Reckless Credit Lending in terms of the National Credit Act 34 of 2005

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CHAPTER 1

GENERAL INTRODUCTION

1 1 Introduction

The South African consumer credit legislation has recently been improved through the enactment of the National Credit Act 34 of 2005.[1] The National Credit Act was subsequently amended by the National Credit Amendment Act 19 of 2014.[2] The National Credit Act repealed and replaced the Credit Agreements Act 75 of 1980[3] and the Usury Act 73 of 1968,[4] which initially dealt with consumer credit law in South Africa.[5] The repeal of the Credit Agreements Act and the Usury Act by the National Credit Act emanates from a number of weaknesses identified in the former consumer credit legislation.[6] One of these weaknesses was the failure by the aforementioned legislation to protect consumers from reckless credit lending by unscrupulous credit providers.[7] The preceding consumer legislation was also found to be ineffective and outdated.[8] For example, the Credit Agreements Act and the Usury Act had to be applied jointly as they both regulated consumer credit, making consumer credit "an extremely difficult and confusing environment".[9] The necessity for legislative reform in the field of consumer credit law arose *inter alia* because of the ineffectiveness of previous consumer credit legislation to deal with the demand of a complex consumer credit market in South Africa.[10] The Technical Committee[11] that was appointed by the Department of Trade and

[1] Hereinafter the National Credit Act, the NCA or the Act.
[2] Hereinafter the National Credit Amendment Act or the Amendment Act.
[3] Hereinafter the Credit Agreements Act.
[4] Hereinafter the Usury Act.
[5] Renke, Roestoff and Haupt (2007) *Obiter* 230.
[6] Policy Framework (2004) par 2.11. Kelly-Louw (2008) *SA Merc LJ* 203.
[7] Par 2 2 below.
[8] Par 2 2 below.
[9] Aucamp (2013) *THRHR* 378.
[10] Renke, Roestoff and Haupt (2007) *Obiter* 230.
[11] Hereinafter the Technical Committee. The nature and extent of the Technical Committee's mandate is discussed in more detail under par 2 2 below.

Industry[12] highlighted various shortcomings and ineffectiveness in the consumer credit legislation and recommended the repeal of the outdated legislation.[13] It is no surprise that the Credit Agreements Act and the Usury Act were repealed by the National Credit Act given the many challenges posed by the inept previous legislation on consumer credit. The reasons and policy considerations for the repeal of the Credit Agreements Act and the Usury Act through the promulgation of the National Credit Act shall be discussed below.[14]

In order to address some of the abovementioned shortcomings, the National Credit Act currently makes provision for reckless credit lending provisions such as a compulsory credit assessment that must be conducted by a credit provider before extending credit to a consumer, a first of its kind in the history of South African credit law.[15] The purpose of the National Credit Act properly outlines the extent of the attempt to resolve the various shortcomings of and the ineffectiveness of the previous consumer credit legislation, especially regarding the discouraging of reckless credit granting by credit providers. Section 3 of the National Credit Act provides for the purpose of the Act which includes promoting responsibility in the credit market by encouraging responsible borrowing and discourage reckless credit granting by credit providers.[16] To achieve these goals, the National Credit Act has added a new dimension to credit regulation by introducing measures aimed at preventing reckless credit granting.[17] The relevant requirements for a compulsory assessment, the forms of reckless credit lending and the sanctions for reckless credit lending shall be discussed further below in this dissertation.[18]

The concept of reckless lending[19] was unknown in South Africa until the inception of the National Credit Act.[20] The legislation which preceded the National Credit Act did not

[12] Hereinafter the DTI.
[13] Kelly-Louw (2008) *SA Merc LJ* 203.
[14] Par 2 2.
[15] Par 3 2 2 below.
[16] S 3(c)(i) and (ii).
[17] Scholtz *ed* (2015) par 11.1.
[18] See ch 3 and 4 respectively.
[19] Kelly-Louw (2015) *LAWSA* par 134. Kelly-Louw states that historically "reckless lending" as a concept is well known in countries like Australia, Belgium, the United Kingdom and the United States of America, unlike South Africa.

impose an obligation on credit providers to conduct an assessment of the consumer's financial position and his ability to repay the debt before granting credit to the consumer.[21] The National Credit Act has given effect to the sentiments expressed by the drafters of the policy framework and the credit law review committee[22] by introducing novel provisions that identify four main forms of reckless credit and prohibiting reckless credit granting and proactively obliging the credit providers to undertake a compulsory assessment prior to entering into a credit agreement with a consumer.[23] There is a direct link between the compulsory credit assessment that a credit provider must conduct in terms of the National Credit Act, the four forms of reckless credit lending and the powers granted to the authorities (the courts or the National Consumer Tribunal[24]) in respect of any form of reckless credit lending.[25]

The Act also provides for a statutory defence against reckless credit granting that can be raised by the credit provider if certain requirements are met.[26] The credit provider's statutory defence, also known as the absolute defence or complete defence, is a balancing of rights and a mechanism by the legislature to avoid abuse of the reckless credit granting provisions by the consumer to the prejudice of credit providers.[27] There is a requirement for the consumer to answer all questions posed to him during the compulsory assessment fully and truthfully. Should a consumer fail to answer fully and truthfully such request for information from the credit provider then the credit provider can rely on the complete defence should the consumer allege reckless credit granting.[28] There are four forms of reckless credit lending possible in terms of the NCA.[29] A forth and special form of reckless credit lending is also discussed for purposes of this dissertation and for

[20] Kelly-Louw (2015) *LAWSA* par 134.
[21] Renke LLD Thesis (2012) par 8.3.2.1.
[22] See the Summary of Findings *Credit Law Review* (2003).
[23] Scholtz *ed* (2015) par 11.1.
[24] Hereinafter the Tribunal. The Tribunal is a new role player in the South African consumer credit industry and was established in terms of s 26 of the Act.
[25] Par 4 1.
[26] Scholtz *ed* (2015) par 11.1.
[27] Par 3 3.
[28] Par 3 3.
[29] Par 3 2 2.

completeness sake.[30] There are certain powers that a court or the National Consumer Tribunal may grant where there are findings of reckless credit lending, which powers are discussed below.[31]

1 2 Research Statement

The broad problem statement of this dissertation is to investigate and critically evaluate the measures under the National Credit Act aimed at the prevention of reckless credit lending, namely the compulsory credit assessment that has to be conducted by the credit provider, the forms of reckless credit granting recognised by the legislature and the orders that may be granted by the courts or the Tribunal in the case of reckless credit lending, to alleviate the consequences of the latter. The policy considerations and a general overview of the rationales behind the promulgation of the National Credit Act as they relate to reckless credit lending will also be discussed.

1 3 Research Objectives and Overview of Chapters

Pertinent research objectives have been formulated with reference to the above-mentioned research statement in order to define and restrict the scope of this study. The overview of the chapters is as follows:

(a) The National Credit Act has provided the credit industry with effective debt prevention measures aimed at preventing reckless credit lending and over-indebtedness. Chapter 1 provides the introduction and historical background information of this dissertation and in particular in respect of the development of consumer credit legislation in South Africa as far as the prevention of reckless lending provisions is concerned.

[30] Par 4 2 2.
[31] Par 4 3.

(b) The policy considerations and rationales underlying the new reckless credit prevention measures in the National Credit Act will receive attention in chapter 2.

(c) The compulsory assessment that a credit provider must undertake in terms of the National Credit Act will receive attention in chapter 3. The same pertains to the complete defence that is afforded to the credit provider in terms of the Act where an allegation of reckless credit granting is made by the consumer.

(d) The four forms of reckless credit lending identified by the legislature in relation to the compulsory credit assessment will next receive attention, in chapter 4. The same holds for the powers of the courts or the Tribunal to address the fact that reckless lending has occurred.

(e) Finally, in chapter 5, conclusions and recommendations shall be made with regard to the reckless credit lending measures in the National Credit Act.

1 4 Delineation and Limitations

One of the forms of reckless credit lending that will be discussed in chapter 4 directly causes the consumer to become over-indebted.[32] Over-indebtedness will therefore be discussed in this context only but not in general. The latter refers to over-indebtedness that is caused by other causes than reckless-lending, for instance as a result of the consumer's job loss.

1 5 Terminology

In this dissertation the concepts "credit provider" and "consumer" will bear the same meaning as defined in terms of the National Credit Act. The Act[33] defines "consumer" and "credit provider" as follows:

[32] See par 4 2 2.
[33] S 1.

"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) a 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 to 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;
(e) the lender under a secured loan;
(f) the lessor under a lease;
(g) the party to who 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) For the sake of convenience the masculine form is used throughout this dissertation to refer to a natural person.

(b) 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, when referred to for the first time, are referred to in full.

(c) The law as it appears in this study reflects the position as on 1 October 2017.

CHAPTER 2

AN OVERVIEW OF SOME OF THE RATIONALES BEHIND THE PROMULGATION OF THE NATIONAL CREDIT ACT, IN PARTICULAR, THE RECKLESS LENDING PROVISIONS

2 1 Introduction

It has already been mentioned above[34] that the necessity for legislative reform in the field of consumer credit law arose *inter alia* because of the outdated and ineffective previous consumer credit legislation that dealt with the demands of a complex consumer credit market in South Africa.[35] This chapter contains a discussion of certain rationales culminating in the promulgation of the National Credit Act[36] and, specifically, its new provisions on the prevention of reckless credit lending. In addition, attention will be focused on related aspects of the latter.[37]

2 2 The Reckless Lending Provisions: Rationales

The rationales for the promulgation of the National Credit Act and its reckless lending provisions emanate from the historical challenges concerning the implementation of the preceding credit laws, such as the Usury Act and Credit Agreements Act.[38] As a result of the historical challenges with the abovementioned consumer credit laws, the Technical Committee was established by the DTI with the objective of reviewing the abovementioned legislative shortcomings.[39] The Technical Committee highlighted

[34] Par 1 1.
[35] Renke, Roestoff and Haupt (2007) *Obiter* 230.
[36] The purpose of the NCA is to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market industry and to protect consumers by amongst others promoting responsibility in the credit market by discouraging reckless credit granting by credit providers. See s 3.
[37] See par 2 3 below.
[38] See par 1 1. The NCA was intended to address such historical challenges.
[39] See par 1 1.

various shortcomings and ineffectiveness in the consumer credit legislation and recommended the repeal of the outdated legislation.[40] The recommendations for the repeal of the ineffective and outdated preceding legislation[41] were made in light of the fact that there was no uniformity in the transactions that were protected by the said laws.[42] The lack of uniformity in respect of opportunities for access to reasonable credit was also prevalent as a contributory factor to reckless credit lending. This is evidenced by the fact that due to a number of historical reasons, the majority of South African consumers struggled to gain access to credit as they were not deemed to be credit worthy and as a result could not access reasonably priced credit.[43] On the other hand, the minority of consumers who were qualified to access such credit were inundated with the over-supply of credit offers.[44] The result of the latter was an over-supply of consumer credit to the minority that was eligible for credit lending versus the restricted access for the majority of consumers who desperately needed access to cheaper credit. This in turn led to the minority of consumers having a high level of debt and the majority of consumers resorting to informal and unregulated financial markets where credit was more expensive.[45]

Of specific interest to this topic is the exploitation of consumers by credit providers and the reckless granting of credit at a high cost with absolute disregard for the ability of the consumer's ability to repay the credit.[46] As it will be discussed in more detail below, the failure of credit providers to assess the ability of the consumer to repay the credit amount is considered a major contributor towards consumer over-indebtedness and reckless credit lending.[47] In addition, the lack of a compulsory credit assessment by credit providers prior to granting credit to consumers was foreseen during the policy consideration as a necessary introduction to the new credit law dispensation on the prevention and

[40] Policy Framework (2004) par 2.10.
[41] The Usury Act, the Credit Agreements Act and the Exemption Notices in terms of the Usury Act.
[42] Policy Framework (2004) par 4.1.
[43] Policy Framework (2004) par 2.7.
[44] Policy Framework (2004) par 2.7. The majority of consumers did not have sufficient security or collateral for credit and were considered to be risky.
[45] Policy Framework (2004) par 2.7. Kelly-Louw (2008) *SA Merc LJ* 204.
[46] Policy Framework (2004) par 6.5.
[47] The compulsory affordability assessment prior to credit lending was unknown in South African consumer credit law.

prohibition of reckless credit.[48] Thus the need for legislative reform was important to ensure that the consumer credit regulatory framework protects consumers from high levels of debt and reckless credit lending.[49] There was also a critical need for the balancing of interests and rights of consumers and credit providers and a regulatory framework that is cost-effective, fair and efficient in order to promote access to finance whilst preventing reckless credit lending.[50] As a result, a legislative framework review process was undertaken by the DTI to address the consumer credit law shortcomings.

The results of the research initiative by the Technical Committee was the production of a detailed report, Summary of Findings *Credit Law Review* (2003).[51] The Technical Committee's report identified a number of areas for policy and regulatory reform.[52] The Technical Committee's report culminated with the findings that the Usury Act and Credit Agreements Act should be replaced by a single piece of legislation to be overseen by one statutory regulator.[53] The report was published by the DTI and also formed part of the initial policy proposals subject to which the National Credit Act was eventually drafted.[54] In August 2004 the DTI published a Policy Framework for Consumer Credit, which consisted of the basis upon which the new consumer credit legislation was subsequently drafted.[55] The product of the Policy Framework culminated in the enactment of the National Credit Act.[56] The NCA has introduced some of the most important and necessary consumer credit law provisions on the prevention and prohibition of reckless credit lending. One of the most important sections of the NCA is section 81(2), which

[48] Policy Framework (2004) par 5.5.
[49] Policy Framework (2004) par 1.13.
[50] Policy Framework (2004) par 1.15.
[51] Summary of Findings *Credit Law Review* (2003). In October 2003, the Technical Committee submitted its report with its findings and recommendations to the Minister of Trade and Industry.
[52] Kelly-Louw and Stoop (2012) 17. See Summary of Findings *Credit Law Review* (2003) par I.
[53] See par 2 3 3.
[54] Kelly-Louw and Stoop (2012) 17.
[55] Policy Framework (2004) par 1.18. The review by the Technical Committee incorporated several other reports, including the 1992 SA Law Commission review of the Usury Act, the 1995 SA Law Commission report on debt collection, the 2001 investigation into SME finance by a task group of the Policy Board for Financial Services and Regulation and Ntsika's 1999 National Small Business Regulatory Review.
[56] Kelly-Louw (2008) *SA Merc LJ* 207.

imposes an obligation on a credit provider to conduct a compulsory assessment before granting new credit or additional credit to a consumer.[57]

2 3 Related Aspects

Consumer education, the disclosure of pre-agreement information and the enforcement functions of the National Credit Regulator and the Consumer Tribunal are elements related to the prevention of reckless credit lending.[58] A brief summary of the underlying policy in respect of these aspects will be provided below, despite the fact that these aspects will not be addressed further in this dissertation.

2 3 1 Disclosure

It is evident that the disclosure and availability of information on prospective credit is a critical factor that enables a consumer to make informed choices regarding the incurring of the credit.[59] As a result, one can argue that without full disclosure and availability of information, the consumer cannot reasonably make an informed choice on credit related matters. It is a logical conclusion that the more you know the better choice you can make.[60] Therefore, the level of disclosure by the credit provider and the availability of information to the consumer are critical and a mitigating factor for the prevention of reckless credit lending. There is a definite interplay between disclosure of information to the consumer and the consumer's decision whether or not to enter into the credit agreement. This decision remains the consumer's. However, just like in the case where the consumer cannot afford the credit or does not understand the risks and costs underlying the credit, the credit provider should refuse to grant the credit to the consumer.

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[57] Par 3 2 2 below.
[58] The compulsory obligation to conduct a creditworthiness assessment before the granting of credit to the consumer.
[59] Policy Framework (2004) par 4.14.
[60] Policy Framework (2004) par 4.14.

Some consumers found it difficult to understand their risks, costs and obligations before concluding credit agreements,[61] due to the lack of disclosure of the full costs of credit.[62] In order to address the abovementioned challenges, the National Credit Act deals with the issues specifically relating to credit agreements, the disclosure that is required before an agreement may be concluded and the form or format in which such an agreement must be cast, in plain and understandable language.[63] Therefore, the progress made through the Policy Framework (2004) regarding pre-agreement disclosure as an additional measure to alleviate reckless credit lending as introduced under the National Credit Act, is to be welcomed.[64]

2 3 2 Consumer Education

The lack of consumer education in a form of basic literacy and numeracy skills is considered as a contributory factor in consumers not understanding the limited information disclosed to them by credit providers.[65] It is submitted that, where consumers lack basic education and basic information regarding the potential credit products they may encounter, they are most likely not to understand and appreciate the nature and extent of their rights, risks and obligations. The consumers were also found to be at fault as they neglected to read terms and conditions prior to signing a credit agreement, as their interest in knowing about the terms and conditions of their agreement was surpassed by a desire to obtain credit.[66] There is a causal link between the lack of disclosure, lack of consumer education and reckless credit lending. This causal link is based on the analysis that a consumer who is not provided with sufficient information through disclosure and lacks basic education, is likely not to understand his rights and obligations and he is most

[61] Policy Framework (2004) par 5.1. The disclosure requirements in the previous enactments were considered as out-dated and ineffective.
[62] Policy Framework (2004) par 5.2. Kelly-Louw states that, in addition to the lack of transparency and disclosure, consumers have difficulty in understanding what is being disclosed as it would be written in complex wording, often in small print. Kelly-Louw (2008) *SA Merc LJ* 213.
[63] Kelly-Louw (2008) *SA Merc LJ* 213. Credit providers must supply consumers with a pre-agreement disclosure statement, a quotation of credit and full disclosure of all credit costs. S 92 of the NCA.
[64] Policy Framework (2004) par 5.5.
[65] Policy Framework (2004) par 5.11. Hawthorne (2007) *SA Public Law* 482. Hawthorne states that in pursuance of its objective at transparency, the NCA attempts to regulate the pre-contractual behaviour of consumers in order to prevent reckless credit and the resulting over-indebtedness.
[66] Policy Framework (2004) par 5.2.

likely to enter into a reckless credit agreement.[67] A proper disclosure, availability of information and basic education for consumers, mitigates reckless credit lending.

2 3 3 The National Credit Regulator and the Tribunal

The National Credit Act's overarching purpose is to create a single system of credit regulation and a single regulating authority in the form of the National Credit Regulator to administer the consumer credit industry.[68] In achieving the goals of a single credit regulation system, the National Credit Regulator and the Tribunal were established as two new consumer credit institutions under the National Credit Act.[69] The National Credit Act provides remedies to consumers whilst the National Credit Regulator provides greater access to redress and serves as a compliance monitoring and an enforcement agency.[70] The National Credit Regulator and the Tribunal serve as important instruments in ensuring compliance with the provisions for the prevention of reckless credit lending. The importance of the functions of the Tribunal is discussed in a subsequent chapter as it relates to the powers of the Tribunal in respect of reckless lending.

2 4 Conclusion

The main aim of this chapter was to briefly discuss the policy considerations underlying the reckless credit provisions and related matters now contained or provided for in the National Credit Act. Lacunae in these respects in the previous consumer credit enactments were pointed out as well as suggested new policy guidelines in order to address such lacunae. One such lacuna was the failure by the legislature in the past to require credit providers to conduct compulsory credit assessments before granting credit to consumers. It is to be welcomed that the proposed policy guidelines in order to make

[67] A consumer who has the benefit of full disclosure and information regarding the credit offered and has the reasonable level of education to understand the nature and extent of the credit product is more likely to make an informed decision and would be able to mitigate the prospects of entering into a reckless credit agreement.
[68] Kelly-Louw (2008) *SA Merc LJ* 208.
[69] Otto and Otto (2015) par 3.
[70] Policy Framework (2004) par 7.4.

provision for a compulsory credit assessment were eventually embodied in the National Credit Act. In the next chapter, I will consider the compulsory assessment and the credit provider's complete defence against an allegation of reckless credit lending.

CHAPTER 3

THE RECKLESS CREDIT PROVISIONS IN TERMS OF THE NATIONAL CREDIT ACT AND THE CREDIT PROVIDER'S COMPLETE DEFENCE

3 1 Introduction

The prevention of granting reckless credit is considered as an important lodestar of the National Credit Act as emphasised in earlier discussions above.[71] The National Credit Act's introduction of the compulsory assessment obligation for credit providers to assess a potential credit consumer's ability to repay the credit has been positively welcomed, as a first of its kind in South African law.[72] The NCA has also introduced four forms of reckless credit lending aligned to orders that may be granted by the relevant authorities in the case of each form of reckless credit lending.[73] The forms of reckless credit lending and the relevant orders are discussed in the next chapter.

As stated earlier,[74] one of the objectives of the National Credit Act is to create and maintain a balance between the competing rights and responsibilities of credit providers and consumers by promoting equity in the credit market.[75] With regards to equity in respect of the reckless lending provisions, the Act seeks to achieve such balancing of rights through the introduction of the credit provider's complete defence. The credit provider's complete defence protects the credit provider against an allegation of reckless credit lending by the consumer, where the consumer failed to answer the credit provider's compulsory assessment questions fully and truthfully.[76]

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[71] Kelly-Louw and Stoop (2012) par 12.1. See *Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flomboyant Edleen CC and Another* 2011 (2) SA 266 (SCA) at 272D.
[72] See par 3 2 2 below.
[73] See s 80(1) of the NCA.
[74] Par 2 2.
[75] See par 2 2 above.
[76] See par 3 3 below.

The reckless credit lending provisions such as the section 81(2) compulsory assessment and the credit provider's complete defence will be discussed in this chapter. The general introduction to this chapter and the limitation of the application of the credit provider's compulsory assessment obligation are discussed in paragraph 3 2 1. The reckless credit assessment in terms of section 81(2) will be discussed in paragraph 3 2 2 followed by a discussion of the new affordability assessment regulations, Regulation 23A and its purpose, in paragraph 3 2 3. The credit provider's complete defence will be discussed in paragraph 3 3 and paragraph 3 4 will conclude this chapter.

3 2 The Section 81 National Credit Act Assessment

3 2 1 General

The importance of the section 81(2) obligation on a credit provider to conduct a compulsory assessment before granting new credit or additional credit to a consumer has been emphasised above.[77] It is clear when having regard to section 81(2) that a credit provider has to conduct an affordability assessment prior to granting new credit or additional credit to a consumer. However, it is important to firstly discuss the limitations[78] of the credit provider's compulsory assessment obligation prior to an extensive discussion of section 81. The former mentioned limitations relate to the fact that the reckless credit provisions and its accompanying debt relief remedies apply only to natural person consumers who entered into credit agreements governed by the National Credit Act on or after 1 June 2007, the date upon which the final and most important part of the NCA became effective.[79] In addition to the exclusion of juristic persons from the application of the reckless credit lending provisions, the Act excludes certain types of agreements from the said provisions.[80] Section 81 to 84 of the National Credit Act do not apply to a school loan or a student loan, an emergency loan, a public interest credit

[77] Par 1 1.
[78] Part D of Ch 4 of the NCA.
[79] See s 78(1).
[80] S 78(1) and s 78(2)(a) – (f). See Van Heerden and Boraine (2011) *De Jure* 395.

agreement, a pawn transaction, an incidental credit agreement or a temporary increase in the credit limit under a credit facility.[81]

3 2 2 The Section 81(2) Assessment

The compulsory assessment introduced by section 81 of the NCA is considered as pivotal in preventing credit being granted recklessly.[82] As already mentioned above, one of the most important sections of the NCA is section 81(2), as it introduced some onerous compulsory assessment obligations on a credit provider in order to prevent the granting of reckless credit.[83] Section 81(2) states the following:

> 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 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.[84]

The provisions of section 81(2) are explicit in mentioning the prerequisite obligation of a credit provider to take reasonable steps to assess the proposed consumer's general understanding and appreciation of the risks and costs of the proposed credit, debt re-payment history as a consumer under credit agreements, existing financial means, prospects and obligations prior to entering into a credit agreement with the consumer. However, it remains unclear as to what actually constitutes "reasonable steps" by the credit provider during the section 81(2) assessment. In the case of *Horwood v Firstrand Bank Ltd*[85] it was held that to ascertain whether or not a credit provider has taken the required reasonable steps to meet its assessment obligations in terms of section 81(2), is

[81] S 78(1) and s 78(2)(a) – (f). With the exception of the credit facility which is defined in s 8(3), these credit agreements are defined in s 1 of the Act.
[82] Van Heerden and Renke (2015) *IIR* 76.
[83] Van Heerden and Renke (2015) *IIR* 93.
[84] S 81 (2) of the NCA.
[85] (2010/36853) [2011] ZAGPJHC 121. Hereinafter *Horwood*.

to be determined objectively on the facts and circumstances of any given case.[86] In *Absa v De Beer*[87] the court stated that as part of the reasonable steps in terms of the section 81(2) assessment, the credit provider must obtain proof of income and determine the sustainability of such income.[88]

Renke states that, when one considers the provisions of section 81(2), it is immediately apparent that the section 81 assessment is a prerequisite to enter into a credit agreement.[89] However, section 81(2) is silent on the case of an increase in the credit limit of an existing credit agreement. In the interpretation of section 80(1)[90] it becomes clear that the section 81(2) assessment is also a requirement in the case of credit limit increases. Kelly-Louw submits that the provisions in the NCA preventing reckless lending are by far the most contentious provisions of the Act.[91] Renke further states that the provisions of section 81(2) rendering it compulsory for a credit provider to conduct a credit assessment before extending new credit to a consumer are of cardinal importance and should be singled out.[92] It has already been singled out above that section 81(2) imposes a compulsory obligation on a credit provider to conduct a compulsory assessment before granting new credit or additional credit to a consumer. Another issue to consider regarding the compulsory assessment is the time when such an assessment should be made by the credit provider. The time factor of the compulsory assessment is naturally a critical determining factor in considering whether credit was granted recklessly. The relevant time for determining whether a credit agreement is reckless is the time when the

[86] *Horwood* par 5.
[87] 2016 3 SA 432 (GP). Hereinafter *De Beer*.
[88] *De Beer* 15. The court went further to state that the credit provider must take the age of the consumer into consideration when granting a loan and not grant a loan and/or reduce the repayment term of the loan if the consumer is too old. In this case the consumer was 65 years old and would have had to repay the loan by the age of 85.
[89] Renke LLD Thesis (2012) 430. The fact that the s 81(2) assessment is peremptory, was confirmed in *National Credit Regulator v Hirst* [2015] ZANCT 18 (29 Oct 2015).
[90] The introductory words to s 80(1) state 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, other than an increase in terms of s 119(4)... S 119(4) deals with the increase of the credit limit under a credit facility on an automatic basis.
[91] Kelly-Louw (2014) *SA Merc LJ* 25. Kelly-Louw further submits that the rigorous provisions of the National Credit Act have had an unintended consequences of closing access to credit to many and have 'strangled a burgeoning property market', whilst the same provisions have cushioned South Africa from the current financial crisis which has shaken most of the developed world to its core.
[92] Renke LLD Thesis (2012) par 10 2 2 1.

credit agreement was concluded or when the amount approved in terms of thereof was increased.[93] The times of withdrawal of amounts approved in terms of the agreement are thus of no concern for this determination and the reckless credit determination will always entail an after the fact enquiry.[94]

The compulsory section 81(2) assessment requires that a credit provider not only does an affordability assessment of the consumer, but also assesses the consumer's debt history and tests the consumer's general understanding of the risks, cost and obligations of the credit agreement.[95] Authors differ on the interpretation of the requirement for credit providers to assess the consumer in terms of section 81(2). Renke disagrees with Vessio's suggestion[96] that rather than "assess" the credit provider should simply inform the consumer of the section 81(2) requirements.[97] Renke submits that the Act makes it clear that the consumer's 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 must be explained to the consumer by the credit provider.[98] Renke elaborates on the abovementioned duty of a credit provider, namely as a duty to take reasonable steps that a reasonable credit provider under similar circumstances would take to ensure that the consumer indeed understands and appreciates the prescribed aspects.[99] Renke further submits that section 81(2) indeed embodies a duty on the credit provider to explain the risks, costs, rights and obligations under the credit agreement to the consumer, which is similar to the duty under European law to explain certain information to credit consumers.[100] In *De Beer*, in finding that the assessment did not comply with section 81(2), the court based its findings on two requirements.[101] The first requirement is that "reasonable steps" must be taken to assess the proposed consumer's existing means,

[93] Kelly-Louw (2014) *SA Merc LJ* 32.
[94] Kelly-Louw (2014) *SA Merc LJ* 32.
[95] S 81(2)(a)(i) – (ii). Kelly-Louw (2014) *SA Merc LJ* 25.
[96] Vessio (2009) *TSAR* 279.
[97] Renke LLD Thesis (2012) 432.
[98] Renke LLD Thesis (2012) 432.
[99] Renke LLD Thesis (2012) 432.
[100] Renke LLD Thesis (2012) 432.
[101] *De Beer* par 60.

prospects and obligations and such steps should not be irrational.[102] The second reason was that the assessment came short of the section 81(2)*(b)* requirement[103] as all the loans were for commercial purposes.[104] In light of the fact that the loans were for commercial purposes, the court found that any employee of the bank could conclude that the farming venture *in casu* would not be successful.[105] The court declared the credit agreement as reckless and exercised its discretion to set aside the agreement.[106]

In addition to and as part of the reasonable steps that must be taken during the assessment, section 81(2) requires that the consumer's debt repayment history and the consumer's existing financial means, prospects and obligations be considered. The consumer's financial means and prospects include an assessment of any reasonable and potential revenue flow from a business.[107] In order to determine what constitutes "financial means, prospects and obligations" with respect to a consumer, section 81(2) has to be read in conjunction with section 78(3), which stipulates the meaning of the concept. Section 78(3) states that financial means, prospects and obligations with respect to a consumer or prospective consumer includes:

> *(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

[102] *De Beer* pars 60-61. The court found it irrational that the credit provider had taken the consumer's surety's income into account in coming to the conclusion that the existing financial means were sufficient to pay the loan instalments.
[103] Whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer had such a purpose for applying for that credit agreement.
[104] *De Beer* par 62.
[105] *De Beer* par 63. There was already sufficient evidence before the court to indicate the extent to which the consumer's commercial farming was not successful as there was lack of income or proof thereof from the consumer.
[106] *De Beer* par 64.
[107] S 78(3)(c).

(c) if the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the reasonably estimated future revenue flow from that business purpose.

The financial means, prospects and obligations of a consumer are inclusive of the assessment of all the above-mentioned section 78(3) elements and each case has to be considered on its own merits in this regard. In the case of *Standard Bank of South Africa v Panayiotts*[108] the court found that "financial means" also include assets and liabilities and that "prospects" include any prospects that the consumer's financial position would improve.[109] The overall objective of the section 81(2) assessment read with section 78(3) is to ascertain the prospects of the consumer to afford the new or additional credit and to satisfy that obligation to repay the debt due to the credit provider.[110] It makes sense to require the assessment to consider a wide range of potential financial means, prospects and obligations in light of section 78(3) in order to achieve an objective and fair assessment of the repayment of debt prospects by the consumer and thereby mitigating the risk of reckless credit lending.

It must be noted that even after the consumer's financial means, prospects and obligations have been ascertained in terms of section 81(2) read with section 78(3), there is no standard form of conducting the section 81 assessment. The National Credit Act initially did not contain any provision detailing exactly how the assessment should be conducted and no standard format for the assessment was prescribed.[111] Section 82(1) of the Act initially provided that a credit provider may determine for itself the evaluative mechanism or models and procedures to be used in meeting its assessment obligations under section 81, provided that any such model or mechanisms and procedure results in a fair and objective assessment.[112] The recent National Credit Amendment Act and Regulation 23A have amended the initial situation, by prescribing the affordability assessment model for credit providers in conducting the compulsory assessment.

[108] 2009 (3) SA 363 (W). Hereinafter *Panayiotts*.
[109] *Panayiotts* 366F.
[110] Kelly-Louw and Stoop (2012) 293.
[111] Van Heerden and Renke (2015) *IIR* 76.
[112] Van Heerden and Renke (2015) *IIR* 76.

The May 2013 Draft Guidelines were the first concrete steps towards clarifying the requirements for a section 81 assessment, but did not contain much detail regarding the requirements for the assessment.[113] As previously mentioned above, the National Credit Amendment Act introduced significant amendments to the assessment mechanism and procedures set out in section 82.[114] The Amendment Act introduced an amendment to the NCA, so that it currently provides for the Minister to prescribe the criteria and measures to determine the outcome of affordability assessments.[115] As a result, a credit provider may determine for itself the evaluative mechanism, model or procedure it wants to make use of, now with the proviso that it results in a fair and objective assessment, which must not be inconsistent with the affordability assessment regulations made by the Minister.[116] Regulation 23A now provides for the affordability assessment regulations which are binding on credit providers.[117] The provisions of Regulation 23A affordability assessment are discussed further below.[118]

3 2 3 Regulation 23A

As mentioned above,[119] section 82 after its amendment in terms of the National Credit Amendment Act provides for the additional requirement that the affordability assessment mechanisms or models and procedures used by credit providers should not be inconsistent with the affordability assessment regulations made by the Minister.[120] Regulation 23A[121] and the definitions to give effect to Regulation 23A became effective as part of the amendments to the regulations promulgated in terms of the National Credit

[113] Van Heerden and Renke (2015) *IIR* 88.
[114] S 24(a). Van Heerden and Renke (2015) *IIR* 82.
[115] S 24(a). Van Heerden and Renke (2015) *IIR* 82.
[116] Van Heerden and Renke (2015) *IIR* 83. Coetzee states that, although decided prior to the amendment of s 82, the decision in *Horwood* that the credit provider must take reasonable steps to assess the prescribed matters and that the credit provider's evaluative mechanisms, modules and procedures must be fair and objective, is still relevant. Coetzee LLD Thesis (2015) par 5.5.
[117] Van Heerden and Renke (2015) *IIR* 83. The affordability assessment regulations as published by the Minister became effective on 13 September 2015.
[118] Par 3 2 3 below.
[119] Par 3 2 2.
[120] See also Renke (2015) *Litnet Akademies.*
[121] See the National Credit Regulations including affordability assessment regulations (GN R202, *GG* 38557, 13 March 2015) Regulation 23A. Hereinafter Regulation 23A.

Act on 13 March 2015.[122] The legislature has now introduced a compulsory evaluative mechanism for affordability assessment in the form of regulation 23A, a criterion to conduct affordability assessment application and as a result reduces the discretion that credit providers previously had to conduct their own form of an affordability assessment. The introduction of Regulation 23A is to be welcomed as it now provides some clarity as to how the affordability assessment should be conducted.

Renke provides the following clear summary of Regulation 23A and important defined concepts forming part thereof:[123]

> The most important definitions inserted in section 1 of the National Credit Regulations for the purposes of regulation 23A are the definitions of "gross income", "discretionary income" and "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 section 78(3) and 81(2)(a)(ii) of the Credit Act, should serve as a point of departure. Regulation 23A(3) forms the crux of the provisions in respect to the consumer's existing financial means and prospects. It provides that a 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.

[122] Renke (2015) *Litnet Akademies.* However, the actual coming into operation thereof was then postponed with six months, to 13 Sep 2015.
[123] Renke (2015) *Litnet Akademies.*

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 the credit agreements. Of importance is that the 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 R 2000, the credit provider must deduct at least an amount of R881 as a 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. 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 3 The Credit Provider's Complete Defence in terms of Section 81

As stated earlier,[124] there was a critical need for the balancing of interests and rights of consumers and credit providers in order to promote access to finance whilst preventing reckless credit lending. One such a balancing mechanism of rights and obligations relating to reckless credit lending is the introduction of the credit provider's complete defence in terms of section 81 of the NCA. The credit provider's complete defence is a necessary prevention plan from potential abuse of the reckless credit lending provisions by consumers. A few initial remarks: It is important to note that the credit provider's complete defence is dependent on the credit provider having actually conducted the compulsory assessment. A finding that a credit agreement constitutes reckless credit has many adverse consequences for a credit provider whereby the consumer is substantially protected when a credit provider tries to enforce the agreement against the consumer.[125] Unfortunately, the reckless credit provisions are subject to the risk of abuse by some consumers and hence the need for the credit provider to be protected in such instances.[126] Measures were introduced in the National Credit Act to limit the abuse of these provisions, through section 81(1) and (4).

Section 81(1) requires that when applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the section 81(2) affordability assessment. In return the credit provider can rely on the complete defence should the consumer fail to fully and truthfully answer any such requests for information. In respect of the complete defence, which is set out in section 81(4), there are two requirements that must be fulfilled for a credit provider to successfully rely on the defence. Firstly, the credit provider must establish that the

[124] Par 2 2.
[125] Kelly-Louw (2014) *SA Merc LJ* 25.
[126] Kelly-Louw (2014) *SA Merc LJ* 26.

consumer failed to answer fully and truthfully its requests for information. Secondly, a court or the Tribunal must determine that the consumer's failure materially affected the ability of the credit provider to make a proper assessment.[127]

There are different views regarding the issue of whether or not the credit provider has the obligation to verify the truthfulness or completeness of the information submitted by the consumer during the section 81 affordability assessment. In *Horwood* it was stated as follows:

> In my view the correct interpretation of these provisions is that where a credit provider has taken the required 'reasonable steps to assess' the relevant matters referred to in s 81(2), the credit agreement is not a reckless one in terms of s 80(1), whether or not the assessment was tainted by a consumer's incomplete or untruthful answers. The complete defence provided for under s 81(4) is a defence which may, as the respondent has done in this matter, be raised in addition to one that a credit provider's assessment obligations under s 81 have been met.[128]

The court went further to mention that:

> Section 81(1) of the National Credit Act obliges a prospective consumer to fully and truthfully answer any request for information made by the credit provider as part of the assessment required by s 81. Absent indications that would reasonably alert a credit provider to the contrary, which has not been established on the facts of this matter, a credit provider is, in my view, entitled to accept for this purpose the veracity of the information provided to it by or on behalf of a prospective consumer.[129]

In *Absa Bank v COE Family Trust*[130] it was stated that section 81(4) needs to be read with s 81(2). The section clearly gives the credit provider a defence in terms of the overall purpose of the Act, to ensure fairness to both parties in circumstances where the consumer fails to fully and truthfully answer any request for information made by the credit provider as part of its assessment.[131]

It seems practical to expect nothing more than the requirement of the reasonable steps to be taken by the credit provider during the section 81 assessment and to require that the

[127] S 81(4)(a) – (b). Van Heerden in Scholtz *ed* (2015) par 11.5.5.
[128] *Horwood* par 7.
[129] *Horwood* par 14.
[130] *Absa v COE Family Trust* 2012 (3) SA (WCC) 189 C. Hereinafter *Coe Family Trust*.
[131] *COE Family Trust* 189C.

credit provider must prove that such an assessment has been materially tainted by incomplete or untruthful information provided by the consumer is too much of a burden on the credit provider.[132] Vessio submits that the wording of section 81(1) gives the impression that the positive duty rests on the credit provider to ask the correct information-gathering questions and the consumer is merely saddled with answering fully and truthfully.[133] Renke submits that, based on the wording of section 81(1), no obligation is imposed on the consumer to spontaneously provide information not asked for to the credit provider.[134] Renke further submits that it appears that the only obligation that rests on the consumer in terms of the said section is to fully and truthfully answer any questions put to him by the credit provider.[135] I agree with Vessio and Renke that indeed section 81(1) merely requires the consumer to answer fully and truthfully the information that has been requested by the credit provider from the consumer and there is no obligation on the credit provider to verify such information, absent any reasonable suspicion.

It is important to note that the credit provider's complete defence is conditional upon the material effect it has on the credit provider's ability to make a proper assessment. The complete defence against reckless credit is only available to a credit provider when both requirements of section 81(4) are satisfied.[136] Section 81(4) contains a requirement of materiality and it is accordingly not every failure by a consumer to fully and truthfully answer the credit provider's requests for information as part of the prescribed assessment that entitles the credit provider its defence.[137] Therefore, if the consumer's failure to answer fully and truthfully did not materially affect the credit provider's ability to make a proper assessment, the complete defence will not succeed.[138] In *Horwood* Meyer J commented, but did not rule on the issue of materiality.[139] The court stated that "I should

[132] Absent reasonable grounds for suspicion on the veracity or truthfulness of such information there is no duty on the credit provider to doubt same.
[133] Vessio (2009) *TSAR* 279.
[134] Renke LLD Thesis (2012) 434.
[135] Renke LLD Thesis (2012) 434.
[136] Van Heerden in Scholtz *ed* (2015) par 11.5.5.
[137] *Horwood* par 6.
[138] Van Heerden in Scholtz *ed* (2015) par 11.5.5.
[139] *Horwood* par 15.

mention that an important issue that was not raised or argued by counsel is what test for materiality is enacted in s 81(4) of the NCA. I leave this question open."[140] It can be stated that *Horwood* missed the prime opportunity to provide clarity on the test for materiality as stated in terms of 81(4) and it therefore remains uncertain as to what exactly materiality entails in this context.

Van Heerden and Boraine correctly submit that in each specific instance the facts of the particular matter and the extent of the untruthfulness or incompleteness of the consumer's information will have to be considered in order to determine whether it can be said that the credit provider's ability to make a proper assessment was materially affected.[141]

3 4 Conclusion

The main aim of this chapter was to discuss the credit provider's compulsory credit assessment and the complete defence as a counter defence where an allegation of reckless credit is raised by the consumer.[142] The section 81 compulsory assessment and Regulation 23A were discussed in light of its requirements, namely that a credit provider not only does an affordability assessment of the consumer, but also assess the consumer's debt history and tests the consumer's general understanding of the risks, cost and obligations under the credit agreement.[143] The link between section 81(2) read with 78(3) was subsequently discussed, in addition to and as part of the reasonable steps to be taken by the credit provider during the assessment. The complete defence of the credit provider and the requirements for the successful reliance on same received attention in paragraph 3 3. It has been stated above that the compulsory assessment imposed on credit providers in terms of the National Credit Act is of cardinal importance in the mitigating reckless credit lending.[144] The same holds for the promulgation of Regulation 23A and the new definitions to give effect to it. At least credit providers now have a basis model to use when having to conduct a credit assessment, which is to be welcomed especially if a new,

[140] *Horwood* par 15.
[141] Van Heerden and Boraine (2011) *De Jure* 400.
[142] Pars 3 2 and 3 3 above.
[143] Par 3 2 2.
[144] Par 3 2.

inexperienced credit provider decides to enter the credit market.[145] Finally, it was pointed out that the court, in *Horwood*, did not make use of the opportunity it had to clarify the provisions of section 81(4) in respect to the test for materiality. It has been submitted that, in view of Regulation 23, courts will in future have to scrutinise the credit provider's compliance with these regulations during its compulsory assessment and that such compliance will impact on whether or not the credit provider conducted a proper assessment which would entitle him to rely on the complete defence against reckless credit.[146]In the next chapter the research will discuss the different forms of reckless credit lending and the orders that may be granted in each instance of reckless credit lending by the courts or the Tribunal.

[145] Par 3 2 3.
[146] Van Heerden in Scholtz *ed* (2015) par 11.5.5.

CHAPTER 4

RECKLESS CREDIT LENDING IN TERMS OF THE NATIONAL CREDIT ACT AND THE CONCOMITANT RELIEF

4 1 Introduction

There are four forms of reckless credit lending in terms of the National Credit Act.[147] The first three forms of reckless credit are in terms of section 80 of the National Credit Act, which became effective on 1 June 2007. The first form of reckless credit[148] occurs where, at the time that the credit agreement was made, or at the time when the amount approved in terms of an existing agreement was increased,[149] the credit provider failed to conduct the required section 81(2) assessment.[150] The second form[151] of reckless credit is a result of a credit provider having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement.[152] The third form[153] of reckless credit occurs where the credit provider having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that, entering into that credit agreement would make the consumer over-indebted.[154] As stated above,[155] a forth form and a special form

[147] S 80(1) and s 88(4).
[148] Provided for in s 80(1)(a). Hereinafter also referred to as form one of reckless credit lending.
[149] S 119 (4) is excluded as it deals with automatic and unilateral credit limit increases under a credit facility with the consumer's consent being granted previously.
[150] S 80(1)(a).
[151] S 80(1)(b)(i). Hereinafter also referred to as form two of reckless credit lending.
[152] S 80(1)(b)(i).
[153] S 80(1)(b)(ii). Hereinafter also referred to as form three of reckless credit lending.
[154] S 80(1)(b)(ii).
[155] Par 1 1.

of reckless credit lending is also discussed for purposes of this dissertation and for completeness sake, it will not be discussed any further as it is not the main focus of the topic.[156] The fourth form[157] of reckless credit refers to the situation where a credit provider enters into a credit agreement (other than a consolidation agreement contemplated in terms of a section 88 debt review, or a debt re-arrangement order or agreement) with a consumer who has applied for a debt re-arrangement and that debt re-arrangement still subsists.[158] Importantly, section 81(3) clearly provides that a credit provider must not enter into a reckless credit agreement with a prospective consumer. Reckless lending is therefore prohibited in terms of the National Credit Act. In what follows, the forms of reckless lending will be discussed,[159] followed by a discussion of the orders provided for in terms of the NCA where credit has been extended despite the above-mentioned section 81(3) prohibition.[160] I conclude this chapter in paragraph 4 4.

4 2 The Forms of Reckless Credit Lending in terms of the National Credit Act

4 2 1 General

As previously mentioned, one of the purposes of the National Credit Act is to discourage reckless credit and seeks to promote responsible credit lending through mechanisms aimed at ensuring that credit providers take reasonable steps to avoid granting credit recklessly. One such a mechanism is the requirement that credit providers must conduct a compulsory assessment and if the latter is not adhered to such credit agreement could be found to be reckless. The consumer can therefore rely on reckless credit lending as a defence for debt enforcement or use it as a cause of action.[161] A consumer who relies on the defence of reckless credit must nonetheless provide the necessary information and details to substantiate the defence.[162]

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[156] The focus of the dissertation is to discuss the forms of reckless credit lending as provided by s 80(1).
[157] S 88(4). Hereinafter also referred to as form four of reckless credit lending.
[158] S 88(4).
[159] Par 4 2.
[160] Par 4 3.
[161] Van Heerden in Scholtz *ed* (2015) par 11.5.7.
[162] Otto and Otto (2015) par 34.2.

4 2 2 The Forms of Reckless Credit Lending

The first three of the four forms of reckless credit lending have been introduced through section 80 of the National Credit Act. Section 80(1) of the National Credit Act provides as follows:

> 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, other than an increase in terms of section 119(4)—
> (a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or
> (b) 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—
> (i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or
> (ii) entering into that credit agreement would make the consumer over-indebted

The first form of reckless credit[163] is where, at the time that the credit agreement was made, or at the time when the amount approved in terms of an existing agreement was increased,[164] the credit provider failed to conduct the required section 81(2) assessment discussed above.[165] In this instance of reckless lending the credit provider's failure to conduct the compulsory assessment is inexcusable and the lack of a prior affordability assessment thus has the effect that the credit agreement is *per se* reckless.[166] It is irrelevant what the outcome of the assessment would have been, had it been conducted.

The second and third form of reckless credit revolve around the fact that the affordability assessment, which was conducted, indicated negative consequences but that the credit provider, in spite of the latter, continued to enter into the particular credit agreement. Reckless lending form two therefore occurs when the credit provider complies with the assessment requirements in terms of section 81(2), but then disregards the fact that the preponderance of available information indicated that the consumer lacked an

[163] Provided for in s 80(1)(a).
[164] S 119 (4) is excluded as it deals with automatic and unilateral credit limit increases under a credit facility with the consumer's consent being granted previously.
[165] Par 3 2.
[166] Van Heerden in Scholtz *ed* (2015) par 11.5.2.

understanding or appreciation of his risks, costs or obligations under the proposed credit agreement.[167] For example, failure to properly explain the interest to be charged or monthly instalments applicable to the credit agreement could constitute this form of reckless credit.[168] The third form of reckless credit occurs when the credit provider conducts the assessment in respect of a consumer who is not over-indebted at the time of the assessment, then ascertains by means of the assessment that entering into the proposed credit agreement with the consumer (or increasing the credit limit under an existing credit agreement) will render the consumer over-indebted and still continues to grant the new (or additional) credit to the consumer.[169] In this instance of reckless lending, the consumer's over-indebtedness is directly caused by the reckless credit granting, which has to be distinguished from general over-indebtedness, where the latter has nothing to do with the reckless entering into a credit agreement, but is caused by another cause, such as the loss of a job.

Only the third form of reckless credit is therefore directly linked to over-indebtedness whilst the first two forms are deemed to be reckless without having such a link.[170] However, reckless form one or two could be applicable in the case where the consumer, when entering into the credit agreement, was already over-indebted.[171] Reckless lending and over-indebtedness are therefore two distinct concepts but may be linked where the reckless credit granting specifically causes the consumer's over-indebtedness.[172]

The fourth form of reckless credit is *ad hoc* and is mentioned under section 88(4), but strangely no consequences are ascribed to it.[173] The fourth form of reckless credit refers to the situation where a credit provider enters into a credit agreement (other than a consolidation agreement[174] contemplated in terms of a section 88 debt review, or a debt

[167] S 80(1)(b)(i). See also Van Heerden in Scholtz *ed* (2015) par 11.5.2.
[168] Van Heerden in Scholtz *ed* (2015) par 11.5.2.
[169] S 80(1)(b)(ii).
[170] Boraine and Van Heerden (2010) *THRHR* 652.
[171] Boraine and Van Heerden (2010) *THRHR* 652.
[172] Renke LLD Thesis (2012) par 8 3 2 1.
[173] Boraine and Van Heerden (2010) *THRHR* 652.
[174] The Act does not provide a definition of the concept "consolidation agreement" but it cannot be anything else than an agreement in terms whereof a consumer's existing debts are being consolidated into one agreement.

re-arrangement order or agreement) with a consumer who has applied for a debt re-arrangement and that debt re-arrangement still subsists. All or part of that new credit agreement may be declared to be reckless credit, whether or not the circumstances set out in section 80 apply.[175] If the court or Tribunal finds that a credit provider has entered into a reckless credit agreement with a consumer, certain orders may be made which will be discussed next.

4 3 The Powers of the Courts or the Tribunal in respect of Reckless Lending

One has to determine, prior to discussing the powers of the courts or the Tribunal in respect of reckless credit, how it comes about that the issue of reckless credit lending serves before a certain court or the Tribunal in the first place. The answer to the above-mentioned question can be found with reference to section 83(1) and section 86 respectively. Section 86(6) of the National Credit Act provides that when a debt counsellor to whom a debt review application is made by a consumer, makes a determination, he must determine whether any of the consumer's credit agreements appear to be reckless when the consumer seeks a declaration of reckless credit.[176] The debt counsellor's recommendation that reckless lending has taken place (if that is the case) must then be submitted to the court (or the Tribunal)[177] in terms of section 86(7)(c)(i), where after the court or the Tribunal will deal with the matter. However, the debt counsellor is not entitled to declare a credit agreement reckless himself.[178]

Originally only the courts were vested with the power to declare a credit agreement reckless as envisaged by section 83.[179] The National Credit Amendment Act[180] has extended such powers to the Tribunal by the amendment of section 83.[181] Therefore, to come back to the debt counsellor's recommendation in terms of section 86(7) above, the

[175] S 88(4).
[176] S 86(6)(b).
[177] S 86(7)(c) does not mention the Tribunal, but this must have been an oversight by the legislature as the Tribunal, as will be discussed below, now has the power to deal with reckless lending cases.
[178] Van Heerden in Scholtz *ed* (2015) par 11.5.7.
[179] Van Heerden in Scholtz ed (2015) par 11.5.7.
[180] S 25.
[181] S 25. Van Heerden in Scholtz *ed* (2015) par 11.5.7.

debt counsellor may now recommend to the court or the Tribunal that an agreement be declared reckless.[182]

In terms of section 83(1) a court or the Tribunal can *suo motu* (in its own discretion) raise and investigate reckless credit as section 83 does not require an allegation of reckless credit before a court or the Tribunal can exercise such powers.[183] Van Heerden submits that the consumer who alleges credit was granted recklessly, bears the onus of proof.[184] She further submits that reckless credit can be alleged by the consumer either as a cause of action where he takes the initiative to apply to have the credit agreement set aside, or as a defence, where he raises it during enforcement proceedings that have been instituted by a credit provider.[185]

The powers of the court or the Tribunal are the same in respect of reckless credit form one and two respectively. If a court or the Tribunal declares a credit agreement reckless in terms of section 80(1)(a), because no credit assessment was done, or in terms of section 80(1)(b)(i), because although a credit assessment was done, the consumer did not understand the risks, costs and obligations under the agreement,[186] an order may be made[187] in terms of section 83(2) to the effect of:

> (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 83(3)(b)(i).

The two orders available to the courts or the Tribunal are therefore to set aside the credit agreement (partially or wholly) or to suspend it. Due to the use of the word "or" in section 83(2), the one or the other order may be made, but not both.

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[182] Van Heerden in Scholtz ed (2015) par 11.5.7.
[183] Van Heerden in Scholtz *ed* (2015) par 11.5.7.
[184] Van Heerden in Scholtz *ed* (2015) par 11.5.7. See also *Standard Bank of South Africa v Herselman* [2016] ZAFSHC 39 (3 March 2016).
[185] Van Heerden in Scholtz *ed* (2015) par 11.5.7.
[186] Van Heerden in Scholtz *ed* (2015) par 11.5.7.1.
[187] In terms of s 130(4)(a) these orders must be made upon a finding of reckless credit.

It will be seen below that a suspension order is also possible in the case of the third form of reckless lending.[188] It is therefore apt to discuss the consequences of suspension in terms of the Act here. In terms of section 84 the latter entail that during the period of suspension (a) the consumer is not required to effect any payments in terms of the suspended credit agreement, (b) the credit provider may not charge any interest, fee or other charge to the consumer and (c) the credit provider cannot enforce his rights under the agreement, or under any other law.[189] In terms of section 84(2), after the suspension has come to an end, all the respective rights and obligations of the credit provider and the consumer under the credit agreement are revived and become fully enforceable, except to the extent that a court may order otherwise.[190] The effect of the suspension of a credit agreement is basically that it creates a moratorium period during which the consumer is not required to make any payment under the agreement and no interest, charge or fee may be charged to the consumer.[191] Renke submits that the only effect of suspension of a credit agreement for a specified period of time is that the duration of the agreement is extended by that same period.[192]

Van Heerden and Boraine are of the view that the only reasonable inference to be drawn from the section 84(2) provisions that the consumer's rights are revived where section 84(1) does not make specific mention of the consumer's rights, is that section 84(1) by implication envisages that the consumer's right to possession and use of the financed item be suspended for as long as the suspension is in force.[193] They suggest that with regard to most movable property the credit provider may approach the court for an interim attachment order to secure the safekeeping of the movable financed item pending expiry of the suspension.[194] Such an interim safekeeping attachment order does not

[188] See also Boraine and Van Heerden (2010) *THRHR* 656.
[189] Despite any law to the contrary. See s 84(1).
[190] S 84(2)(a)(i) and (ii). In terms of s 84(2)(b), no interest, costs etc may be charged by the credit provider to the consumer that the credit provider was unable to charge during the suspension period. Renke therefore submits that s 84(2)(b) does not empower the courts or the Tribunal to write off any interest payable under the credit agreement. See Renke LLD Thesis (2012) par 8 3 2 5 5.
[191] Boraine and Van Heerden (2010) *THRHR* 654. S 84(1)(a) and (b).
[192] Renke LLD Thesis (2012) par 8 3 2 5 5.
[193] Van Heerden and Boraine (2011) *De Jure* 406.
[194] Van Heerden and Boraine (2011) *De Jure* 407.

amount to enforcement proceedings and will not be treated as such in terms of the section 84(1) prohibition on enforcement under the Act.[195] In *Mbatha* it was held that if the effect of the agreement is merely suspended, all elements of the agreement would have to be suspended.[196] This would mean that the consumer would not be entitled to continue to retain possession of the vehicle during the period of suspension.[197] At the same time the consumer would not have to make any payments under the agreement during the suspension period.[198]

Boraine and Van Heerden submit that it is not clear in the case of suspension whether the court may more than once suspend a credit agreement that was found to be reckless, but that the suspension is clearly intended to assist the consumer to eventually repay the debt.[199]

It is submitted by Van Heerden that a suspension rather than a setting aside would be appropriate in those instances where form one or two reckless credit was extended and performance has already occurred but where the consumer has in the meantime become over-indebted. It would therefore be just and reasonable that the agreement continues after the consumer is given the suspension period to recover from his over-indebtedness.[200] The major issue seems to be the position of the credit provider's security during the suspension in terms of section 84.[201] The court remarked in the *SA Taxi Securitisation v Mbatha*[202] case that it might be just and reasonable to set aside the agreement if the consumer has a valid complaint that the consumer would never have become involved in the credit transaction, if it was not for the recklessness of the credit provider.[203] In that event the agreement would be null and void, and as if it had never

[195] Van Heerden and Boraine (2011) *De Jure* 407.
[196] *Mbatha* par 48.
[197] *Mbatha* par 48.
[198] *Mbatha* par 48.
[199] Boraine and Van Heerden (2010) *THRHR* 654.
[200] Van Heerden in Scholtz *ed* (2015) par 11.5.7.1.
[201] Van Heerden in Scholtz *ed* (2015) par 11.5.7.1. S 84 is discussed below.
[202] 2011 (1) SA (GSJ) 317. Hereinafter *Mbatha*.
[203] *Mbatha* par 47.

been and as a consequence the credit provider, who remains the owner of the vehicle,[204] would be entitled to restoration of the vehicle.[205] The court further provided some guidelines as to what information the defendants should provide in order to demonstrate that credit was granted recklessly, including details of the negotiations leading up to the conclusion of the agreement, the level of education of the defendant and details of all indebtedness at the time the lease agreement was concluded.[206]

There is valid criticism on the lack of guidelines in respect to the section 83(2) powers. According to Boraine and Van Heerden it is awkward that section 83(2)(a) does not state that the court may set the credit agreement aside as being voidable, but rather that it may set aside all or part of the rights and obligations of the consumer.[207] They further state that the section also does not differentiate between a situation where a credit provider and a consumer have (a) merely entered into the credit agreement and (b) the case where either one or both have already performed in terms of such an agreement.[208] Boraine and Van Heerden submit that in cases where performance in terms of the contract has not yet taken place, it makes sense that the court may rule that the consumer has no further rights and obligations which would amount to the cancellation of contract.[209] The said authors further state that the reason that setting aside all rights and obligations of the consumer amounts to a cancellation for all practical purposes, although the provisions do not state that explicitly, is that a credit agreement usually constitutes a reciprocal contract and that every right has an obligation as its counterpart.[210] In the case where one or both parties has/have performed, the next issue relates to restoration, and in the absence of precedence or clear guidelines, the fact that the National Credit Act does not make the agreement voidable in so many words, may also pose difficulties.[211]

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[204] For example, in the case of an instalment agreement under circumstances where the final instalment has not been paid yet.
[205] *Mbatha* par 47.
[206] *Mbatha* par 56.
[207] Boraine and Van Heerden (2010) *THRHR* 652.
[208] Boraine and Van Heerden (2010) *THRHR* 652.
[209] Boraine and Van Heerden (2010) *THRHR* 653.
[210] Boraine and Van Heerden (2010) *THRHR* 653.
[211] Boraine and Van Heerden (2010) *THRHR* 653.

Otto and Otto are of the view that, in the absence of any criteria in the National Credit Act, one can expect that the courts or the Tribunal will set aside an agreement only in extreme cases.[212] It would be reasonable and justifiable for a court or the Tribunal to only set aside an agreement only in extreme cases as the consequences for such an order can be drastic for the credit provider. The circumstances of each case will determine whether such extreme measures should be implemented by the court or the Tribunal.

Van Heerden and Boraine submit further that the choice by a court to order a suspension of the reckless credit agreement rather than the complete or partial setting aside thereof, should be guided by the question whether the lack of assessment or the lack of comprehension by the consumer of the risks, costs and obligations under the credit agreement subsequently led the consumer to become over-indebted, thus creating a situation in which the consumer requires a "debt-breather" in the form of suspension in order to recover financially. In such a case the consumer can again at a later stage resume repayments in respect of the reckless agreement.[213]

To conclude the debate between setting aside or suspension, Renke submits that it appears that the option between setting aside and a suspension will essentially be a common sense decision guided by the facts of a particular case.[214] Renke further submits that the same should be true for the choice between setting aside the consumer's rights and obligations partially or completely.[215] It is unfortunate that the Amendment Act does not provide more detail in this regard.[216] Boraine and Van Heerden submit that, since the National Credit Act does not state in particular that reckless credit causes a credit agreement to be illegal or unlawful[217] and that it is therefore null and void as such, and in view of the sections dealing with the consequences of reckless credit,[218] such credit

[212] Otto and Otto (2015) par 34.2.
[213] Van Heerden and Boraine (2011) *De Jure* 404.
[214] Renke LLD Thesis (2012) par 8 3 2 2 5.
[215] Renke LLD Thesis (2012) par 8 3 2 2 5.
[216] Coetzee LLD Thesis (2015) par 5.5.
[217] Otto and Otto also agree with this view. See Otto and Otto (2015) par 34.2.
[218] S 83 and 84.

agreements remain valid and it is therefore left to the courts to decide the parties' fate regarding the consequences as provided in the National Credit Act.[219]

In respect to the third form of reckless credit lending, if a court or the Tribunal declares that a credit agreement is reckless in terms of section 80(1)(b)(ii), because entering into that specific agreement made the consumer over-indebted, it[220]

> (a) must further consider whether the consumer is over-indebted at the time of those proceedings; and
> (b) if the court concludes that the consumer is over-indebted, the court may[221] 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.

Section 83(4) provides as follows:

> Before making an order in terms of subsection (3), the court must consider—
> (a) the consumer's current means and ability to pay the consumer's current financial obligations that existed at the time the agreement was made; and
> (b) the expected date when any such obligations under a credit agreement will be fully satisfied, assuming the consumer makes all the required payments in accordance with any proposed order.

Accordingly, before a court or the Tribunal are empowered to make the section 83(3)(b) orders, it must first be ascertained in terms of section 83(3)(a) whether or not the consumer is still over-indebted at the time of the proceedings. Coetzee states that, with regards to form three reckless credit, both times of the consumer's over-indebtedness are

[219] Boraine and Van Heerden (2010) *THRHR* 651.
[220] S 83(3)(a) and (b)(i) and (ii). See also Van Heerden in Scholtz *ed* (2015) par 11.5.7.2.
[221] In terms of s 130(4)(a) these orders must be made upon a finding of reckless credit.

therefore relevant, over-indebtedness at the time the agreement was entered into and at the time the determination of reckless credit is made.[222]

The court or the Tribunal must also in terms of section 83(4) consider the consumer's financial ability at the time of the proceedings to pay the consumer's financial obligations as they are at the time of the said proceedings.[223] Only obligations that already existed at the time of conclusion of the agreement under investigation are considered.[224] According to Renke "this makes sense because only those obligations had to be considered by the credit provider in order to avoid the third instance of reckless lending resulting in over-indebtedness".[225]

As was the case with reckless form one and two, the courts or the Tribunal have/has two possible orders available to them, namely suspension or restructuring. However, in this case due to the use of the word "and" in section 83(3)(b) the courts or the Tribunal will make both the orders. It also needs to be noted that in terms of section 83(3)(b)(i) the particular reckless credit agreement must be suspended. This is indicated by the words "suspending the force and effect of that credit agreement".[226] However, as far as the restructuring is concerned, section 83(3)(b)(ii) clearly provides that the consumer's other credit agreements and not the reckless agreement, should be restructured.[227] It makes sense for the Act to only address the particular reckless credit agreement that caused the consumer's over-indebtedness through suspension as the suspension of other credit agreements would surely be unreasonable and unfair to other credit providers who have not caused such over-indebtedness.[228]

Coetzee submits that an order setting aside the consumer's obligations is not competent when only the third form of reckless credit is pertinent.[229] However, she submits that

[222] Coetzee LLD Thesis (2015) par 5.5.
[223] Renke LLD Thesis (2012) par 8 3 2 5 5.
[224] Renke LLD Thesis (2012) par 8 3 2 5 5.
[225] Renke LLD Thesis (2012) par 8 3 2 5 5.
[226] Renke LLD Thesis (2012) par 8 3 2 2 5.
[227] See Boraine and Van Heerden (2010) *THRHR* 656.
[228] Renke LLD Thesis (2012) par 8 3 3 5 5.
[229] Coetzee LLD Thesis (2015) par 5.5.

more than one form of reckless credit extension may exist in respect of a particular set of facts and that a setting aside order could therefore be a possibility where a consumer is found to be over-indebted as a result of reckless credit granting.[230]

Once the consumer's other credit agreements have been restructured by a court or the Tribunal in accordance with section 83(3)(b)(ii), the effect of debt re-arrangement in accordance with section 88 applies.[231] This means that the consumer may not incur any further charges under a credit facility or enter into any further credit agreement other than a consolidation agreement and that the credit provider may not exercise or enforce by litigation or other judicial process any right or security under that agreement.[232] Renke submits that the mentioned prohibitions against the incurrence of further charges and entering into new credit agreements should also be effective in the case of reckless lending, and especially in cases where reckless credit grating rendered the consumer over-indebted, in spite of the fact that section 88(1) contains no reference to restructurings under section 83(3)(b).[233]

4 4 Final Evaluations in respect of the Section 83 Powers and Conclusion

The courts or the Tribunal can set aside the whole agreement or only part of it as the court or the Tribunal determines just in the circumstances. The National Credit Act does not provide criteria that a court or the Tribunal can apply in this regard. The same holds for the power to set aside or to suspend the credit agreement *in toto* or partially when it deems it just and reasonable to do so.[234] In *De Beer* the court stated that the remedy must be "just and reasonable", in exercising its discretion in terms of section 83(2)(a) to set aside the agreement.[235] The court considered certain factors that weighed in favour of

[230] Coetzee LLD Thesis (2015) par 5.5. Coetzee further submits that a credit provider, in addition to the adverse consequences as provided for in section 84 in respect to suspension, will also suffer the embarrassment that other credit providers will be treated preferentially when a restructuring of the consumer's obligations is ordered.
[231] Van Heerden in Scholtz *ed* (2015) par 11.5.7.2.
[232] Van Heerden in Scholtz *ed* (2015) par 11.5.7.2.
[233] Renke LLD Thesis (2012) par 8 3 2 5 5.
[234] Van Heerden in Scholtz *ed* (2015) par 11.5.7.1.
[235] *De Beer* par 64.

setting aside the agreement, namely, the extent of the recklessness, the elderly age of the consumers and the fact that the property to be declared executable was the primary home of the consumers.[236] The court then declared the agreement as reckless and set aside the agreement.[237]

Boraine and Van Heerden submit that the treatment of reckless credit would have been clearer and more satisfactory if the legislature had rather allowed a court the discretion in the case of any form of reckless credit to either suspend the operation of such an agreement, or to void such an agreement.[238] The last mentioned option could be linked to a statutory restoration and/or forfeiture clause depending on the form of reckless credit involved. They conclude that this would at least have saved the parties from entering into subsequent litigation to deal with restoration.[239]

There was further criticism on the effectiveness of the section 83 powers. Boraine and Van Heerden argue that from a debt relief point of view the permitted orders would not necessarily offer a lasting solution to the consumer's over-indebtedness.[240] The authors believe that the reason for such a conclusion is that even if a court (or the Tribunal) finds a credit agreement to be reckless and orders that the consumer's rights and obligations be set aside in full or in part, the credit provider may in terms of the common law claim restoration. The reason is because the National Credit Act does not state that a reckless credit agreement is illegal and therefore null and void and restoration is not prohibited in terms of the Act. Also considering that even if the court declares the agreement reckless and then suspends the force and effect of such agreement, it will bring some relief to the consumer in terms of the repayment obligation. The dilemma is that once the suspended period comes to an end, the particular consumer will again become liable to repay the money owed to the credit provider.

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[236] *De Beer* par 65.
[237] *De Beer* par 66.
[238] Boraine and Van Heerden (2010) *THRHR* 656.
[239] Boraine and Van Heerden (2010) *THRHR* 656.
[240] Boraine and Van Heerden (2010) *PELJ* 14.

Although the new reckless credit provisions now forming part of the South African consumer credit legislation need to be welcomed due to their prevention aims on reckless lending and over-indebtedness, an important shortcoming of the new provisions are the lack of guidelines and therefore clarity to the courts or to the Tribunal in respect of the exercising of its section 83 powers. Be that as it may, the Act grants the court or the Tribunal with judicial discretion which means that the particular institution must be supplied with sufficient facts to consider when making an order before exercising such discretion. This remains important.

To conclude, in this chapter the forms of reckless lending introduced in terms of the National Credit Act were discussed.[241]This was followed by a discussion of the question how an instance of reckless credit comes to serve before a court or the Tribunal and the powers of the courts or the Tribunal in relation to such cases.[242] Finally, in paragraph 4 4, a few final evaluations in respect of the section 83 powers were made.

[241] Par 4 2.
[242] Par 4 3.

CHAPTER 5

FINAL CONCLUSIONS AND RECOMMENDATIONS

5 1 General

The purpose of this dissertation was to investigate and critically evaluate the measures under the National Credit Act aimed at the prevention of reckless credit lending, namely the compulsory credit assessment that has to be conducted by the credit provider,[243] the forms of reckless credit granting recognised by the legislature and the orders that may be granted by the courts or the Tribunal in the case of reckless credit lending to alleviate the consequences of the latter. The aforementioned discussion was preceded by a discussion of policy considerations underlying the reckless lending provisions.[244] The main objective was to make final conclusions and recommendations in respect of the National Credit Act's reckless lending provisions.

5 2 Conclusions and Recommendations

The rationales for the promulgation of the National Credit Act and its reckless lending provisions emanate from the historical challenges concerning the implementation of the Act's preceding credit laws, such as the Usury Act and Credit Agreements Act.[245] One of the outstanding problems was the failure by the preceding legislation to impose an obligation on credit providers to conduct a compulsory credit assessment before extending new or additional credit to consumers.[246] As a result of these challenges, the legislature focused on new policy objectives to encourage responsible borrowing and to discourage reckless credit lending.[247] This in turn, for the first time in the history of South

[243] The credit provider's complete defence in the case of an allegation of reckless credit lending by the consumer, which is related to the
[244] Ch 2.
[245] Par 2 2.
[246] Par 2 4.
[247] Par 2 2.

African consumer credit legislation, gave rise to a set of provisions which are directly aimed at the combatting of reckless lending and over-indebtedness.[248] This is to be welcomed, because it is common knowledge that South African consumers are experiencing high levels of indebtedness. The policy considerations and eventual enactment of provisions in the NCA in respect to consumer education, the disclosure of pre-agreement information and the enforcement functions of the National Credit Regulator and the Tribunal are elements related to reckless credit lending[249] and is therefore also a positive development. The disclosure of information on potential credit and consumer education are considered as critical factors that enable a consumer to make informed decisions and thereby mitigate against reckless credit lending.[250] The establishment of the National Credit Regulator and the Tribunal serves as an important instrument in ensuring compliance with the provisions for the prevention of reckless credit lending under one consolidated and uniform piece of consumer credit legislation, the National Credit Act.[251]

One of the most important sections of the National Credit Act is section 81(2), which imposes an obligation on a credit provider to conduct a compulsory assessment before granting new credit or additional credit to a consumer.[252] The National Credit Act's introduction of the compulsory assessment obligation for credit providers to assess prospective credit consumer's ability to repay the credit has been positively welcomed, as a first of its kind in South African law.[253] The positive impact that this compulsory assessment has on the prevention of reckless credit lending cannot be overstated and needs to be singled out.[254] The compulsory section 81 t assessment as introduced by the NCA is considered as pivotal in preventing credit being granted recklessly.[255] It is important to note that the compulsory assessment requires that a credit provider not only does an affordability assessment of the consumer, but also assess the consumer's debt

[248] These measures were discussed in chs 3 and 4.
[249] See par 2 3.
[250] Pars 2 3 1 and 2 3 2.
[251] Par 2 3 3.
[252] Par 3 2 2.
[253] See par 3 2 2 above.
[254] Par 3 2 2.
[255] Par 3 2 2.

history and test the consumer's general understanding of the risks, cost and obligations of the credit agreement.[256] In addition to the abovementioned duty, the credit provider has to take reasonable steps to explain the risks, costs, rights and obligations of a consumer to ensure that the consumer indeed understands and appreciates the relevant information disclosed.[257]

Regulation 23A, the affordability assessment regulations and the new definitions to give effect to it, created a compulsory evaluative mechanism for affordability assessment. The criteria to conduct the affordability assessment are accordingly provided which as a result reduces the discretion that credit providers previously had to conduct their own form of an affordability assessment.[258] Renke correctly submits that due to the aforementioned credit providers will no longer have *carta blanche* when conducting the affordability assessment and the regulation amendments therefore provide consistency amongst credit providers.[259]

The provisions of reckless credit lending are vulnerable to abuse by consumers and there was thus a need for the balancing of interests and rights of consumers and credit providers in order to promote access to finance whilst preventing reckless credit lending.[260] The introduction of the credit provider's complete defence constitutes such a balancing mechanism.[261] The defence also ensures or at least attempts to ensure that a consumer provides a credit provider with full and truthful information, which of course is important for the conducting of more accurate section 81(2) credit assessments. The likelihood of the consumer failing to service the credit is accordingly limited.

The compulsory credit assessment in terms of section 81(2) that a credit provider has to conduct prior to granting credit to a consumer is directly linked to the three forms of

[256] Par 3 2 2.
[257] Par 3 2 2.
[258] Par 3 2 3.
[259] Par 3 2 3.
[260] Par 3 3.
[261] Par 3 3.

reckless credit recognised in terms of section 80 of the NCA[262] This, together with the fact that reckless lending has serious consequences for the credit provider, serves a dual purpose.[263] It acts as a deterrent factor against reckless credit lending and alleviates the situation of a consumer, should reckless lending have occurred.

The main point of criticism to be directed against the reckless provisions in the NCA is the lack of guidance on how or when the courts or the Tribunal should exercise the powers granted in terms of section 83(2) and (3).[264] A clear indication of the consequences of these powers, such as whether or not restitution must occur, is also lacking. This impacts negatively on the effectiveness of the reckless lending provisions. It is important to single out the fact that the recent Amendment Act has failed to address the aforementioned shortcomings in the NCA which according to me is a pity. A valuable opportunity to address these issues went astray and they therefore still need to be resolved by the legislature to ensure the optimal efficiency and implementation of the National Credit Act.

However, it is also important to recognise the achievements of the National Credit Act in respect of the debt prevention measures with the aim to prevent reckless credit lending and reduce over-indebtedness. There is a critical need for the balancing of the interests and rights of consumers and credit providers in order to promote access to finance whilst preventing reckless credit lending and I am of the view that the current reckless lending provisions went a long way to achieve that balance. The achievements of the Act far outweigh the negative criticism. But, as has been mentioned above, one aspect that will have to receive attention by the legislature are the powers of the courts or the Tribunal in respect of reckless lending. Perhaps a solution could be to insert reckless lending in section 89(2), unlawful credit agreements, with the result that a court (or the Tribunal) will then have to declare the reckless credit agreement void.[265] This should act as sufficient deterrent to prevent reckless credit granting in South Africa.

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[262] Par 4 1.
[263] Par 4 3.
[264] Pars 4 3 and 4 4.
[265] In terms of s 89(5) NCA.

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