RECKLESS CREDIT IN TERMS OF THE NATIONAL CREDIT ACT 34 OF 2005

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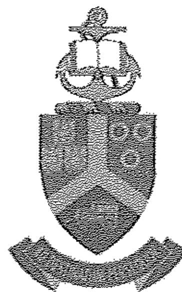

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CHAPTER 1: GENERAL INTRODUCTION

1 1 Introduction

Some of the main problems experienced with the South African credit law framework prior to the National Credit Act 34 of 2005[1] was that it was dated, ineffective and characterised by the over-supply of credit to those members of society who were deemed to be creditworthy, while, by contrast, the majority of the population had no access to reasonably priced credit as a result whereof many consumers were faced with heavy debt burdens.[2]

In order to address the aforementioned and other problems the National Credit Act was promulgated, which enactment now is the piece of consumer credit legislation currently applicable in South Africa. The Act became partly effective on 1 June 2006,[3] effectively replacing its predecessors, namely the Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968. One of the aims of this piece of legislation was to address the weaknesses of its predecessors by endeavouring to prevent the granting of reckless credit to consumers and, in doing so, protecting consumers from credit which may be, or may become, unmanageable.[4] Section 3 therefore provides that one of the aims of the NCA is to protect consumers. This is in turn *inter alia* achieved by discouraging reckless credit granting by credit providers[5] and the prevention of over-indebtedness of consumers.[6]

Reckless lending is a relatively new concept in the South African legal system. The regulation thereof has had the effect of forcing credit providers to act consciously to avoid the granting of reckless credit and in turn to avoid the subsequent consequences which follow. The introduction of the NCA has also brought about the

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[1] Hereinafter the "National Credit Act", the "NCA" or the "Act".

[2] Scholtz *et al The Guide to the National Credit Act 34 of 2005* (2008) par 11.5.1.

[3] The remainder of the NCA became effective on 1 Sep 2006 and 1 Jun 2007. See Proc 22 in *GG*-28824 of 11 May 2006.

[4] Mould "Tacit responsibilities assigned to the drafter of a credit agreement by the National Credit Act 34 of 2005 with particular emphasis on contractual consensus: A critical analysis" 2008 *Journal for Juridical Science* 109.

[5] S 3(c)(ii).

[6] S 3(g).

recognition of the concept "over-indebtedness" into the South African credit market.[7] It is important to note that reckless credit lending to a large extent works in tandem with that of over-indebtedness.[8]

1 2 Research statement, research objectives and chapters

The aim of this dissertation is to investigate and evaluate the measures in terms of the National Credit Act aimed at promoting responsibility in the credit market by discouraging reckless credit granting by credit providers and contractual default by consumers. In order to achieve this I will address the core aspects of the reckless credit provisions in the Act, namely the credit provider's compulsory assessment and assessment mechanisms, along with the credit provider's absolute defence in the case of an allegation of reckless lending by the consumer,[9] a brief distinction between "over-indebtedness" in the general sense and "over-indebtedness" linked to reckless credit,[10] the forms of reckless credit[11] and the powers of the South African courts or the National Consumer Tribunal[12] when dealing with instances of reckless credit granting.[13] Finally, in the last chapter[14] I will conclude and make recommendations, where applicable.

1 3 Delineation and limitations

It will be seen below that the concept of over-indebtedness is relevant to one of the forms of reckless credit lending recognised in terms of the NCA. However, the concept has a general meaning, which is not linked to and caused by reckless credit lending. The scope of this dissertation will be limited to the over-indebtedness of consumers in relation to reckless credit lending. And also, regulation 23A, the so-

[7] "Over-indebtedness" is defined in s 79. For a further discussion see par 3 2 below.
[8] Vessio "Beware the provider of reckless credit" 2009 *TSAR* 274. See further Van Heerden and Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" 2011 *De Jure* 393.
[9] Ch 2.
[10] See par below.
[11] Ch 3.
[12] Hereinafter the "Tribunal". The Tribunal has been established in terms of s 26 of the Act.
[13] Ch 4 below.
[14] Ch 5.

called affordability assessment regulations, will only be dealt with briefly in this dissertation.[15]

1 4 Terminology

Section 1 of the National Credit Act defines "credit provider" as the party who *inter alia* supplies goods or services or advances money or credit to another under a variety of credit agreements.[16] "Consumer" is defined in section 1 *inter alia* as the party to whom goods or services are sold, to whom money is paid or credit is granted.

1 5 Reference techniques

(a) For the sake of convenience the masculine form is used throughout this dissertation to refer to a natural person.

(b) The law as stated in this dissertation reflects the position as on 1 May 2017.

[15] See par 2 3 1 below.

[16] See in respect to the credit agreements that are subject to the Act s 8 read with s 1.

CHAPTER 2: THE CREDIT PROVIDER'S COMPULSORY CREDIT ASSESSMENT, ASSESSMENT MECHANISMS AND COMPLETE DEFENCE

2 1 Introduction

The National Credit Act prohibits the granting of reckless credit.[17] In order to prevent credit from being granted recklessly, the NCA imposes a compulsory obligation on credit providers to conduct pre-agreement assessments prior to the extension of credit. In essence, the purpose of the assessment is to establish whether the prospective consumer understands the proposed credit agreement and whether the consumer can afford to repay the proposed credit on the terms and conditions as set out in the proposed agreement. The credit provider's obligation in this regard is to conduct a pre-agreement assessment as envisaged by section 81 of the NCA prior to the entering into of a credit agreement with the natural person consumer. The question whether credit was granted recklessly is accordingly answered with reference to whether a pre-agreement assessment was conducted and, if so, whether the outcome of the assessment was heeded at the time that the credit agreement was concluded.[18]

The aim of this chapter is to discuss the credit provider's compulsory assessment in terms of the NCA, the assessment mechanisms of the credit provider and the credit provider's complete defence in the case of an allegation by the consumer that credit was granted recklessly.

2 2 The section 81 National Credit Act credit assessment

2 2 1 General

Section 81 of the NCA falls within Chapter 4 Part D of the Act[19] and is entitled "Prevention of reckless credit". Renke submits this to be one of the most important

[17] S 81(3).
[18] Scholtz *et al* (2008) par 11.5.2.
[19] Ch 4 Part D and therefore the reckless credit provisions have limited application. These provisions never apply where the consumer is a juristic person, as defined in s 1 of the NCA. See s 78(1). They also do not apply in the case of a school or student loan, an emergency loan, a public interest credit agreement, a pawn

sections in the NCA, with the aim of preventing reckless credit granting by credit providers.[20]

Section 81(2), specifically dealing with the credit provider's compulsory assessment, provides as follows:

> *A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-*
>
> *(a) the proposed consumer's-*
>
> *(i) general understanding and appreciation of the risks and costs of the proposed credit, and the rights and obligations of a consumer under a credit agreement;*
>
> *(ii) debt re-payment history as a consumer under credit agreement;*
>
> *(iii) existing financial means, prospects and obligations; and*
>
> *(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that agreement.*

Therefore, in terms of section 81(2) credit providers, before entering into a proposed credit agreement with a consumer, bear a statutory duty to first take reasonable steps to assess the consumer's understanding and appreciation of the risks and costs and of the consumer's obligations under the proposed agreement, as well as of the consumer's financial capabilities to afford the credit.[21] The assessment thus has a dual purpose and is more comprehensive than a straight forward affordability assessment.

Section 81(2) makes it clear that the credit provider must not enter into a credit agreement before doing the assessment. The assessment is therefore compulsory as section 81(2) imposes an obligation on the credit provider to refrain from extending credit if the assessment has not been done first. As will be seen later,[22]

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transaction, an incidental credit agreement or a temporary increase in the credit limit of a credit facility. See s 78(2). All these types of credit agreements, with the exception of the credit facility which is defined in s 8(3), are defined in s 1 of the Act. They are discussed in Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005,* thesis submitted for the degree of Doctor Legum, University of Pretoria (2012) (hereinafter Renke (2012) Thesis) par 8 3 2 2.

[20] Renke (2012) Thesis 429 and 430.

[21] Renke (2012) Thesis 429 and 430.

[22] Ch 3 below.

failure to do the required assessment constitutes one of the forms of reckless lending recognised in terms of the NCA. The same holds for the instance where the consumer does not understand or appreciate the proposed credit agreement, or cannot afford the credit.[23]

The peremptory nature of section 81(2) was discussed in the unreported case of *ABSA Bank Ltd v Kganakga*.[24] It was reiterated that credit providers are bound by the requirements of section 81(2) and that this is reinforced by section 81(3) which provides that a credit provider must not enter into a reckless credit agreement with a prospective consumer.[25]

The requirement in section 81(2) that a credit provider must take reasonable steps to assess was described by Louw J in the judgment of *ABSA Bank Ltd v De Beer & Others*[26] as an assessment which is done reasonably and not irrationally.[27] In *De Beer* the defendants alleged that no pre-agreement assessment was conducted by the plaintiff. The plaintiff proceeded to refute the allegation. However, the issue the plaintiff had was that it was unable to produce the required documentation as they had been destroyed in a fire at its storage warehouse. The court thus held that the credit provider could not prove that it had in fact conducted the required assessment. From this it is clear that, in instances where a credit provider alleges that a credit assessment was in fact conducted, it bears the onus of proving it to the court.[28] However, where a consumer alleges that the credit provider has not complied with the provisions of section 81, the consumer has to produce evidence to that effect.[29]In *Standard Bank of South Africa v Herselman*[30] the consumer did not succeed with the defence of reckless lending. Based on the evidence before it the court said that "[w]hen one adds to this list of favourable factors the absence of any gainsaying evidence from the defendant that she understands the risk she was taking in signing as a guarantor for her husband's debt with the bank, only one conclusion is possible and that is, that having objectively and fairly assessed the defendant to be a person

[23] See Chapter 3 below.
[24] 2016 JDR 0664 (GJ), hereinafter *Kganakga*.
[25] See the discussion by Harmse "Reckless credit – both sides of the story" Dec 2016 *De Rebus* 24.
[26] 2016 (3) SA 432 (GP) at par 54, hereinafter *De Beer*.
[27] See also Harmse Dec 2016 *De Rebus* 24.
[28] See also Scholtz *et al* (2008) par 11.5.3.
[29] *Benade v Absa Bank Ltd* [2014] ZAWCHC 84 (16 May 2014).
[30] [2016] ZAFSHC 39 (3 March 2016), hereinafter *Herselman*.

of sound credit worthiness and capable of honouring her husband's indebtedness to the plaintiff, if called upon to do so, the Bank awarded the credit after obtaining the Deed of Suretyship from the defendant".

Finally, where a consumer makes an application to enter into a specific credit agreement with a specific credit provider, the consumer may not during the time that that credit provider is considering the application, enter into or apply for any further credit agreements with other credit providers, without disclosing the details thereof to the former credit provider, enabling it to include such information in the section 81 assessment.[31]

2 2 2 The aspects that need to be assessed in terms of section 81(2)

2 2 2 1 The consumer's understanding and appreciation of the credit agreement

As far as the first part of the credit provider's dual assessment is concerned, the consumer's understanding and appreciation of the risks, costs and his rights and obligations. Vessio states that rather than assess, it is suggested that the credit provider is better advised to simply inform the consumer of these risks, costs, rights and obligations. However, the credit provider must take further steps to assess the consumer's debt repayment history as a consumer under credit agreements, as well as the consumer's existing financial means, prospects and obligations and, when applicable, whether there is a reasonable basis to conclude that the commercial venture for which the consumer is making the application will succeed. These aspects will be addressed below.[32]

The credit provider's obligation in terms of section 81(2) of the NCA was further discussed at length by Satchwell J in *Kganakga*. In accordance with the aforementioned case the criteria or issues which the assessment must address in respect to the consumer's understanding and appreciation of the credit agreement are as follows:

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[31] Boraine and Van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" 2010 *THRHR* 397.

[32] Pars 2 2 2 2 and 2 2 2 3.

a) The consumer's state of mind as it relates to his understanding of the risks and costs of the proposed credit and the consumers rights and obligation in terms of the credit agreement between himself and the credit provider.
b) The consumer's previous experience and behaviour as a consumer under a credit agreement.

The court in *Kganakga* made materially relevant statements regarding the assessment of the consumer's understanding of the risks relating to the proposed credit. In this matter the crux of the defendant's plea was that the plaintiff was obliged in terms of section 81(2)(a) to take reasonable steps to ensure that the defendant has a general understanding of the risk involved in the credit transaction, but that it failed to take such steps to ensure that the defendant understood the risk, being the substantial difference between the value of the property bought (approximately R420 000) and mortgaged under a mortgage (approximately R720 000).

The court made reference to section 81(2)(a) and indicated that insofar as the consumer is concerned, the credit provider's assessment must cover three issues. It stated that it did not propose to set out any *numerus clausus* of examples of how those issues are to be covered but will merely, by illustration of some, assist in determining whether or not the plaintiff *in casu*, met the requirements of section 81(2)(a).[33]

First the court addressed the aspect of the consumer's state of mind as it relates to the consumer's understanding and appreciation of the risks and costs of the proposed credit and his rights and obligations under a credit agreement. It stated that the understanding of the consumer pertains only to risks and costs of the credit which is sought, and not to the risks of "that which is to be acquired with the credit or for which the credit will be utilised". It indicated that the credit provider must take reasonable steps to assess that the proposed consumer understands and appreciates what is meant by credit, by loan, what it means to pay instalments, what the penalties are for failure to make payment of an instalment, what is the concept of

[33] *Kganakga* at par 24. See also Scholtz *et al* (2008) par 11.5.3.

interest, that it may be calculated on the full amount of credit which remains and how it is calculated and at what rate.[34]

The credit provider should ensure that the proposed consumer understands that there are risks associated with the failure to pay interest or capital or an instalment, whether at all or timeously. The credit provider should also see to it that the proposed consumer understands that the written document holds primacy over any spoken discussions. It should ensure that the proposed consumer understands that payment of an amount which is less than the agreed monthly instalment will mean that both capital and interest are not paid and that the total amount owed may increase notwithstanding that the smaller payments have been made. The court stated further that the consumer should know what he has to do and what the credit provider has to do each month and throughout the duration of the credit agreement. Where the loan is secured by any security, the credit provider must see to it that the prospective consumer understands what is meant by and how such security is used in relation to the credit, what purpose is achieved thereby and that immovable property may be at risk if the instalments are not paid.[35]

Scholtz sets out that prior to 13 September 2015, section 81(2) served as a basic provision of the National Credit Act against which a credit provider's compliance with the pre-agreement assessment obligation had to be tested. However, after 13 September 2015, a credit provider's compliance with the pre-agreement assessment obligation has to be determined with reference to section 81(2) read with the Affordability Assessment Regulations.[36] This will be explained below.[37]

2 2 2 2 The affordability or financial assessment

The next leg of the assessment to be conducted by the credit provider is a review of the debt repayment history of the prospective consumer as well as of the consumer's

[34] *Kganakga* at par 25. See also Scholtz *et al* (2008) par 11.5.3.
[35] Scholtz *et al* (2008) par 11.5.3. See also *Kganakga* at par 72. The rest of the criterion will be dealt with in par 2 2 2 2 below with regard to the affordability assessment.
[36] Scholtz *et al* (2008) par 11.5.3.
[37] Par 2 3 1.

financial means, prospects and obligations.[38] This assessment amounts to the affordability or financial assessment of the consumer.

In the matter of *The National Credit Regulator v Hirst*[39] the Tribunal held in retort to the allegation that the credit provider had contravened section 81(2) of the Act that the onus on a credit provider to take reasonable steps to assess a consumer's financial means, prospects and obligations or to obtain relevant information or proof relating to the debt repayment history of the consumer, or to conduct credit bureau checks to determine the debt repayment history of consumers or to ask the consumer to list his expenses is peremptory and that the relevant credit agreements, where aforementioned had not been done, would amount to reckless credit granting.[40]

In *Kganakga* the court dealt with the second and third legs of the credit assessment to be conducted by the credit provider in terms of section 81(2)(a), namely an assessment of the proposed consumer's debt repayment history as a consumer under credit agreements and of the proposed consumer's existing financial means, prospects and obligations. In respect to the second leg of the assessment, the consumer's previous experience and behaviour as a consumer under credit agreements should be taken cognisance of. The court held that the credit provider must request that the consumer disclose his own credit history as far as he has previously utilised credit and the manner in which that was handled. There should also be disclosure of any civil judgments taken against the consumer.[41]

As part of the third leg of the assessment, the finances of the proposed consumer at the time of the application for credit needs to be disclosed to ensure that he can

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[38] The phrase "financial means, prospects and obligations" is explained by the legislature in s 78(3). It *inter alia* includes income, or any right to receive income, but excludes income that the prospective consumer receives, has a right to receive or holds in trust for another person. It also includes the financial means, prospects and obligations of another adult person within the consumer's immediate family of household, to the extent that the consumer and that other person share their respective financial means and mutually bear their respective financial obligations. The phrase finally includes the reasonable estimated revenue flow from the business purpose, where the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement. See also *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (W) at 366E-F where it was decided that "financial means" include assets and liabilities and "prospects" any prospects that the consumer's financial situation would improve, with the inclusion of aspects such as increases and the liquidation of assets.

[39] (2015) ZANCT 18 (29 Oct 2015).

[40] See ch 3 below for a discussion of the forms of reckless lending. See also Scholtz *et al* (2008) par 11.5.3.

[41] *Kganakga* at par 26. See also Scholtz *et al* (2008) par 11.5.3.

afford to pay the instalments in terms of the credit agreement. The future prospects of the proposed consumer should be taken into account as well as other expenses and obligations that must be met before any credit instalments can be paid.[42]

The court in this regard therefore provided a greater description of the obligations of the credit provider in conducting its assessment. It further entrenched the credit provider's responsibilities to take reasonable steps in conducting its assessment.[43]

A further aspect relating to the pre-agreement assessment concerns the question whether the ability of a surety to repay the credit in the event that the principal debtor is unable to do so should be assessed at the time that a suretyship (or then credit guarantee) is concluded. It has thus been submitted that the credit provider, in instances where a surety is involved, should also at the time of entering into the credit agreement assess the ability of the surety to afford to repay the credit in the event that the principal debtor is unable to do so. The motivation is that section 81(2) requires that a credit provider do a pre-agreement assessment in respect of a "consumer" prior to entering into a proposed credit agreement. The definition of consumer in this regard includes the guarantor under a credit guarantee and the definition of credit agreement includes a credit guarantee.[44] Section 80 of the Act goes on to deal with reckless credit which also refers to calculating the value of a credit guarantee for purposes of determining whether credit was granted recklessly.[45] Further, common sense dictates that a suretyship agreement should only be entered into with a surety that is able to repay the credit should the principal debtor be unable to do so as the suretyship, which is meant to serve as security for the repayment of the debt in such an instance, would otherwise serve no purpose. It is further set out that a credit provider may not combine the surety's income with that of the consumer who is the principal debtor to conclude that the consumer can afford the proposed credit.[46]

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[42] *Kganakga* at par 27. See also Scholtz *et al* (2008) par 11.5.3.
[43] Scholtz *et al* (2008) par 11.5.3.
[44] Scholtz *et al* (2008) par 11.5.3. See also *Herselman* 39, where the court held that the plaintiff was obliged to conduct an affordability assessment of the defendant to establish her ability to honour the suretyship at issue in this matter.
[45] See s 80(3)(a)-(c).
[46] Scholtz *et al* (2008) par 11.5.3.

2 2 2 3 Assessment of a commercial purpose

Section 81(2)(b) requires the credit provider to first assess whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit. The commercial purpose in this regard must relate directly to the application for credit and, according to *Kganakga*,[47] the commercial purpose must not pertain to any other underlying agreement with other persons.[48] In *Kganakga* it was further pleaded that the plaintiff ought to have known that the defendant was purchasing the property purely for commercial purposes but failed to enquire, in terms of section 81(2)(b), whether the defendant understood the risk in the credit transaction and to advise him whether or not the credit transaction would achieve a successful commercial purpose.[49] Therefore section 81(2)(b) of the Act requires a credit provider to assess the future financial prospects of a business where the consumer intends on utilising the loan to purchase a business or to enter into the commercial transaction.

In *Wiese* the central issue before the appeal court was whether the National Credit Act permitted a credit provider to have regard to the projected income of a separate commercial entity when assessing a consumer's ability to afford to repay a personal loan, in circumstances where the loan to be advanced to the customer is for the specific purpose of purchasing that commercial entity. The court in *Wiese* was faced with the issue as to whether a *bona fide* defence existed to the bank's claim. The defence raised by the appellants was that of reckless credit as more fully provided for in Part D of Chapter 4 of the NCA.[50] Wiese claimed that the bank granted the reckless credit by approving a fourth and fifth loan in circumstances where it had failed to conduct the required assessment as per section 81(2). He held further that it was common knowledge to the bank that the repayments were more than double the combined monthly instalments of both appellants, which income was derived from their fixed employment.[51]

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[47] Par 31.

[48] Harmse Dec 2016 *De Rebus* 24. See further Scholtz *et al* (2008) par 11.5.3 and *Wiese and Another v Absa Bank Ltd* 2017 JDR 0342 (WCC), hereinafter *Wiese*.

[49] Scholtz *et al* (2008) par 11.5.3.

[50] See ch 3 below.

[51] 2017 JDR 0342 (WCC) at par 22-23.

The respondent replied that the application for credit by the appellants was for the purchase of a business as a going concern. The respondent further alleged that part of the credit assessment conducted was with regard to the ability of the business to repay the loans.[52]Accordingly the respondent's assessment in terms of section 81(2)(b) confirmed that the cash flow projection of the business confirmed its ability to service the loan repayments when they fell due.[53]

Wiese thus confirmed that it is incumbent on a credit provider, when making its section 81(2) assessment, to have regard to the reasonably estimated future revenue flow of the business that the consumer intends on purchasing by means of the credit applied for.[54]

Where a consumer therefore applies for credit with the intention of entering into a commercial transaction, the purpose of the section 81(2)(b) assessment provision is to ensure that credit providers assess that the income obtained from the business will be capable of meeting the consumer's monthly repayments. This has the effect of preventing consumers from borrowing recklessly and entering into commercial ventures doomed to fail.

2 3 The credit provider's section 82 NCA assessment mechanisms and procedures

2 3 1 The position prior to the National Credit Amendment Act 19 of 2014

Prior to the National Credit Amendment Act 19 of 2014[55] credit providers could determine and adopt their own assessment mechanisms and procedures, provided

[52] *Wiese* at par 32.
[53] *Wiese* at par 34. In *Wiese* at par 46 this point became important as the appellants, after hearing the respondents version, changed track and claimed that the assessment was not detailed enough and that the loans that were granted were personal rather business in nature. The court in *Wiese* at par 47 held that the appellants at this point must have realised that they had painted themselves into a corner as they had not mentioned anywhere in their founding affidavit that an employee of the respondent had in fact been provided with a cash flow projection for the business. The court held that the fact that he was purchasing a going concern would self-evidently have made the production of a cash flow projection not only possible but something which the bank would no doubt have wished to consider. The court found the non-disclosure of the appellant of this fact was material and that the appellant would not have considered purchasing the business himself if he was not confident in its success.
[54] *Wiese* at par 53.
[55] Hereinafter the NCA Amendment Act, which became effective on 13 March 2015.

that such mechanisms and procedures resulted in a fair and objective assessment.[56] Furthermore, the National Credit Regulator[57] could publish guidelines proposing evaluative mechanisms, models and procedures to be used when making a section 81 credit assessment.[58] The NCR could also, in respect to developmental credit agreements,[59] pre-approve the evaluative mechanisms, models and procedures to be used by the credit provider in developing assessment criteria and the conducting of the relevant assessment.[60] To summarise, before the NCA Amendment Act the only requirement was that the assessment models, mechanisms or procedures had to result in a fair and objective assessment.

In order to ensure that credit providers use evaluative mechanisms, procedures or models that will result in a fair and objective assessment, credit providers should be fully advised as to what questions they should be posing to their potential clients. In addition, the forms that their potential clients have to complete should be comprehensive in scope.[61] Vessio further holds that this places an onus on legal practitioners to correctly advise their credit provider clients and ensure that the credit provider is carrying out proper risk analysis on the prospective client. Failure in this regard could lead to a situation whereby a credit provider who is trying to enforce the credit agreement, could be found by the court or the Tribunal to have lent recklessly.[62]

2 3 2 The position after the NCA Amendment Act

Section 82(1) of the National Credit Act was amended in terms of section 24(a) of the NCA Amendment Act. The amended section 82(1) still empowers a credit provider to determine its own evaluative mechanisms or models and procedures

[56] S 82(1). Vessio 2009 *TSAR* 280 at fn 45 submits that the terms as set out in this section are to a large extent vague terms and as such a court will have to pronounce thereon and thus determine what "fair and objective" procedures entail.
[57] Hereinafter referred to as the "NCR". The NCR was established in terms of s 12 of the NCA and is *inter alia* responsible to enforce the National Credit Act. See s 15.
[58] S 82(2)(a), before its amendment in terms of s 24(a) of the NCA Amendment Act.
[59] See s 1 for the definition of this type of credit agreement.
[60] S 82(2)(b), before its amendment in terms of the NCA Amendment Act. See also Vessio 2009 *TSAR* 279-280.
[61] Vessio 2009 *TSAR* 279. See further Otto and Otto *The National Credit Act 34 of 2005 Explained* (2015) par 34.2. and Renke (2012) Thesis 433.
[62] Vessio 2009 *TSAR* 279 fn 38.

when having to conduct the section 81(2) compulsory credit assessment. However, the proviso is now that such mechanism or model and procedure must not only result in a fair and objective assessment, but must also be consistent with the affordability assessment regulations made by the Minister.[63] As a result, section 82(2), as amended, empowered the Minister, on recommendations by the NCR, to make affordability assessment regulations. As a further result and in order to give effect to the aforementioned sections, regulation 23A and definitions in order to give effect to the provisions of regulation 23A were inserted in the Regulations to the National Credit Act.[64] Regulation 23A is entitled "Criteria to conduct affordability assessment" and is divided into subdivisions. The brief discussion that follows is done in accordance with Renke's[65] discussion of regulation 23A.

The first part of the regulation sets out its field of application.[66] The next three subdivisions are aimed at regulating the second leg of the credit provider's compulsory section 81(2) assessment,[67] namely to ascertain whether the consumer can afford the proposed credit applied for. Regulation 23A provides details on how the prospective consumer's existing financial means, prospects and obligations must be assessed. In summary, the consumer's discretionary income must be assessed to determine whether or not the consumer can afford the proposed credit.[68] Finally, regulation 23A is concluded with measures that regulate the credit provider's obligation to consider the consumer's debt repayment history in terms of credit agreements and with measures on miscellaneous matters.

According to Renke, the result of regulation 23A is that the credit provider no longer has *carte blanche* when conducting the affordability assessment. As was stated above, in terms of the amended section 82(1), the credit provider's assessment

[63] The Minister of Trade and Industry is responsible for consumer credit matters.
[64] See the Regulations made in terms of the National Credit Act, 2005 (GN R489, *GG* 28864, 31 May 2006), hereinafter the "National Credit Regulations". Regulation 23A and the definitions referred to were inserted by GN R202 of 13 March 2015 and became effective six months later, on 15 Sep 2015. For a discussion of reg 23A, see Van Heerden and Renke "Perspectives on the South African responsible lending regime and the duty to conduct pre-agreement assessment as a responsible lending practice" (2015) *Int Insol* Review vol 24, no 2 67 ff and Renke (2015) *Litnet Akademies*.
[65] Renke (2015) *Litnet Akademies*.
[66] The types of agreements which are exempted in terms of s 78 of the Act from its reckless lending provisions (see par 2 2 1 above) are also exempted from the provisions of reg 23A. See reg 23(A)(2).
[67] Discussed in par 2 2 2 2 above.
[68] "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. These concepts are defined in reg 1 of the National Credit Regulations.

mechanism, model or procedure now also have to comply with regulation 23A, in addition thereto that it must give rise to fair and objective credit assessments.

2 4 The credit provider's complete defence

Credit providers and consumers are obliged to co-operate in the prevention of reckless credit. However, as was indicated above,[69] it is clear that the credit provider has a far more onerous duty in the latter respect.

As far as the credit provider's compulsory assessment obligation is concerned, there exists interplay with the consumer's obligation to provide information to the credit provider in order to enable the latter to conduct the assessment. A credit provider can only conduct an accurate assessment if it is based on true and complete information regarding the consumer's financial situation. In the latter respect section 81(4) of the National Credit Act makes provision for a complete defence which a credit provider may raise to an allegation by the consumer of having granted credit recklessly.

In terms of section 81(1), when applying for credit and while the application is being considered by the credit provider, the consumer must fully and truthfully answer any requests for information made by the credit provider as part of the credit assessment in terms of section 81(2). This obligation of the consumer will come into existence the moment the prospective consumer makes an application for credit.[70] Vessio submits that the wording of section 81(1) seems to impose a positive responsibility on the credit provider to ask the correct information-gathering questions. The consumer in this respect is simply burdened with answering all the questions posed by the credit provider "fully and truthfully".[71]

Section 81(4) is linked to the consumer's obligation in terms of section 81(1) and provides that it is a complete defence to an allegation that a credit agreement is

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[69] Par 2 2.

[70] This obligation continues to exist while the credit application is being considered. Harmse Dec 2016 *De Rebus* 24-25.

[71] Vessio 2009 *TSAR* 279. See further Otto and Otto (2015) par 34.2. fn 46 who state that in absence of indications that would reasonably alert a credit provider to the contrary, the credit provider is entitled to accept the correctness of the information provided to it by the consumer.

reckless if the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as a part of the credit assessment.[72] However, in addition and in order for the credit provider's complete defence to prevail, the court or the Tribunal must determine that the consumer's failure to do so materially affected the ability of the credit provider to make a proper section 81(2) assessment.[73] Accordingly the credit provider must provide comprehensive assessment forms to potential credit consumers, as the material information obtained therefrom regarding the potential credit consumer is what the credit provider will utilise in determining whether or not to extend credit to the prospective credit consumer and what, at the end of the day, will assist the credit provider in establishing its section 81 complete defence.[74]

Vessio makes reference to the United States spokesperson for the Consumer Credit Counselling Service (a debt charity) who said "[t]he lack of basic checks is a worry. As the credit crunch takes its toll on consumers' finances, many people may be tempted to lie on credit application forms. It is vital there are rigorous checks put in place to ensure more credit is not given to borrowers who are already overstretched."

To summarise, the complete defence as contemplated in section 81(4) of the NCA provides that if a consumer has failed to answer the credit provider's requests for information in its pursuance of compliance with section 81(2) of the NCA, the credit provider will not have granted credit recklessly and as such the respective consequences for granting credit recklessly discussed below[75] will not prevail.[76] However, while the National Credit Act will not come to the rescue of a consumer who has provided false information to a credit provider to gain access to credit, a credit provider will be left with little comfort should he have to join the long queue of other credit providers who are attempting to execute on the consumer's property.[77] It is my view that the consumer's obligation in terms of section 81(1) is ancillary to the obligations of credit provider in terms of section 81(2) and as such are of equal

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[72] S 81(4)(a).
[73] S 81(4)(b).
[74] Vessio 2009 *TSAR* 279. See further Pienaar "Credit Providers Beware" (Oct 2016) *Without Prejudice* 22.
[75] Ch 3 and 4.
[76] Harmse Dec 2016 *De Rebus* 25.
[77] Vessio 2009 *TSAR* 279 fn 37.

importance, especially due to the consequences which ensue through non-compliance.

Now turning to case law. In *De Beer*[78] the bank was no longer in possession of the relevant documents due to a fire that destroyed its storage facilities. The court therefore held that the bank was unable to rely on the section 81(4) defence as there was no evidence that the defendants provided incomplete or untruthful information to the bank. Therefore, what is important from the perspective of the credit provider is that the documents on which the credit provider basis its complete defence must be produced, or capable of being produced before the court.

In *Horwood v Firstrand Bank Ltd*[79] the court took the view that in addition to the section 81(4) defence, a credit provider can also raise the defence that it has met its assessment obligations under section 81. In this regard the court remarked that where a credit provider has taken the required "reasonable steps to assess" the relevant matters referred to in section 81(2), the credit agreement is not a reckless one in terms of section 80(1), regardless of whether or not the assessment was tainted by a consumer's incomplete or untruthful answers.[80]

Finally, in *Absa Bank v Trustees for the Time of the Coe Family Trust*[81] the court held that the credit provider's defence in terms of section 81(4) is not relevant in the instance where no section 81(2) assessment was conducted by the credit provider in the first place.

[78] 2016 (3) SA 432 (GP).
[79] [2011] ZAGPJHC 121 21 Sep 2011) par 8.
[80] Renke (2012) Thesis 430.
[81] 2012 (3) SA 184 (WCC).

CHAPTER 3: THE FORMS OF RECKLESS CREDIT

3 1 General

Section 80 of the National Credit Act makes provision for three forms of reckless credit lending. As will become clear below, the forms of reckless lending are directly related to the question whether or not the section 81(2) assessment[82] has been conducted by the credit provider and, if so, what transpired thereafter.

The aim of this chapter is to discuss the different forms of reckless lending in terms of the National Credit Act. Preceding this discussion, a few remarks will be made in respect to the concept "over-indebtedness". The reason is that there is a relation between over-indebtedness and one of the forms of reckless lending.

3 2 Over-indebtedness in terms of section 79 of the National Credit Act

Over-indebtedness is a novel concept in the South African consumer credit law and was introduced in terms of the provisions of the National Credit Act. The aims of the NCA in respect to over-indebtedness are to promote responsibility in the credit market by the avoidance of over-indebtedness[83] and to address and prevent over-indebtedness of consumers and to provide mechanisms to resolve a consumer's over-indebtedness.[84] These aims in turn are aimed at the protection of South African consumers, one of the main aims of the National Credit Act. The aforementioned aims in respect to over-indebtedness are related to the aims in the Act to prevent reckless lending to consumers.[85]

Section 79 of the Act not only provides the definition of over-indebtedness[86] but also makes provision for the determination of over-indebtedness[87] as well as what credit providers need to take into account when making its determination.[88] Over-

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[82] See par 2 2 above.
[83] S 3(c)(i).
[84] S 3(g).
[85] See in this respect par 1 1 above
[86] S 79(1).
[87] S 79(2).
[88] S79(3)(a)-(b).

indebtedness is defined in section 79(1) of the NCA as the situation whereby, on the basis of the preponderance of information[89] available at the time the determination of over-indebtedness is made, it is clear that the consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party. Regard must be had to the consumer's financial means, prospects and obligations[90] and probable ability to satisfy all his obligations in terms of the aforesaid credit agreements in a timely manner as indicated by the consumer's history of debt repayments.[91] What is important is the consumer's inability, considering the specified criteria, to satisfy his debt obligations. Mere difficulty to do the latter will therefore not render the consumer over-indebted.[92] According to Renke[93] the phrase "in a timely manner" in the section 79(1) definition of over-indebtedness is not defined and what would constitute "in a timely manner" is thus a factual question. He suggests that the time limit in the contract or contracts itself within which to pay the debt or debts must serve as a guideline.[94] Furthermore, section 79(2) provides that the person making a determination as to whether or not a consumer is over-indebted, must apply the aforementioned criteria as they exist at the time the determination is being made.[95]

Section 79(3) provides that, when a determination regarding whether or not a consumer is over-indebted in terms of section 79 is to be made, the value of a credit facility is the settlement value under that facility at the time of the determination.[96] The value of a credit guarantee is the settlement value of the credit agreement it guarantees, if the guarantor has been called upon to honour that guarantee, and if not, the settlement value of the credit agreement that it guarantees discounted by a prescribed factor.[97]

[89] According to Vessio 2009 *TSAR* 275 this means "the majority of" information available.

[90] S 79(1)(a).

[91] S 79(1)(b). See also Van Heerden and Boraine 2011 *De Jure* 393 and Scholtz *et al* (2008) par 11.3.1. There are, in this regard, as per s 85 and 86 of the NCA, debt relief measures with the goal to assist the over-indebted consumer in satisfying his or her debt obligations. These debt relief measures are termed "court ordered debt review" and "voluntary debt review" respectively.

[92] Renke (2012) Thesis 420.

[93] Renke (2012) Thesis 420.

[94] Renke (2012) Thesis 421.

[95] See also Vessio 2009 *TSAR* 275 and Renke (2012) Thesis 419.

[96] S 79(3)(a).

[97] S 79(3)(b)(i) and (ii). See also Scholtz *et al* (2008) par 11.3.1. In the latter of the mentioned instances the value of a credit guarantee is 0 – reg 24(11).

The time for making an assessment of "over-indebtedness" where reckless lending was the probable cause for the over-indebtedness will be discussed below.[98]

3 3 The forms of reckless credit in terms of the National Credit Act

3 3 1 General

Responsible lending practices by credit providers play a pivotal role in avoiding instances where consumers become trapped in debt and unable to escape the grips of over-indebtedness. It therefore remains of paramount importance for a country that seeks to pursue financial welfare of its consumers in the credit market to ensure that it maintains an effective responsible lending regime with sufficient *ex ante* as well as *ex post* measures in the pursuance of avoiding irresponsible credit granting and in providing debt relief to over-indebted consumers. Otto and Otto observe in this regard as follows: "The provision in the NCA dealing with the prevention and consequences of reckless credit are not only far reaching, but also extremely important to all concerned."

The *ex ante* responsible lending practices, which serve as preventative measures to avoid reckless credit granting and over-indebtedness, are arguably the most important tools in establishing a healthy credit market.[99] The credit provider's compulsory section 81(2) credit assessment serves as an example.[100] In contradistinction, the *ex post* measures merely serve as attempts to restore the health of the credit market which finds itself entrenched by irresponsible lending. The powers of the courts or the Tribunal to pronounce on agreements where it has been established that credit was extended recklessly is an example.[101] It is therefore submitted that addressing the causes of over-indebtedness are to be preferred over merely treating the symptoms of irresponsible lending practices, which practices are often the root cause of the aforesaid over-indebtedness.[102]

[98] Par 3 4.
[99] Scholtz *et al* (2008) par 11.5.1.
[100] Renke (2012) Thesis 413.
[101] See ch 4 below.
[102] Scholtz *et al* (2008) par 11.5.1.

In terms of section 80 of the NCA three instances of reckless credit granting is recognised by the legislature.[103] These instances, as dealt with below,[104] are related to the question whether or not a section 81(2) credit assessment was conducted by the credit provider and, if so, what happened after the assessment. However, it has to be remembered that the reckless lending provisions do not apply to juristic person consumers.[105]

In terms of the introductory part to section 80(1), a "credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased".[106] This is important as it is therefore not only the conclusion of a new credit agreement with a consumer that may constitute reckless credit, but also the increase of the credit limit of an existing credit agreement.[107]

The first instance of reckless lending in terms of section 80 occurs where the credit provider did not conduct the section 81(2) compulsory credit assessment. In this case the credit provider's failure to do the assessment is inexcusable, leading to the transaction being branded as reckless credit.[108] The financial position and capability of the consumer is irrelevant. Even where the consumer was able to afford the credit and an assessment would merely have confirmed that, it does not negate the duty of the credit provider to conduct the assessment.[109] The failure to conduct the section 81(2) assessment makes the credit agreement *per se* reckless.[110]

The second type of reckless credit entails a situation where the credit provider conducts the relevant credit assessment and then enters into the credit agreement with the consumer regardless of the outcome of said assessment.[111] In this instance the agreement will be deemed to be reckless because, even though the credit

[103] See Scholtz *et al* (2008) par 11.5.2 and Lombard & Renke "The impact of the National Credit Act on Specific Company Transaction" 2009 *SA Merc LJ* 497-498.
[104] Par 3 3 1
[105] See par above.
[106] The exception is an increase in terms of s 119(4), which provides for unilateral increases of the credit limits of credit facilities with the consumer's permission.
[107] See Renke (2012) Thesis 437.
[108] See further *Absa Bank v Trustees for the Time of the Coe Family Trust* 2012 (3) SA 184 (WCC) where no assessment as contemplated in s 81(2) was undertaken and where the one debtor who stood surety was a student who had no income.
[109] Scholtz *et al* (2008) par 11.5.2. See further Renke (2012) Thesis 435.
[110] Scholtz *et al* (2008) par 11.4.3.
[111] Section 80(1)(b)(i).

provider complied with his duties in terms of section 81(2) of the Act, the credit provider disregarded the fact that the preponderance of available information indicated that the consumer lacked an understanding or appreciation of his risks, costs or obligations under the proposed credit agreement.[112] The implication of this type of reckless credit is that the credit provider has a duty to inform the consumer of the latter's risks, costs and obligations under the agreement.[113] In respect hereof the court in *SA Taxi Securitisation (Pty) Ltd v Mbatha*[114] indicated that the consumer should provide information demonstrating his level of education and experience at the time, including a disclosure of prior credit transactions entered into by the particular consumer.

The third type of reckless credit refers to a situation in which the credit provider fully complies with its obligations in terms of conducting the relative pre-agreement assessment, the consumer fully understands his risks and obligations in terms of the credit agreement, but the information gathered by the credit provider in terms of the assessment reflects that the consumer is not able to afford the credit and that entering into such an agreement would render the consumer over-indebted. The credit provider, on the basis of the aforementioned circumstances, ignores the information and proceeds to extend credit to the consumer.[115] The causing of the consumer's over-indebtedness in this instance constitutes reckless lending[116] and there is therefore a direct link between the reckless lending and over-indebtedness. This is in contrast to general over-indebtedness, where the said link is absent and where the consumer for instance becomes over-indebted due to illness or the loss of his job. The granting of credit to a consumer who is already over-indebted even before he enters into the proposed credit agreement, would also amount to reckless credit granting.[117]

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[112] Scholtz *et al* (2008) par 11.5.2.

[113] Scholtz *et al* (2008) par 11.5.2. at fn 681. See further Renke (2012) Thesis 435.

[114] 2011 (1) SA 310 (GSJ) (Hereinafter *Mbatha*).

[115] In *Mbatha* the court held in respect of the third form of reckless credit that the consumer is required to provide all details of all his indebtedness at the time of conclusion of the agreement as well as of any information regarding his income and expenditure. See further Scholtz *et al* (2008) par 11.5.7.

[116] Renke (2012) Thesis 436.

[117] Scholtz *et al* (2008) par 11.5.2 at fn 683 submits that this is the position in spite of the wording of s 80(1)(b)(ii) that refers to "would make the consumer over-indebted". He states that to hold otherwise would mean that credit cannot be extended to consumers if it would cause their over-indebtedness but it would be competent to extend credit to already over-indebted consumers.

Finally, a *sui generis* type of reckless lending is provided for in terms of section 88(4) of the Act. This occurs whether or not the section 80 circumstances apply in the case where the credit provider enters into a credit agreement[118] with a consumer who is subject to debt review.

3 4 The determination of reckless credit

Section 80(2) provides that the person making the determination whether or not a reckless credit agreement was concluded by the credit provider, must apply the criteria in terms of section 80(1) discussed above[119] as they existed at the time the agreement was made. In other words, the consumer's ability to meet his obligations under the particular credit agreement at the time the agreement was entered into must be assessed and not the ability to meet his obligations at the time the determination is being made. The same holds for the consumer's general understanding and appreciation of the risks, costs etcetera under the credit agreement. It is possible that the consumer who can now (when the reckless determination is being conducted) afford the credit, could not do so at the time that the credit agreement was entered into and therefore reckless lending occurred at the time of conclusion of the contract. According to Renke[120] this makes sense. A determination of reckless credit will therefore always be an *ex post facto* enquiry.[121]

It will be seen below[122] that a court or the Tribunal, before making the orders in respect to the third form of reckless lending, where the entering into the new credit agreement or the increase in the credit limit of an existing credit agreement caused the consumer's over-indebtedness, must also make a determination whether the consumer is still over-indebted at the time of the proceedings or not.

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[118] Other than a consolidation agreement. "Consolidation agreement" is not defined in the NCA but it is an agreement in terms whereof the consumer's debts are merely consolidated in one agreement. Consolidation agreements are therefore treated differently in terms of the Act. See Scholtz *et al* (2008) par 11.5.2. at fn 684.

[119] Par 3 3.

[120] Renke (2012) Thesis 436.

[121] Van Heerden and Boraine 2011 *De Jure* 399.

[122] Par 4 2 3.

CHAPTER 4: THE POWERS OF THE COURT OR THE TRIBUNAL IN RESPECT TO RECKLESS LENDING

4 1 General

The instances of reckless lending have been discussed in the previous chapter. The aim of this chapter is to consider the powers bestowed on the courts or the Tribunal by the National Credit Act to deal with reckless lending or to counteract the consequences thereof.[123] However, a question which is related to the courts' or the Tribunal's powers in relation to reckless lending is how does an instance of reckless lending come to serve before a court or the Tribunal in order for the particular institution to be in a position to exercise its powers. This question, and the legislative amendments empowering the Tribunal to adjudicate on reckless lending, will therefore be dealt with first.

4 2 How reckless lending come to serve before the courts or the Tribunal

In terms of the National Credit Act various procedures are provided for to bring the fact that reckless lending has occurred, to a court's or the Tribunal's attention. Before these procedures or avenues are discussed, it needs to be pointed out that the initial NCA empowered the courts (and not the Tribunal as well) to adjudicate on reckless lending. However, this changed with the coming into operation of the NCA Amendment Act. Section 25 of the latter amended section 83 of the NCA dealt with below with the result that the Tribunal now also has the power to deal with instances of reckless lending.[124] In what follows, unless indicated otherwise, the amended sections of the NCA will be considered.

Section 83, initially entitled "Court may suspend reckless credit agreement" and after its amendment in terms of the NCA Amendment Act "Declaration of reckless credit agreement", provides the first instance in which reckless lending can find itself before the court or the Tribunal. In terms of section 83(1) in any court or Tribunal proceedings in which a credit agreement is being considered, the court or the

[123] See par 4 3 below.

[124] See also Scholtz *et al* (2008) par 11.5.7.

Tribunal may declare that the credit agreement is reckless, in accordance with the provisions of section 80.[125] This power may be exercised despite any provision of the law or agreement to the contrary.[126] Section 83(1) therefore empowers the courts or the Tribunal, where a credit agreement serves before them (for instance where the credit provider has issued summons against the consumer), to *suo motu* take cognisance of the fact that reckless lending has taken place.[127] Therefore, section 83 does not require an allegation of reckless credit before the court or the Tribunal can exercise its powers. Where a court or the Tribunal make use of its section 83(1) powers and declare a credit agreement or credit agreements to be reckless, the prescribed orders in terms of section 83 may be made by the particular judicial body.

The second instance provided for to ensure that an instance of reckless lending comes to serve before a court is in terms of section 86, entitled "Application for debt review". Although section 86 mainly deals with applications for debt review (to a debt counsellor)[128] by a consumer where the consumer is over-indebted, section 86(6)(b) provides that a consumer may seek a declaration of reckless credit, where any of the consumer's credit agreements appear to be reckless. If this is the case, the debt counsellor must determine if reckless lending has occurred and if so, issue a proposal to the Magistrate's Court, recommending that one or more of the consumer's credit agreements be declared to be reckless.[129] Once again, if this happens, the court may make a section 83 order or orders to address the reckless lending situation.[130] However, if the debt counsellor rejects the consumer's application because, according to the debt counsellor, the consumer is not over-indebted, the consumer may apply directly to the Magistrate's Court for the necessary relief in terms of section 86(7)(c).[131] As discussed above, the latter includes the order that one or more of the consumer's credit agreements be declared

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[125] Discussed in par 3 3 above.

[126] According to Renke (2012) Thesis 439 this means that the parties to an agreement may not exclude this power of a court (or the Tribunal) to declare a credit agreement reckless in their agreement. Further, the laws pertaining to for instance the jurisdiction of the courts will likewise have no effect on the said powers of the court (or the Tribunal).

[127] See also Renke (2012) Thesis 439 and Vessio 2009 *TSAR* 282.

[128] The debt counsellor is a new role player in the South African credit industry that was introduced in terms of the NCA.

[129] Ss 86(6) and 86(7)(c)(i). The court does not have to accept the debt counsellor's report – Pienaar October 2016 *Without Prejudice* 22 and Lombard and Renke 2009 *SA Merc LJ* 496.

[130] See s 87(1)(b)(i) discussed in par 4 3 below.

[131] S 86(9).

credit agreements be declared to be reckless credit. It is further important to note, from a practical perspective, that a debt counsellor is in no way empowered to declare a consumer to be over-indebted or that a credit agreement amounts to one of reckless credit lending, but they are in this regard empowered only to investigate, through debt review, and to make determinations and recommendations in this regard.[132] Finally in respect to the section 86 avenue to get the necessary relief in the case of reckless lending, it must be mentioned that section 86 makes no mention of the Tribunal. It therefore seems that this access route cannot be used by a consumer to bring reckless lending to serve before the Tribunal.

According to Renke[133] the third avenue to access the courts in the case of reckless lending is by means of section 85, entitled "Court may declare and relieve over-indebtedness". In terms of section 85(a), if it is alleged in any court proceedings in which a credit agreement is being considered that the consumer is over-indebted (or although not mentioned in section 85, that reckless lending has occurred), the court may refer the matter to a debt counsellor. The latter will then evaluate the matter and report back to the court in terms of section 87. In terms of section 87(1)(b)(i), the court may make an order declaring any credit agreement to be reckless, followed by the reckless court orders in terms of section 83. Renke submits that section 85(b) by implication also makes provision for a court to declare one or more credit agreements as reckless. Section 85(b) allows a court, upon an allegation of reckless credit, to proceed directly with the matter, to declare that the consumer is over-indebted (or that reckless lending has occurred) and to make an order to relieve the consumer's over-indebtedness in terms of section 87 (or to make a reckless lending order or orders). Once again, similarly to section 86, it seems that the section 85 avenue may not be used to access the Tribunal. It therefore seems that only section 83 empowers the Tribunal to deal with instances of reckless lending.

Where the consumer alleges in terms of section 85 that credit has been extended recklessly, it is important for the consumer to note that a mere accusation that the credit was granted recklessly will not suffice. This position has been echoed in various cases whereby courts required more from consumers in making such allegations.

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[132] Vessio 2009 *TSAR* 284.

[133] Renke (2012) Thesis 440-441.

Scholtz correctly submits that a consumer who alleges reckless credit bears the onus of proving it.[134] It is further submitted that the consumer can raise reckless credit as a cause of action by taking the initiative to apply to have a credit agreement set aside or alternatively by instituting a counter claim. Reckless lending can further be raised as a defence where the consumer raises it during enforcement proceedings that have been instituted by the credit provider.[135]

It is emphasised that consumer is required to comprehensively set out the reason as to why the agreement is alleged to be reckless. Authority for this can be found in the matter of *Mercantile Bank Ltd v Hajat*[136] where the court indicated that the mere fact that payments in terms of a credit agreement were not made when they were due is not *per se* evidence of reckless credit. The court indicated that mere averments by the consumer such as that "the applicant should never have granted me credit in such a reckless manner, under the circumstances where I was already financially disabled" were by themselves hopelessly inadequate and provided no assistance to the enquiry whether credit was indeed granted recklessly.[137]

Further reference must be made to *Mbatha*[138] where the court held that there is a tendency in our courts for defendants to make bland allegations that they are over-indebted or that there has been reckless credit lending by the credit providers. The court emphasised that consumers who allege the granting of reckless credit should not be "inherently and seriously unconvincing", but that they should contain a reasonable amount of verification detail and this as such should be set out in sufficient particularity.[139]

The courts have also taken the position that consumers who raise reckless credit should not simply repeat the factors of the relevant reckless credit section but that consumers should establish the way in which the credit provider violated the reckless credit provisions. In the matter of *Absa Bank Ltd v Malherbe,*[140] the court held that the defendant's contentions that credit was recklessly extended was grounded on a

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[134] Scholtz *et al* (2008) par 11.5.7. See further *Absa Bank Ltd v Potgieter* (2017) ZAECPEHC 8 (31 January 2017).
[135] Scholtz *et al* (2008) par 11.5.7.
[136] (2013) ZAGPJHC 134 at par 42.
[137] Scholtz *et al* (2008) par 11.5.2. and at fn 686.
[138] 2011 (1) SA 310 (GSJ) at par 26.
[139] See further Scholtz *et al* (2008) par 11.5.2.
[140] (2013) ZAFSHC 78 at pars 76 and 78.

vague allegation of reckless credit. The court then echoed the comments above and held that a mere repetition of the factors referred to in the relevant section without elaborating as to how the credit provider's violation of each of those factors directly affected the defendant, and without disclosing cogent reasons as to precisely why the defendant had taken no meaningful practical steps before the plaintiff instituted these proceedings, to seek the relief being sought, was only demonstrating a lack of bona fides on the part of the defendant.[141]

Therefore the position is clear that consumers when raising the allegation of reckless credit lending, must do so in a way that illustrates to the court the way in which the credit provider violated the relevant reckless credit provisions. This position, fairly, ensures that credit providers will not be prejudiced by *mala fide* consumers who simply wish to get out of their responsibilities in terms of their respective credit agreements.

4 3 The powers of the courts or the Tribunal in respect to reckless credit

4 3 1 General

The National Credit Act, in instances of reckless credit, provides the courts or the Tribunal with certain powers where the court or the Tribunal finds that credit has been extended to credit consumers recklessly. A declaration that a credit agreement is reckless has the effect of penalising the credit provider as a consequence of the provider's disregard of the reckless credit provisions in terms of section 80 of the NCA.[142]

In *African Bank Ltd v Myambo NO and Others*[143] the court held that if clerks of the court have reason to believe that a particular credit agreement may be an instance of reckless credit as provided for in section 80 of the Act, they must refer a request for consent to judgment to the court. Further the court held that magistrates may call for evidence, including documentary evidence, which will enable them to determine whether a particular credit agreement is reckless as defined in section 80 of the Act.

[141] Scholtz *et al* (2008) par 11.5.2.
[142] Van Heerden and Boraine 2011 *De Jure* 393.
[143] 2010 (6) SA 298 (GNP).

4 3 2 The powers of the courts or the Tribunal

Where a court or the Tribunal *suo motu* makes a finding of reckless lending in terms of section 83(1) discussed above,[144] it is empowered in terms of section 83(2) and (3) to make certain orders to address the credit provider's reckless behaviour. The same holds for the other avenues discussed above[145] that cause an instance of reckless lending to serve before a court. At the end of the day all the other avenues that were discussed above lead to section 87. One of the powers of the court in terms of section 87 is to make an order declaring any credit agreement to be reckless, followed by an order in terms of section 83(2) or (3).[146] Section 83 and the sections in the Act to give effect thereto, will now be discussed.

Where a court or the Tribunal declares a credit agreement to be reckless on the basis that the credit provider failed to conduct a section 81(2) assessment, or on the basis that the credit provider conducted an assessment but continued to enter into the credit agreement with the consumer despite the fact that it was evident from the information gathered that the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed agreement,[147]the court or the Tribunal may make an order setting aside all or part of the consumer's rights and obligations under that agreement,[148] or alternatively may suspend the force and effect of that credit agreement until a date determined by the court.[149] The court orders for the first two forms of reckless lending in terms of section 80 are therefore the same.

Where a court or the Tribunal declares a credit agreement to be reckless due to the fact that the credit provider, despite having conducted the required assessment, nevertheless entered into the agreement with the consumer despite the preponderance of the information gathered indicating that entering into such an agreement would have the effect of rendering the consumer over-indebted,[150] the court or the Tribunal in this regard may make an order suspending the force and

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[144] Par 4 2.
[145] Par 4 2.
[146] S 87(1)(b)(i).
[147] See par 3 3 above for the forms of reckless lending in terms of s 80.
[148] S 83(2)(a).
[149] S 83(2)(b).
[150] See par 3 3 above.

effect of that credit agreement until a date determined by the court.[151] The court or the Tribunal must also restructure or re-arrange the consumer's obligations under any other credit agreements in accordance with section 87.[152] However, before the court orders in terms of section 83(3) may be made, the court or the Tribunal must first consider whether the consumer is still over-indebted at the time of the court or Tribunal proceedings. It is thus submitted that if the consumer is not over-indebted any longer at the time of the proceedings, the court or Tribunal is not empowered to make the section 83(3) orders. In addition, before making the section 83(3) order, the court or the Tribunal must consider the consumer's current means and ability to pay the consumer's current financial obligations which already existed at the time the agreement was entered into and the expected future date when any such obligation under a credit agreement will be fully satisfied, assuming the consumer makes all payments required by the order.[153]

In spite of the use of the word "may" in section 83(2) and (3), reference must be made to section 130(4)(a) of the NCA which provides that when any debt procedure (in other words enforcement) matter is before the court, and the court determines that the credit agreement was reckless as described in section 80, the court must make an order as contemplated in section 83. As such it is emphasised that a court has no discretion to deviate from the powers given to it by section 83 and can make no alternative order than those provided for in the said section.[154] Furthermore, the NCA does not regard a reckless credit agreement as an unlawful agreement[155] and as such reckless credit as a debt relief mechanism is limited to the relief as set out in section 83 of the NCA.[156]

Now turning to the court orders in terms of section 83(2) which could be imposed by a court or the Tribunal in respect of the first two forms of reckless lending in terms of section 80 of the Act, in other words in the case where no credit assessment was

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[151] S 83(3)(b)(i).

[152] S 83(3)(b)(ii).

[153] S 83(4)(a) and (b). See Vessio 2009 *TSAR* 283; Pienaar October 2016 *Without Prejudice* 22; Otto and Otto (2015) par 34.2 and Renke (2012) Thesis 456.

[154] Van Heerden and Boraine 2011 *De Jure* 401.

[155] The NCA, in s 89(2), lists a number of credit agreements that are regarded to be unlawful and continues to spell out the consequences of such unlawfulness in s 89(5). After the amendment of s 89(5) in terms of the NCA Amendment Act, the only consequence of unlawfulness in terms of the Act is that the court must declare the particular credit agreement void, whereupon the common law consequences in respect to illegal contracts will prevail.

[156] Van Heerden and Boraine 2011 *De Jure* 401.

done, or where an assessment was done but where the consumer failed to understand the risks, costs and obligations under the credit agreement.

The first possibility is the setting aside of all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances. The reference to "under that agreement" indicates that the complete or partial setting aside powers relate to the particular reckless agreement.[157]

Apart from stating that the court or the Tribunal must deem it just and reasonable in the circumstances to set aside, the NCA contains no criteria which the relevant court or the Tribunal can apply in coming to its decision of whether it will set aside the reckless credit agreement or not. The same holds for the question of whether it will set aside the credit agreement *in toto* or only partially. As a result, where the court or the Tribunal decides to set apart partially, it is also unclear how much of the particular credit agreement should be set aside.[158]Otto and Otto state that a natural consequence of the court or Tribunal's setting aside of the consumer's obligations (in whole or in part) on the ground of reckless credit lending is that the consumer need not perform those obligations at all.[159]

As far as the failure in section 83(2)(a) to distinguish between the situation where the parties have entered into the agreement and there has been performance or where performance has not yet occurred is concerned, in the latter instance it would makes sense that the court or Tribunal would rule that the consumer has no further rights and obligations.[160] As far as the restitution of performances already delivered in the case of setting aside is concerned, according to Van Heerden and Boraine[161] the

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[157] See also Renke (2012) Thesis 443. The suspension therefore has the effect of granting the consumer a "debt breather" in which instance he may recover financially in order to be able to resume making payments. This remedy has the aim of providing debt relief aimed at alleviating over-indebtedness and not merely an arbitrary punishment to a credit provider who extended the reckless credit. Once the suspension of the agreement ends, all the respective rights of the credit provider and consumer under that agreement are revived and are fully enforceable except to the extent that a court may order otherwise. See further Van Heerden and Boraine 2011 *De Jure* 404 – 405.

[158] Scholtz *et al* (2008) par 11.5.7.1. See further Otto and Otto (2015) par 34.2 and Van Heerden and Boraine 2011 *De Jure* 402-403.Van Heerden and Boraine also criticise the failure by the legislature (a) to differentiate between situations where performance has already been delivered and situations where it has not been delivered, (b) to address the question of restitution of performances where setting aside is ordered and (c) stipulate what the consequences of setting aside are on the credit provider's rights and obligations. In respect to the latter, see the discussion by Renke (2012) Thesis 452-454.

[159] Otto and Otto (2015) par 34.2. See further Van Heerden and Boraine 2011 *De Jure* 402.

[160] Scholtz *et al* (2008) par 11.5.7.1. See also Van Heerden and Boraine 2011 *De Jure* 403.

[161] Van Heerden and Boraine 2011 *De Jure* 403.

credit provider will be able to claim restoration of any performance. They also point to the fact that section 83(2) does not prohibit restitution.[162] In *Mbatha*[163] the court indicated that a credit agreement which is set aside is null and void as if it had never been and therefore the credit provider would be entitled to restitution. The second possible court order is to suspend the reckless agreement in terms of section 83(2)(b). Once again, the reference to "that credit agreement" indicates that the suspension of the particular reckless agreement is pertinent. In terms of section 84(1)(a)-(c), during the period that the force and effect of a credit agreement is suspended, (a) the consumer is not required to make any payment required under the agreement; (b) no interest, fee or other charge under the agreement may be charged to the consumer; and (c) the credit provider's rights under the agreement or under any law in respect of that agreement are unenforceable, despite any law to the contrary. Section 84(2)(a) of the NCA further sets out that after the lifting of the suspension of the force and effect of a credit agreement, all the respective rights and obligations of the credit provider and consumer under that agreement are revived and fully enforceable, except to the extent that a court may otherwise order.[164] A few remarks on the suspension power follows.

The National Credit Act does not impose any restriction on the period of suspension. According to Renke[165] suspension clearly affects the consumer's payment obligations under the credit agreement because, during the suspension period, the consumer does not have to effect the payment of any credit instalments or interest, fees or other costs in terms of the suspended credit agreement. It is agreed with Boraine and Van Heerden[166] that a particular credit agreement may be suspended more than once.[167] It is further submitted that Renke[168] is correct in respect to the consequences of suspension where he says that the only effect of suspension is that the duration of the suspended credit agreement is extended by the period of the suspension and that the consumer's obligations in terms of the agreement (including

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[162] Boraine and Van Heerden 2010 *THRHR* 653.
[163] 319E.
[164] Again it is reiterated that the credit provider may not charge the consumer any interest, fee or other charge that could not be charged during the suspension – s 84(2)(b).
[165] Renke (2012) Thesis 454.
[166] Boraine and Van Heerden 2010 *THRHR* 654.
[167] The authors base their opinion on an interpretation of the words "except to the extent that a court may order otherwise" in s 84(2).
[168] Renke (2012) Thesis 455.

interest, fees and costs) remain the same as initially agreed upon when entering into the agreement. And also, it is submitted that Van Heerden and Boraine[169] are correct in saying that suspension penalises the credit provider for extending credit recklessly because the effect of suspension is that the credit provider has to wait longer to receive his money in terms of the credit agreement.

The question whether or not the consumer should be allowed to keep the object in terms of the credit agreement during the suspension of the latter becomes relevant. Van Heerden and Boraine[170] hold the view that the consumer is not entitled to possess and keep the object (security) under the credit agreement during the period of suspension. They *inter alia* based their opinion on *Mbatha*[171] where the court held a similar view due to the fact that the suspension of the force and effect of a credit agreement means that all its elements are suspended. The court made specific reference to section 81(4)(c), which provides that the credit provider will not be entitled to enforce its rights during a period of suspension and read the section with section 81(4)(a) and (b) of the NCA. The court in scrutinising the wording of the NCA, held that there is no basis for reading into the language of the NCA a provision that when suspension is appropriate, the court has the authority to permit the consumer to utilise the security in a manner which would permit the consumer to use the financed object in a manner which may allow it to deteriorate during its suspension. In this regard the court held it to be highly doubtful that the legislature had the intention that the consumer could keep the money and the box.[172]

Finally in respect to the section 83(2) orders, a court or the Tribunal has the discretion to either set aside or suspend. Both are not possible. This is indicated by the use of the word "or" between the two powers.[173] However, no guidance is provided in the Act when the one or the other will be appropriate. In *Mbatha*[174] the court remarked that "[i]f the consumer has a valid complaint that, but for the recklessness of the credit provider, the consumer would never have become involved in the credit transaction, it might be 'just and reasonable' to 'set aside' the

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[169] Van Heerden and Boraine 2011 *De Jure* 405.
[170] Van Heerden and Boraine 2011 *De Jure* 406.
[171] 319F-G.
[172] Van Heerden and Boraine 2011 *De Jure* 406.
[173] See also Renke (2012) Thesis 443.
[174] 319D-E.

agreement". Van Heerden and Boraine[175] make a few useful remarks in this regard, for instance that suspension "appears to be a remedy designed to provide temporary debt relief aimed at alleviating over-indebtedness and not merely an arbitrary punishment to a credit provider who extended reckless credit" and "a suspension order will thus be futile where the granting of the order will clearly not help the consumer to recover financially". It is possible for a consumer to whom reckless credit has been extended and who prefers to carry on with the credit agreement to request a suspension rather than a setting aside of the agreement.[176] *De Beer*[177] serves as an example of a judgment where a court exercised its discretion in favour of setting aside instead of suspension.

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, the court may make an order in terms of section 83(3)(b). However, it has to be remembered that the court or the Tribunal must first determine whether or not the consumer is still over-indebted at the time of the proceedings. It should also be remembered that the court or the Tribunal *inter alia* must consider the consumer's current means and ability to pay the consumer's current financial obligations which already existed at the time the agreement was entered into.

Therefore when the recklessness of credit is seated in the fact that entering into that specific credit agreement made the consumer over-indebted, it would in this regard appear that the consumer's state of over-indebtedness both at the moment of entering into the agreement and at the time that the court or Tribunal declares the agreement reckless is relevant. Section 83(3)(b) obliges the court or the Tribunal to consider when the obligation(s) of the consumer will be fulfilled under the credit agreement that were in existence at the time that the reckless credit was extended. It appears to indicate that the legislature intended that such information should be relevant, not only with regard to the restructuring of such existing debt obligations, but also with regard to formulating an appropriate time period for suspension of the force and effect of the reckless credit agreement.[178]

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[175] Van Heerden and Boraine 2011 *De Jure* 404.
[176] Scholtz *et al* (2008) par 11.5.7.1.
[177] As discussed by Scholtz *et al* (2008) par 11.5.7.1.
[178] Scholtz *et al* (2008) *par* 11.5.7.2.

The wording of section 83(3)(a) and (b) seems to suggest that, although a credit agreement may be declared reckless because it actually caused over-indebtedness, the court or Tribunal will be able to exercise its powers in terms of section 83(3) only if the consumer is actually still over-indebted when the court or Tribunal makes the declaration of over-indebtedness. If he is still over-indebted, the court or Tribunal then has discretion to suspend the force and effect of the reckless agreement ("that credit agreement") in accordance with the provisions of section 84[179] and to restructure any other obligation under any other credit agreement (therefore not the particular reckless credit agreement that caused the over-indebtedness)[180] entered into by the over-indebted consumer. Such restructuring occurs in terms of section 87, which in turn authorises a court to re-arrange the consumer's obligations in any manner contemplated in section 86(7)(c)(ii). The latter section allows for the extension of the period of the agreement, automatically reducing the amount of the credit instalments payable, the postponing during a specified of the dates on which payments are due under the credit agreement or agreements or both such orders.[181] Another possibility is the recalculation of the consumer's obligations because of a contravention of Part A or B of Chapter 5 or of Part A of Chapter 6.[182] A few remarks follow.

As a result of the use of the word "and" between section 83(3)(b)(i) and (ii), it is clear that the court or the Tribunal has to make both the orders provided for in the subsection.[183] The power when restructuring to postpone the payment dates during a specified period should not be confused with suspension.[184] It is submitted that Renke[185] is correct that the difference between the two orders is that in the case of a postponement of payment dates, the consequences of suspension in respect of interest and other costs will not prevail.[186] Section 86(7)(c)(ii) does not empower a court or the Tribunal to reduce the interest rate under the consumer's credit agreements.[187] Van Heerden and Boraine[188] summarise the section 83(3)(b) orders

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[179] Discussed above.
[180] See Renke (2012) Thesis 458.
[181] S 86(7)(c)(ii)(aa)-(cc).
[182] S 86(7)(c)(ii)(dd). See Scholtz *et al* (2008) par 11.5.7.2.
[183] See Renke (2012) Thesis 457.
[184] Van Heerden and Boraine 2011 *De Jure* 410.
[185] Renke (2012) Thesis 459.
[186] Interests, fees and other costs will therefore continue to accrue in the case of a postponement order.
[187] *SA Taxi Securitisation (Pty) Ltd v Dick Lennard* unreported case nr CA 166/2010 at par 10.

to suspend and restructure by saying that the legislature's aim seems to be to penalise the credit provider for the reckless credit. Suspension makes the credit provider wait for payment and he forfeits interest fees and charges and at the same time preference is given to the restructuring of the consumer's other credit agreements.

Once a consumer's other credit agreements have been restructured by the court or Tribunal in accordance with section 83(3)(b)(ii), the effect of debt re-arrangement in accordance with section 88 applies. 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 the credit provider may not exercise or enforce by litigation or other judicial process, any right or security under that credit agreement.[189]

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[188] Van Heerden and Boraine 2011 *De Jure* 409.
[189] See Scholtz *et al* (2008) par 11.5.7.2.

CHAPTER 5: FINAL CONCLUSIONS AND RECOMMENDATIONS

The purpose of this dissertation was to investigate and write on the reckless credit provisions in terms of the National Credit Act. The purpose was to consider the credit provider's compulsory credit assessment, his complete defence in the case where reckless lending is alleged by the consumer, the forms of reckless lending and the powers of the courts or the Tribunal pertaining to reckless credit.

The introduction of the reckless credit provisions in terms of this National Credit Act, which celebrated its 10th anniversary in 2017, should be welcomed. This is especially true for the obligation that is now imposed on credit providers in terms of the NCA to conduct a compulsory credit assessment before granting new credit or increasing the credit limit in terms of an existing credit agreement.[190] As was illustrated in for instance *De Beer*,[191] this obligation contributes to curb reckless lending and it also plays a major role in the prevention of consumer over-indebtedness in South Africa that results from credit agreements. Regulation 23A[192] is perhaps a bit paternalistic. However, I am of the opinion that more research will have to be conducted to determine its true impact, for instance as far as access to credit is concerned. However, it definitely has a positive side in that it serves as a basis model to credit providers on how the section 81 assessment should be conducted.

The credit provider's complete defence in terms of section 81[193] is likewise a positive development. It serves to strike a balance between the rights and obligations of the parties to a credit agreement, the credit provider on the one hand and the consumer on the other.

Naturally it would have been meaningless to have prescribed a compulsory assessment without providing for any sanctions for non-compliance with the mentioned obligation. The forms of reckless lending, which are directly related to the failure to conduct the compulsory assessment or what transpires after the assessment has been conducted,[194] must therefore be endorsed. I submit that this

190 Par 2 2.
191 Par 2 2.
192 See par 3 4.
193 Par 2 4.
194 Par 3 3.

serves as a deterrent to credit providers preventing them from failing to comply with section 81 of the NCA. To put it positively, the forms of reckless lending should compel credit providers who are subject to the NCA to adhere to the section 81 provisions.

It is further to be endorsed that the powers of the courts in terms of section 83 have now been extended to the Tribunal as well.[195] The latter is a more informal and cheaper institution than the courts and this development in terms of the NCA Amendment Act should benefit South African consumers. However, it is a lacuna in the Act that the other access routes to the courts in respect of reckless lending[196] have not been extended to the Tribunal as well.

The powers of the courts or the Tribunal in respect to reckless credit needs further attention. As was indicated above, there is a lack of guidance to the courts or the Tribunal in this respect, in particular as far as the section 83(2) orders are concerned.[197] On the other hand, the courts or the Tribunal should be left with some judicial discretion in respect of their powers. However, there are instances where the legislature can provide more certainty, for instance by imposing a prohibition on the lowering of the interest rate in terms of the credit agreement when restructuring the consumer's obligations.[198]

It is therefore apt to make a few recommendations that in my opinion will serve to improve the reckless provisions in terms of the National Credit Act. First of all, I submit that all the access routes to obtain the reckless lending relief should be extended to the Tribunal. This will benefit consumers, who will have easier access to a more informal and cheaper judicial body to resolve reckless lending and to obtain the required relief, should reckless occurs.

The court orders in terms of section 83 should also receive further consideration. Perhaps a bit more guidance to the courts or the Tribunal in this respect would be appropriate, without abolishing complete judicial discretion. It may be considered to alleviate the status of a reckless credit agreement to that of an unlawful credit agreement in terms of section 89(2) of the Act, with the accompanying consequence

[195] Par 4 2.
[196] Par 4 2.
[197] Par 4 3 2.
[198] See par 4 3 2.

that the reckless credit agreement must be declared void.[199] This will provide certainty in respect to the consequences of entering into a reckless credit agreement.

It is finally submitted that Part 4 of Chapter D of the NCA was developed as a means of protecting consumers and bringing to life the spirit and purport of the NCA as contemplated in section 3.

The introduction of Part D of Chapter 4 of the National Credit Act containing the reckless credit provisions has had the result of affording credit consumers envisioned protection.

[199] Par 4 3 2.

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