR has reasonable ground to believe that the other party has failed to comply with the provisions of the

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<sup>627</sup> Van Zyl in Scholtz (ed) *Guide to the National Credit Act* (2008) 17-6

<sup>628</sup> NCT/7321/2013/57(1)(P)

<sup>629</sup> The conduct of the respondent where prohibited under s 81(2) read with s 1, which act or omission was also in contravention of Regulation 55(1) of the NCA

<sup>630</sup> Par 7.2 of the NCT/7321/2013/57(1)(P)

<sup>631</sup> In terms of s 150(g)

<sup>632</sup> s 55(1)(a)

<sup>633</sup> s 55(6)(b)

<sup>634</sup> 2014 JOL 32315 (SCA) (unreported case, nr 415/13, date of judgement: 18/9/2014)



NCA or is engaging in activity in a manner that is inconsistent with the NCA. However, there are yet no actual cases where the NCT have imposed such fines.

This authorisation is a remedy imposed by the legislature to ensure that credit providers do not continue with prohibited conduct. Not only will such a continuation have a financial impact on the credit provider, it will also have an impact on the reputation of the credit provider and possibly result in deregistration as credit provider.<sup>635</sup>

## 6.6. Conclusion

Section 83(1) provides power to the court to *suo motu* look into a possibility that a particular credit agreement could be reckless lending.<sup>636</sup> Comparing section 83 to 85, where an allegation of over-indebtedness must be brought to the court's attention, the court does not require an allegation of reckless credit. However, the court may not deviate from the powers given to the court in terms of section 83 and may only make the order provided for this particular section.<sup>637</sup>

If a court declares a credit agreement reckless in terms of sections 80(1)(a) or 80(1)(b)(i), it may make an order setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines to be just and reasonable in the circumstances. Alternatively, it may make an order suspending the force and effect of that specific credit agreement in accordance with section 83(3) (b) (i).

If the court, after considering the credit agreements, finds that despite having conducted an assessment<sup>638</sup> the credit provider proceeded to enter into the credit agreement with the consumer notwithstanding the fact that that particular credit agreement will render the consumer over-indebted, then the court must determine:

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<sup>635</sup> s 57(1) and 150(g)

<sup>636</sup> Scholtz et al par 11.4.5, also see *African Bank Ltd. V Myambo* 2010 (3) SA (GNP) 298

<sup>637</sup> Van Heerden & Boraine 2011(Vol 2) *De Jure* par 2.5.2

<sup>638</sup> s 80(1)(a) and s 80(2)

- (a) whether the consumer is over-indebted at the time of the court proceeding<sup>639</sup>; and
- (b) if the consumer is indeed over-indebted, the court may make an order declaring the credit agreement reckless lending and suspend the force and effect of that particular reckless agreement until such date as determined by the court<sup>640</sup> and restructure the credit obligations of the consumer.<sup>641</sup>

For the restructuring order, the court will have to consider the consumer's current means and ability to meet their current financial obligations as well as the date upon which these obligations will be fully satisfied.<sup>642</sup> Therefore, reckless credit and over-indebtedness will sometimes intersect with one other, for example, the consumer can become over-indebted because of reckless credit granting.<sup>643</sup> Then the consumer will be entitled to the remedies as discussed in this chapter.<sup>644</sup> As a result the defense of reckless credit and over-indebtedness are often interconnected, for example if the consumer failed to disclose all the relevant information upon application of credit, the agreement will not be considered reckless credit lending. Failure to disclose requested information materially affects the ability of the credit provider to make a proper assessment.<sup>645</sup> As a result, the agreement will not be reckless credit, but the consumer could be declared over-indebted and his current credit obligations could be restructured.<sup>646</sup>

The significance of a determination of reckless credit by a court is that it has the effect that a consumer can in some instances obtain significant debt relief, for instance by the setting aside of the agreement, or at the very least the suspension of the agreement and the restructuring of his other credit agreement debt. The court has the discretion to

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<sup>639</sup> s 3(3)(a)  
<sup>640</sup> s 83(3)(b)(i)  
<sup>641</sup> s 83(3)(b)(ii)  
<sup>642</sup> s 83(4)(b) also see discussion in Kelly-Louw *Consumer Credit Regulation in SA* 307 - 308  
<sup>643</sup> Vessio 2009 *TSAR* 274  
<sup>644</sup> s 83(3)(b)(i)-(ii)  
<sup>645</sup> Kelly-Louw *Consumer Credit Regulation in SA* 300-301  
<sup>646</sup> s 87

raise the issue of reckless credit in any proceeding in which a credit agreement is being considered, for example during summary judgement applications.

Furthermore, the credit provider has a duty to conduct a proper assessment of the consumer's financial position, prior to entering into a credit agreement with the particular consumer. The credit provider also have a duty to ensure that the consumer understand and appreciate the risks and costs under the potential credit agreement and determine whether the consumer will be able to replay the instalments under the credit agreement.

If, however, a court declares that a credit agreement is reckless in terms of section 80(1) (b) (ii), it must further consider whether the consumer is over-indebted at the time of the court proceedings. If the court then concludes that the consumer is over indebted, it may make an order suspending the force and effect of that credit agreement until a date determined by the court when making the order of suspension. In addition, it may then also restructure the consumer's obligations under any other credit agreements in accordance with section 87.

Should a credit provider continue to grant credit recklessly, the NCR may file a notice on the particular credit provider to comply with the provisions of the NCA<sup>647</sup> and that the credit provider should not act in contravention of the conditions of his registration as credit provider.<sup>648</sup> If the credit provider ignores the notification or fails to comply with the provisions of the NCA, the NCR can approach the Tribunal for filing an administrative fine against the particular credit provider<sup>649</sup> because of the prohibited conduct of the credit provider.

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<sup>647</sup> s 55 also see Van Heerden & Boraine 2011 (44 Vol 2) *De Jure* 8

<sup>648</sup> s 48

<sup>649</sup> s 150 and 151

Reckless credit agreements are not considered unlawful (or illegal) contract<sup>650</sup>, consequently the relief available in section 83 is limited for reckless credit agreements compared to the relief presented in section 89(5) in respect unlawful agreements.<sup>651</sup> In terms of section 89 the consequences are severe in that the security is forfeited to the State and the credit provider will be able to claim for restoration of any performance based on for example on unjustified enrichment of the consumer.<sup>652</sup>

Though the common law provisions regarding unlawful contracts will not be applicable to reckless credit agreements, it appears the courts are of the opinion that a consumer may not be unjustifiably enriched. The credit provider has a right to restoration. In the *Gerber*<sup>653</sup> case, the court adhered to the court's power in terms of section 83, but failed to consider the common law principles regarding enrichment and restoration. This omission was rectified in the *Opperman*<sup>654</sup> case as well as the *Mbatha*<sup>655</sup> case. In the first instance, the Constitutional Court stated that it is unconstitutional to allow for arbitrary deprivation of property by preventing any claim by the credit provider against the consumer for the repayment of the money. In the second instance the court held "... that it is unlikely that the legislature intended that the consumer should keep the money and the box." These were significant court cases, which shaped the issue regarding security in reckless credit agreements.

Even though the purpose of the NCA is to protect the consumer, this purpose must not be considered the only purpose when interpreting the NCA.<sup>656</sup> By doing so, one will lose sight of the other objectives<sup>657</sup> of the NCA. This in turn could result in the interpretation

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<sup>650</sup> See discussions in par 2.5.2 and 3.3.1 of this study, also s 89 sets out the various instances of unlawful agreements, which does not include or refer to a reckless credit agreement

<sup>651</sup> Van Heerden & Boraine 2011(Vol 2) *De Jure* par 2.5.2.

<sup>652</sup> Van Heerden & Boraine 2011(Vol 2) *De Jure* par 2.5.3.1 also Boraine & Van Heerden 2010 *THRHR* 1

<sup>653</sup> De Kock v Gerber and Others, unreported case, number 90358/2010 in the Magistrate's Court of Port Elizabeth

<sup>654</sup> *National Credit Regulator v Opperman & others* 2013 (2) SA 1 (CC)

<sup>655</sup> *SA Taxi Securitisation (Pty) Ltd v Mbatha & two others* 2011 (1) SA 310 (GSJ)

<sup>656</sup> *SA Taxi Securitisation (Pty) Ltd. v Nako & Others* (19/2010, 21/210, 22/2010, 77/2010, 89/2010, 104/2010, 842/2010) [2010] ZAECBHC 4 (8 June 2010) 18

<sup>657</sup> s 3 and see paragraph 2.2 page 16 - 17

of being bias in favour of the consumer, which could result in being unfair towards the rights of the credit providers.<sup>658</sup>

In several cases discussed in this study, the defendants alleged that the credit agreements were reckless lending; however, in none of the matters the courts determined or found any credit agreement to have been granted recklessly. In some instances the allegations of reckless credit granting was left undecided, turned down or left open. This raises the question of the effectiveness of the remedy of reckless credit.

Boraine and Van Heerden<sup>659</sup> raised the same questions. These authors concluded that from a debt relief point of view, a court ordering a credit agreement to be reckless lending would not "... necessarily offer a lasting solution to a debtor's over-indebtedness".<sup>660</sup> The reason for this conclusion is that even if a court found a credit agreement to be reckless lending and order that the consumer's right and obligations be set aside in full or in part, the credit provider may in terms of the common law claim for restoration.<sup>661</sup> This is because the NCA does not state that a reckless credit agreement is illegal and therefore null and void<sup>662</sup> and restoration is not prohibited in the NCA.<sup>663</sup> Furthermore, even if the court declares the agreement reckless and then suspends<sup>664</sup> the force and effect of such agreement, it will bring some relief to the consumer in terms of the repayment obligation. However, once the suspended period comes to an end, the particular consumer will again become liable to repay the money owed to the credit provider.

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<sup>658</sup> s 3(d) where the NCA also promotes equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers.

<sup>659</sup> Boraine & Van Heerden 2010 (Vol 13) *Potchefstroom Electronic Law Journal* page 14

<sup>660</sup> Boraine & Van Heerden 2010 (Vol 13) *Potchefstroom Electronic Law Journal* page 15

<sup>661</sup> *Opperman v Boonzaaier and Others* (WCC), unreported case no 24887/2010

<sup>662</sup> See Chapter 3 in this study for discussion.

<sup>663</sup> Boraine & Van Heerden 2010a (73) *THRHR* 650

<sup>664</sup> s 84

**PART III: A COMPARISON WITH INTERNATIONAL  
LEGISLATION AND MEASURES  
CHAPTER 7: PREFACE**

## 7.1. Introduction

Towards the end of the century (late 1990s to the early 2000's, there was a significant increase in over-indebted consumers in South Africa. This was a result of various factors:<sup>665</sup>

- after South Africa became a democracy<sup>666</sup> the historically disadvantaged consumers, who had no access to credit in the formal financial market and who had little financial experience or education, were now able to gain easy access to credit; and/or
- affirmative action and transformation of the civil service; and/or
- over eager borrowing by consumers, without consideration to whether it is affordable or not; and/or
- credit provider's lack of consideration as to whether the consumers are able to repay credit loans.

Consequently, in 2001 the DTI decided to review the consumer-credit legislation and investigate the problems that existed in the consumer-credit market.<sup>667</sup> In order to do so, a Technical Credit Law Committee was established, which gave rise to various research reports and obtaining of expert opinions.<sup>668</sup> Some of these opinions were even obtained from outside the borders of South Africa, for example Meagher (IRIS Centre, University of Maryland, United States of America) *Regulation of Payday Lenders in the United States*.<sup>669</sup> From the recommendations and findings of this committee, an official *Policy Framework for Consumer Credit*<sup>670</sup> was drafted that formed the basis of the NCA. The DTI appointed various experts to assist with the drafting of the new credit legislation, which also included people beyond the borders of the country.<sup>671</sup>

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<sup>665</sup> Kelly-Louw Consumer Credit Regulation in SA 13  
<sup>666</sup> 1994

<sup>667</sup> Kelly-Louw Consumer Credit Regulation in SA 15

<sup>668</sup> See the comprehensive list in Kelly-Louw Consumer Credit Regulation in SA 15 fn 102  
<sup>669</sup> 2002

<sup>670</sup> August 2004

<sup>671</sup> Parties involved in the drafting of the NCA can be found in Kelly-Louw (2008) 20 SA MERC LJ 200 fn 29 at 207

Legislation protecting debtors/consumers is an international trend, even though the level of protection and context may differ from country to country. The reason for the different approaches is that the needs, circumstances, resources, political agenda, economic philosophy, and history differ in each country.<sup>672</sup>

The following part of the study will analyse the global view pertaining to the credit ability of consumer's and the impact it has on the credit market.

## **7.2. Overview of the international trend**

Due to the economic recession that started during 2007 and 2008 and consumers losing their jobs, worldwide concerns were raised about the large number of consumers that had difficulty managing their debts. Clearly, the development was a worldwide phenomenon and not an isolated trend and/or concern in South Africa.

Friedman and Mandelbaum<sup>673</sup> discuss how the world dominance historically moved from Great Britain in the 19th century to the United States in the 20th century and in the 21st century to China. However, the United States did not skip the recession that most countries were facing. The United States also faced the economic turmoil. According to the authors, five factors contributed to the economic recession in the United States, namely:<sup>674</sup>

- i. The leaders of the country ignored the fact that the world has changed structurally, and still is, and they failed to confront the challenges of the new world.
- ii. United States failed to give attention to public education, national debt, and deficit.
- iii. United States failed to promote entrepreneurial initiatives, research and development.
- iv. Many consumers stretched their economic and financial resources too thinly resulting in consumers extending themselves beyond their means.

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<sup>672</sup> Otto in Scholtz (ed) *Guide to the National Credit Act* (2008) 1-1

<sup>673</sup> "That Used to Be Us" (2012)

<sup>674</sup> These factors are discussed in an article "Looking back to Move Forward" (2013) pages 91 - 97



v. Unites States political system was polarised.

In a Texas law journal, a research paper was published on over-indebtedness of the American consumer.<sup>675</sup> The article stated that consumer over-indebtedness is a result of consumers having easy access to credit cards and the granting of mortgage loans.<sup>676</sup> The author pointed out that due to the economic turmoil during 2007 and 2008, the housing market revealed that many of the United States' consumers were approved for loans they could not afford on their actual income<sup>677</sup>, and consumers did not fully understand the terms of their loans.<sup>678</sup> Debt relief measures in United States can be found in their bankruptcy legislation, though there are authors who are convinced that over-indebtedness of consumers should be dealt with outside the bankruptcy laws.<sup>679</sup> When comparing the two documents the different approach to bankruptcy legislation is conspicuous: the article mentions consumers receiving **credit** counselling prior to filing their bankruptcy petition<sup>680</sup>, whereas the NCA refers to **debt** counselling. Interesting to note is that the United States bankruptcy legislation aims at making it harder for the over-indebted consumer to avoid repaying their debts<sup>681</sup> by emphasising that the consumer should behave responsibly.<sup>682</sup> Responsible lending is also encouraged.<sup>683</sup>

The economic recession during 2007 and 2008, also lead to concerns for Europe as were seen in the European Commission's Research note 4/2010.<sup>684</sup> The document examined households who had difficulty in paying outstanding loans in terms of their income level, age of the consumer, and the number of children in the household. However, the document mostly focused on over-indebtedness in households that had

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<sup>675</sup> Dickerson "Consumer Over-Indebtedness: A U.S. Perspective" 2008 (43)

<sup>676</sup> Dickerson *Texas International Law Journal* 2008 (43) at 135

<sup>677</sup> Dickerson *Texas International Law Journal* 2008 (43) at 141, which was supported by an article by Lahart "After Subprime: Lax lending lurks elsewhere" (2007) at 14

<sup>678</sup> Dickerson *Texas International Law Journal* 2008 (43) at 142

<sup>679</sup> Dickerson *Texas International Law Journal* 2008 (43) page 143, also see fn 58 referring to Eric Posner "Should debtors be forced into Chapter 13?" (1999) 32 LOY L.A.L. Rev. 965

<sup>680</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2008, also referred to as BAPCPA

<sup>681</sup> Dickerson *Texas International Law Journal* 2008 (43) at 145

<sup>682</sup> Dickerson *Texas International Law Journal* 2008 (43) at 144

<sup>683</sup> Dickerson *Texas International Law Journal* 2008 (43) at 157

<sup>684</sup> "Over-indebtedness: New evidence from the EU-SILC special module" by Nicole Fondeville, Ethan Özdemis and Terry Ward, November 2010

difficulty to meet their monthly obligations; a concern prioritised in the International Consumer Debt Report published during May 2001. The INSOL (International Federation of Insolvency Practitioners) published a report regarding consumer debt, in which they recommended that overspending and over-indebtedness should be prevented before it happens.<sup>685</sup>

In 2007, a policy was drafted by the European countries to encourage responsible lending.<sup>686</sup> The strategy aimed at:

- i. encouraging lenders to grant responsible and affordable credit;
- ii. encouraging credit relations to be transparent and understandable;
- iii. cautioning credit lending to be done carefully, responsibly and fairly;
- iv. emphasised the effectiveness of protective legislation, and
- v. addressing over-indebtedness as a public concern.

During 2008, the European Parliament and Council published a directive on credit agreements for consumers<sup>687</sup>, which gave members of the European Union (EU) until June 2010 to incorporate the provisions of the EU directive into each member's own national laws. The principles also aim at protecting consumers.<sup>688</sup>

The following provisions are briefly discussed as an overview and introduction to this study:

- The EU Directive requires creditors disclosing information to the consumer of the credit or loan, which information may not result in unfair and misleading practices.<sup>689</sup> Standard disclosure denotes, for instance, pre-contractual disclosure<sup>690</sup> that will allow consumers to compare different offers. Therefore, the information disclosed to the consumers must contain adequate data regarding the

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<sup>685</sup> INSOL International Consumer debt report: report of findings and recommendations (2001) 29

<sup>686</sup> ECRC/NCRC "*Principles of responsible credit*" (2007) at 1

<sup>687</sup> Directive 2008/48/EC, that also repealed Council Directive 87/102/EEC (OJ L33/66) also see Renke 2011 (74) THRHR 210

<sup>688</sup> Which substantiate what Otto said in *NCA Explained* (2010) on page 1

<sup>689</sup> Recital 18

<sup>690</sup> See also *CA Consumer Finance* (Judgement) [2014] EUECJ C-499/13 (18 December 2014)

cost of the credit<sup>691</sup>, terms and conditions and the consumer's obligations in terms of the proposed credit agreement.<sup>692</sup>

Compared to the EU Directive (2008), it is clear the South African legislation (NCA) promulgated in 2007 already stipulated that the consumer should be provided with a pre-agreement and quotation<sup>693</sup> with the precise information that should be disclosed, especially if it is a small or intermediate credit agreement.<sup>694</sup>

- The second important provision is the Directive regarding the creditworthiness of the consumer. The EU Directive places a duty on the creditor to take all necessary steps to determine a consumer's creditworthiness when doing the assessment for credit.<sup>695</sup> The EU Directive requires the members of the EU to be responsible and to promote a fair relationship between consumer and creditor in the credit market. Recital 26 declares that creditors should refrain from irresponsible lending by granting credit to a consumer without determining whether the particular consumer can afford the credit.<sup>696</sup>

In comparison with the NCA, this provision was also incorporated into the credit legislation of South Africa prior to the EU Directive. One of the purposes of the NCA is to promote a responsible credit market by encouraging responsible borrowing by consumers and discouraging reckless credit granting by credit providers<sup>697</sup> (fair and equal relationship between credit provider and consumer). Furthermore, the NCA also requires that credit providers do an assessment prior to entering into a credit agreement with a potential consumer<sup>698</sup>, which is also considered a step to prevent reckless credit lending.<sup>699</sup> The NCA took the

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<sup>691</sup> Recital 20 requires that the cost of credit includes the disclosure of interest, commissions, taxes and fees. See also Renke 2011 (74) THRHR 211

<sup>692</sup> Recital 19

<sup>693</sup> s 92(3)(b), Reg 28 and Form 20

<sup>694</sup> See para 5.5 of this study

<sup>695</sup> Recital 26

<sup>696</sup> Renke 2011 (74) THRHR 211

<sup>697</sup> s 3(c) of the NCA

<sup>698</sup> Chapter 5 of this study

<sup>699</sup> s 81(2) of the NCA

assessment obligation a step further by requiring that the assessment should not only be restricted to the credit worthiness<sup>700</sup> of the consumer, but also to whether the consumer understands the risk and cost of the proposed credit.<sup>701</sup>

- The last provision of importance for this study is the requirement that the credit agreement must contain all essential information in a clear and concise manner that will enable consumers to know their rights and obligations under the credit agreement.<sup>702</sup>

Comparing to the NCA, this prerequisite has also been included in the South African legislation. Section 64 of the NCA gives the right to the consumer to receive information in plain and understandable language. The Act actually explain “plain” by stating that “... if it is reasonable to conclude that an ordinary consumer of the class of persons whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance and import of the document without undue effort ...”<sup>703</sup>

In terms of the growing credit market, the EU directive has provided important guidelines for its members to follow. The aim to prevent over-indebtedness is a significant objective globally and cannot be ignore by any country, irrespective of whether the legislation of the particular country is basic or comprehensive. Consumers must be protected in the credit market, but not without balancing their rights and obligations against that of the credit provider. Moreover, each year consumers worldwide generally spend more money than they earn.<sup>704</sup>

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<sup>700</sup> Recital 26 of EU directive

<sup>701</sup> s 81(2)(a)(i), which is align with EU directive that also focus on consumer education. See also Renke 2011 (74) THRHR 211

<sup>702</sup> Recital 31 of EU directive

<sup>703</sup> s 64(2) of the NCA

<sup>704</sup> Dickerson *Texas International Law Journal* 2008 (43) at 149

### 7.3. Conclusion

It is clear that over the last decades legislatures internationally have introduced legislation, research, and articles covering consumer credit and various other areas of consumer protection.<sup>705</sup> More in-depth research is required into the development of reckless lending and/or irresponsible lending in countries such as the United States and the countries of European Union. However, the issue of the development of reckless and/or irresponsible lending falls beyond the scope of this study. The comparison with international legislation and measures discussed chapter was/is merely a background sketch to the globally identified need of debt management existing within the credit market.

Reckless lending is not a unique phenomenon in South Africa; worldwide policy documents and articles encourage lenders to practice responsible lending and consumers to borrow money responsibly. Protective legislation is important but the balance of responsibility should be shared between the lender and the borrower.

According to Otto, there are two approaches in the international market, namely:<sup>706</sup>

- Some countries have developed concise legislation that provides the credit industry with basic principles but little detail. In this approach the courts and the legal authors provide the basic legislation with substance where needed.
- In other countries, the legislation is more comprehensive, for example in Great Britain. In South Africa, the second approach is prevalent, as in the NCA.

The United Kingdom was most likely the precursor for implementing comprehensive consumer credit legislation, considering this country has initiated consumer credit legislation back in 1974.<sup>707</sup> In the light of this timely regulation, the next chapter will focus on drafting a comparative analysis between the NCA and the Consumer Credit Act<sup>708</sup> of Great Britain.

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<sup>705</sup> Otto *et al Guide to the National Credit Act* (2013) 1-4

<sup>706</sup> Otto 2005 *THRHR* 184

<sup>707</sup> Otto *et al Guide to the National Credit Act* (2013) 1-4

<sup>708</sup> Act 39 of 1974 as well as the Amendments that followed in 2006.

## **CHAPTER 8: GREAT BRITAIN**

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### **8.1. Introduction**

Hire-purchase agreements were unknown to Roman-Dutch law. It was developed in Europe during the middle of the nineteenth century with the increased growing of the commercial trading between countries. However, it was only at the end of the nineteenth century that Roman-Dutch law contracts as an authentic type of contract

came into use in South Africa.<sup>709</sup> This was also the beginning of sellers exploiting purchasers.

Over the last four decades, this exploitation gave rise to the development of various legislative measures aimed at protecting consumers and covering consumer credit. The country that initiated comprehensive consumer credit legislation was the United Kingdom by implementing the Consumer Credit Act, No 39 of 1974.<sup>710</sup>

During September 2008 and March 2009 the banking system in the United Kingdom nearly collapsed, which resulted in banks being nationalised and rescued by the government.<sup>711</sup> During that period, Great Britain experienced a deteriorating economy that led to bad debts and loan arrears. There are authors who reckon the resultant credit-defaulting state of affairs was due to (unfortunate) legislative amendments<sup>712</sup> at that time, as well as the increasing use of credit unions by the government as a mechanism to achieve its financial inclusion goals.<sup>713</sup>

The subsequent discussion will continue to analyse the development of consumer legislation in the United Kingdom in terms of applicable points of interest vis-à-vis the Consumer Credit Act of that country.

## **8.2. Overview of the Consumer Credit Act<sup>714</sup>**

Usury legislation in Britain is part of the credit market since the ninth century.<sup>715</sup> Legislation covering consumer credit used to focus on particular areas, for example moneylenders and hire-purchase agreements, and not on consumer credit in its entirety.

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<sup>709</sup> Otto in Scholtz (ed) *Guide to the National Credit Act* (2008) 1-3

<sup>710</sup> Otto in Scholtz (ed) *Guide to the National Credit Act* (2008) 1-4

<sup>711</sup> Goddard et al. *Crisis in UK banking: lessons for public policy* (2009) 279-284

<sup>712</sup> Amendment of the consumer Credit Act in 2006.

<sup>713</sup> McKillop et al. *Credit Unions in Great Britain: recent trends and current prospects* (2011) 35

<sup>714</sup> No 39 of 1974

<sup>715</sup> Otto in Scholtz (ed) *Guide to the National Credit Act* (2008) 1-3

During 1965, the Crowther Committee was established to investigate the consumer credit situation in Great Britain.<sup>716</sup> During March 1971, their report<sup>717</sup> was published, recommending the need for reform of consumer credit legislation.<sup>718</sup> A bill was drafted and introduced to Parliament, and on 31 July 1974, the Consumer Credit Act came in operation.<sup>719</sup> This legislation was subsequently amended in 2006, and in 2010, the Consumer Credit Directive was implemented. The 1974 Act outlined the regulation for the providing of credit and hiring of goods throughout Great Britain to individuals<sup>720</sup> where the credit limit or payment for hire does not exceed £25,000.<sup>721</sup>

The Consumer Credit Act of 1974 introduced consumer protection and regulated bodies trading in consumer credit. According to the Consumer Credit Act, these bodies must have a license to trade as such, which will be issued by the Office of Fair Trading (hereafter referred to as OFT).<sup>722</sup> Noteworthy is that this license will be suspended or revoked in the event of irregularities.<sup>723</sup>

The Consumer Credit Act identified three main types of agreements: (i) regulated consumer credit agreements, (ii) regulated consumer hire agreements and (iii) partially regulated agreements.<sup>724</sup> The term “a hire agreement<sup>725</sup>” is not applicable to this study and will therefore not be discussed or included in references.

The relevant definitions are:

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<sup>716</sup> Keenan *Business Law* (2005) 420

<sup>717</sup> Report of the Committee on Consumer Credit (Chairperson Lord Crowther) (1971) vol 1 Cmnd 4596 (the “Crowther Report”)

<sup>718</sup> Goode *Consumer Credit Act: A student guide* (1979) 5, also see *Office of Fair Trading v Lloyds TSB Bank PLC & Ors* [2006] EWCA Civ 268 (22 March 2006)

<sup>719</sup> Goode *Consumer Credit Act: A student guide* (1979) 10

<sup>720</sup> Individuals included natural persons, unincorporated associations, and partnerships of any size.

<sup>721</sup> This limit was abolished with the 2006 Amendment Act. See discussion in paragraph 8.3 of this study.

<sup>722</sup> s 21, Part III of the Consumer Credit Act, also see Goode *Consumer Credit Act: A student guide* (1979) 106

<sup>723</sup> s 32, Part III of the Consumer Credit Act, also see s 25(2) and (2A) of the Amended Consumer Credit Act of 2006

<sup>724</sup> Part II of the Consumer Credit Act

<sup>725</sup> Which is defined as an agreement where an individual (a hirer) and the other person (owner) agrees that the goods are loaned to the hirer for use without the option to purchase (s 15, Part II of the Consumer Credit Act)



“**regulated agreement**” is defined as “... an agreement between an individual (the debtor) and any other person (the creditor), by which the creditor provides the debtor of any amount”.<sup>726</sup> This amount is currently limited to £25,000.<sup>727</sup>

“**individual**” includes a partnership or other unincorporated body and exclude corporations registered with the Companies House or created by legislation.<sup>728</sup>

“**credit**” includes cash loans and any other form of financial accommodation.<sup>729</sup> The definition also states that the amount allowed as credit (or financial accommodation) will be equal to the total price of the goods, less the deposit (if any) and the total charges for credit.<sup>730</sup>

The Consumer Credit Act consists of 193 sections and five schedules<sup>731</sup>, divided into 12 parts. This act is “... designed to provide a comprehensive code regulating the consumer credit and almost every aspect of a credit granting operator”.<sup>732</sup> Yet this legislation does not refer to the process of applying for credit, the measures needed to assess the consumer’s affordability, and neither is there any reference in the Act to reckless credit granting as known in South Africa.<sup>733</sup>

During the worldwide financial crisis in 2007 to 2008, the EU published a Directive 2008/48/EC<sup>734</sup> to member states that resulted in Great Britain adopting the Consumer

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<sup>726</sup> s 8, Part II of the Consumer Credit Act

<sup>727</sup> The original legislation had the limit at £5000, but the amount has been increased. According to the Consumer Credit Act of 2006 there is no upper limit.

<sup>728</sup> Goode *Consumer Credit Act: A student guide* (1979) 55

<sup>729</sup> s 9(1), Part II of the Consumer Credit Act

<sup>730</sup> s 9(3), Part II of the Consumer Credit Act

<sup>731</sup> Which is much larger than the original 96 pages as per Goode *Consumer Credit Act: A student guide* (1979) 37

<sup>732</sup> Goode *A Consumer Credit Act: A guide for students* (1979) 37

<sup>733</sup> However, later in this chapter there is a discussion on “irresponsible lending” which is based on the same principle as “reckless lending”.

<sup>734</sup> Which the Council Directive 87/102/EEC (OJ L33/66), also see Renke 2011 (74) *THRHR* 210.

Credit Directive on 23 April 2008. It replaced the 1987 Consumer Credit Directive.<sup>735</sup> The changes mainly affected creditors, credit-brokers and credit intermediaries, and would be applicable to all credit agreements.

In this chapter, legislation and/or policies that influenced the credit market in Great Britain leading to various developments in the consumer protection sphere will be investigated. These aspects will be compared with the NCA in the light of the changing social conditions that prompted the law reforms.

### **8.3. Consumer Credit Act: Entry into credit agreement**

The process in which parties (debtor and creditor) enter into a regulated agreement requires that specified information must be disclosed to the debtor in the prescribed manner prior to entering into the particular agreement.<sup>736</sup> Should the regulations not be observed, the agreement will become unenforceable against the debtor.<sup>737</sup> The Consumer Credit (EU Directive) Regulations 2010 substituted this section of the Consumer Credit Act on 1 February 2011.<sup>738</sup>

The creditor is also required to provide the debtor with "... an adequate explanation" of the following:<sup>739</sup>

- features of the agreement that will make the credit provided, incompatible for particular type of use;
- how much the debtor will have to pay periodically;
- features of the agreement that could have an adverse effect on the debtor in a manner the debtor could not have foreseen;

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<sup>735</sup> Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L133, Page 66 (22 May 2008).

<sup>736</sup> s 55(1), Part V of the Consumer Credit Act

<sup>737</sup> s 55(2), Part V of the Consumer Credit Act

<sup>738</sup> S.I. 2010/1010, regulations 16, 99(1) with 100 and 101

<sup>739</sup> s 55A(2)(a)-(e), Part V of the Consumer Credit Act, which is considered to be the pre-contractual explanation

- consequence for the debtor, should the debtor fail to repay the credit on the agreed times under the agreement, the legal proceedings that the creditor could institute and the possibility that the creditor may repossess the debtor's home, and
- the right to withdraw from the agreement, the effect thereof and how and when this right may be exercised.

The creditor may give the pre-contractual explanation and advice orally or in writing<sup>740</sup>, while with the NCA it must be given in writing.<sup>741</sup> The purpose of the pre-contractual agreement is to provide the debtor with the opportunity to ask the creditor questions or for further information and explanations,<sup>742</sup> a stipulation that is much aligned with the South African legislation.

#### **8.4. Consumer Credit Act: Assessment of creditworthiness<sup>743</sup>**

The Consumer Credit Act provides basic requirements regarding the assessment of a debtor to determine the particular debtor's creditworthiness. Section 55B merely states that the creditor must conduct an assessment prior to entering into a regulated agreement with a debtor or increasing the credit limit of a debtor.<sup>744</sup>

Section 55B does not provide guidelines as to how the creditors should conduct the assessment for creditworthiness, except to require that the creditor must obtain "sufficient information" from the consumer and the Credit Reference Agency where it is necessary.<sup>745</sup> The Act provides no meaning as to what will be considered "sufficient" information and it is for the creditors to decide whether they will obtain this sufficient information from either the consumer or the credit reference agency.<sup>746</sup>

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<sup>740</sup> s 55A(3), Part V of the Consumer Credit Act

<sup>741</sup> s 92 of the NCA also see Reg 28

<sup>742</sup> s 55A(1)(c) & (d), Part V of the Consumer Credit Act

<sup>743</sup> s 55B was inserted by the Consumer Credit Act (EU Directive) (S.I. 2010/1010, regulations 5, 99(1) with 100 and 101

<sup>744</sup> s 55B(1) & (2), Part V of the Consumer Credit Act

<sup>745</sup> EU Commission Directive 2011/90/EU (effective 1 January 2013) at par 7.3, page 30 and section 55B(3)(a) & (b), Part V of the Consumer Credit Act, no 39 of 1974.

<sup>746</sup> Though section 55B provide the creditors with the discretionary power to choose where to obtain the information from, it is important that the creditor must assess credit worthiness. Therefore OFT

Credit markets rely on credit scoring and behavioural scoring techniques. The applicable information is available from Credit Reference Agencies; a tool that provides creditors with the information needed when deciding whether a consumer has the ability to repay the loan, or the possibility exist that a consumer might default.<sup>747</sup>

It is also the responsibility of creditors to explain the proposed credit agreement to the consumer, who applied for the credit. The features of the credit agreement, the cost, and the consequences of failure to make payments must be explained to the consumer to assist her or him to make a decision as to whether the proposed credit agreement is suited for the consumer's needs and financial position.<sup>748</sup> This explanation can be done orally or in writing<sup>749</sup> allowing the consumer to ask for further information and/or explanations.

This section in the Act does not state the reason or purpose to do an assessment of the debtor's creditworthiness. However, it does state that for the purposes of this section, pawn transactions and agreements secured on land, will be excluded from a creditworthy assessment.<sup>750</sup> The section also provides the necessity to have an assessment done, but it appears that no clear guidance is given to the creditor, or the penalty or consequences should the credit fail to comply.<sup>751</sup> Furthermore, no reference is made to reckless credit granting by a creditor or the remedies available to a debtor should the credit grant credit, which the debtor cannot afford to repay. There are no clear available norms for determining affordability in the Act.<sup>752</sup>

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<sup>747</sup> (Office of Fair Trading) guidance on Irresponsible Lending, that covers affordability of credit, should be read together with the EU directive 2011/90/EU.

<sup>748</sup> OFT 1107 of March 2010 (updated February 2011) par 4.23 at 42 also see *McGuffick v The Royal Bank of Scotland PLC* [2009] EWHC 2386 (Comm) (06 October 2009)

<sup>749</sup> EU Commission Directive 2011/90/EU (effective 1 January 2013) at par 2.6 page 6 (Chapters 7 & 8).

<sup>750</sup> Regulation 6 of the Consumer Credit (Amendment) Regulations 2010, SI 2010/1969

<sup>751</sup> s 55B(4), Part V of the Consumer Credit Act

<sup>752</sup> Except for the general provisions in section 32, Part III of the Consumer Credit Act where the creditor's license can be suspended or revoked or the licensee could receive a penalty of £50,000 should the regulations of the Act be contravened

<sup>752</sup> Bramley "Affordability Criteria for Mortgage Lending" (2011) at 2

“Affordability” has a variety of meanings, which suggested that different policies have different meanings subject to the levels of problems affecting different types of consumers in different circumstances.<sup>753</sup> There are two approaches, namely housing cost to income versus income left after housing costs.<sup>754</sup> Fundamentally, the affordability criteria consider hardship, housing needs and changes of circumstances. The OFT project on irresponsible lending emphasises that lending decisions are primarily based on the consideration of affordability.<sup>755</sup> In other words, the consumer’s ability to repay (affordability of the product or amount) and the consumer’s expected level of risk (the possibility of repayment of the loan).<sup>756</sup>

The OFT states in their Guidance for Creditors<sup>757</sup> that creditors rely on assessments of affordability, therefore the information provided by the consumers ought to be accurate and up to date. Consumers have the responsibility to advise the creditors when there is a change in their circumstances.<sup>758</sup> Over-indebtedness, on the other side, is defined as a situation “... where households or individuals are in arrears on a structural basis, or at a significant risk of getting into arrears in a structural basis”.<sup>759</sup>

## **8.5. Consumer Credit Act: Pre-contractual information and agreements**<sup>760</sup>

The consumer is entitled to receive pre-contractual information in “good time”<sup>761</sup> before the consumer enter into the proposed credit agreement with the creditor. The Agreement Regulations does not define a good time, or the form of the credit agreement or the ordering of the information.

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<sup>753</sup> Bramley 1994 (vol 9) (no 1) *Housing Studies* 103-124, Bramley “Affordability comes of age” (2006) and Linneman et al. 1992 (Vol 29)(no 3) *Urban Studies*

<sup>754</sup> Bramley “Affordability Criteria for Mortgage Lending” (2011) at 3

<sup>755</sup> OFT 1107 of March 2010 (updated February 2011) par 4.11 at 42

<sup>756</sup> *McGuffick v The Royal Bank of Scotland PLC* [2009] EWHC 2386 (Comm) (06 October 2009)

<sup>757</sup> OFT 1107 of March 2010 (updated February 2011) at 12

<sup>758</sup> OFT 1107 of March 2010 (updated February 2011) at 13

<sup>759</sup> OXERA (2004) also see European Commission Research Note 4/2010 “Over-indebtedness: New evidence from the EU-SILC special module” by Nicole Fonderville et al. (November 2010) at 3

<sup>760</sup> EU Commission Directive 2011/90/EU (effective 1 January 2013) at page 6 (Chapters 9 & 10).

<sup>761</sup> A good time will depend on the precise circumstances of the transaction. Also see EU Commission Directive 2011/90/EU (effective 1 January 2013) at par 9.4 on page 35.

The Disclosure Regulations<sup>762</sup> do stipulate that the information must be clear and legible and that the consumer must be able to leave with the information to consider the proposed credit agreement and to compare the agreement with offers from other creditors. This means that the pre-contractual information must be in a standard format, that is, the Pre-contractual Information Form.<sup>763</sup>

## 8.6. Amendment of the Consumer Credit Act

During July 2001, the Secretary of State for Trade and Industry announced that the 1974 Consumer Credit Act would be reviewed.<sup>764</sup> As a result, the Department of Trade and Industry and the Department for Work and Pensions published a paper<sup>765</sup> that indicated the need for reform. The need for reform was supported by the increasing dissatisfaction of consumers regarding the lending practices of creditors, the number of consumers that struggled with their debt repayment<sup>766</sup> and the over-indebted suicides.<sup>767</sup>

On 30 March 2006, the royal assent was given to the Consumer Credit Act 2006 and the amendments to the 1974 Act were implemented in Great Britain over a period of two (2) years.<sup>768</sup> The amendments (2006) introduced the following main changes to the Consumer Credit Act of 1974:

(i) Abolishing the £25,000 threshold

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<sup>762</sup> Regulation 3 of the Consumer Credit (Disclosure of Information) Regulations 2004, SI 2004/1481.  
<sup>763</sup> Regulation 8 of the Consumer Credit (Disclosure of Information) Regulations 2004, SI 2004/1481. EU Commission Directive 2011/90/EU (effective 1 January 2013) at par 2.7 page 6 (Chapter 9 & 10).

<sup>764</sup> Slaughter *et al.* "Consumer Credit Act 2006: Amendments to the Consumer Credit Act 1974" (2008) at 5

<sup>765</sup> "Tackling Over-Indebtedness – Action Plan 2004"

<sup>766</sup> Richards *et al.* "Irresponsible Lending?" (2008) at 502

<sup>767</sup> Fletcher "Debt Suicides" The Mirror (2006)

<sup>768</sup> Slaughter *et al.* "Consumer Credit Act 2006: Amendments to the Consumer Credit Act 1974" (2008) at 4

This amendment meant that all consumer credit agreements will fall under the scope of the Consumer Credit Act and this became effective as from 6 April 2008.<sup>769</sup> However, certain credit agreements are exempted from the operations of the 2006 Consumer Credit Act, namely:

- (a) credit agreements provided to businesses;<sup>770</sup>
- (b) high net-worth<sup>771</sup> debtors<sup>772</sup>; and
- (c) partnership of more than three persons.<sup>773</sup>

This removal of limit resulted in all credit agreements entered into with consumers will be protected by the Consumer Credit Act, except those credit agreements entered into for business purposes of with debtors worth more than £150,000 or with partnerships consisting of more than three persons.

(ii) Licence requirements

The OFT may issue a licence for a fixed period of time, which may not exceed the maximum period<sup>774</sup> prescribed by the Secretary of State.<sup>775</sup> The 2006 amendments also provided the OFT with the power to assess the competence of a business to provide credit before issuing a licence. This is referred to as the “fitness test” that became operational on 6 April 2008.<sup>776</sup> When considering whether issuing of the licence, the OFT will consider evidence of past misconduct, knowledge, experience and skills that the people participating in the business have in relation to the licenced activity and the practices and procedures of the business to whom the licence will be issued.<sup>777</sup>

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<sup>769</sup> Slaughter *et al.* “Consumer Credit Act 2006: Amendments to the Consumer Credit Act 1974” (2008) at 6

<sup>770</sup> s 16B

<sup>771</sup> A net annual income during the previous financial year of not less than £150,000 or net assets (disregarding the primary residence and certain pensions and insurance assets) throughout the previous financial year of not less than £500,000.

<sup>772</sup> The debtor is a natural person, also see s 16A

<sup>773</sup> SI 2007/1168

<sup>774</sup> This period is currently not more than 5 (five) years.

<sup>775</sup> s 34

<sup>776</sup> s 25A

<sup>777</sup> s 25A read together with Consumer credit licencing: General guidance for licenses applications on fitness and requirements (January 2008) OFT 969.

This power given to the OFT to issue licences is an ongoing responsibility. The OFT will also consider whether creditors are fit to hold their credit licence.<sup>778</sup> Should the OFT be dissatisfied with a creditor, they will issue a notice in this regard.<sup>779</sup>

In *McGuffick v The Royal Bank of Scotland PLC*<sup>780</sup> the court's attention was drawn to section 25 of the Act<sup>781</sup> where the OFT can consider whether a creditor is fit to hold a licence if there is evidence that the applicant is engaged in a business practice which can be considered deceitful or unfair or improper, which includes irresponsible lending.<sup>782</sup> Therefore, section 25 of the Act reformed the licensing of providers of consumer credit services as well as the powers and functions of the OFT in relation to the issuing of the licence to provide credit to consumers.

(iii) Unfair relationship test

This test replaced the "extortionate credit bargain" test, which enables the consumer to challenge the unfair relationship with creditors<sup>783</sup> in court. As a result, hereof the court has the power to re-write unfair credit agreements.<sup>784</sup>

The reformed provisions became effective on 6 April 2007.<sup>785</sup> Under the 1974 Act the consumer was required to make payments at the time of the credit agreement was made, which was grossly exorbitant and considered to be in contravention of

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<sup>778</sup> s 33B  
<sup>779</sup> s 33B(2) and (3)  
<sup>780</sup> [2009] EWHC 2386 (Comm)(6 October 2009)  
<sup>781</sup> Consumer Credit Act of 1974 as well as the amendment of 2006  
<sup>782</sup> s 25(2B), which resulted in the OFT to set up the irresponsible lending project in August 2008, I.e. OFT 1107  
<sup>783</sup> s 140A  
<sup>784</sup> s 140B also see *Doorstop Ltd. v Gillman & Lepervier* [2012] JRC 199 (1 November 2012)  
<sup>785</sup> Slaughter *et al.* "Consumer Credit Act 2006: Amendments to the Consumer Credit Act 1974" (2008) at 15



the ordinary principles of fair dealing.<sup>786</sup> The following instances will constitute an unfair relationship”:

- (a) any of the terms of the agreement;<sup>787</sup>
- (b) the manner in which the creditor has exercised or enforced their rights under the credit agreement;<sup>788</sup>
- (c) any other thing done (or not done) by or on behalf of the creditor, before or after entering into the credit agreement.<sup>789</sup>

“Unfair” is a concept that is very well known in consumer protection.<sup>790</sup> On 26 May 2008, the Unfair Commercial Practice Directive was implemented in Great Britain.<sup>791</sup> This directive stated that a practice would be unfair if:<sup>792</sup>

- (a) It contravenes the requirements of professional diligence; and
- (b) It materially changes the economic behaviour of the consumer with regard to the credit agreement.

“Professional diligence” is described as “the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either (a) honest market practice in the trader’s field of activity; or (b) the general principle of good faith in the trader’s field of activity”.<sup>793</sup>

These amendments appeared to provide clearer guidance to credit providers and consumers when entering into credit agreements.

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<sup>786</sup> Slaughter *et al.* “Consumer Credit Act 2006: Amendments to the Consumer Credit Act 1974” (2008) at 15, also see *Doorstop Ltd. v Gillman & Lepervier* [2012] JRC 199 (1 November 2012)

<sup>787</sup> s 140A(1)(a)

<sup>788</sup> s 140A(1)(b)

<sup>789</sup> s 140A(1)(c)

<sup>790</sup> “The Unfair Commercial Practice Directive” Directive 2005/29/EC and “Consumer Protection from Unfair Trading Regulations” SI 2008/1277

<sup>791</sup> Slaughter *et al.* “Consumer Credit Act 2006: Amendments to the Consumer Credit Act 1974” (2008) at 21

<sup>792</sup> SI 2008/1277 Regulation 3

<sup>793</sup> SI 2008/1277 Regulation 2

## 8.7. Household credit

Like in most countries, household credit in Great Britain was adversely affected by the recession of 2007 to 2008 resulting in a significant increase of the outstanding household credit in comparison to the disposable income of the consumers.

During June 2005 the total consumer debt in Great Britain amounted to £1.1 million and grew with £1 million every four minutes.<sup>794</sup> Consumers received unsecured credit such as credit card products that they could not afford to repay as it added up to 100% of their salary. The products that were supposed to be a short-term financial purchasing credit instrument ended up in being a long-term debt.<sup>795</sup>

In 2006, the household credit was 157.6 % to the household income that increased considerably to 166.4% in 2007.<sup>796</sup> By 2009, it dropped to 164.9%. In the UK, the number of mortgage repossessions rose from 25,900 in 2007 to 47,700 in 2009.<sup>797</sup> At this stage the government intervened by assisting banks to help borrowers to restructure loan repayments or to postpone the repayment of loans.<sup>798</sup>

Recent statistical information published by the Bank of England depicted that total lending to individuals increased by £3.9 billion in July 2015, compared to the average monthly increase of £3.3 billion over the previous six months.<sup>799</sup> There are still concerns that some households are merely “treading water”, which means that the impact of

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<sup>794</sup> Talbot “*Debt Facts and Figures*” (2006)

<sup>795</sup> Richards *et al.* “*Irresponsible Lending?*” (2008) at 502

<sup>796</sup> European Credit Research Institute (ECRI), Lending to households in Europe (1995-2009) and Eurostat, National accounts

<sup>797</sup> European Commission Research note 4/2010 “*Over-indebtedness: New evidence from the EU-SILC special module*” by Fondeville *et al.* (November 2010) at 24, also see Bramley “*Affordability Criteria for Mortgage Lending*” (2011) at 20

<sup>798</sup> The mortgage holders was able to postpone 50% of the loan repayments for a period of 2 years and to extend the repayment period of the mortgage loan at no extra cost. Also see Bramley “*Affordability Criteria for Mortgage Lending*” (2011) at 20.

<sup>799</sup> Bank of England Statistical release, published on 1 September 2015.

household credit on the financial situation in Great Britain can be more severe than expected.<sup>800</sup>

## 8.8. Irresponsible lending

The financial crisis in Great Britain raised the accountability question: How blameable was the financial services sector for the financial crisis and the treatment of low-income borrowers?

On the one side the OFT required greater reform of the banking sector to ensure that financial institutions accept responsibility when lending money (credit) to consumers.<sup>801</sup> On the other side the OFT has strengthened consumer protection<sup>802</sup> by amending the Consumer Credit Act in 2006.<sup>803</sup> Consumer protection was extended by the banking services to protect consumers against irresponsible lending by ensuring affordability, transparency of terms and conditions, and supporting a borrower when she or he experienced repayment difficulties.

A method to prevent irresponsible lending was the introduction of the Responsible Lending Index (hereafter referred to as RLI).<sup>804</sup> The RLI was a voluntary index for the credit industry that would allow lenders to measure themselves according to the degree of responsibility in their corporate process.<sup>805</sup> However, the RLI was not welcomed in the whole credit industry. The British Bankers' Association (BBA) and the Banking Code Standards Board (BCSB) did not support the original RLI concept, because they feared that their authority was being undermined, and questioned the need for another standard to be implemented in the credit industry.<sup>806</sup> After negotiations between the

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<sup>800</sup> Bramley "Affordability Criteria for Mortgage Lending" (2011) at 20  
<sup>801</sup> CHASM "What is responsible lending and borrowing" (March 2013) at 1  
<sup>802</sup> Kempson *et al.* "Extortionate Credit in the UK" (1999) at 29  
<sup>803</sup> See discussion in paragraph 8.6 of this study.  
<sup>804</sup> Richards *et al.* "Irresponsible Lending?" (2008) at 504  
<sup>805</sup> Richards *et al.* "Irresponsible Lending?" (2008) at 504  
<sup>806</sup> Richards *et al.* "Irresponsible Lending?" (2008) at 508

credit industry and the consumer organisations, the RLI gained more support; however, on 3 April 2006 APACS terminated the initiative.<sup>807</sup>

It is significant newspaper articles published in Great Britain urged consumers to be responsible borrowers.<sup>808</sup> CHASM concurred by stating that consumers should consider affordability when borrowing and should not knowingly over-indebt themselves. Consumers were warned not to take huge risks.<sup>809</sup> As far back as 1999, the DTI has established that borrowers falsified income by forging wage slips.<sup>810</sup> Consumers provided incorrect information because they were desperate for money and/or did not fully understand the implications of over-indebting themselves.

## 8.9. Conclusion: Comparison between South Africa and Great Britain

A comparison of the Consumer Credit Act of Great Britain with the NCA of South Africa, point to the following noteworthy conclusions:

- Both legislations refer to consumers being natural persons and/or individuals. However, the consumer credit legislation and directives in Great Britain include partnership of three or less persons<sup>811</sup> as a consumer, while the NCA considers a partnership a juristic person.<sup>812</sup>
- In both legislations, the creditor must be registered to trade as credit provider. In the Consumer Credit Act, Part III deals with the licensing of credit and hiring businesses, while Chapter 3 Part A in the NCA deals with the registration, requirements and procedure. Both legislations stipulate that the licence will be

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<sup>807</sup> According to the letter advising that the RLI initiative will not continue, the APACS states that members collectively had a lack of general interest in the initiative. Also see Richards *et al.* “*Irresponsible Lending?*” (2008) at 509

<sup>808</sup> On 3 May 2012 *The Daily Telegraph* quoted Mr. Phillip Hammond, the Defence Secretary of Great Britain, when he said that banks were not solely responsible for the financial crisis. He stated that that the consumers who took out loans were consenting adults who in some instances wants to blame others for their actions, while they should accept their share of blame for the Britain’s woes.

<sup>809</sup> “*What is responsible lending and borrowing?*” (March 2013) at 1

<sup>810</sup> Kempson *et al.* “*Extortionate Credit in the UK*” (1999) at 11

<sup>811</sup> SI 2007/1168

<sup>812</sup> s 1 of the NCA

revoked if the licensee contravenes the applicable credit legislation and render themselves guilty of irregularities.<sup>813</sup>

- Furthermore, the wrongdoer who holds a licence may be penalised with a fine should the wrongdoer contravene the respective legislation. According to the Consumer Credit Act the penalty is £50,000 compared to the NCA that can impose an administrative fine of R1 million or 10% of the annual turnover of the previous financial year, whichever is the greatest.<sup>814</sup>
- The definition for “credit” differs vastly between the two legislations. The definition of the Consumer Credit Act is basic compared to that of the NCA.<sup>815</sup> The Consumer Credit Act also refers to a deposit, which is no longer applicable to the South African credit market.<sup>816</sup>
- The pre-contractual agreement can be given to the debtor orally or in writing, while the NCA requires it given in writing according to Regulation 28(a), Chapter 4, Part A where the legislature states that the pre-agreement testament must consist of 1 document. The South African legislation appears to be more careful by requiring the pre-agreement to be in writing as opposed to the legislation in Great Britain.
- Comparing the assessment of a consumer between the two legislations, the Consumer Credit Act covers the basic principles, while the NCA is more comprehensive and precise.<sup>817</sup>

It appears that the NCA is more concise and clear in comparison to the Consumer Credit Act of Great Britain, even though in some instances the NCA is still vague (as discussed in Part II of this study). However, it can be said with certainty that the Act, at least as far as the prevention side of debt is concerned, is a great improvement on its predecessors and something we could be proud of.<sup>818</sup>

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<sup>813</sup> s 32 of the Consumer Credit Act and s 57 and 150 of the NCA

<sup>814</sup> See discussion in par 6.4 of this study

<sup>815</sup> See s 1 of the NCA as well as the discussion in paragraph 2.3 of this study

<sup>816</sup> In terms of the Credit Agreements Act, Act 75 of 1980, which was repealed with the NCA, a deposit had to be paid prior to a credit agreement coming into existence

<sup>817</sup> See section 81 of the NCA as well as the discussion in Chapter 5 of this study

<sup>818</sup> Renke 2011 (74) THRHR 229

## **PART IV: GENERAL CONCLUSION**

### **CHAPTER 9: CONCLUDING REMARKS**

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#### **9.1. Introduction**

This dissertation investigated the recommended standard to be applied by the South African courts when dealing with reckless credit applications and the consequential orders that the Court has discretion to grant. It also identified problem areas created by

some of the provisions of the NCA and indicated some solutions to be considered in solving the challenges that rise from the NCA.

As indicated throughout this dissertation, the intention of the legislature is not always clear in the provisions of the NCA relating to reckless credit. This uncertainty will have to be interpreted by the courts, which interpretational guidelines have been provided for in a few precedents as well as by some authors.

The NCA regulations as well as the amendments aimed at addressing specific challenges in the consumer credit market as identified by the DTI is an ongoing process. The NCA and the Amendment Act brought about a single system of credit regulation that will regulate and administer the credit industry.<sup>819</sup>

Upon comparing the NCA with similar legislation in developed countries, namely Great Britain and European countries, it appears that the NCA is on par and in some instances ahead of global credit legislations.<sup>820</sup> Reckless credit is an example; the NCA repeatedly encourage borrowers of all income levels to lend responsible and keep lenders accountable.<sup>821</sup> However, the sanctions that have to be imposed on reckless credit agreements remain vague and uncertain.<sup>822</sup> With the implementation of the NCA it most likely will reduce undesirable credit practices significantly, but it will take some time for the financial system to adjust and expand under the new law.

## **9.2. Summary of findings**

The NCA declares that all consumers, natural persons, juristic persons, or an association of persons, have the right to apply for credit. However, the consumer does not have the right to be granted the credit.<sup>823</sup> Furthermore, the credit provider may not

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<sup>819</sup> Chapter 2  
<sup>820</sup> Chapter 8 and 9  
<sup>821</sup> Part II  
<sup>822</sup> Chapter 6  
<sup>823</sup> Chapter 4

discriminate against the consumer when considering the credit application, and/or whether the consumer will be able to afford the repayment of the credit agreement.<sup>824</sup> Yet, the credit provider must ensure that the consumer is able to repay the loan (affordability assessment), otherwise the court may consider the credit agreement to have been reckless lending.

In order to prevent reckless lending, section 81 of the NCA is possibly the most important section in the NCA. It compels the credit provider to do an assessment **before**<sup>825</sup> entering into a credit agreement with a consumer.<sup>826</sup> The NCA does not provide for such assessment mechanisms and therefore credit providers have to design, develop, and implement their own assessment mechanism, models and procedures as providing it is fair and objective and do not discriminate. A consumer has an obligation to disclose all information fully and honestly. The failure of the consumer to do so will constitute a defense for the credit provider against reckless credit allegations.<sup>827</sup>

Section 3(c)(ii) and section 81(3) of the NCA clearly state that a credit provider must not enter into a reckless credit agreement with a prospective consumer, a hefty obligation in the light of the consequences attached to reckless credit lending.<sup>828</sup> Depending on the type of reckless credit<sup>829</sup> the consumer's rights and duties in terms of the particular credit agreement will be set aside or suspended.<sup>830</sup> Though the NCA is precise as to the consequences of reckless credit granting, the Act is vague and unclear as to what should happen if the contractual parties are guilty of reckless behaviour in terms of the reckless credit agreement.

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<sup>824</sup> Par 4.3  
<sup>825</sup> Par 5.2  
<sup>826</sup> Chapter 5  
<sup>827</sup> Chapter 4  
<sup>828</sup> Chapter 6  
<sup>829</sup> Par 5.4  
<sup>830</sup> Chapter 6



The NCA does not state that credit agreements that give rise to reckless credit lending are *ab initio* null and void as is the case in unlawful credit agreements.<sup>831</sup> Therefore, the courts will have to exercise their own discretion and rely on common law. If performance in terms of the reckless credit agreement has not yet followed, the court may order the setting aside of the consumer's future rights and obligations. Consequently, the particular credit agreement will be cancelled and the contractual relationship between the credit provider and the consumer will end.<sup>832</sup>

However, the situation is not as clear as to where partial performance occurred in terms of the reckless credit agreement as well as the performance of the *merx* (movable or immovable goods) in terms on the contract. In the case in point, the NCA does not provide a clear guideline. Therefore, the courts will have to rely on their own discretion when having to apply the provisions of the NCA and the common law.

The provisions relating to reckless credit lending<sup>833</sup> does not provide detailed information regarding restoration: whether the credit provider will be able to reclaim any amount of the credit granted or goods delivered to the consumer, and/or whether the consumer will be entitled to reclaim any payments made by the consumer to the credit provider. Section 83(2)(a) only states that the court may set aside all or any of the rights and obligations of the consumer **under**<sup>834</sup> the reckless credit agreement. Various authors and court cases concluded that section 83(2)(a) also does not prohibit or limit the credit provider from claiming money or goods delivered in terms of another cause of action such as unjustified enrichment.<sup>835</sup>

A credit agreement is a specific type of contract to which the law of contract and the principles of a valid and enforceable contract is applicable. A credit agreement is also a reciprocal contract in terms whereof each party to the agreement has rights and

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<sup>831</sup> Chapter 3 and 6  
<sup>832</sup> Par 6.3  
<sup>833</sup> s 80, 81, 82, 83 & 84  
<sup>834</sup> Par 6.3.1.  
<sup>835</sup> Chapter 6

obligations. If the rights and obligations of the consumer to a reckless credit agreement are cancelled, it could imply that the rights and obligations of the credit provider will inevitably also fall away.<sup>836</sup>

Reckless credit applications do not apply to juristic persons<sup>837</sup> and to certain credit agreements as listed in section 78(2).<sup>838</sup> Additionally, the court has the discretion to consider reckless lending without the consumer having to bring the issue to the court's attention. In the matters where a consumer alleges reckless lending, the consumer must provide evidence to substantiate the allegation.<sup>839</sup>

Should the court, during any proceedings, find a particular credit agreement to have been granted recklessly by the credit provider, the court may make an order setting aside all or part of the consumer's rights and obligations under that agreement; as the court determines to be just and reasonable in the circumstances.<sup>840</sup> Alternatively, it may make an order suspending the force and effect of that specific credit agreement.<sup>841</sup>

Reckless credit lending involves three types, namely:

- i. The first type of reckless credit lending is when the credit provider failed to conduct an affordability assessment on the credit application of a consumer, in which case the credit agreement will be declared reckless lending irrespective of whether the consumer was able to afford the repayment of the loan.
- ii. The second type of reckless credit occurs when the credit provider failed to explain the risk, cost and obligations under the particular credit agreement with the consumer to such an extent that the consumer understand and appreciate the risks, cost and obligations. The credit provider will find this difficult to prove, therefore it is concurred that a credit provider should include a clause in the credit

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<sup>836</sup> Chapter 6

<sup>837</sup> Chapter 2

<sup>838</sup> Chapter 2

<sup>839</sup> Chapter 6

<sup>840</sup> Chapter 6 and also see sections 80(1)(a) or 80(1)(b)(i)

<sup>841</sup> Chapter 6 and also see sections 83(3) (b) (i) and 84

application and agreement confirming that the consumer understands and appreciate all the risks, cost, and obligations of the agreement.<sup>842</sup>

- iii. The third type of reckless credit is when the credit provider conducted a proper assessment and results indicate that the consumer cannot afford the repayment of the credit agreement, yet the credit provider continues to enter into the agreement with the particular consumer.

Reckless credit and over-indebtedness will sometimes overlap, for example, the consumer can become over-indebted because of reckless credit granting.<sup>843</sup> If the consumer failed to disclose all the relevant information upon application of credit, the agreement will not be considered reckless credit lending because failure to disclose requested information materially affects the ability of the credit provider to make a proper assessment.<sup>844</sup> As a result, the court will not declare the particular credit agreement to be reckless credit granting. But if the consumer could still not afford to repay all the obligations under the credit agreement, the court will then declare the consumer over-indebted and his current credit obligations could be restructured.<sup>845</sup>

In order to restructure the credit obligations, the court will consider the consumer's current means and ability against the financial obligations as well as the date upon which these obligations will be fully satisfied.<sup>846</sup> This consideration forms the basis for the restructuring order that will be enforceable on all effected parties.

If a credit provider continues to grant credit recklessly, the NCR may file a notice on the particular credit provider to instruct the said credit provider to comply with the provisions of the NCA. If the credit provider should continue to act in contravention of the conditions of his registration as credit provider, the NCR will approach the Tribunal.<sup>847</sup>

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<sup>842</sup> Chapter 2 & 5  
<sup>843</sup> Chapter 6  
<sup>844</sup> Chapter 6  
<sup>845</sup> Chapter 6  
<sup>846</sup> Chapter 6  
<sup>847</sup> Chapter 6

Should the tribunal find that the credit provider acted in contradiction of the NCA and its registration conditions, the Tribunal has the discretion to make an order in terms whereof the credit provider has to pay an administrative fine that may not exceed<sup>848</sup>:

- 10% of the wrongdoer's annual turnover during the preceding financial year; or
- R1 000 000.

If the credit provider continues to act in contradiction with the NCA, the credit provider could be deregistered.<sup>849</sup>

Though reckless credit agreements are not considered an unlawful (or illegal) contract<sup>850</sup>, it is advisable that the legislature should consider the same consequences applicable to credit providers who enter into reckless credit agreements as with unlawful agreements. The court should be granted further discretion to make an order in terms whereof the security (on which the reckless credit agreement is based) is forfeited to the State and that the credit provider will be able to claim for restoration of any performance based on, for example, unjustified enrichment of the consumer.<sup>851</sup>

In the *Gerber*<sup>852</sup> case, the court failed to consider the common law principles regarding enrichment and restoration. Auspiciously, this omission was rectified in the *Opperman*<sup>853</sup> case as well as the *Mbatha*<sup>854</sup> case. In the first instance, the constitutional court stated that it is unconstitutional to allow for arbitrary deprivation of property by preventing any claim by the credit provider against the consumer for the repayment of the money. In the second instance the court held "... that it is unlikely that the legislature intended that the consumer should keep the money and the box." Both were significant court cases that shaped the issue regarding security in reckless credit agreements.

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<sup>848</sup> Par 6.4

<sup>849</sup> Par 6.4

<sup>850</sup> Chapters 2, 3 & 6

<sup>851</sup> As per s 89

<sup>852</sup> *De Kock v Gerber and Others*, unreported case, number 90358/2010 in the Magistrate's Court of Port Elizabeth

<sup>853</sup> *National Credit Regulator v Opperman & others* 2013 (2) SA 1 (CC)

<sup>854</sup> *SA Taxi Securitisation (Pty) Ltd v Mbatha & two others* 2011 (1) SA 310 (GSJ)

It is concurred that the aim of the NCA is to protect the consumer. The intention of the legislature is acknowledged. However, the legislature and the courts should not adhere to this protection to such an extent that the other purposes/aims of the NCA are ignored. This could result in the interpretation and application of the NCA becoming biased in favour of the consumer, while being unfair to credit providers and their rights.<sup>855</sup>

The amendments are most welcome and brought about a step in the right direction. This applies to section 89(5)(c) that has been found to be unconstitutional, as well as the gap regarding what should happen to immovable as well as movable assets during the suspension period should rights and obligations are set aside.<sup>856</sup> Yet, the investigation indicates that more steps are needed to address the gaps in terms of reckless credit.

### **9.3. A final word**

In conclusion, it is acknowledged that the NCA as well as the subsequent amendments brought about an improvement to the credit activities of the consumer in the credit market. However, the investigation at issue would suggest the NCA undertakes a self-analysis to clear up the uncertainties in the Act. A hard look at and further amendments could only benefit all parties concerned.

Practice and precedents will gradually clear up the uncertainties and issues still impeding the practical implementation of the NCA. It is concurred with Renke that the amendments in the NCA is a positive and gratifying development compared to the predecessors of the Act and to the relevant worldwide legislation.<sup>857</sup>

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<sup>855</sup> Chapter 6 and see s 3(d) where the NCA also promotes equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers.

<sup>856</sup> Chapter 7

<sup>857</sup> Renke 2011 (74) THRHR 229

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