WHAT ARE THE EFFECTS OF THE RECKLESS CREDIT SECTIONS IN THE NCA IN THE PREVENTION OF OVER-INDEBTEDNESS?

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By

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Declaration

I , Tessa Papenfus hereby declare that this dissertation is my own work and that all sources used or quoted have been indicated and that this dissertation was not submitted by me for another degree at another University.

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Chapter 1 INTRODUCTION AND BACKGROUND

1 Introduction

In its simplest form credit denotes "the power to obtain goods before payment, based on the trust that payment will be made."[1] This basic definition pre-supposes an agreement between at least two parties in terms of which one undertakes to provide the other with the means to purchase goods in return for which the other party will make full payment at a later stage. Paying later for a commodity that can be enjoyed immediately is a very attractive option for most consumers. It goes without saying that those who extend credit do not do so for charitable purposes. Rather the benefactor charges interest and trusts the debtor to repay the loan in full. Charles Lamb aptly remarked "the human species, according to the best theory I can form of it, is composed of two distinct races: the men who borrow, and the men who lend" [2]. This distinction is pertinent and it clearly defines the reason why the National Credit Act[3] (hereinafter the NCA or Act) was needed in South Africa.

2 Policy framework for Consumer Credit

Prior to the coming into operation of the NCA the granting of credit in South Africa was mainly regulated in terms of the Usury Act[4] and the Credit Agreements Act[5] . It however became clear that what the South African credit market required was regulation in terms of a single comprehensive credit act that addressed the shortcomings of the aforementioned acts. The DTI'S Policy Framework for Consumer Credit[6] was an extensive investigation into credit regulation before the NCA and highlighted a number

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[1] *The Concise Oxford Dictionary* (1991) 272.
[2] Scholtz *et al Guide to the National Credit Act* (Lexis Nexis) (2008 *et seq)* preface (hereinafter Guide to the National Credit Act).
[3] Act 34 of 2005.
[4] Act 73 of 1968.
[5] Act 75 of 1980.
[6] *Consumer Credit Law Reform: Policy Framework for Consumer Credit* August 2004 (DTI) available at http://www.thedti.gov.za.ccrdlawreview/policy.june2005.pdf.(hereinafter Policy Framework)

of shortcomings that made it imperative that a major revamp of the credit regulations was necessary. The biggest problems created by the previous credit regime were stated to be as follows[7]:

"The credit market that developed over the last 40 years is inappropriate for the present and future political economic and social context of South Africa. It is a market that both reflects, but also reinforces, the two economies of South Africa- one economy that is modern furthermore a market that is characterized by a lack of transparency, limited competition, the high cost of credit and limited consumer protection. For all these reasons, a fundamental review of the credit market and its regulation is necessary."

The credit market prior to the NCA mostly served middle and high income white consumers, which services were mostly offered by banks and other financial institutions.[8] The other part of the economic sphere were mostly low income, previously disadvantaged consumers and small and medium enterprises that made up an informal financial market and were serviced by micro- lenders, loan sharks and pawnbrokers.[9]

A significant shortcoming of the previous credit regime was thus that there was no equal access to the credit markets for the lower income consumers[10]. These lower income consumers were often forced into the arms of shady credit providers with overblown interest rates and illegal ways of getting repayment. Reputable credit providers like banks were hesitant to venture into lower income markets to provide affordable credit to consumers[11]. Different consumers were afforded different levels of protection often leading to the fact that the very poor had the least protection from regulation.[12]

The Policy Framework investigation points out that after 1994 over-indebtedness in South Africa skyrocketed. Many reasons are cited for this namely that previously disadvantaged consumers gained access to credit which went together with the

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[7] Policy Framework ch2.
[8] Kelly-Louw "Prevention and alleviation of consumer over-indebtedness"(2008) 20 SA *Merc LJ* 203 (hereinafter Kelly-Louw). See also Stoop " South African Consumer Credit Policy: Measures Indirectly Aimed at Preventing Consumer Over-indebtedness" (2009) 21 *SA Merc LJ* 365 (hereinafter Stoop).
[9] Ibid.
[10] Chapter 2.2 *Policy Framework .*
[11] Chapter 2.12 *Policy Framework.*
[12] Chapter 2.11*Policy Framework.*

transformation of the civil service, affirmative action and aspirational borrowing which lead to reckless lending that caused the fact that many consumers found themselves over indebted with no possible way to repay debts[13].It became apparent that a dysfunctional credit market existed which was based on the following and other problems in the consumer-credit market[14]:

- fragmented and outdated consumer-credit legislation as well as debt collection procedures contained in the Magistrates' Courts Act[15];
- ineffective consumer protection, particularly in relation to the low-income groups, estimated to represent some 85 per cent of the population;
- the high cost of credit and, for some areas, the lack of access to any credit;
- the lack of or selective disclosure regarding credit towards consumers[16];
- there was no penalties for non-compliance and the Act was not well enforced;
- the exploitation of consumers by micro-lenders, intermediaries, debt administrators, and debt collectors;
- credit providers behaved recklessly towards consumers when granting
- credit;
- lenders totally disregarded a consumer's (borrower's) ability to repay, which lead to high levels of indebtedness;
- there was excessive soliciting and harassing for credit by various credit providers; and
- credit bureaux were not regulated and they often held and provided faulty and incorrect credit information[17].One of the main problems with the South African credit market was the so called reckless granting of credit. The following reasons were cited for this occurrence: Insolvency legislation was weak and did not enable effective rehabilitation of over-indebted low and middle income

[13]Kelly-Louw 204.
[14] Ibid.
[15] Act 32 of 1944.
[16] Although lenders had to disclose certain aspects in terms of the Usury Act they only disclosed the interest rate and no other costs of credit.
[17] Consumers were black-listed incorrectly without receiving notice of such listing, and they also had no access to check whether their credit information was correct

consumers.[18] Granting of court orders like garnishee and emolument orders did not take into account whether the credit had in fact been granted in a reckless way and this in turn created an incentive for reckless credit provision by making it profitable and effective to do so.[19] The weak insolvency laws stated above also lead to consumers acting recklessly in gaining new credit to cover old debts, which they did by not disclosing the full extent of their liabilities and escaping their debts by moving to a new location[20]. This was leading to an unending spiral of bad debt and bad repayment by consumers.[21]

It was thus evident that the existing credit legislation needed to be reviewed and penalties *inter alia* had to be introduced to curb reckless lending and in so doing making it less profitable for credit grantors to extend credit recklessly.

3 The National Credit Act

The NCA that was supposed to be the panacea for the ills of the South African credit market came into full operation on I1 June 2007. It has the following objectives as set out in section 3 thereof:

" The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, 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;

(c) promoting responsibility in the credit market by

[18]Chapter 6.2 *Policy Framework.*
[19]*Chapter 6.3 Policy Framework .*
[20] Ibid.
[21]Chapter 6.4 Policy Framework.

(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
(ii) discouraging reckless credit granting by credit providers and 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, and from unfair or fraudulent conduct by credit providers and credit bureaux;

(f)improving consumer credit information and reporting and regulation of 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."

It is clear from the purpose of the act that the legislature stuck closely to the proposed aims in the policy frameworks and the working papers. The NCA is important legislation and it has come a long way in protecting the rights of the consumer and in such process granting access to credit to consumers who would otherwise have been excluded from the protection of its predecessors.

The Act applies to a wide range of consumers and includes private individuals no matter what their financial position may be[22]. It now increases the spectrum of protection across all walks of life. As Otto rightly comments: "The National Credit Act is therefore an important piece of legislation, not only from the consumer's point of view but also from a broad economic perspective"[23].

4. Direct debt relief remedies introduced by the NCA

In order to fulfil the objective in section 3(c) of promoting responsibility in the credit market by responsible borrowing, avoidance of over-indebtedness and fulfillment of financial obligations by consumers and discouraging reckless credit granting by credit providers and contractual default by consumers, the concepts of reckless credit and over-indebtedness have been introduced by the NCA. These novel concepts are set out in Part D of Chapter 4 of the NCA which contain direct[24] debt relief remedies aimed at preventing reckless credit and preventing and alleviating over-indebtedness**.**

4.1 Over-indebtedness

' Over-indebtedness' is defined in section 79 of the Act and refers to the situation where the preponderance of available information at the time that a 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. In order to establish whether a consumer is over-indebted as contemplated by section 79, regard must be had to the consumer's financial means, prospects and obligations[25] and probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment[26]. When a determination has to be made as to whether a person is over-indebted or not, the aforementioned criteria must be applied as they exist when the

[22]Otto & Otto *The National Credit Act Explained* (2010) 2(hereinafter Otto &Otto).For a comprehensive discussion of the scope of application of the Act see Stoop " Kritiese Evaluasie van die toepassingsveld van die National Credit Act " 2008 *De Jure* 352(hereinafter Stoop Toepassingsveld).
[23]Ibid.
[24] Stoop at 367.
[25] S79(1)(a) .
[26] S79(1)(b).

determination is made[27]. Van Heerden points out that the significance of this provision is that it means that it is wide enough to accommodate the situation where a consumer could have been able to afford credit at the time he entered into a credit agreement and only became over-indebted at a later stage[28]. The debt relief remedies offered in respect of over-indebtedness , namely voluntary debt review in accordance with section 86 of the Act or court-ordered debt review as envisaged by section 85 of the Act, aim to achieve debt restructuring which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements[29].

4.2 Reckless Credit

Reckless credit refers to the way in which credit is granted . Section 80 of the NCA provides that a credit agreement is reckless if, at the time that the agreement was made, or at the time when the credit limit is increased, other than an increase in terms of section 119(4) [30]of the Act

(a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time[31]; or

(b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that

(i) the consumer did not *generally*[32] understand or appreciate the consumer's risks, cost or obligations under the proposed credit agreement[33]; or

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[27] S79(2).
[28] Van Heerden in *Guide to the National Credit Act* par 11.3.1
[29] Van Heerden and Boraine " The money or the Box: perspectives on reckless credit in terms of the National Credit Act 34 of 2005" 2011 *De Jure* 392 (hereinafter Van Heerden and Boraine).See spesifically s3(i) read with s85,86,87 and 88.
[30] S119(4) provides that if a consumer , at the time of applying for the credit facility or at any later time, in writing has specifically requested the option of having the credit limit automatically increased from time to time, the credit provider may unilaterally increase the credit limit once a year and by an amount as indicated in the subsection.Thus in such instance a pre-agreement assessment as prescribed by s81, as discussed hereinafter, will not be necessary.
[31] S80(1)(a).
[32] It is to be noted that this subsection is broadly worded and does not require that the consumer should " specifically" not have understood the risks, costs and obligations under the agreement but merely requires a " general" lack of such understanding.

(ii) entering into that credit agreement would make the consumer over-indebted[34].

When a determination regarding reckless credit must be made the aforementioned criteria must be applied as they existed at the time that the agreement was made and without regard for the ability of the consumer to meet the obligations under that agreement or understand or appreciate the risks, costs and obligations under the proposed credit agreement at the time the determination is made[35]. Thus the recklessness in the form of one or more of the types of reckless credit mentioned in section 80(1)(a) and (b) must have been present at the moment when the credit agreement was concluded.

Van Heerden points out that there may be some overlap between reckless credit and over-indebtedness but this will not necessarily be the case in all instances of reckless credit and conversely, there may be many instances where a consumer may have become over-indebted after he or she entered into a credit agreement but not as a result of credit having been extended recklessly, for instance where a consumer is retrenched after having entered into a credit agreement that he or she could well afford while they still had their job[36]. With reckless credit the credit provider is penalized for his reckless disregard of the fact that the consumer should not enter into a credit agreement for one or more of the reasons mentioned in section 80[37]. Reckless credit however not only penalizes the credit provider for his "sin" of granting credit recklessly but entitles the consumer to certain debt relief remedies, namely complete or partial setting aside of the consumers rights and obligations in terms of the credit agreement, suspension and also debt rearrangement in the instance where the extension of reckless credit resulted in the over-indebtedness of the consumer.

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[33] S80(1)(b)(i).
[34] S80(1)(b)(ii).
[35] S80(2)(a) and (b).
[36] Van Heerden in Scholtz *et al* par 11.1.
[37] Vessio" Beware the provider of reckless credit" 2009 *TSAR* 274

5. Scope of dissertation

It is clear that the NCA aims to create a whole new dispensation of debt relief for consumers and financial institutions alike and it is in the spirit of consumerism and (often) skewered relationship between the parties to a credit transaction that one should view the concept of reckless credit. It can however be asked whether the various provisions in the Act pertaining to reckless credit supports the objective of preventing reckless credit and if not, how the Act should be modified to achieve this objective.

The aim of this dissertation is to investigate the concept of reckless credit and the remedies introduced by the NCA to prevent reckless credit granting and to deal with the situation where reckless credit has been extended. By analysing the sections of the Act regarding reckless credit it will eventually be possible to draw some conclusions regarding the effect of the reckless credit provisions in the NCA in preventing over-indebtedness.

CHAPTER 2 RECKLESS CREDIT: KEY ASPECTS AND ASSESSMENT

1 Introduction

In order to facilitate a discussion of reckless credit granting it is important to note a few preliminary aspects relating to the concept of reckless credit as contemplated by the Act: The first is that the issue of reckless can only be raised in respect of a credit agreement to which the NCA applies[38]. The second is that even if the NCA applies to a credit agreement the issue of reckless credit can only be raised if the agreement came into existence on or after 1 June 2007. This is because the reckless credit provisions do not apply to pre-existing agreements[39] .

Further, even if the NCA applies and even if the matter does not relate to a pre-existing agreement it may still happen that reckless credit cannot be raised because the consumer is a juristic person. In this regard section 78(1) spesifically provides that the provisions of the Act relating to reckless credit and over-indebtedness does not apply to juristic persons. A juristic person is broadly defined and includes a partnership, association or other body of persons , corporate or incorporated, or a trust, if there are three or more individual trustees; or the trustee is in itself a juristic person but it does not include a stokvel.

Finally it must be noted that section 78 of the Act provides as follows:
“ Sections 81 to 84 and any other provisions of this Part to the extent that they relate to reckless credit, do not apply to

a) a school loan or a student loan;
b) an emergency loan;
c) a public interest credit agreement;

[38] See Stoop Toepassingsveld supra.
[39] See Schedule 3 to the Act. A ‘pre-existing agreement’ means an agreement which was made before the effective date which refers to the date on which the Act came into operation. Item 4 of Schedule 3 spesifically excludes reckless credit from application to pre-existing agreements.

d) a pawn transaction;
e) an incidental credit agreement; or
f) a temporary increase in the credit limit under a credit facility.

provided that any credit extended in terms of paragraph (a) to (c) is reported to the National Credit Register in the prescribed manner and form, and further provided that in respect of any credit extended in terms of paragraph(b), reasonable proof of the existence of the emergency as defined in section 1 is obtained and retained by the credit provider."

Another aspect of note, which will be addressed in detail hereinafter , is the fact that in the context of preventing reckless credit, section 81 of the Act compels credit providers to do a credit assessment prior to entering into a credit agreement with the consumer. Provisions relating to these assessment mechanisms are contained in section 82.

As will also be discussed in detail later in this dissertation, the debt relief remedies pertaining to reckless credit will be meaningless if the courts are not empowered to deal with reckless credit. The NCA thus appears to give the courts extensive powers in sections 83 and 84 to deal with reckless credit .

Finally it is to be noted that section 80 of the Act provides for three types of reckless credit[40]: Type one reckless credit occurs when the credit provider fails to do a pre-agreement assessment as contemplated by section 81- the credit granted in such instance is reckless per se. Type two reckless credit occurs when the credit provider does a section 81–assessment but disregards the fact that the preponderance of available information indicates that the consumer did not generally understand his risks, costs or obligations under the proposed credit agreement. Type three reckless credit occurs when the credit provider did a section 81–assessment but disregarded the fact that the preponderance of available information indicated that entering into that specific credit agreement would make the consumer over-indebted.

[40] Boraine & van Heerden "Some observations regarding reckless credit in terms of the National Credit Act" 2010(73) *THRHR* 651(hereinafter Boraine and Van Heerden)

2. Assessment aimed directly at preventing reckless credit granting

2.1 Introduction

The NCA attempts to prevent reckless credit granting by requiring the credit provider to do a pre-agreement assessment as contemplated by section 81 of the Act. Section 81 provides that a credit provider must not enter into a reckless credit agreement with a prospective consumer [41].It further states that a credit provider must not enter into a credit agreement without first taking reasonable[42] steps to assess[43]

(a) the proposed consumer's
    (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
    (ii) debt repayment history as a consumer under credit agreements;
    (iii) existing financial means, prospects and obligations; and
(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.

The consumer also has a duty to prevent reckless credit granting[44]. In this regard the NCA provides that when applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the required assessment[45]. Van Heerden and Boraine submit that where, for instance, a consumer applies to enter into a specific credit agreement with a specific credit provider, such consumer may not during the time that the credit provider is considering the aforementioned application, enter into any further credit agreements with other credit providers without disclosing full details thereof to the firstmentioned credit

[41] Renke " Measures in South African Consumer Credit Legislation aimed at the prevention of reckless lending and over-indebtedness: an overview against the background of recent developments in the European Union "2011 *THRHR* 223 points out that this is a general prohibition.
[42] The Act does not set out what it means by 'reasonable steps'.
[43] S81(2).
[44] Van Heerden and Boraine at 397.
[45] S81(1).

provider in order to enable such credit provider to include such information in the section 81-assessment[46].

2.2 Nature of assessment

Van Heerden and Boraine further point out that the assessment required by section 81 is more comprehensive than a mere affordability assessment as the consumer's general understanding of the risks , costs and obligations should also be assessed and it should be evident from the assessment that regard was also had to the consumer's debt repayment history[47].

The NCA does not prescribe an evaluation model to be used by credit providers when they do the assessment as required by section 81. According to section 82 a credit provider may determine for itself the evaluative mechanisms and models or procedures to be used in meeting its assessment obligations under section 81, provided that any such mechanisms, model or procedure results in a fair and objective assessment[48].Section 61(5) of the Act provides that 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[49].

This right of the credit provider to determine its own evaluative mechanism is subject to the right of the National Credit Regulator to pre-approve the evaluative mechanisms, models and procedures to be used for assessment purposes in respect of developmental credit agreements and to publish guidelines proposing evaluative mechanisms, models and procedures to be used in respect of other credit agreements[50]. A guideline published by the National Credit Regulator is not binding on a

[46] Van Heerden and Boraine at 397.
[47] Ibid.
[48] Ibid.Vessio *supra* indicates that the wording of section 82 is interesting in that the positive responsibility appears to be on the credit provider to ask the correct information gathering questions.
[49] The Constitution of the Republic of South Africa,1996.
[50] S82(2).

credit provider, except with regard to developmental credit or if so ordered by the National Consumer Tribunal[51].

The National Credit Regulator has not published any specific guideline but has indicated that credit providers may use the content of Form 16 of the Regulations made in terms of the NCA[52] as a basis for such an assessment. In brief the content of Form 16 relates to the following[53]:

- Personal details ,including name, initials ,surname; identity number (or passport number and date of birth);postal and physical address; contact details;
- All income, inclusive of employment income and other sources of income;
- Monthly expenses, for example taxes , Unemployment Insurance Fund; pension; medical aid; insurance ; court orders and others;
- List of all debts, disclosing monthly commitment, total balance outstanding; original amount and amount in arrears (if applicable) – this would include for example home loans, furniture .
- Living expenses, namely groceries, utility and continuous services, school fees , transport fees and so forth.

Note should also be taken of the suggestions of Van Heerden and Boraine regarding the nature and content of the section 81 assessment. They submit that for purposes of the comprehensive compulsory pre-agreement assessment as required by section 81, the credit provider must implement non - discriminatory evaluative measures, cast plainly[54] in an official language that the consumer reads and understands[55], which should *inter alia* address the following aspects:

(a) Whether the consumer understands and appreciates the risks and costs of the credit and his or her rights and obligations as a consumer under the credit agreement. It is submitted that this can objectively be achieved by inserting a

[51] S82(3).
[52] Published in GG 28864
[53] Insights into aspects of the National Credit - Deloitte retrieved from www.deloitte.com
[54] S64.
[55] S63.

clause into the credit application indicating that the risks and costs of the credit and the consumer's rights and obligations as a consumer under a credit agreement have been explained to him or her by the credit provider and that the consumer expressly acknowledges that he or she understands and appreciates same[56].

(b) The consumer's debt repayment history as a consumer under credit agreements. It is submitted that for this purpose , unless the consumer is an existing client of the credit provider and the credit provider has access to the consumer's debt repayment history, the credit provider should do a credit bureau check as that will give an indication as to whether the consumer has a good or bad debt repayment history. A bad debt repayment history, eg judgments due to non-payment of debt might serve to expose the consumer as a possible reckless credit risk in the sense that entering into a credit agreement with him or her might lead to the consumer's over-indebtedness. It is submitted that it is prudent that the assessment contain a reference to the fact that the credit provider did have due regard to the consumer's debt repayment history as required by section 81(2)(a)(ii).

(c) The consumer's existing financial means prospects and obligations. It should be borne in mind that "financial means prospect and obligations" has an extended meaning in terms of the NCA which will enable the credit provider to also take into account the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the prospective consumer and that other person customarily share their respective financial means and mutually bear their respective financial obligations[57].

(d) Where the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the credit provider may for purposes of assessing the consumer's financial means, prospects and obligations also have regard to the reasonably estimated future revenue flow from that business

[56] Van Heerden in *Guide to the National Credit Act* par 11.6.*See also Vessio 280 fn 42.*
[57] S78(3).

purpose[58]. It is submitted that in this regard the credit provider should thus require projected profit margins of the business venture from the consumer .The assessment in the case where the consumer has such commercial purpose for applying to enter into a credit agreement must indicate that there is a reasonable basis to conclude that such commercial purpose may prove to be successful.

(e) Assessment should be done not only of the means prospects and obligations of a consumer under a credit facility or a credit transaction to which the NCA applies, but also of the surety in respect of such credit facility or credit transaction.

If the Tribunal finds that a credit provider has repeatedly failed to meet its obligations under section 81, or customarily uses evaluative mechanisms, models or procedures that do not result in a fair and objective assessment, the Tribunal, on application by the National Credit Regulator may require that credit provider to apply any guidelines published by the National Credit Regulator or apply any alternative guidelines consistent with prevalent industry practice, as determined by the Tribunal[59].

Van Heerden and Boraine submit that, given the fact that the reckless credit remedy is not to the avail of juristic persons, a section 81 pre-agreement assessment appears to be a compulsory prerequisite only where a credit agreement is entered into with a natural person consumer[60]. However, although not compulsory in the case of juristic persons, they remark that it is good business practice to also conduct a pre-agreement assessment along the lines mentioned hereunder where the consumer is a juristic person, obviously with the necessary changes required by the context[61].

2.3 Complete defence for credit provider

Section 81(4) states that for all purposes of the NCA, it is a complete defence to an allegation that a credit agreement is reckless if the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by section 81 *and* a court or the

[58] S78(3)(c).
[59] S82(2)(a) and (b).
[60] Van Heerden and Boraine 398.
[61] Ibid.See further the suggestions they make regarding the s81-assessment.

Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment[62].

This complete defence is only available to a credit provider who can prove that both requirements of section 81(4) are met [63]. The NCA however does not mention specific aspects that would indicate " materiality" as referred to in section 81(4)[64].Van Heerden and Boraine accordingly submit that in each specific instance the facts of the particular matter and the extent of the untruthfulness of the consumer will have to be considered in order to determine whether it can be said that the credit provider's ability to make a proper assessment was materially influenced.

In *Horwood v FirstRand Bank Ltd* the court said the following about a credit provider's responsibility to do an assessment and the consumer's obligation to answer such assessment questions truthfully:

"A failure on the part of a credit provider to take reasonable steps to assess the prescribed matters renders the credit agreement a reckless one and a failure on the part of a consumer to fully and truthfully answer requests forming part of the compulsory assessment arms a credit grantor with a complete defence if the consumer's failure materially affected the ability of the credit provider to make a proper assessment. In my view the correct interpretation of these provisions is that where a credit provider has taken the required "reasonable steps to assess" the relevant matters referred to in section 81(2), the credit agreement is not a reckless one in terms of section 80(1), whether or not the assessment was tainted by a consumer's incomplete or untruthful answers. The complete defence provided for under section 81(4) is a defence which may, as the respondent has done in this matter, be raised in addition to one that a credit provider's assessment obligations under section 81 have been met".

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[62] S81(4)(a) and (b).
[63] Van Heerden in *Guide to the National Credit Act* par 11.4.1.
[64] *Horwood v Firstrand Bank Ltd* [2011] JOL 27913 (GSJ).The court indicated (par 6) that not every failure by a consumer to fully and truthfully answer the credit provider's request for information as part of the prescribed assessment will entitle the credit provider to the complete defence mentioned in s81(4).The question as to what would constitute such materiality was however left open by the court (par 15).

3. Conclusion

It is clear that although the legislature requires both credit providers and consumers to steer away from reckless credit the main responsibility for not granting credit recklessly lies with the credit provider. The NCA aims to prevent the granting of reckless credit by placing a peremptory obligation on the credit provider to do a comprehensive pre-agreement assessment as contemplated by section 81 before he enters into a credit agreement with a prospective consumer. The effect of failing to conduct such an assessment is that the credit that is subsequently extended is reckless per se. The legislature has however attempted to balance the rights of credit providers and consumers by affording the credit provider a complete defence in the case where the consumer does not answer truthfully to the questions asked during the assessment and it materially influences the credit providers assessment ability. It is submitted that this complete defence is necessary as the fact that a consumer is not truthful in disclosing his financial position or the extent of his credit agreement debt may deceive the credit provider into believing that the consumer is not a credit risk and that granting credit to him would not fall into one of the categories of reckless credit. Where the consumer is not truthful his financial downfall is thus of his own making and not attributable to reckless credit granting.

Although the Act gives some indicators as to what should be contained in the assessment and despite the indication by the National Credit Regulator that Form 16 can be used as guideline it is submitted that clear and specific guidelines for the section 81 assessment require to be established.

CHAPTER 3 RECKLESS CREDIT: POWERS OF THE COURT

1 Introduction

In terms of section 83(1) , despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, the court may declare that the credit agreement is reckless. Van Heerden and Boraine indicate that, unlike section 85 of the Act, which requires an allegation of over-indebtedness before a court can exercise its powers relating to over-indebtedness, section 83 does not require an allegation of reckless credit before a court can exercise its powers with regard to reckless credit[65]. It thus appears that a court can *suo motu* (of its own accord) look into the issue of reckless credit during court proceedings in which a credit agreement is being considered[66]. Given that the words "court proceedings" is used, it is clear that a court can make use of these powers in action and application proceedings[67]. They point out that although a debt counsellor[68] may during a debt review in terms of section 86 determine that a specific credit agreement is reckless, it is only a court which can actually declare that specific agreement reckless[69]. In this regard they indicate furthermore that it should be noted that it is not a requirement of the Act that the consumer is obliged to approach a debt counsellor for purposes of a determination of reckless credit before such issue may be raised and it is submitted that either the consumer or the court (*suo motu)* may raise the issue of reckless credit without the assistance of a debt counsellor[70].

In respect of the approach to be taken by a court when determining whether reckless credit was granted, the court in *SA Taxi Securitisation (Pty) Ltd v Mbatha*[71] remarked[72]:

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[65] Van Heerden and Boraine at 400..
[66] Van Heerden in *Guide to the National Credit Act* par 11.4.5.
[67] S86(6) provides that if a consumer seeks a declaration of reckless credit during a debt review in terms of section 86, the debt counsellor must determine whether any of the consumer's credit agreements appear to be reckless.
[68] A debt counsellor is defined in reg 1 as " a natural person who is registered in terms of section 44 of the Act offering a service of debt counseling. In terms of reg 1 "debt counselling" means " performing the services contemplated in section 86 of the Act".
[69] Van Heerden and Boraine at 400.
[70] Ibid.
[71] 2011(1) SA 310(GSJ).

" While one of the purposes of the NCA is to discourage reckless credit, the Act is also designed to facilitate access to credit by borrowers who were previously denied such access. An over-critical armchair approach by the court towards credit providers when evaluating reckless credit, or the imposition of excessive penalties upon lenders who have recklessly allowed credit, would significantly chill the availability of credit especially to the less affluent members of our society."

Van Heerden and Boraine also point out that section 130(4)(a) provides that if in any debt procedures in a court, the court determines that the credit agreement was reckless as described in section 80 it *must* make an order contemplated in section 83[73]. They are of the opinion that the court thus has no discretion in such an instance to deviate from the powers given to it by section 83 and can make no other orders than those provided for in the said section[74]. In this regard they also emphasize that it is important to note that the NCA does not regard a reckless credit agreement as an unlawful agreement and thus it is clear that 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 Act in respect of unlawful credit agreements[75].

2. The powers of the court with regard to type one and two reckless credit

The NCA grants a court the same powers where no credit assessment (type one reckless credit) as required by section 81 was done prior to entering into a credit agreement with the consumer as in the instance where the credit provider, having conducted an assessment entered into the credit agreement with the consumer despite that the preponderance of information available to the credit provider indicated that the consumer did not *generally* understand or appreciate his or her risks, costs or

[72] At par 37.See also *SA Taxi Securitisation (Pty) Ltd v Nako and others* unreported ECJ case no 19/2010.
[73] Van Heerden and Boraine at 401.
[74] Ibid.
[75] Boraine and Van Heerden 1.

obligations under the proposed credit agreement (type two reckless credit)[76]. If a court declares that a credit agreement is reckless in terms of type one or type two, the court has a discretion[77] to make an order setting aside all or part of the consumer's rights and obligations under *that* credit agreement, as the court determines just and reasonable in the circumstances *or* suspending the force and effect of *that* credit agreement in accordance with section 83(3)(b)(i)[78].

2.1 Setting aside of a reckless credit agreement

Van Heerden and Boraine point out that in respect of the first two types of reckless credit as envisaged by section 80(1)(a) and 80(1)(b)(ii) of the Act, the court has a discretion to order either partial or complete setting aside of the consumer's rights and obligations under the agreement or suspending the force and effect of the specific agreement[79]. The Act is however silent on how a court should decide which one of the aforementioned orders it should make[80]. They indicate that it treats both the situation where no credit assessment was done as well as the situation where a credit assessment was actually done but the consumer did not understand the relevant risks, costs and obligations in the same manner without differentiating between the two[81]. It also does not differentiate between the situation where performance in terms of the agreement has not yet occurred and the situation where the parties have already performed, for instance where the credit provider has advanced money or goods and the consumer has or has not made certain payments[82]. They also point out that the section is further silent on the rights and obligations of the credit provider in the instance where the consumer's rights and obligations under the credit agreement are set aside

[76] Van Heerden and Boraine 402.
[77] The word'may' is used and it is submitted that it indicates a discretion.
[78] Ibid.
[79] Van Heerden and Boraine 402
[80] Boraine and Van Heerden 3.
[81] Van Heerden and Boraine 403.
[82] Ibid.

partially or completely and indicate that these consequences may follow even if the consumer is not over-indebted[83].

They consequently ask how a court must decide whether to set aside the rights and obligations of a consumer under a credit agreement or to merely suspend the force and effect of such credit agreement?[84]If the court does decide to opt for setting aside the consumer's rights and obligations, they indicate that one may ask on what basis it will for instance regard it as " just and reasonable in the circumstances" to only partially set the consumer's rights and obligations under the agreement aside as opposed to completely? In their opinion the absence of clear guidelines regarding the setting aside of the consumer's rights and obligations, and the absence of an indicator as to when setting aside will be more appropriate than suspension, may lead to a fragmented approach by the courts and requires clarification[85].

The aforementioned authors further submit that where performance in terms of the reckless credit agreement has not yet occurred it might appear " just and reasonable in the circumstances" that the court may rule that the consumer has no further rights and obligations[86]. It will thus for all practical purposes effectively amount to cancellation of the contract and both parties will be absolved from reciprocal performance.[87]Where however performance has already occurred, such as where the credit provider advanced a loan amount or delivered a vehicle to the consumer and the consumer has or has not made certain agreed payments and the agreement is set aside, they indicate that the next question to be asked relates to restoration[88]. As reckless credit agreements do not constitute unlawful credit agreements[89] for purposes of the NCA with the grave consequence of forfeiture of the credit provider's rights as provided for by section 89(5) of the NCA, they submit that the credit provider will be able to claim

[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Boraine and Van Heerden 4.
[87] Ibid.
[88] Boraine and Van Heerden 7.
[89] S89 which sets out the various instances of unlawful agreements, does not contain a reference to a reckless credit agreement.

restoration of any performance based on for example, undue enrichment of the consumer[90].

In this context the judgment of *SA Taxi Securitisation (Pty) Ltd v Mbatha*[91] should again be noted where the court indicated that if the consumer has a valid complaint that, but for the recklessness of the credit provider, the consumer would never have become involved in the credit transaction, it might be " just and reasonable " to set aside the agreement[92]**.** In that event, the court indicated, the agreement would be null and void as if it had never been[93]. As a consequence, the credit provider, who remains owner of the vehicle which was financed in this specific instance, would become entitled to restoration thereof[94]. On the other hand the consumer, who no longer has any obligations under the agreement that has been set aside, would be relieved of any further indebtedness or deficiency claim under the agreement[95]**.**

2.2 Suspension of a reckless credit agreement

Section 84 of the NCA provides that during a period that the force and effect of a credit agreement is suspended in terms of the Act[96]

(a) the consumer is not required to make any payment required under the agreement;
(b) no interest , fee or other charge under the agreement may be charged to the consumer;
(c) the credit provider's rights under the agreement, or under any law in respect of that agreement, are unenforceable, despite any law to the contrary.

Once a suspension of the force and effect of a credit agreement ends, all the respective rights of the credit provider and consumer under that agreement are revived[97] and are

[90] Ibid.
[91] *Supra*.
[92] At par 47. See also Van Heerden and Boraine 404.
[93] Ibid.
[94] Ibid.See also *SA Taxi Securitisation (Pty) Ltd v Chesane* 2010(6) SA 557 (GSJ) par 28 and *SA Taxi Securitisation v Booi* unreported ECG-case no 4077/2009.
[95] Ibid.
[96] S84(1)(a) to (c).

fully enforceable except to the extent that a court may order otherwise[98]. However, no amount may be charged to the consumer by the credit provider with respect to any interest, fee or other charge that were unable to be charged during the suspension[99].

Van Heerden and Boraine indicate that where a suspension is appropriate, the penalty for the credit provider in having extended reckless credit lies in the fact that the credit receiver will not receive any payment in respect of the agreement for the period of suspension, will forfeit the interest and other charges that would have accrued during that period and will not be able to enforce the agreement by for instance cancelling the agreement and repossessing the financed item, if any[100].

They are of the opinion that section 84 is problematic as it is unclear how a suspension in terms of section 84 affects the credit provider's security, such as a motor vehicle financed in terms of an instalment agreement[101]. They ask whether a suspension in terms of section 84 means that the consumer is entitled to retain the depreciating security whilst not making any payments[102]. They further point out that the NCA does not specify or limit the period of suspension and it may well be that the court orders a suspension which may run over a considerable amount of tim[103]e. They also indicate that section 84 does not expressly state that the consumer is obliged to return the financed item to the credit provider for the period of suspension or that the consumer is entitled to retain possession of such item whilst the suspension is in force[104].

The authors indicate that two different points of view may be taken in this regard. The one view is that the bar against enforcement of the agreement read together with the right of the consumer to stop making payments for the period of suspension whilst not being placed under an express obligation to return the financed item to the credit

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[97] It is submitted that this is an unfortunate choice of word, as the suspension does not end or terminate the relevant rights and obligations. " Resume" instead of " revive " may have been a more appropriate choice.
[98] S84(2)(a)(i) and(ii).
[99] S84(2)(b).
[100] Van Heerden and Boraine 405.
[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Ibid.

provider for the period of suspension ,viewed against the backdrop that the agreement is not cancelled or set aside but merely suspended, indicates that the legislature intended that the consumer cannot be deprived of possession of the financed item during the period of suspension[105].

The other view is that it is unfair to allow the consumer, during a period of suspension of a reckless credit agreement to retain the credit provider's depreciating security whilst not making any payments and to also penalize the credit provider further by non- receipt of payments and the forfeiture of interest and other charges for the period of suspension[106]. From this second perspective, they remark that the mere fact that a section 81- assessment was not done or that the consumer , despite the assessment did not understand the risks , costs and obligations under the agreement, does not entitle the consumer to free possession and use of the financed item as consolation[107].

In the context of suspension of a reckless credit agreement one must once again take note of the judgment in *SA Taxi Securitisation (Pty) Ltd v Mbatha* where the court took the view that if the effect of the agreement is suspended, *all* elements of the agreement would have to be suspended[108]. The court indicated that although section 81(4)(c) contemplates that the credit provider will not be entitled to enforce its rights during a period of suspension, that subsection must be read with subsection 81(4)(a) and (b)[109]. Spesifically the court held that there is no basis for reading into the language of the NCA a provision that when suspension is appropriate, the court also has the power to permit the consumer to utilize the security in a manner which will permit it to deteriorate during the period of suspension. The court thus remarked that " It seems unlikely that the legislature ever intended that the consumer could keep the 'money *and* the box' "[110].

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[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Par 48 .
[109] Par 45.
[110] At par 46.The court indicated that if the effect of the agreement is merely suspended, all elements of the agreement would have to be suspended and that this would mean that the consumer would not be entitled to retain possession of the vehicle during the period of suspension but that at the same time the consumer would not have to make any payments under the agreement during the suspension period (at par 48).

Van Heerden and Boraine submit that although section 84 bars enforcement during a suspension and absolves the consumer from payment during the suspension it does not necessarily imply that the consumer may possess and use the credit provider's depreciating security to the credit provider's detriment during such suspension[111]. They are of the opinion that possibly the provision that is made in section 84(2) for a " revival " of the respective *rights* and obligations of both the parties once the suspension ends , may shed more light upon the matter[112]. In this regard they ask why it would be necessary to state in section 84(2) that the consumer's rights are revived if section 84(1) does not make any specific mention of the consumer's rights[113]. Their submission is that the only reasonable inference to be drawn from this is in fact that section 84(1) ,although not in express terms, by implication envisages that the consumer's right to possession and use of the financed item be suspended for as long as the suspension is in force[114].

According to Van Heerden and Boraine a further problem relating to suspension of a reckless credit agreement is what should be done in the instance where the financed item that is subject to a suspension, is immovable property?[115] They remark that inconvenience and cost of requiring the consumer to vacate the immovable property for the period of suspension would be immense[116]. According to them distinguishing between moveable and immovable property for purposes of suspension in terms of section 84 may lead to claims of infringement of persons right to equal treatment in terms of section 9 of the Constitution[117].

3 Powers of the court with regard to type three reckless credit

As indicated type three reckless credit refers to the situation contemplated in section 80(1)(b)(ii), namely where a section 81-assessment was done, but the credit provider

[111] Van Heerden and Boraine 407.
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] Van Heerden and Boraine 407.
[116] Ibid.
[117] The Constitution of the Republic of South Africa, 1996.

disregarded the preponderance of available information and still entered into a credit agreement with the consumer and entering into that specific credit agreement caused the consumer to become over-indebted.

Section 83(3) provides that once the court has declared the agreement reckless it[118]

(a) must further consider whether the consumer is over-indebted at the time of those court proceedings; and
(b) if the court concludes that the consumer is over-indebted the court *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 and restructuring the consumer's obligations under any other credit agreements, in accordance with section 87[119] .

Before making the order as set out in section 83(3) the court is *must* consider the consumer's current means and ability to pay his or her current financial obligations that existed at the time the agreement was made[120]. The court *must also* consider the expected date when any such obligation under a credit agreement will be fully satisfied, assuming the consumer makes all the required payments in accordance with any proposed order[121].

Van Heerden and Boraine indicate that where the court thus grants the debt relief as set out in section 83(3) it will effectively mean that the court will make an order suspending

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[118] S83(3)(a) and (b).
[119] See also s87 which provides : "(1)(a) If a debt counsellor makes a proposal to the Magistrates court in terms of section 86(8)(b) or a consumer applies to the magistrates court in terms of section 86(9), the magistrates court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means , prospects and obligations may
(a) reject the recommendation or application as the case may be; or
(b) make
(i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) or (3), if the magistrates court concludes that the agreement is reckless;
(ii) an order rearranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii); or
(iii) both orders contemplated in subparagraph (i) and (ii)."
It is further provided by s87(2) that the National Credit Regulator may not intervene before the magistrates court in a matter referred to it in terms of s87.
[120] S83(4)(a).
[121] S83(4)(b).

the credit agreement which was entered into recklessly and caused the consumer to become over-indebted and that all the consumer's other credit agreements, excluding the aforementioned agreement, in respect of which the consumer has subsequently also become over-indebted as a result of the reckless credit granting, will be restructured[122].According to them it thus appears that the legislature intended to penalize the credit provider in respect of this third type of reckless credit by suspending the credit provider's right to payment and enforcement and forfeiture of interest , fees and charges which would otherwise have been charged during that period and by giving preference to restructuring of other credit agreements in respect of which the consumer may subsequently have become over-indebted as a result of having entered into the suspended reckless credit agreement[123].

Restructuring of the consumer's other credit agreements (thus the credit agreements other than the reckless one) will have to occur in terms of section 86(7)(c) of the NCA by

(a) extending the period of the agreement and reducing the amount of each payment accordingly;
(b) postponing during a specified period the dates on which payments are due under the agreement;
(c) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
(d) recalculating the consumer's obligations because of contraventions of part A or B of Chapter 5, or Part A of Chapter 6[124].

Van Heerden and Boraine submit that the court's power to postpone dates of payments in terms of section 86(7)(c) should not be confused and equated with the court's power to suspend a reckless credit agreement in terms of section 84 and they indicate further that the court is not empowered to "write off "interest when ordering a debt

[122] Van Heerden and Boraine 408 and 409.
[123] Ibid.
[124] Part A of Ch 5 deals with unlawful credit agreements and provisions and Part B deals with disclosure, form and effect of credit agreements. Part A of Ch 6 deals with collection and repayment practices.

restructuring[125]. They indicate that once these debts have been restructured, the provisions of section 88(3) will apply to such restructured debt thus effectively preventing enforcement by the credit provider whilst the consumer duly makes payments in terms of the debt restructuring order[126].

4 Conclusion

From the above discussion it is clear that the legislature was intent on penalizing a credit provider who grants reckless credit. This is clear from the fact that failure to conduct a section 81 assessment is regarded as reckless per se.It is further evident from the fact that a court may apparently out of its own accord raise the issue of reckless credit even if the consumer does not raise it. The wide powers that are granted to the courts to address the situation where credit has been granted recklessly is also an indication that the legislature "meant business" when he introduced the remedies in respect of reckless credit.

It is however submitted that the efficiency of the reckless credit remedies is undermined by the uncertainty surrounding the application of these remedies. Clarity needs to be

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[125] Van Heerden and Boraine 409.

[126] S 88(3) provides :" Subject to section 86(9) and (10) , a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i) may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until

(a) the consumer is in default under the credit agreement; and
(b) one of the following has occurred:
    (i) an event contemplated in subsection (1)(a) through (c); or
    (ii) the consumer defaults on any obligation in terms of a rearrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal."

S 88(1) provides that a consumer who has filed an application for debt review in terms of section 86(1) , or who has alleged in court that he or she is over-indebted must not incur any further charges under a credit facility or enter into any further credit agreement, other than a consolidation agreement, with any credit provider until one of the following events has occurred:

(a) the debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) have expired without the consumer having so applied;
(b) the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application;
(c) or a court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreements as rearranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.

provided on the criteria for deciding when to do a complete setting aside of the rights and obligations of the consumer in the case of types one and two reckless credit and when to do only a partial setting aside. The Act should furthermore indicate exactly when a suspension as contemplated by section 84 would be appropriate and what the effect of such suspension on movable and immovable security is.

From the above discussion of the powers of the court it also appears as if the penalty imposed on the credit provider for granting reckless credit is not severe enough to ensure that credit providers will refrain from granting credit recklessly. It is submitted that the introduction of a harsher penalty in this regard, such as cancellation of a credit provider's registration by the National Credit Regulator immediately once a court rules that such provider has granted reckless credit may be effective in curbing reckless credit granting.

Unless the uncertainties regarding the powers of the court in respect of reckless credit are clarified one can hardly regard them as truly efficient because different courts will keep on applying them differently and consumers who were the victims of reckless credit will not be treated equally.

CHAPTER 4 RECKLESS CREDIT: FURTHER DEVELOPMENTS

1 Introduction

Despite the provisions contained in the NCA to address the problem of reckless credit granting , the need still exist to refine the way in which South Africa seeks to address this problem. From the aforementioned discussions it became clear that problems exist in both the credit granting phase (insofar as clarity is required regarding the section 81 assessment) as well as after the granting of reckless credit (insofar as the powers of the court need to be reconsidered and clarified). In order to find further solutions to the reckless credit problem the Representatives of the major retail banks , the Banking Association of South Africa (BASA) , the South African Reserve Bank and the Financial Services Board have recently reached an agreement entitled ' Ensuring Responsible Market Conduct for Bank Lending" to improve responsible lending and preventing households from being caught in a debt spiral[127].The agreement calls for several measures to be taken, including a review of loan affordability assessments, appropriate relief measures for distressed borrowers, reviewing the use of debit orders and limiting the use of garnishee orders[128].Only those aspects pertinent to the issue of reckless credit will be discussed.

2 Joint Agreement between BASA and the Minister of Finance

At a meeting in August 2012 between the aforementioned roleplayers it was agreed that while there are currently no systemic risks related to unsecured (or secured) lending,

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[127] *'Ensuring Responsible Market Conduct For Bank Lending"* Joint Statement by the Minister of Finance and the Chairperson of the Banking Association of South Africa November 2012.The agreement is a consequence of a meeting that took place between the parties on 19 October 2012 , which built on commitments that were made during a previous consultation between the Finance Minister and major retail bank chief executives and the chairperson of BASA on 27 August 2012(hereinafter Joint Statement).

[128] In terms of the Joint Statement it is indicated that problematic issues were identified, *inter alia* excessive lending to households even when such loans are not affordable and also the extending of unaffordable loans to pensioners and other social grant recipients.

certain market conduct behaviour may result in households, particularly poor ones, getting caught in a debt spiral[129]. It was inter alia recorded that BASA and the National Treasury[130]

- recognise that although the efficient regulation of the banking sector limits the incidence of poor credit practices, some credit practices are undesirable and reckless, and agree on the need to deal with poor market conduct practices that contribute to over-indebtedness of borrowers;
- agree that perverse incentives favouring reckless lenders should be stopped.

At a subsequent meeting on 19 October it was *inter alia* agreed that[131]

- to prevent future indebtedness and address current over-indebtedness where practical, BASA and its member banks will review their approach to the assessment of affordability, and ensure the selling of appropriate credit products to their customers;
- BASA, the National Credit Regulator and the National Treasury will formulate a standard to measure affordability, which could then be incorporated into regulations as minimum standards.

3 Final Conclusion and remarks

If one has regard to the reckless credit provisions in the NCA it is clear that the requirement of compulsory pre-assessment and the prohibition of each of the three types of reckless credit can play a direct role in the prevention of over-indebtedness. Obviously if no credit assessment is done, as with type one reckless credit, it may have the effect that it credit can be granted recklessly without the credit provider having ever had any regard for the consumer's financial position. With type two reckless credit the danger is that although an assessment is done, the consumer may still be drawn into the web of over-indebtedness because of a lack of understanding of the costs, risks and

[129] Joint Statement 2.
[130] Ibid.
[131] Ibid.

obligations involved in taking up specific credit. With type three the role that the reckless credit provisions in section 80 read with section 81 and 83 can play is obvious: if a credit grantor is deterred from granting type three reckless credit the situation where the consumer becomes over-indebted is immediately prevented.

It is submitted that the joint statement regarding the agreement by the Minister of Finance and BASA is a positive step towards addressing the problems surrounding reckless credit granting in South Africa and will enhance the ability of the reckless credit provisions of the NCA to contribute towards preventing over-indebtedness of consumers . A drawback of the agreement is unfortunately that it only binds the member banks of BASA[132]. Although the other credit providers who are not party to the agreements, such as non-bank micro lenders and retailers are encouraged to conform to the good practices committed to by the banks, it is doubtful whether they will do so unless there is some legislative leverage on them.

It is further submitted that by introducing a basic assessment model that can be used as for purposes of the assessment required by section 81 of the NCA, will definitely improve the credit situation of many consumers who might be potential victims of reckless credit granting resulting in over-indebtedness. It is however important, to note, as pointed out by Van Heerden and Boraine, that section 81 does not merely contemplate an affordability assessment but requires a more comprehensive investigation which should also cover the consumer's ability to understand the risks, costs and obligations inherent in taking up credit.

It is also submitted that merely paying attention to improving the section 81 assessment process will not in itself be sufficient to combat reckless lending and over-indebtedness as a result of such reckless lending. In this regard it is important that the assessment process must be complimented by clear and extensive powers of the courts to deal with " reckless " credit providers .If a credit provider has no serious ill consequnces to face due to granting reckless c credit it will not deter him from drawing more consumers into

[132] Joint Statement at 4.

the spiral of over-indebtedness by granting them reckless credit. It is thus submitted that the hand of the National Credit Regulator should also be strengthened to cancel the registration of a credit provider should a court find that such credit provider has engaged in reckless credit granting.

Type 3 reckless credit is probably the type that most generally takes place – meaning that for most people reckless credit granting and over-indebtedness go hand in hand from the start of their credit relationship with a "reckless " credit provider. By improving the reckless credit provisions in the NCA it is submitted that one will improve the prevention of over-indebtedness of consumers. Merely improving the reckless credit provisions for purposes of preventing over-indebtedness is however not enough- it is submitted that it will also be necessary to educate consumers on the causes and consequences of reckless credit as well as over-indebtedness.

The National Treasury and BASA now has a golden opportunity to take positive steps to address the issue of reckless credit granting and its role in either preventing or causing over-indebtedness. This project will take place in a larger context where they will also give attention to related issues regarding over-indebtedness which negatively impact on the South African credit market. It is submitted that a holistic approach should be taken in terms whereof the problem of reckless credit granting is addressed at an even earlier stage than when the consumer already sits in the credit provider's office, eager to take up credit that he cannot afford or does not understand the consequences of. Innovative ways of educating consumers about the concept of reckless credit should be developed such as for example the screening of " info-bulletins" during advertising breaks at peak television hours wherein consumers are informed about the dangers of taking up reckless credit.

In the end however it should be remembered that the best reckless credit assessment model will not fulfil its objective if consumers continue to give false information about their financial position. Consideration should thus be given to making it an offence in terms of the Act to give false information during a credit assessment in terms of section

81 if the information is such that it can materially influence the credit provider's ability to do a proper assessment. The reckless credit provisions in the Act can only serve to prevent over-indebtedness if both the credit provider and the consumer comply with their assessment obligations as envisaged by section 81 of the Act.

In sum, if one has to conclude on the effect of the reckless credit sections in the NCA on the prevention of over-indebtedness it is submitted that these sections , namely section 80 (which indicates when a credit agreement is reckless),section 81(compulsory assessment and section 83 (powers of the court) have the potential to play an important role in preventing over-indebtedness. The fact of the matter is however that in their current format they are not as efficient in respect of the effect that they can have towards preventing over-indebtedness which is symptomatic of reckless credit granting because, as indicated, a proper assessment model needs to be developed in order to ensure effective pre-agreement assessment as contemplated by section 81. Further the effectiveness of the reckless credit provisions in preventing over-indebtedness is hampered by the vagueness surrounding the powers of the court as set out in section 83.

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POLICY DOCUMENTS AND OTHER STATEMENTS

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- " Ensuring Responsible Market Conduct for Bank Lending" Joint statement by Minister of Finance and the Chairperson of the Banking Association of South Africa November 2012