

**The credit provider's duty in terms of the National Credit Act 34 of 2005 to
conduct a pre-agreement assessment**

By

Lubabalo Jayiya

Student number: 14388830

Submitted in accordance with the requirements for the degree of

Master of Laws

At the University of Pretoria

Supervisor: Prof S Renke

February 2017



TABLE OF CONTENTS

CHAPTER 1: GENERAL INTRODUCTION..... 1

1 1 Introduction 1

1 2 Research statement..... 3

1 3 Research objectives and overview of chapters..... 3

1 4 Delineation and limitations 4

1 5 Terminology 4

1 6 Reference techniques..... 5

**CHAPTER 2: A GENERAL OVERVIEW OF SOME OF THE RATIONALES
BEHIND THE PROMULGATION OF THE NATIONAL CREDIT ACT AND, MORE
IN PARTICULAR, ITS RECKLESS LENDING PROVISIONS 6**

2 1 Introduction..... 6

**2 2 The promulgation of the National Credit Act and the reckless lending provisions:
rationales..... 6**

2 3 Related aspects.....11

2 3 1 Disclosure.....11

2 3 2 Consumer education.....13

2 3 3 The National Credit Regulator..... 13

2 3 4 The National Consumer Tribunal.....14

2 4 Conclusion.....14



CHAPTER 3: THE RECKLESS CREDIT PROVISIONS IN TERMS OF THE NATIONAL CREDIT ACT AND ITS REGULATIONS16

3 1 Introduction16

3 2 The section 81 National Credit Act assessment and the credit provider’s complete defence.....17

 3 2 1 General.....17

 3 2 2 The section 81 assessment.....17

 3 2 3 The credit provider’s complete defence in terms of section 8123

3 3 Reckless credit granting in terms of the National Credit Act25

 3 3 1 General.....25

 3 3 2 The instances of reckless lending: section 80.....25

3 4 The powers of the courts/National Consumer Tribunal in respect of reckless lending.....28

3 5 Conclusion.....36

CHAPTER 4: FINAL CONCLUSIONS AND RECOMMENDATIONS38

4 1 General38

4 2 Conclusions and recommendations38

BIBLIOGRAPHY43

LIST OF CASES45



CHAPTER 1

GENERAL INTRODUCTION

1 1 Introduction

The most recent piece of consumer credit legislation in South Africa is the National Credit Act 34 of 2005.¹ The National Credit Act became effective on 1 June 2006, 1 September 2006 and 1 June 2007.² When the first part of the NCA became effective on 1 June 2006, the NCA's predecessors, the Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968, were repealed.³ This repeal stemmed from a number of weaknesses that were identified in the consumer credit legislation that was in operation at the time by the Technical Committee that was appointed by the Department of Trade and Industry.⁴ One of these weaknesses was a failure by the legislature to adequately protect South African credit consumers from reckless lending practices by credit providers, resulting in many consumers becoming over-indebted.⁵ The latter also played a role in and gave rise to the promulgation of the National Credit Act. These and other rationales behind the repeal of the Usury Act and the Credit Agreements Act, and the subsequent promulgation of the National Credit Act, relevant to the topic of this dissertation, will be discussed below.⁶

¹ Hereafter the National Credit Act, the NCA or the Act.

² Scholtz ed (2008) par 2.5; Kelly-Louw and Stoop (2012) 18-19 and Otto and Otto (2013) 8-10. See also ss 1-25; 35-59; 69;73; 164-173 and Schedule 1-3. These provisions came into effect on 1 June 2006. On 1 September 2006, the National Consumer Tribunal was set up as provided for in terms of ss 26-34. The remainder of the NCA's provisions became effective on 1 June 2007.

³ S 172(4).

⁴ See Kelly-Louw (2008) *SA Merc LJ* 203-207 and Woker (2010) *Obiter* 226. Kelly-Louw and Stoop (2012) 291 assert that the previous consumer credit enactments did little to assist over-indebted consumers. Roestoff and Renke (2003) *Obiter* 107-108 affirm that the Usury Act and the Credit Agreements Act that were in operation for many years before they were eventually repealed by the NCA were not adequate as instruments to effectively regulate the consumer credit market in South Africa.

⁵ Summary of Findings *Credit Law Review* (2003) 4-10.

⁶ See ch 2 below.

In order to address the aforementioned weaknesses, the National Credit Act now, for the first time in the history of South African consumer credit legislation, makes provision for a compulsory credit assessment that must be conducted by a credit provider before extending credit to a consumer.⁷ Due to the fact that the credit assessment that must be conducted is *inter alia* based on information that must be provided to the credit provider by the consumer, the NCA makes provision for a complete defence to the credit provider where the particular consumer does not answer the credit provider's questions fully and truthfully.⁸

Directly linked to the compulsory credit assessment that must be conducted by credit providers in terms of the NCA, three forms of reckless lending are recognised by the legislature, with a set of powers bestowed on the courts or the National Consumer Tribunal⁹ should any form of reckless lending take place.¹⁰ The forms of reckless lending and the powers of the courts and the Tribunal are discussed below.¹¹ The aim of the aforementioned provisions in the NCA is to give effect to the Act's objectives in section 3, which is *inter alia* to protect the consumer by promoting responsibility in the credit market by encouraging responsible borrowing, the avoidance of over-indebtedness and the discouraging of reckless credit granting by credit providers.¹² A further aim is to address and prevent the over-indebtedness of consumers.¹³

The NCA is therefore a far-reaching piece of legislation which has very little resemblance to its predecessors. Its scope of application is very broad and this is to be welcomed because it means that more credit consumers in South Africa enjoy its protection. However, the applicability of the

⁷ The compulsory assessment is provided for in s 81(2) and reg 23A and will be discussed in par 3 2 2 below. The same holds for the credit provider's assessment mechanisms and procedures which are discussed in par 3 2 2 below.

⁸ S 81(1) and (4). This aspect is discussed in par 3 2 3 below.

⁹ The National Consumer Tribunal was established in terms of s 26 of the NCA and is hereafter referred to as "the Tribunal".

¹⁰ Ss 80 and 83.

¹¹ See ch 4.

¹² S 3(c)(i) and (ii).

¹³ S 3(g).

provisions in the NCA concerning the prevention of reckless lending have limited application and will therefore be discussed below.¹⁴

1 2 Research statement

The broad research statement of this dissertation is to investigate and evaluate the measures in terms of the National Credit Act aimed at promoting responsibility in the market by discouraging reckless credit granting by credit providers and contractual default by consumers. Underlying policy considerations, the scope of application of the reckless lending provisions and the credit provider's complete defence in the case of an allegation by a consumer of reckless lending will likewise be addressed.

1 3 Research objectives and overview of chapters

The following research objectives have been identified in relation to the abovementioned research statement:

- (a) It has already been mentioned¹⁵ that one of the underlying reasons for the promulgation of the National Credit Act was to prevent reckless lending. The rationales for the promulgation of the NCA and in particular the policy considerations pertaining to the prevention of reckless lending are discussed in more detail in chapter 2 of this dissertation.
- (b) The next research objective, which is discussed in chapter 3, entails an investigation of the credit provider's compulsory credit assessment in terms of the NCA. This part will be introduced by a discussion of the ambit of the reckless lending provisions in the Act. Related aspects to the compulsory credit assessment, namely the credit provider's assessment mechanisms and procedures and complete defence, should reckless lending

¹⁴ See par 3 2 1.

¹⁵ Para 1 | above.

be alleged, will also be addressed. The forms of reckless lending recognised by the legislature and the powers of the courts and the Tribunal in respect thereto, are discussed as well.

- (c) Chapter 4 provides conclusions and, if any, recommendations, based on the research that was conducted in chapters 2 to 3 of this dissertation.

1 4 Delineation and limitations

It will be seen below¹⁶ that the concept over-indebtedness is relevant to one of the forms of reckless lending. However, the concept also has a general meaning that is not linked to and caused by reckless lending. The scope of this dissertation is limited to the over-indebtedness of consumers in the former respect.

1 5 Terminology

The concepts “consumer” and “credit provider” are used frequently in this study. For convenience sake, the definitions of the concepts are therefore provided and are as follows:

“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 whom 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

“Credit provider”, in respect of a credit agreement to which this Act 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;

¹⁶ Par 3 3 2.



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

1 6 Reference Techniques

- (a) The full titles of the sources referred to in this study are provided in the bibliography together with an abbreviated "mode of citation". This mode of citation is used to refer to a particular source in the footnotes. However, legislation and court decisions are referred to in full.

- (b) The law as it appears in this study reflects the position as on 31 December 2016.

CHAPTER 2

A GENERAL OVERVIEW OF SOME OF THE RATIONALES BEHIND THE PROMULGATION OF THE NATIONAL CREDIT ACT AND, MORE IN PARTICULAR, ITS RECKLESS LENDING PROVISIONS

2.1 Introduction

The departure from the old established precedent led to the arrival of the National Credit Act, coupled with new forms of protection extended to those consumers who were over-indebted.¹ This chapter entails a discussion of some of the rationales behind the promulgation of the National Credit Act and, in particular, its new provisions on the direct prevention of reckless lending. In addition, brief attention will be paid to related aspects to the latter.

2.2 The promulgation of the National Credit Act and the reckless lending provisions: rationales

A number of problems with the credit law dispensation that preceded the National Credit Act were identified by the Department of Trade and Industry (DTI) task team² that did a review of the said dispensation and these were reiterated in the eventual policy framework document that preceded the coming into operation of the National Credit Act, Policy Framework (2004).³ The predecessors to the National Credit Act, the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980, were found to be dated and ineffective.⁴ More in general, there was no uniformity in the transactions that were protected by these laws and by the Exemption Notices in terms of the Usury Act.⁵ More specific to the topic of this dissertation, for various reasons the former credit dispensation was characterised by an over-supply of credit to the members of society who were considered to be creditworthy. By contrast, reasonable priced credit was out of

¹ Otto and Otto (2013) 4. Renke (2011) *THRHR* 1 and 12.

² See below.

³ This document and the steps and processes that precede it, are discussed in more detail below.

⁴ Policy Framework (2004) 13.

⁵ Policy Framework (2004) 13 and 22.

the reach of the majority of the South African population.⁶ As a result many consumers sat with heavy debt burdens.⁷ One of this reasons was that disadvantaged consumers had to resort to the services of the informal and unregulated financial markets in order to gain access to credit.⁸ This credit is more expensive than the credit extended by the main stream financial institutions. Low-income consumers were therefore left vulnerable from unregulated credit markets.⁹ Other contributing factors were the high cost of credit, the lack of or selective disclosure regarding the cost of credit towards consumers, the exploitation of consumers by micro-lenders and credit intermediaries, the reckless behaviour of credit providers towards consumers when granting credit, in particular lenders' total disregard of a consumer's ability to repay credit and the excessive soliciting for and harassment of consumers by credit providers to incur credit.¹⁰ Consumers received credit offers that were not requested, and consequently were induced to take on more debts than what they could afford.¹¹ These credit offers were often made through credit card limit increases, store cards limit increases, unrequested loan or credit offerings by mail, deceiving advertisements and aggressive agents.¹²

The need to reform South Africa's consumer credit regulatory framework was therefore identified by government.¹³ The regulation of the consumer credit industry is required as a result of the potential of credit to lead to high levels of debt, amongst others.¹⁴ The overall aim is to protect consumers by preventing or minimising the potential abuse of consumers.¹⁵ However, when regulating the credit industry, it should be aimed at maintaining a balance between the protection of the consumer and the regulatory burden that is put on credit providers.¹⁶ If the balancing of interests is omitted, credit providers

⁶ Policy Framework (2004) 13. This was *inter alia* caused by high interest rates.

⁷ Policy Framework (2004) 12 and 13.

⁸ Kelly-Louw and Stoop (2012) 12. The reason was based on the fact that these consumers did not have any assets that could serve as a security for their loans. See Kelly-Louw (2008) *SA Merc LJ* 204.

⁹ Kelly-Louw (2008) *SA Merc LJ* 204.

¹⁰ Kelly-Louw (2008) *SA Merc LJ* 204.

¹¹ Policy Framework (2004) 30.

¹² Policy Framework (2004) 30.

¹³ Policy Framework (2004) 13. According to Stoop (2009) *SA Merc LJ* 366 some writers and financiers disagreed with the fact that comprehensive credit legislation was needed. They argued that consumer protection and credit legislation should be abolished in order to give effect to the principle of freedom of contract. They further claimed that supply and demand should regulate the credit industry.

¹⁴ Policy Framework (2004) 6 and 7.

¹⁵ Policy Framework (2004) 6.

¹⁶ Policy Framework (2004) 7.



will bear an excessive burden and expensive compliance requirements which will increase the cost of credit, result in higher risk and probably lower returns for providers.¹⁷ It was accordingly stated that a legislative framework for consumer credit should not present unreasonable and unpredictable risks coupled with extreme and ill-defined compliance requirements.¹⁸ Further, a legislative framework that has excessive compliance requirements will probably cause credit providers to eschew honest consumers who are seeking credit, by increasing the cost of finance so as to meet the compliance costs.¹⁹ The drafters of the policy framework for a new credit law dispensation for South Africa therefore held the view that it is paramount to create a regulatory framework that is more cost-effective, fair and efficient in order to *inter alia* promote access to finance and ensure adherence to policy.²⁰

In 2001, the South African Department of Trade and Industry²¹ considered reviewing and investigating the credit legislation that preceded the National Credit Act.²² In March 2002, the Director-General of the DTI requested the Micro Finance Regulatory Council to undertake the review of the consumer credit laws and to make proposals for a new regulatory framework.²³ The DTI established a Technical Credit Law Committee to oversee the review of consumer credit policy and legislation and to gather up expert opinion where necessary.²⁴ This Committee was tasked to review the provisions of the Usury Act, the Credit Agreements Act and the Magistrates' Court Act (relating to the debt collection procedures) and the common law.²⁵

During this review process, a number of consumers were consulted and the consumers expressed the opinion that they were displeased with the level of disclosure by credit providers.²⁶ The consumers further mentioned that the cost of credit was higher than that which was disclosed and

¹⁷ Policy Framework (2004) 7.

¹⁸ Policy Framework (2004) 7.

¹⁹ Policy Framework (2004) 7.

²⁰ Policy Framework (2004) 8.

²¹ Hereafter the "DTI".

²² Kelly-Louw (2009) *SA Merc LJ* 204.

²³ Summary of Findings *Credit Law Review* (2003) 3.

²⁴ Kelly-Louw and Stoop (2012) 16.

²⁵ Kelly-Louw and Stoop (2012) 16.

²⁶ Summary of Findings *Credit Law Review* (2003) 3.

that the complaint mechanisms and remedies were not sufficient.²⁷ The research conducted by the Committee exposed a serious weakness with regard to the allocation of credit, and that credit is provided at a very high cost in certain market segments.²⁸ The research found specific weaknesses in the credit market which included the following:²⁹

- (a) Inadequate rules on the disclosure of the cost of credit, with the result that cost was regularly inflated above the disclosed interest rate through the inclusion of a variety of fees and charges, including excessive credit life insurance. This undermined the consumer's ability to make informed choices, whether between cash and credit purchases or between different credit providers, and resulted in reduced consumer pressure on credit providers to reduce interest rates and costs.
- (b) An unrealistically low Usury Act cap on interest rates that caused low-income and high-risk clients to be marginalised.
- (c) Inaccurate, weak and incomplete credit bureau information that resulted in bad client selection, ineffectual credit risk management and high bad debts, with resultant huge increases in the cost of credit.
- (d) Inappropriate debt-collection and personal insolvency legislation that created an incentive for credit providers to lend credit recklessly and prevented effective rehabilitation of over-indebted consumers.
- (e) Predatory behavior by credit providers that led to high levels of debts for certain consumers and unmanageable risk to all credit providers.
- (f) Inconsistencies in legislation related to mortgages and property transfers, which undermined consumers' ability to offer security and locked them into high cost, unsecured credit.

²⁷ Summary of Findings *Credit Law Review* (2003) 3.

²⁸ Summary of Findings *Credit Law Review* (2003) 3.

²⁹ Summary of Findings *Credit Law Review* (2003) 3. See also Kelly-Louw and Stoop (2012) 16.

- (g) Regulatory uncertainty that caused credit providers to lean towards short-term credit and profit-taking. Credit providers also resisted the provision of long-term finance, including housing finance for small and medium enterprises.

The Technical Committee submitted its recommendations to the Minister of Trade and Industry in October 2003. In the Committee's report, Summary of Findings *Credit Law Review* (2003), a number of areas for policy and regulatory reform were identified.³⁰ The Committee recommended that the Usury Act and the Credit Agreements Act should be repealed and replaced by a new, single piece of legislation which will be overseen by one statutory regulator.³¹ The DTI approved the Committee's findings and recommendations and as a result a Policy Framework for Consumer Credit³² was published by the DTI in August 2004. This was followed by the tabling of the National Credit Bill in Parliament in March 2005, which in turn was adopted in the National Assembly and the National Council of provinces in December 2005 and assented to by the President of the Republic of South Africa on 10 March 2006.³³ After that the National Credit Act was promulgated³⁴ and it then became effective on different dates.³⁵ From here on onwards, the focus will be placed on the relevant policy considerations dealt with in Policy Framework (2004), and in particular on those considerations that are relevant to the topic of this dissertation.

Policy Framework (2004) is divided into chapters, and *inter alia* deals with "the need for a regulated consumer credit market and reform", "addressing the historical legacy", "constituting a credit market that is fair, competitive and sustainable", "helping consumers make informed choices" and "dealing with debt".³⁶ The new credit market that government sought to promote also, in addition to other aims, had to foster sustainable and socially responsible credit provision.³⁷ It is important to note that in Policy Framework (2004), under the heading "Dealing with debt", the drafters of the document, and with reference to the National Credit Act's

³⁰ Kelly-Louw and Stoop (2012) 17.

³¹ Kelly-Louw and Stoop (2012) 17.

³² Policy Framework (2004).

³³ Kelly-Louw (2008) *SA Merc LJ* 207. See also Renke LLD Thesis (2012) 406.

³⁴ In GN 230 in *GG* 28619 dd 15 March 2006.

³⁵ 1 June 2006, 1 September 2006 and 1 June 2007.

³⁶ See Policy Framework (2004) 5-36 and Renke LLD Thesis (2012) 407.

³⁷ Policy Framework (2004) 22.

predecessors, the Usury Act and the Credit Agreements Act, made the unequivocal statement that “South African law provides no effective protection against over-indebtedness...”³⁸ According to these drafters the reasons for over-indebtedness are *inter alia* reckless lending and borrowing. They went on to make the crucial statement that “[r]eckless credit extension will be curbed by introducing a general requirement that all credit providers should do affordability assessments prior to approving any credit facility”.³⁹ The goal that was set by the drafters to monitor and ensure compliance with these measures “by means of the imposition of strict penalties for non-compliance”⁴⁰ is also important for purposes of this dissertation.

Finally, it has also been considered that responsibility will not only have to rest with credit providers, but consumers will also have to bear responsibility to provide the correct information to credit providers.⁴¹

2 3 Related aspects

As will be indicated below, the disclosure of pre-agreement information, consumer education and the enforcement functions of the National Credit Regulator and the National Consumer Tribunal are aspects that are related to the direct debt prevention measures in the National Credit Act, namely the compulsory obligation to conduct a creditworthiness assessment before the granting of credit to the consumer. Although these aspects will not be elaborated on further in this dissertation, a brief summary of the underlying policy will be provided here.

2 3 1 Disclosure

A consumer credit market characterised by weak disclosure in relation to the cost of credit and monetary information of certain products often prevents consumers from

³⁸ See Policy Framework (2004) 30 and Renke LLD Thesis (2012) 410.

³⁹ Policy Framework (2004) 31 and Renke LLD Thesis (2012) 410.

⁴⁰ Policy Framework (2004) 31.

⁴¹ Policy Framework (2004) 31.



making informed choices.⁴² Therefore, the fact has to be acknowledged that over indebtedness results from, *inter alia*, reckless lending and low levels of awareness.⁴³

The drafters of the Policy Framework stated as follows in respect of the disclosure measures in the predecessors, and more in particular the Usury Act 73 of 1968, to the National Credit Act: “[t]he disclosure requirements in the current legislation are outdated and ineffective”.⁴⁴ And, “[v]ery few consumers are aware of the total costs, including the fees, charges and add-ons of an item bought on credit”.⁴⁵ In addition, when information was made available to consumers, it was normally contained in small print which defeated the purpose of disclosure.⁴⁶

On the other hand, consumers were also at fault because they neglected to read terms and conditions before signing a credit agreement, as their interest in knowing about the terms and conditions of their agreement was superseded by a desire to obtain the credit, for whatever purpose.⁴⁷

It is therefore to be welcomed that the Policy Framework has foreseen⁴⁸ “...pre-contractual disclosure in the form of a compulsory, written quote, which would be binding on the credit provider for a minimum period providing the consumer’s circumstances do not change”, as an additional measure calculated to alleviate reckless credit, and that this policy aim was taken up in the National Credit Act in section 92 thereof. What is also of importance is that the compulsory, written credit quotation in terms of section 92 is binding on credit providers for a period of five business days. The aim of the quotation is *inter alia* to give consumers enough information and time that will allow them to shop around for cheaper credit.⁴⁹ Another aim, according to me, is so that

⁴² Policy Framework (2004) 26.

⁴³ Policy Framework (2004) 31.

⁴⁴ Policy Framework (2004) 26.

⁴⁵ Policy Framework (2004) 26.

⁴⁶ Policy Framework (2004) 26.

⁴⁷ Policy Framework (2004) 26.

⁴⁸ Policy Framework (2004) 26.

⁴⁹ Policy Framework (2004) 26.

the consumer can perhaps make the decision to refrain from incurring the new credit and to rather save until he can do a cash transaction.

2 3 2 Consumer education

Finally, more attention must also be drawn to the importance of consumer education for the reason that "...people are going to be able to convert [the disclosed] information into effective knowledge".⁵⁰ I am of the view that it is almost impossible for consumers to discern or appreciate heavy and burdensome loan contracts on their own without a proper understanding of consumer credit agreements. According to the drafters of the Policy Framework, South Africa faces an enormous challenge in this regard and therefore consumer education had to be dealt with.⁵¹ It is suggested that credit extension in South Africa will be of a higher quality if the majority of consumers become better informed and therefore more discerning in respect of the credit market.⁵² Consumers must not only possess consumer rights, they must also be made aware of such rights. Policy Framework (2004) as a result made provision for consumer education as one of the functions of the National Credit Regulator, which is *inter alia* to promote consumer education.⁵³

2 3 3 The National Credit Regulator

One of the most important measures that was expected to prevent reckless behaviour by credit providers was the empowerment of the National Credit Regulator⁵⁴ to monitor compliance with the National Credit Act coupled with the imposing of the necessary sanctions for non-compliance and to provide effective remedies to consumers.⁵⁵ In addition, the National Credit Regulator was expected to register credit providers, deal with the complaints of credit consumers

⁵⁰ Policy Framework (2004) 27.

⁵¹ Policy Framework (2004) 27.

⁵² See also the Policy Framework (2004) 27.

⁵³ Policy Framework (2004) 27 and 34.

⁵⁴ The National Credit Regulator was established in terms of s 12 and is *inter alia* responsible to enforce the Act in terms of s 15 thereof.

⁵⁵ Policy Framework (2004) 34.

against credit providers and to conduct investigations of matters arising from the credit market, such as the violation of consumers' rights.⁵⁶

2 3 4 The National Consumer Tribunal

The establishment of the National Consumer Tribunal, which eventually happened in terms of section 26 of the National Credit Act, was foreseen in Policy Framework (2004).⁵⁷ The Tribunal, as will become apparent in the next chapter, has important functions in relation to the enforcement of the reckless lending provisions in terms of the Act.

2 4 Conclusion

It has been mentioned in the previous sub-paragraph that the Usury Act and the Credit Agreements Act did not contain any measures that provided effective protection against over-indebtedness. What these pieces of legislation lacked in particular was the imposing of an obligation on a credit provider to conduct a creditworthiness assessment of the prospective consumer and of the consumer's ability to repay the debt before the extension of credit to the consumer took place.⁵⁸ It has also been mentioned that reckless lending and borrowing are causes of over-indebtedness.⁵⁹ It is therefore to be welcomed that the National Credit Act, when it became effective, was the first consumer credit law in South Africa to introduce compulsory assessment and related matters provisions, such as the consequences of non-compliance with the assessment provisions. This promulgation of these provisions, which will be dealt with in the next chapter, are in accordance with Policy Framework (2004), discussed in sub-paragraph 2 2 above. It is also in line with the Act's objectives to protect the consumer *inter alia* by "encouraging responsible borrowing, avoidance of over-indebtedness"⁶⁰ and "discouraging

⁵⁶ Policy Framework (2004) 34.

⁵⁷ Policy Framework (2004) 35.

⁵⁸ Van Heerden in Scholtz ed (2008) par 11.1.

⁵⁹ Par 2 2.

⁶⁰ S 3(c)(i).

reckless credit granting by credit providers”.⁶¹ It is further in line with the goal to “[prevent] over-indebtedness of consumers.”⁶² Finally, the establishment of the National Credit Regulator and of the National Consumer Tribunal in terms of the National Credit Act is in compliance with the Act’s objective to provide “for a consistent and accessible system of consensual resolution of disputes arising from credit agreements”.⁶³

⁶¹ S 3(c)(ii). See also the pre-ambule to the Act, where the promotion of responsible credit granting and use and the prohibition of reckless credit granting are set as goals.

⁶² S 3(g).

⁶³ S 3(h).

CHAPTER 3

THE RECKLESS CREDIT PROVISIONS IN TERMS OF THE NATIONAL CREDIT ACT AND ITS REGULATIONS

3 1 Introduction

Remarks have been made above regarding the fact that the National Credit Act, for the first time in the history of South African consumer credit legislation, introduced rigorous reckless credit lending and over-indebtedness provisions.¹ The role of the reckless credit provisions is to *inter alia* prevent the reckless granting of credit as stated unequivocally in the Act.² In order to give effect to this and the other related objectives in the National Credit Act,³ the legislature has imposed a compulsory obligation on credit providers to conduct an assessment of various aspects before granting credit, or additional credit, to a consumer. In order to guard the interests of the credit provider and to give effect to the purpose of the Act to protect consumers by “promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers”, provision was made in the Act for a complete defence in favour of the credit provider upon an allegation by the consumer that credit was extended recklessly, in the case where the consumer failed to fully and truthfully answer the credit provider’s request for information as part of the credit assessment. The legislature has also, and this is linked to the compulsory assessment that has to be conducted, identified three forms of reckless lending. Finally, the legislature determined sanctions in respect of each form of reckless lending. The purpose of this chapter is to address the aforementioned matters, with the focus on sections 78 to 84. As far as the regulations in terms of the National Credit Act are concerned, all that will be provided is a brief overview of the new affordability assessment regulations and its purpose. The focus of this chapter is based on Part D of Chapter 4 of the Act, in particular reckless credit

¹ Par 1 1 above. The reckless credit provisions were the first set of direct measures under the National Credit Act aimed at the prevention and reduction of the over-indebtedness of credit consumers in South Africa – Stoop (2009) *SA Merc LJ* 367.

² S 3(c)(ii). See also par 2 4 above.

³ See par 2 4 above.

provisions. The reckless credit assessment and the credit provider's complete defence will be discussed in paragraph 3 2. This will be followed by a discussion of the forms of reckless lending in paragraph 3 3 and of the sanctions in relation to the latter in paragraph 3 4. Paragraph 3 5 will contain a brief conclusion of the chapter.

3 2 The section 81 National Credit Act assessment and the credit provider's complete defence

3 2 1 General

The compulsory obligation that is now imposed in the National Credit Act on credit providers to conduct a compulsory assessment before credit or additional credit is granted to consumers is contained in section 81(2), which section came into operation on 1 June 2007. Before discussing the provisions of section 81 and the credit provider's assessment mechanisms and procedures in terms of section 82, the limited application of the reckless credit provisions should first of all be mentioned. The reckless provisions will never be applicable in the case where the consumer is a juristic person⁴ in terms of the Act.⁵ Credit can therefore be extended recklessly to natural person consumers only. The reckless provisions also do not apply to a school or student loan, an emergency loan, a public interest credit agreement, a pawn transaction, an incidental credit agreement or to a temporary increase in the credit limit under a credit facility.⁶ These exclusions have to do with the nature of these types of agreements.⁷

3 2 2 The section 81 assessment

Section 81 is entitled "Prevention of reckless credit". As this section has the clear aim to prevent reckless credit, it is submitted to be one of the most important sections in the National Credit

⁴ "Juristic person" is defined in s 1 and includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if there are three or more individual trustees, or the trustee is itself a juristic person, but does not include a stokvel.

⁵ S 78(1).

⁶ S 78(2). All these types of credit agreements are defined in s 1 of the Act. The only exception is the credit facility, which is defined in s 8(3). For a discussion of these agreements see Renke LLD Thesis (2012) par 7 2 2.

⁷ For a discussion of the probable reasons for these exclusions from the reckless credit provisions, see Renke LLD Thesis (2012) par 8 3 2 2.

Act.⁸ Sections 81(2), specifically dealing with the credit provider's compulsory assessment, states as follows:

A credit provider must not enter into a credit agreement without first taking reasonable steps to assess –

- (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 re-payment 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.

Thus, when considering the provisions of section 81(2), it is clear that a credit provider who desires to enter into a credit agreement with a prospective consumer bears a statutory duty to assess the different aspects prescribed in section 81(2). This assessment is a prerequisite in terms of the National Credit Act to enter into a credit agreement.⁹ However, section 81(2) does not mention that the assessment has to be conducted in the case of an increase in the credit limit of an existing credit agreement. But if the words in section 80(1) are considered that “[a] credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased”, then it becomes clear that the section 81(2) assessment is a prerequisite in the case of credit limit increases as well.

If the aspects that have to be assessed in terms of section 81(2) are considered, it is apparent that the assessment required by section 81 of the NCA is more comprehensive than merely an affordability assessment.¹⁰ In addition to affordability, the consumer's general understanding and

⁸ See Renke LLD Thesis (2012) 429-430.

⁹ Renke LLD Thesis (2012) 430. See also *National Credit Regulator v Hirst* [2015] ZANCT 18 (29 October 2015) where an allegation was made before the National Consumer Tribunal that section 81(2) was contravened by the credit provider due to his failure to take reasonable steps to assess the consumer's financial means, prospects and obligations. The Tribunal found that the section 81(2) assessment is peremptory and that *in casu* the relevant credit agreements were concluded recklessly.

¹⁰ Van Heerden and Boraine (2011) *De Jure* 397. See also Van Heerden in Scholtz ed (2008) par 11.5.6.

appreciation of the risks and costs of the proposed credit, and of the rights and obligations under the proposed credit agreement, has to be assessed.¹¹ Renke¹² submits that a credit provider should take “at least the steps that a reasonable credit provider under similar circumstances would take” to assess or make sure that the particular consumer indeed understands and appreciates the aspects mentioned in section 81(2). Renke further submits that section 81(2) imposes a duty to explain on credit providers.¹³

Section 81(2), and this is important, does impose the obligation on credit providers to conduct an affordability assessment before granting new or additional credit. In terms of section 81(2), this has to be done with reference to the prospective consumer’s debt repayment history under credit agreements and with reference to the consumer’s existing financial means, prospects and obligations. If the consumer has a commercial purpose for applying for the credit agreement, it must also be assessed whether there is a reasonable basis to conclude that that commercial purpose may prove to be successful.

Section 78(3) provides an explanation of the concepts “financial means, prospects and obligations”. Section 78(3) provides that in this Part (Part D of Chapter 4 dealing with over-indebtedness and reckless credit) “financial means, prospects and obligations” with respect to a consumer or prospective consumer includes:¹⁴

- (a) income, or any right to receive income, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective consumer receives, has a right to receive, or holds in trust for another person;
- (b) the financial means, prospects and obligations of any other adult person within the consumer’s immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily –
 - (i) share their respective financial means; and
 - (ii) mutually bear their respective financial obligations; and
- (c) if the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the reasonable estimated future revenue flow from that business purpose.

¹¹ See also Van Heerden and Boraime (2011) *De Jure* 397.

¹² Renke LLD Thesis (2012) 432.

¹³ Renke LLD Thesis (2012) 432.

¹⁴ See further Van Heerden in Scholtz ed (2008) par 11.5.6.

The word “includes” indicates that section 78(3) gives an extended meaning to the concept “financial means, prospects and obligations”.¹⁵ In the case of *Standard Bank of South Africa Ltd v Panayiotts*¹⁶ it was decided that “financial means” also include assets and liabilities and that “prospects” include any prospects that the consumer’s financial position would improve, with the inclusion of aspects such as increases and the liquidation of assets. The court further held that the prospect of selling the goods to reduce the consumer’s debt must be included under “financial means and prospects” in the case where goods constitute the subject-matter of the credit agreement.¹⁷

The purpose with the affordability part of the section 81(2) assessment is clearly to ascertain whether the proposed consumer is in a financial position to afford the new or additional credit and to repay the debt to the credit provider. According to Kelly-Louw and Stoop¹⁸ it is mandatory in terms of the National Credit Act for credit providers to ascertain whether consumers will be able to promptly perform all their obligations under their credit agreements.

A consumer who wants to allege non-compliance by the credit provider with the provisions of section 81 has to adduce further evidence to that effect.¹⁹ The case of *Standard Bank of South Africa Ltd v Herselman*²⁰ serves as an example where the consumer unsuccessfully raised a defence of reckless credit. Paragraph 12 of the case is important. The consumer in this case signed a suretyship in respect of her husband’s credit debt with the bank. On the evidence the court found that the bank could determine the following information in respect to the consumer’s financial information: she had no debt, she had assets to the value of R2 million, she had no debt repayment history under credit agreements and she had never been sequestered or subjected to debt review in terms of the National Credit Act. The court therefore declared that “[from] this credit record she appeared to be a person who would honour her obligations as surety for the principal debtor, having furnished all the relevant information requested by the Bank” and found that “[w]hen one adds to this list of favourable factors the absence of any gainsaying evidence

¹⁵ See also Renke LLD Thesis (2012) 417.

¹⁶ 2009 (3) SA 363 (W) at 366E-F.

¹⁷ The *Panayiotts* case 366F-G.

¹⁸ Kelly-Louw and Stoop (2012) 293.

¹⁹ *Benade v Absa Bank Ltd* [2014] ZAWCHC 84 (16 May 2014).

²⁰ [2016] ZAFSHC 39 (3 March 2016).

from the defendant that she understands the risk she was taking in signing as a guarantor for her husband's debt with the bank, only one conclusion is possible and that is , that having objectively and fairly assessed the defendant to be a person of sound credit worthiness and capable of honouring her husband's indebtedness to the plaintiff, if called upon to do so, the Bank awarded the credit after obtaining the Deed of Suretyship from the defendant."

Section 81(2) makes it clear that the credit provider must take "reasonable steps" to assess the aspects mentioned in the sub-section. The National Credit Act, before the amendment thereof in 2015,²¹ contained no other direct prescriptions as far as the conducting of the assessment was concerned.²² In terms of section 82(1), credit providers were allowed to determine their own evaluative mechanisms or models and procedures. It was only required that a "fair and objective" assessment should be conducted. After the Act's amendment,²³ credit providers are still allowed to determine their own evaluative mechanisms or models and procedures. The condition is still that the assessment must be fair and objective. However, section 82(1) after its amendment now also requires that the assessment must not be inconsistent with the affordability assessment regulations made by the Minister. In order to give effect to section 82(1), section 82(2) as amended authorises the Minister to make affordability assessment regulations on recommendation of the National Credit Regulator. The result was that the Minister published affordability assessment regulations²⁴ which became effective on 13 September 2015.²⁵

Renke²⁶ summarises the new affordability assessment regulations, regulation 23A, and the new definitions that were inserted into the regulations²⁷ to give effect to regulation 23A, as follows:

The most important definitions inserted in section 1 of the National Credit Regulations for purposes of regulation 23A are the definitions of "gross income", "discretionary income" and

²¹ In terms of the National Credit Amendment Act 19 of 2014 (hereafter the NCA Amendment Act). The NCA Amendment Act became effective on 13 March 2015.

²² Renke LLD Thesis (2012) 430.

²³ In terms of s 24(a) of the NCA Amendment Act.

²⁴ This was done together with the amendments to the regulations to the National Credit Act that were affected by the NCA Amendment Act.

²⁵ Although the amendments to the National Credit Act and its regulations became effective on 13 March 2015, the putting into operation of the affordability assessment regulations was postponed for 6 months.

²⁶ Renke (2015) *LitNet Akademies*.

²⁷ Reg 1.



“necessary expenses”. These concepts are explained below. Regulation 23A, entitled “Criteria to conduct affordability assessment,” is divided into subdivisions. The first part sets out the field of application of regulation 23A. The regulation applies to current, prospective and joint consumers, all credit providers and all credit agreements subject to the Credit Act. The latter is subject to regulation 23A(2), which determines which credit agreements are not subject to regulation 23A. The same credit agreements that are exempted from the reckless provisions in the act are *inter alia*, and for reasons that are self-explanatory, not subject to regulation 23A. The next three subdivisions of regulation 23A have as aim to regulate the second leg of the credit provider’s assessment obligation in terms of section 81(2) more extensively, namely to assess whether the prospective consumer can afford the credit he/she applies for. The manner in which a prospective consumer’s existing financial means and prospects must be assessed is addressed first. This is followed by the assessment of the consumer’s financial obligations and debt repayment history under credit agreements. It is submitted that regulation 23(8), in terms of which a credit provider must make a calculation of the consumer’s existing financial means, prospects and obligations, as envisaged in sections 78(3) and 81(2)(a)(iii) of the Credit Act, should serve as the point of departure. Regulation 23A(3) forms the crux of the provisions in respect of the consumer’s existing financial means and prospects. It provides that the credit provider must take practical steps to assess the consumer’s (or joint consumers’) discretionary income to determine whether the consumer has the financial means and prospects to pay the proposed credit instalments. The discretionary income is the consumer’s gross income less statutory deductions less necessary expenses less all other committed payment obligations as disclosed by the consumer, including obligations disclosed by the consumer’s credit record as held by credit bureaux. “Gross income” means all income earned from whatever source, without deductions. The regulation imposes an obligation on the credit provider to take practical steps to verify the consumer’s gross income. The obligations are imposed on the consumer to accurately disclose to the credit provider all financial obligations and to provide authentic documentation to the credit provider to enable the latter to conduct the affordability assessment. The definition of “necessary expenses” is of importance in respect of the assessment of the consumer’s existing financial obligations. The concept means the consumer’s minimum living expenses including maintenance payments but excluding monthly debt repayment obligations in terms of credit agreements. Of importance is that credit providers are obliged to take fixed minimum amounts into consideration as minimum living expenses. For purposes of the latter a table with “minimum expense norms” is provided. According to the table, if a consumer, for instance, earns a monthly gross income of R2 000, the credit provider must deduct at least an amount of R881 as minimum living or necessary expenses. The only exception is where the consumer, by completing a so-called “declaration of consumer’s necessary expense questionnaire”, can show that his/her living expenses per month are less than the prescribed amount. In summary, as far as the assessment of

the prospective consumer's existing financial means, prospects and obligations are concerned, a credit provider must determine a prospective consumer's discretionary income to ascertain whether the consumer can afford the proposed credit. Regulation 23A is concluded with measures to regulate the credit provider's obligation to take the consumer's debt repayment history in terms of credit agreements into consideration and with measures to regulate a number of miscellaneous aspects. Included under the latter are measures aimed at avoiding double counting in calculating the discretionary income and to provide a consumer, who feels aggrieved by the outcome of the affordability assessment, with a grievance procedure.

Renke²⁸ concludes by saying that

As a result of the abovementioned regulation amendments, credit providers will no longer have *carta blanche* when conducting the affordability assessment. On the positive side, a greater measure of consistency amongst credit providers when conducting these assessments ought to be ensured by the insertion of regulation 23A. A basis model is provided by the legislature that will serve as a basis or bottom line model for all credit providers when conducting the assessment. However, there are aspects in the regulation and definitions deserving of further attention. For example, some of the definitions are poorly drafted and the grievance procedure afforded to the consumer seems not to be aligned with the provisions of the Credit Act. In conclusion, one will have to wait and see what the impact of the new affordability assessment regulations will be in practice.

3 2 3 The credit provider's complete defence in terms of section 81

It is logical that a credit provider *inter alia* has to rely on information that is provided to the credit provider in order to be able to conduct a proper section 81(2) National Credit Act assessment. This is confirmed by section 81(1) which provides that, when applying for credit, and while the application is being considered by the credit provider, the proposed consumer is under the obligation to fully and truthfully answer any requests for information made by the credit provider "as part of the assessment required by this section". According to Kelly-Louw²⁹ the aim of section 81(1) is also to prevent the misuse of the reckless provisions by the consumer.

²⁸ Renke (2015) *LitNet Akademies*.

²⁹ Kelly-Louw (2008) *SA Merc LJ* 220.

Section 81(1) is directly linked to section 81(4). The latter provides a complete defence to the credit provider in the case of an allegation of reckless lending by the consumer. Two requirements have to be met in order for this defence to be available to the credit provider: (1) the credit provider must establish that the consumer failed to fully and truthfully answer requests for information made by the credit provider as part of his credit assessment and (2) a court or the National Consumer Tribunal must determine that this failure by the consumer materially affected the credit provider's ability to do a proper assessment.³⁰ In the case of *Absa Bank v Trustees for the Time of the Coe Family Trust*³¹ it was decided that the section 81(4) defence is of no relevance where the section 81(2) assessment was not conducted in the first place. In the *Horwood v Firstrand Bank*³² decision the court remarked that a credit provider has an additional defence, namely that he has met his assessment obligations in terms of section 81.

Renke submits that on the wording of section 81(1) discussed above, the legislature imposes no obligation on the consumer to provide any information not asked for by the credit provider. The consumer only has an obligation to answer the credit provider's questions fully and truthfully.³³

With section 81(1) read with section 81(4) the legislature therefore came to the assistance of credit providers. Due to the restraint placed by the Act on the credit providers, consumers are also called upon to make the section 81(2) assessment possible.³⁴

3 3 Reckless credit granting in terms of the National Credit Act

3 3 1 General

³⁰ S 81(4)(a) and (b). See also Van Heerden in Scholtz ed (2008) par 11.5.5 and the discussion by Kelly-Louw and Stoop (2012) 300ff.

³¹ 2012 (3) SA 184 (WCC).

³² [2011] ZAGPJHC 121 (21 September 2011) par 8. See also the discussion by Van Heerden in Scholtz ed (2008) par 11.5.5.

³³ Renke LLD Thesis (2012) 434. Van Heerden and Boraine (2011) *De Jure* 397 are of the opinion 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 the full details thereof, to the first mentioned credit provider in order to enable such credit provider to include such information in the section 81 assessment".

³⁴ Van Heerden and Boraine (2011) *De Jure* 397.

Section 80 of the National Credit Act, which became effective on 1 June 2007, sets out three forms of reckless credit. When having regard to these forms of reckless credit and to the wording of section 80, it is clear that the forms of reckless credit are directly linked to the section 81(2) assessment that a credit provider has to conduct.³⁵ Before the forms of reckless credit are discussed, it should be noted that section 81(3) prohibits a credit provider from entering into a reckless credit agreement with a prospective consumer.

3 3 2 The instances of reckless lending: section 80

In terms of the introductory sentence to section 80(1), a credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of an existing agreement is increased,³⁶ the credit provider failed to conduct the required section 81(2) assessment or when the credit provider, after having conducted the required assessment, ignored its results. To be more specific: the first instance of reckless lending takes place where 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 been at the time.³⁷ According to Van Heerden³⁸ the failure by the credit provider to conduct the assessment is *per se* reckless. It is important to note that it is irrelevant what the outcome of the assessment would have been. In other words the financial position of the consumer in respect of this type of reckless credit is irrelevant.³⁹

In the second instance of reckless credit the credit provider has conducted the required section 81(2) assessment. However, in this case the credit provider entered into a credit agreement with the prospective consumer despite the fact that the preponderance of information available to the credit provider indicated that the consumer did not generally understand or appreciated his risks, costs or obligations under the proposed credit agreement.⁴⁰ An example is where the assessment was made. However, the credit provider entered into the credit agreement despite the fact that the consumer had not been advised properly with regard to the financial implications of the

³⁵ See par 3 2 2 above.

³⁶ With the exception of an increase in terms of s 119(4). This sub-section concerns unilateral increases of the credit limit under a credit facility by the credit provider with the consumer's consent.

³⁷ S 80(1)(a).

³⁸ Van Heerden in Scholtz ed (2008) par 11.5.2.

³⁹ Van Heerden in Scholtz ed (2008) par 11.5.2.

⁴⁰ S 80(1)(b)(i).



agreement, such as the interest rates and the calculation thereof.⁴¹ According to Van Heerden⁴² the reckless credit granting in this instance is caused by the credit provider's disregard of the consumer's ignorance. As was said above, credit providers should explain the terms etcetera of the credit agreement to a consumer.⁴³

Boraine and Van Heerden⁴⁴ say it is possible for reckless credit instance one or two to be applicable in a situation where the consumer, when entering into the reckless agreement, was already over-indebted. The continue by saying that it is possible for the consequences of reckless credit instance one or two to follow even where the consumer is not over-indebted.

The third instance of reckless credit is the direct cause of the consumer's over-indebtedness. Section 80(1)(b)(ii) determines that a credit agreement is also reckless if the credit provider, having conducted an assessment as required by section 81(2), entered into a credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that entering into that credit agreement would make the consumer over-indebted. It is therefore the entering into the new credit agreement that causes the over-indebtedness of the particular consumer. Van Heerden summarises the situation by saying that the recklessness of the credit agreement lies in the fact that the conclusion of the particular agreement causes the consumer, who is not over-indebted when the credit agreement is entered into, to become over-indebted as soon as the credit agreement is concluded.⁴⁵

In terms of section 79(1) of the National Credit Act a consumer is over-indebted if the consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which he is a party. The determination concerning over-indebtedness is made on the preponderance of available information at the time the determination is made, by having regard to the consumer's

(a) financial means, prospects and obligations; and

⁴¹ Van Heerden in Scholtz ed (2008) par 11.5.2.

⁴² Van Heerden in Scholtz ed (2008) par 11.5.2.

⁴³ Par 3 2 2.

⁴⁴ Boraine and Van Heerden (2010) *THRHR* 652.

⁴⁵ Van Heerden in Scholtz ed (2008) par 11.5.2.

- (b) 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.

However, one should bear in mind that over-indebtedness can occur without the existence of reckless credit granting.⁴⁶ An example would be where the credit provider complied with his assessment obligations in terms of the Act and ascertained that the consumer understood the credit agreement and could afford the new or additional credit. However, at a later stage the consumer for instance experiences a job loss and as a result can no longer afford his debt instalments. This form of over-indebtedness falls outside the scope of this dissertation and will not receive any further attention.

The question arises as to the time when the assessment of reckless credit should be made. Section 80(2) contains the answer and provides that, when a determination has to be made whether a credit agreement is reckless or not, the criteria set out in section 80(1) discussed above must be applied as they existed at the time the agreement was made. The ability of the consumer at the time the determination is being made to meet his obligations under the credit agreement or the fact that the consumer now understands the agreement should be disregarded.⁴⁷ Renke submits that this makes sense.⁴⁸

When ascertaining whether a credit agreement is reckless, the value of any credit facility is the credit limit under that credit facility at the time it was entered into.⁴⁹ The value of any pre-existing credit guarantee is the settlement value of the credit agreement that it guarantees, if the guarantor has been called upon to honor that guarantee,⁵⁰ or the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor.⁵¹ For any new credit guarantee it will be the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor.⁵²

⁴⁶ See Renke (2011) *THRHR*14.

⁴⁷ S 80(2)(a) and (b).

⁴⁸ Renke LLD Thesis (2012) 436.

⁴⁹ S 80(3)(a). See further Renke LLD Thesis (2012) 438.

⁵⁰ S 80(3)(b)(i). See further Renke LLD Thesis (2012) 438.

⁵¹ S 80(3)(b)(ii). See further Renke LLD Thesis (2012) 438.

⁵² S 80(3)(c). See further Renke LLD Thesis (2012) 438.

3 4 The powers of the courts/National Consumer Tribunal in respect of reckless lending

Before the powers of the courts or the National Consumer Tribunal (the Tribunal) are discussed, the question needs to be answered as to how it happens that the issue of reckless lending or the fact that it has occurred comes to serve before the particular court or the Tribunal.⁵³ The first option is provided for in section 83(1) which provides that the court or the Tribunal, in any court or Tribunal proceedings in which a credit agreement is being considered, may declare that the credit agreement is reckless. This is despite the provision of any law or of any agreement to the contrary. A court or the Tribunal can therefore of its own accord take notice of reckless lending and thereafter deal with it. The only prerequisite is that the credit agreement must be considered by the court or the Tribunal, in other words must already serve before them. It may for instance happen that summons was issued against the consumer for breach of contract and that the credit agreement for that reason is now being considered by the court or the Tribunal. It is important to note that in terms of section 83(1) no allegation of reckless credit is required.

The second option to bring the matter of recklessness to serve before a court or the Tribunal is for the consumer to approach a debt counsellor⁵⁴ in terms of section 86, which deals with applications for debt review. A consumer may, as part of his application for debt review, seeks a declaration of reckless credit.⁵⁵ In such a case the debt counsellor must determine whether any of the consumer's credit agreements appear to be reckless.⁵⁶ If the debt counsellor as a result of this assessment concludes that the consumer is over-indebted, the debt counsellor may issue a proposal to the Magistrate's Court, *inter alia* proposing that one or more of the consumer's credit agreements be declared to be reckless credit, if that was the debt counsellor's conclusion.⁵⁷ The Court will then have to consider the matter and if satisfied that reckless lending has occurred, make one of the prescribed orders to alleviate the consumer's financial situation. This happens in terms of section 87(1)(b)(i) read with section 83, which will be discussed below.

⁵³ Also see Renke LLD Thesis (2012) 439ff for a more complete discussion.

⁵⁴ The National Credit Act instituted the office of the "debt counsellor", who plays an important function in respect of the debt alleviation procedures in terms of the Act. In terms of s 44(1) of the Act a natural person may apply to be registered as a debt counsellor.

⁵⁵ S 86(6)(b).

⁵⁶ S 86(6)(b).

⁵⁷ S 86(7)(c)(i).

Where the debt counsellor does not find the consumer to be over-indebted, the debt counsellor must reject the consumer's application, "even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into".⁵⁸ This sub-section seems to exclude reckless credit instance one and instance two discussed above,⁵⁹ where the over-indebtedness of the consumer is not necessarily involved, from the debt counsellor route to the court. This is strange in light of the fact that section 136(1) of the Act allows a person to submit a complaint concerning an allegation of reckless credit to the National Credit Regulator, and that the Regulator may then refer the complaint to a debt counsellor, "if the matter appears to concern either reckless credit or possible over-indebtedness of the consumer".⁶⁰

Section 85 makes provision for over-indebtedness to be alleged in court. The prerequisite is that the particular credit agreement must be considered in court, for instance in the case of debt enforcement by the credit provider to enforce the payment of the debt in terms of the credit agreement. Although section 85 does not mention reckless credit, Renke⁶¹ submits that the court's powers in terms of section 85 should include the power to make a declaration of reckless credit. According to him this should in particular be the case where reckless credit instance three, where the consumer's over-indebtedness is caused by the reckless lending,⁶² has taken place. It is interesting to note that in spite of the reference to the court or the Tribunal in section 83, sections 85 and 86 refer to courts only.

In any event, assuming that the reckless credit matter now serves before the court or the Tribunal, their powers to deal with the matter are set out in section 83.⁶³ The powers of the court or the Tribunal are the same in respect of reckless credit instance one and two. In terms of section 83(2), if a court or the Tribunal declares that a credit agreement is reckless due to the credit provider's failure to conduct an assessment as required by section 81(2),⁶⁴ or due to the

⁵⁸ S 86(7)(a).

⁵⁹ Par 3 3 2.

⁶⁰ S 139(1)(b).

⁶¹ Renke LLD Thesis (2012) 440-441.

⁶² See par 3 3 2 above.

⁶³ See in general in respect of the powers of the court or the Tribunal Renke LLD Thesis (2012) 438-462 and Van Heerden in Scholtz ed (2008) par 11.5.7.

⁶⁴ S 80(1)(a).



fact that the credit provider did the section 81(2) assessment, but entered into a credit agreement with the prospective consumer despite the fact that the preponderance of information available to the credit provider indicated that the consumer did not generally understand or appreciated his risks, costs or obligations under the proposed credit agreement,⁶⁵ the court or the Tribunal may make an order⁶⁶

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

Suspension takes place in accordance with section 83(3)(b)(i).⁶⁷ The credit agreement therefore has to be suspended until a date determined by the court or the Tribunal.⁶⁸

Where reckless credit instance three occurs, in other words if the credit provider, having conducted an assessment as required by section 81(2), entered into a credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that entering into that credit agreement would make the consumer over-indebted,⁶⁹ the court or the Tribunal must first consider whether the consumer is over-indebted at the time of the proceedings.⁷⁰ In terms of section 83(3)(b), if it is concluded that the consumer is over-indebted, the court or the Tribunal may make an order

- (i) suspending the force and effect of that credit agreement until a date determined by the Court when making the order of suspension; and
- (ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.

⁶⁵ S 80(1)(b)(i).

⁶⁶ In terms of s 83(2)(a) and (b) respectively.

⁶⁷ S 83(2)(b).

⁶⁸ S 83(3)(b)(i) mentions "the Court" only. This must be an omission by the legislature.

⁶⁹ S 80(1)(b)(ii).

⁷⁰ S 83(3)(a).

Before the aforementioned powers of the court or the Tribunal are discussed, the word “may” is used in section 83(2) and (3). It therefore appears as if the court or the Tribunal has a discretion as far as their powers are concerned. However, section 130(4)(a)⁷¹ states that if in any proceedings contemplated in section 130, the court determines that the credit agreement was reckless in terms of the Act, the court must make an order contemplated in section 83. The use of the word “must” indicates that the court or the Tribunal has to exercise the powers bestowed upon it in terms of section 83(2) or (3), when declaring a credit agreement to be reckless in terms of the Act.⁷²

The powers of the court or the Tribunal in respect of reckless credit instance one and two are to set aside or to suspend. The use of the words “that agreement and that credit agreement” in section 83(2)(a) and (b) indicates that the particular reckless credit agreement has to be set aside or suspended.⁷³ The use of the word “or” to link section 83(2)(a) and (b) indicates that a credit agreement which is reckless because of instance one or two, may either be set aside or suspended.⁷⁴

Setting aside may be done in respect of all or part of the consumer’s rights and obligations under the reckless credit agreement, as the court or the Tribunal determines just and reasonable in the circumstances.⁷⁵ Van Heerden and Boraine⁷⁶ remark that the legislature provided no guidelines as to how a court (or the Tribunal) should exercise its discretion in terms of section 83(2)(a) or (b).⁷⁷ The authors also criticise this fact and continue to make a few practical suggestions in order to provide guidance to the courts or the Tribunal. For instance, they are of the opinion that if reckless instance one or two causes the consumer’s over-indebtedness, suspension would be an appropriate remedy, because it “appears to be a remedy designed to provide temporary debt relief aimed at alleviating over-indebtedness”.⁷⁸ However, where such an order will not help the

⁷¹ S 130 deals with “Debt procedures in Court”.

⁷² See also Renke LLD Thesis (2012) 442.

⁷³ Renke LLD Thesis (2012) 443.

⁷⁴ Renke LLD Thesis (2012) 443.

⁷⁵ S 83(2)(a). This sub-section mentions “the court” only. This is sloppy drafting as the introductory sentence to s 83(2) mentions “the court or the Tribunal”.

⁷⁶ Van Heerden and Boraine (2011) *De Jure* 402 and 403.

⁷⁷ To set aside all or some obligations or to set aside or to suspend.

⁷⁸ Van Heerden and Boraine (2011) *De Jure* 404. S 84, setting out the consequences of suspension, is dealt with below.



consumer to recover financially, it will be futile.⁷⁹ As far as setting aside is concerned, the authors state that it appears to be just and reasonable to set aside all the consumer's rights and obligations in the case where no performance has been delivered yet.⁸⁰

Van Heerden and Boraine⁸¹ also discuss other issues in respect of the powers of the court or the Tribunal in terms of section 83(2)(a) and (b),⁸² for instance, must restitution take place where the consumer's obligations are set aside by the court or the Tribunal and what happens to the credit provider's security in the case of a suspension of the credit agreement by the court or the Tribunal. What is of importance in this respect is the fact that the provisions of section 83(2) is the cause of a number of issues and Van Heerden and Boraine's discussion of unlawful credit agreements in terms of section 89 of the National Credit Act.⁸³ Section 89(2) provides for a list of seven unlawful credit agreements. In terms of section 89(5) as amended in terms of the NCA Amendment Act, if a credit agreement is unlawful in terms of section 89(2), "a court must make a just and equitable order including but not limited to an order that the credit agreement is void as from the date the agreement was entered into". Boraine and Van Heerden argue that, due to the fact that reckless credit is not listed in section 89(2), reckless credit therefore does not constitute an unlawful credit agreement in terms of the Act.⁸⁴ A reckless agreement is therefore not null and void as such and will remain valid until the court (or the Tribunal) has decided how to deal with the agreement in terms of section 83(2).⁸⁵ The question is subsequently asked by the authors whether it would not have provided a better solution to all the questions posed by section 83(2) to have inserted reckless credit agreements under section 89(2), with the implication that such agreements would have been unlawful and null and void as such.⁸⁶

Section 84 sets out the consequences of suspension and provides that while the credit agreement is being suspended

⁷⁹ Van Heerden and Boraine (2011) *De Jure* 404.

⁸⁰ Van Heerden and Boraine (2011) *De Jure* 403.

⁸¹ Van Heerden and Boraine (2011) *De Jure* 403ff, with reference to Boraine and Van Heerden (2010) *THRHR* 650ff.

⁸² See also the discussion by Renke LLD Thesis (2012) 445ff.

⁸³ See Boraine and Van Heerden (2010) *THRHR* 650ff. The authors discussed the provisions of s 89 before its amendment in terms of the NCA Amendment Act in 2015.

⁸⁴ Boraine and Van Heerden (2010) *THRHR* 655.

⁸⁵ Boraine and Van Heerden (2010) *THRHR* 651.

⁸⁶ In terms of s 89(5). Boraine and Van Heerden (2010) *THRHR* 654 and 656.

- (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; and
- (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.⁸⁷

After the suspension has come to an end

- (a) all the respective rights and obligations of the credit provider and the consumer under that agreement –
 - (i) are revived; and
 - (ii) are fully enforceable except to the extent that a court may order otherwise; and
- (b) for greater certainty, 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 during the suspension in terms of subsection (1)(b).

According to Renke⁸⁸ section 84 clearly affects the consumer's payment obligations under the suspended credit agreement. While the suspension is ongoing the consumer does not have to make any payments of instalments or interest, fees and charges under the agreement. He further submits that the only effect of suspension for a certain time period is to extend the duration of the credit agreement by that period. The consumer is thus afforded more time to fulfill his financial obligations in terms of the agreement. However, at the end of the day the consumer's financial obligations in terms of the agreement remains the same as was originally agreed upon by the parties.⁸⁹ Boraine and Van Heerden are of the opinion that a credit agreement may be suspended more than once.⁹⁰

⁸⁷ S 84(1).

⁸⁸ Renke LLD Thesis (2012) 454.

⁸⁹ Renke LLD Thesis (2012) 455.

⁹⁰ Boraine and Van Heerden (2010) *THRHR* 654.



Section 83, mentioned above, sets out the powers of the court or the Tribunal in the case of reckless credit instance three. Two remarks by Van Heerden⁹¹ are important in respect to section 83(3)(a) and (b):

[W]hen the recklessness of the credit is seated in the fact that entering into that specific credit agreement made the consumer over-indebted, it would appear that the consumer's over-indebtedness both at the moment of entering into the agreement and at the time that the court declares the agreement reckless is relevant

and

[t]he wording of section 83(3)(a) and (b) seems to suggest that, although a credit agreement may be declared reckless because it actually caused over-indebtedness, the court will be able to exercise its powers in terms of section 83(3) only if the consumer is actually still over-indebted when the court makes the declaration of over-indebtedness.

Before making an order in respect of reckless credit instance three, the court or the Tribunal must consider the “the consumer’s current means and ability to pay the consumer’s current financial obligations that existed at the time the agreement was made”.⁹² The expected date when the consumer’s obligations in terms of his credit agreement will be satisfied, must also be considered. It must be assumed that the consumer will make all the required payments in terms of the court order.⁹³

The use of the word “and” between section 83(3)(b)(i) and (ii) indicates that the court or the Tribunal must make both the orders provided for. The particular reckless credit agreement⁹⁴ that caused the consumer’s over-indebtedness must therefore be suspended and the consumer’s obligations under his other (not the reckless credit agreement) must be restructured.⁹⁵

The restructuring or re-arrangement⁹⁶ of the consumer’s obligations under his other credit agreements take place in terms of section 87. In terms of section 87(1)(b)(ii) a consumer’s

⁹¹ Van Heerden in Scholtz ed (2008) par 11.5.7.2.

⁹² S 83(4)(a).

⁹³ S 83(4)(b).

⁹⁴ S 83(3)(b)(i) refers to the suspension of “that credit agreement”. See also Renke LLD Thesis (2012) 458.

⁹⁵ S 83(3)(b)(ii) clearly refers to the restructuring of the consumer’s obligations under “any other” credit agreements”. See also Renke LLD Thesis (2012) 458.

⁹⁶ Renke LLD Thesis (2012) 458 submits that that the legislature uses the concepts “restructuring” and “re-arrangement” interchangeably.



obligations may be re-arranged or restructured in any manner contemplated in section 86(7)(c)(ii). Restructuring may therefore *inter alia* takes place by

- (a) extending the period of the agreement and thereby reduce the amount of each instalment due accordingly;⁹⁷
- (b) postponing during a specified period the dates on which payments are due under the agreement;⁹⁸
- (c) making both the above orders.⁹⁹

These aforementioned powers of the court or the Tribunal do not include the power to reduce the consumer's interest rates under his credit agreements as part of the debt relief afforded to the consumer.¹⁰⁰ Renke is of the opinion that the following statement by Van Heerden and Boraine¹⁰¹ accurately summarises the powers of the court or the Tribunal in terms of section 83(3)(b)(i) and (ii) in respect to reckless instance three:

It thus appears that the legislature intended to penalise 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.

Section 88(4) also has to be mentioned. It provides for an *ad hoc* form of reckless credit. If a consumer is already subject to a debt restructuring and if that debt restructuring is still ongoing, and a credit provider then enters into a new credit agreement with that consumer, all or part of the new credit agreement may be declared to be reckless. The exception is a consolidation agreement. The concept "consolidation agreement" is not defined in the National Credit Act.

⁹⁷ S 86(7)(c)(ii)(aa).

⁹⁸ S 86(7)(c)(ii)(bb).

⁹⁹ S 86(7)(c)(ii)(cc).

¹⁰⁰ Van Heerden and Boraine (2011) *De Jure* 410. See also *SA Taxi Securitisation v Dick Lennard* 2012 (2) SA 456 (ECG).

¹⁰¹ Van Heerden and Boraine (2011) *De Jure* 409.

However, it is submitted that a consolidation agreement, as the name indicates, is merely an agreement in terms whereof existing debts are being consolidated. New debt is therefore not incurred.

Renke,¹⁰² with reference to arguments by Stoop,¹⁰³ raises an important aspect, and that is that the reckless credit provisions in the National Credit Act are applied *ex post facto*, after the formation of the particular credit agreement. Compliance with these measures are as a rule only tested when the reckless credit agreement already serves before the court (or Tribunal), for whatever reason. Stoop calls it a “lack of pre-agreement control of compliance”. As a result there is no guarantee that a credit provider complies with these measures. Stoop suggests credit audits by the National Credit Regulator to remedy the situation.

3 5 Conclusion

The purpose of this chapter was to set out the reckless credit lending provisions in terms of the National Credit Act and its regulations. The credit provider’s credit assessment and his complete defence in the case of an allegation of reckless credit by the consumer were therefore discussed.¹⁰⁴ This was followed by a discussion of the forms of reckless lending¹⁰⁵ and of the powers of the courts or the Tribunal in relation to the latter.¹⁰⁶

Aspects of importance that were identified in the research in this chapter, and that will be elaborated upon further in the final chapter, are as follows: credit providers now, since the coming into operation of the National Credit Act, have to conduct a compulsory credit assessment, which assessment is a prerequisite to enter into a new credit agreement;¹⁰⁷ the assessment is also a prerequisite for the granting of additional credit to a consumer;¹⁰⁸ the aspects that have to be assessed in terms of section 81(2) are important and it is clear that more than a

¹⁰² Renke LLD Thesis (2012) 462.

¹⁰³ Stoop (2009) *SA Merc LJ* 371-372.

¹⁰⁴ Par 3 2 above.

¹⁰⁵ Par 3 3 above.

¹⁰⁶ Par 3 4 above.

¹⁰⁷ Par 3 2 2 above.

¹⁰⁸ Par 3 2 2 above.

mere affordability assessment is involved;¹⁰⁹ credit providers now, after the coming into operation of the affordability regulations, have to make use of credit assessment models or mechanisms that are fair and objective, but that also comply with the affordability regulations; the consumer is obliged to provide full and truthful answers to a credit provider upon the latter's request for information in order to be able to conduct an accurate credit assessment;¹¹⁰ the section 81(2) assessment is directly linked to a concept that was introduced in the National Credit Act, namely reckless credit, which is prohibited in terms of the Act;¹¹¹ three forms of reckless credit are provided for in the Act, with the form of reckless credit depending on the question whether a section 81(2) assessment was conducted and, if so, what transpired thereafter;¹¹² in the event that reckless credit does occur, the courts or the Tribunal are empowered to make prescribed orders to alleviate the consumer's situation;¹¹³ there are a number of problems with sections 83(2) and (3), setting out the aforementioned powers; and, finally, a re-active instead of a proactive approach is followed by the legislature in respect of the reckless credit provisions in the Act.¹¹⁴

¹⁰⁹ Par 3 2 2 above.

¹¹⁰ Par 3 2 3 above.

¹¹¹ Par 3 3 1 above.

¹¹² Par 3 3 2 above.

¹¹³ Par 3 4 above.

¹¹⁴ Par 3 4 above.

CHAPTER 4

FINAL CONCLUSIONS AND RECOMMENDATIONS

4 1 General

The purpose of this dissertation was to investigate the new reckless credit lending provisions in terms of the National Credit Act and its regulations, against the background of the policy considerations that gave rise to these new measures. The ultimate aim was to make final conclusions and, if applicable, recommendations in respect of the Act's reckless lending measures.

4 2 Conclusions and recommendations

The new policy direction that the South African government took to encourage responsible borrowing and to discourage reckless credit granting by credit providers,¹ is to be welcomed, especially in the light of the problem with over-indebtedness experienced by South African credit consumers.² This is in particular true in the light of the fact that the predecessors to the National Credit Act, the Usury Act and the Credit Agreements Act, did not contain sufficient measures to prevent over-indebtedness resulting from credit debt. On top of all the problems that were experienced with the old dispensation,³ an aspect that needs to be accentuated is the failure by these pieces of legislation to impose an obligation on credit providers to conduct a compulsory credit assessment before extending new or additional credit to a consumer.⁴ The attention that aspects that are related to the credit assessment received in the policy considerations, namely the pre-agreement disclosure of information to credit consumers⁵ and consumer education,⁶ are to be welcomed. The disclosure of pre-agreement information to the consumer assists the latter to make informed credit decisions and confirms the goal in section 3 of the Act to encourage responsible borrowing. Consumer education, on the other hand, aims to

¹ Par 2 2.

² Par 1 1.

³ Par 2 2.

⁴ Par 2 4.

⁵ Par 2 3 1.

⁶ Par 2 3 2.

ensure that credit consumers in South Africa are also educated as far as their rights in terms of the National Credit Act are concerned. Finally, as far as chapter 2 is concerned, the establishment of two new role-players in the South African credit industry, the National Credit Regulator⁷ and the National Consumer Tribunal,⁸ is a positive development. We now have one, consolidated piece of credit legislation, and designated institutions to make sure that this piece of legislation is being enforced.

It is to be welcomed that the legislature, when the National Credit Act was enacted, gave effect to the policy considerations that underlie the Act, in particular those in Policy Framework (2004).⁹ Part D of Chapter 4 in the Act, and more in particular sections 78-84, containing the reckless credit provisions in the new South African credit dispensation, give effect to the aforementioned policy considerations. The mentioned sections also aim to give effect to the objectives of the Act in section 3 thereof, namely to protect the consumer by encouraging responsible borrowing, the avoidance of over-indebtedness and the discouraging of reckless credit granting.

It is of great significance that credit providers now, as a result of the National Credit Act, have to conduct a compulsory credit assessment before extending new or additional credit to consumers.¹⁰ The fact that this assessment is a prerequisite to enter into a new credit agreement or to grant additional credit, must be endorsed. Additional credit means extra debt and consumers thus need to be protected in this regard as well. It must also be endorsed that the credit assessment is more than a mere affordability assessment and that it also has to be ensured by credit providers that consumers understand the risks and costs, as well as their obligations and rights, in terms of the credit agreement.¹¹ Credit providers are thus compelled not only to disclose the relevant credit information to the consumer, but also to explain it.

⁷ Par 2 3 3.

⁸ Par 2 3 4.

⁹ Discussed in pars 2 2 and 2 3.

¹⁰ Par 3 2 2.

¹¹ Par 3 2 2.

The promulgation of regulation 23A and the new definitions to give effect to regulation 23A, known as the affordability assessment regulations,¹² is submitted to be a positive development. The same holds for the fact that credit providers can still make use of their own evaluative models or mechanisms when conducting the credit assessment, provided that it is fair and objective and that it now has to comply with the affordability assessment regulations.¹³ It is concurred with Renke¹⁴ that credit providers, and in particular credit providers that enter into the market for the first time, will now at least have a basis model to use when conducting their credit assessments.

However, the question is whether regulation 23A is not too prescriptive. Its consequences on the granting of credit, and in particular to the lower income, previously disadvantaged consumers, will have to be seen.

The complete defence afforded to the credit provider in the event where the consumer does not answer the credit provider's request for information fully and truthfully,¹⁵ is to be endorsed. It creates a balance in the rights of the parties to the credit agreement and also gives effect to the objective of the Act in section 3 to encourage responsible borrowing. It ought also to ensure that consumers give accurate information to credit providers which in turn enable the credit provider to do a more accurate assessment of the consumer's ability to afford and repay the credit granted to the consumer.

The consequences of the credit provider's failure to conduct the compulsory credit assessment or to ignore the outcome of the assessment, are important. The same holds for the fact that there is a direct link between the credit assessment and the three forms of reckless credit provided for in the National Credit Act.¹⁶ When having regard to the three forms of reckless lending, it is clear that the legislature wanted to enforce compliance with the section 81(2) compulsory credit assessment. It is also apparent that not only compliance with the credit assessment,¹⁷ but also

¹² Par 3 2 2.

¹³ Par 3 2 2.

¹⁴ Par 3 2 2.

¹⁵ Par 3 2 3.

¹⁶ Pars 3 3 1 and 3 3 2.

¹⁷ Reckless credit instance one – see par 3 3 2.

compliance with its results, was aimed at.¹⁸ And, very importantly, when promulgating the forms or instances of reckless lending, the prevention or avoidance of the over-indebtedness of credit consumers was envisaged.¹⁹

The reckless credit provisions would have been futile in the absence of prescribed powers or sanctions to provide for the case where reckless credit occurs in spite of the Act's provisions to prevent it from happening. Although there is much to be said in favour of the powers bestowed on the courts or the Tribunal in terms of section 83(2) and (3),²⁰ for instance that they discourage reckless lending and therefore act as a deterrent and that they afford a measure of debt alleviation to a consumer who is the victim of reckless lending, these measures create too many practical problems.²¹ It is therefore submitted that, in accordance with the submissions by Boraine and Van Heerden, reckless credit should be listed in section 89(2) of the Act, rendering the reckless granting of credit unlawful. This will have the consequence that a court must declare the reckless agreement to be void in terms of section 89(5).²² This will further mean that the common law principles pertaining to unlawful agreements will apply, also in the case of reckless credit agreements.

It is submitted that Stoop's argument, endorsed by Renke, in favour of a proactive approach to reckless credit,²³ should go a long way in the prevention of reckless credit. Stoop's concern that a re-active approach only is not good enough and that many instances of reckless credit will therefore go undetected, is understandable.

As a few final remarks: the new reckless credit provisions in the National Credit Act are an extremely important development in the South African credit law and are fully endorsed. This is in particular true for the section 81(2) compulsory credit assessment, which is, it is submitted, the most important debt prevention measure in the Act. However, although we have come a long way to prevent over-indebtedness in the National Credit Act, there is always room for improvement. It is of vital importance for credit providers to give their full attention to the

¹⁸ Reckless credit instance two and three – see par 3 3 2.

¹⁹ Reckless credit instance three, and to a certain extent, instance one and two as well – par 3 3 2.

²⁰ Par 3 4.

²¹ Par 3 4.

²² Par 3 4.

²³ Par 3 4.



requirements mentioned in Part D of Chapter 4 of the NCA, in order to avoid the severe repercussions non-compliance entails. The primary aim of the reckless credit provisions is the prevention of over-indebtedness, and this will only be achieved if credit providers and consumers give their full collaboration and if both parties to the credit agreement act in good faith.



BIBLIOGRAPHY	
1. BOOKS	MODE OF CITATION
Kelly-Louw M and Stoop PN <i>Consumer Credit Regulation in South Africa</i> , Juta Cape Town 2012	Kelly-Louw and Stoop (2012)
Otto JM and Otto R-L <i>The National Credit Act Explained</i> (Third edition) LexisNexis Durban 2013	Otto and Otto (2013)
Scholtz JW (ed) "Commentary" <i>Guide to the National Credit Act 2008 et seq</i> , with updates (last update: 2016) LexisNexis Durban	Scholtz ed (2008)
2. JOURNALS	MODE OF CITATION
Boraine A and Van Heerden C "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" (2010) <i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i> 650	Boraine and Van Heerden (2010) <i>THRHR</i>
Kelly-Louw M "The prevention and alleviation of consumer over-indebtedness" (2008) <i>SA Mercantile Law Journal</i> 200	Kelly-Louw (2008) <i>SA Merc LJ</i>
Renke S "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) (May) <i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i> 208	Renke (2011) <i>THRHR</i>
Renke S "Die nuwe bekostigbaarheidsassesseringsregulasies ingevolge die Nasionale Kredietwet 34 van 2005 van naderby beskou" (2015) <i>LitNet Akademies</i>	Renke (2015) <i>LitNet Akademies</i>
Roestoff M and Renke S "Solving the problem of overspending by individuals: international guidelines" (2003) <i>Obiter</i> 1	Roestoff and Renke (2003) <i>Obiter</i>
Stoop PN "South African consumer credit policy: measures indirectly aimed at preventing consumer over-indebtedness" (2009) <i>SA Mercantile Law Journal</i> 365	Stoop (2009) <i>SA Merc LJ</i>



Van Heerden C and Boraine A “The money or the box: perspective on reckless credit in terms of the National Credit Act 34 of 2005” (2011) <i>De Jure</i> 392	Van Heerden and Boraine (2011) <i>De Jure</i>
Woker T “Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act” (2010) <i>Obiter</i> 217	Woker (2010) <i>Obiter</i>
3. POLICY FRAMEWORK	MODE OF CITATION
The Department of Trade and Industry South Africa <i>Consumer Credit Law Reform: Policy Framework for Consumer Credit</i> August 2004	Policy Framework (2004)
4. REPORT	MODE OF CITATION
The Department of Trade and Industry South Africa <i>Credit Law Review Summary of Findings of the Technical Committee</i> (August 2003)	Summary of Findings <i>Credit Law Review</i> (2003)
5. THESIS	MODE OF CITATION
Renke S “An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005” thesis submitted for the degree Doctor Legum, University of Pretoria (2012)	Renke LLD Thesis (2012)

6. STATUTES, REGULATIONS AND OTHER
Credit Agreements Act 75 of 1980
National Credit Act 34 of 2005
National Credit Amendment Act 19 of 2014
Usury Act 73 of 1968



REGULATIONS

National Credit Act (34/2005): National Credit Regulations including Affordability Assessment Regulations (GN R202, *Government Gazette* 38557, 13 March 2015)

OTHER

GN 230 in *GG* 28619 dd 15 March 2006.

LIST OF CASES

Absa Bank v Trustees for the Time of the Coe Family Trust 2012 (3) SA 184 (WCC)

Benade v Absa Bank Ltd 2014 ZAWCHC 84 (16 May 2014)

Horwood v Firstrand Bank 2011 ZAGPJHC 121 (21 September 2011)

National Credit Regulator v Hirst 2015 ZANCT 18 (29 October 2015)

Standard Bank of South Africa Ltd v Panayiotts 2009 (3) SA 363 (W) 366E-F

Standard Bank of South Africa Ltd v Herselman 2016 ZAFSHC 39 (3 March 2016)

SA Taxi Securitisation v Dick Lennard unreported 2012 (2) SA 456 (ECG)