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INSECURE LAND TENURE AND THE IMPACT ON THE NATIONAL CREDIT ACT 34 OF 2005

BY

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SUMMARY

South Africa has come a long way since it was declared a democracy in 1994. As the saying of Jean-Baptiste Alphonse Klaar goes, "*plus ca change, plus c'est la meme chose*"- the more things change the more they stay the same.

This dissertation considers the South African property system, specifically with reference to insecure tenure rights, where they stem from and their practical application under the current dispensation. It briefly covers the genesis of communal land systems flowing from Bantustans (also known as homelands), and the development of the laws which attempted to regulate these communal land systems.

This dissertation further considers the relationship between insecure land tenure and the National Credit Act 34 of 2005. In particular, whether insecure land tenure limits the application of the National Credit Act and the achieving of its purposes. In this regard, the development of consumer credit legislation is traced back to the 1920's and up to the passing of the National Credit Act as it is known today.

The National Credit Act is considered against the Constitution of South Africa, 1996 and prevailing land tenure legislation. Section 25(9) of the Constitution instructs Parliament to enact legislation that will realise the right to security of land tenure; it appears that this constitutional obligation has been a forgone dream for many South Africans who still do not enjoy secure and formalised land tenure rights.

The National Credit Act aims to promote the development of a credit market that is accessible by all South Africans, and particularly those who have historically been unable to access credit under sustainable market conditions. Chapter 5 of this dissertation attempt to shed light to the seriousness of the limitations which insecure land systems has on the fulfilment of this and many other objectives of the National Credit Act. Lastly, recommendations will be put forward in an attempt to remedy the *status quo* in a manner that secures a permanent a solution for many South Africans.

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CHAPTER 1:
INTRODUCTION

1.1 Background

After the National Party gained power in South Africa in June 1948, its government diligently set out to enforce a system which it termed "Apartheid".[1] Under Apartheid, ten Bantu homelands (Transkei, Bophuthatswana, Ciskei, Venda, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa, and QwaQwa), commonly known as Bantustans[2] were formed in terms of the repealed Bantu Authorities Act[3] and the Promotion of Bantu Self-Government Act.[4] Through this segregation mechanism black South Africans were separated according to their ethnic groups into self-governing homelands.

In 1970, the Black Homeland Citizenship Act[5] was passed, granting black South Africans citizenship in their respective Bantustans, designated for their particular ethnic group. This Act, in line with the Natives Land Act,[6] which precluded black people from entering into any agreements or transactions for the purchase or lease of land or the acquisition of any rights in or interest to land with a non-black person, did not extend citizenship, economic or political rights in South Africa to black South Africans. Therefore, in their respective Bantustans, black South Africans did not enjoy equal rights in land to those afforded to white South Africans in non-segregated South Africa. One of the biggest pitfalls of the Bantustans system was that the occupiers of such land were not advanced secure title to the land on which they lived. In the Bantustans black South Africans were defaulted to an insecure land tenure system to land.[7]

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1 SF Khunou "Traditional leadership and independent Bantustans of South Africa: some milestones of transformative constitutionalism beyond Apartheid" (2009) 12 *PER* 81-122 96.
2 Khunou 103.
3 Act No. 68 of 1951.
4 Act No. 46 of 1959.
5 Act No. 26 of 1970.
6 Act No. 27 of 1913.
7 Commissioned Report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change: an initiative of the Parliament of South Africa by M Clark and N Luwaya.

Security of land tenure, as will be elaborated on below, is a concept which speaks to one's legal and practical ability to defend one's ownership, occupation, use and access to land from interference by others.[8] It follows therefore that insecure land title on the other hand refers to an inability to defend one's ownership, use and enjoyment of land from interference by others.

Apartheid officially came to an end on 27 April 1994 and the Bantustans were reintegrated into a united South Africa, ushering in the Constitution of the Republic of South Africa, (the "Constitution").[9] The Constitution, which is said to be one of the best drafted pieces of legislation in the world,[10] houses the Bill of Rights. The Bill of Rights is fondly revered as the cornerstone of South Africa's democracy because it enshrines the rights of all South Africans and affirms the values of human dignity, equality and freedom.[11] The dawn of a democratic South Africa brought with it countless constitutional promises and a glimmer of hope to those who had been previously excluded from economic participation due to past discriminatory laws.

To rectify the historical imbalances brought about by colonialism and apartheid and to give effect to the Constitutional provisions, the post-apartheid government embarked on a multi-faceted land reform programme.[12] The programme aims to address unequal land-holding patterns and to protect, secure and strengthen the land rights of the historically disadvantaged.[13] South Africa's land reform programme is set out in the White Paper on South African Land Policy (1997).[14] At the heart of South Africa's land reform policy is tenure reform, which is aimed at protecting, securing and strengthening the rights that people have over land, especially where those rights are weak as a result of past racially discriminatory laws and practices.[15]

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[8] A Mahomed *Understanding Land Tenure Law: Commentary and Legislation* 28.
[9] Act No.108 of 1996.
[10] www.sahistory.org.za/drafting-of-final-constitution.
[11] S7(1).
[12] Diagnostic report on land reform in South Africa, University of the Western Cape (2016).
[13] Diagnostic report on land reform in South Africa, University of the Western Cape (2016).
[14] Department of Land Affairs, White Paper on South African Land Policy 1997.
[15] Commissioned Report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change: an initiative of the Parliament of South Africa by M Clark and N Luwaya.

The Constitution introduced equal rights for all South Africans, such as the right to access to information,[16] the right to housing and property,[17] the right to freedom of trade, occupation and profession,[18] the right to equality,[19] the right to freedom of movement and residence,[20] the right to citizenship[21] and political rights[22] to name a few significant rights for purposes of this paper.

The most significant for the purposes of this paper is the right guaranteed under section 25 of the Constitution namely the right to property. In particular, section 25(6) of the Constitution, which provides that "[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress".

Section 25(9) of the Constitution instructs Parliament to enact legislation that will realise the right to security of land tenure.[23] Taking heed thereof, Parliament enacted the Land Tenure Act[24] and thereafter the Extension of Security of Tenure Act.[25] The latter is aimed at providing measures, with the State's assistance, to facilitate long-term security of land tenure, regulate the conditions of residence on certain land, regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated, and to regulate the conditions and circumstances under which persons whose right of residence has been terminated, may be evicted from land and to provide for matters connected therewith.[26]

In addition, the Constitution mandates the State to "respect, protect, promote and fulfil" the rights contained in the Bill of Rights, which includes the right to tenure

[16] S 32.
[17] Ss 25 and 26.
[18] S 22.
[19] S 9.
[20] S 21.
[21] S 19.
[22] S 20.
[23] "Parliament must enact the legislation referred to in subsection (6)."
[24] Act No. 32 of 1996.
[25] Act No. 62 of 1997.
[26] As stated in the preamble to the Act.

security for those whose tenure is insecure as a result of previous racially discriminatory laws.[27]

As will become apparent from this paper, over two decades later, justice has not been done, or seen to be done, for a third of South Africa's population who still reside in the former Bantustans, as most of these people still do not enjoy full recognition and security of tenure with respect to their land rights and Parliament has been unable to develop laws and policies that sufficiently regulate communal tenure with absolute conclusiveness.[28] While the government has enacted laws to enhance the security of tenure of farm dwellers and labour tenants, there is currently a legal vacuum in terms of formalising, securing and promoting the land rights of the people living in the former homelands as there is no legislation adequately governing this aspect, other than the Interim Protection of Informal Land Rights Act ("Interim Protection Act"), which does not deal with this subject substantively.[29] The purpose of the Interim Protection Act is to provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law; and to provide for matters connected therewith.[30]

The new political dispensation opened and extended access to previously exclusive markets, which resulted in an influx of new market participants (mainly black South Africans).[31] This brought about additional challenges of voracious credit providers extending credit at inflated interest rates without discretion, to non-experienced consumers, and with minimal market regulation leading to a torrent pool of over-indebted consumers who were offered very little protection under former consumer credit legislation.[32]

The new dispensation and its associated challenges and developments in the credit arena, necessitated the need for improved consumer credit legislation, which ultimately resulted in the introduction of the National Credit Act 34 of 2005 (as

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[27] S 7.

[28] Rights without Illusions: The Potentials and Limits of Rights-based Approaches to Securing Land Tenure in Rural South Africa PLAAS Working Paper (2011).

[29] Act No. 31 of 1996.

[30] The preamble of the Interim Protection Act.

[31] Rights without Illusions: The Potentials and Limits of Rights-based Approaches to Securing Land Tenure in Rural South Africa PLAAS Working Paper (2011).

[32] C Walker "The Land Question in South Africa: 1913 and Beyond" Oxford Research Encyclopedia on African History 2017 retrieved on 10 July 2018.

amended) (the "Act"). Renke comments that the Act is a great improvement from its predecessors in so far as it relates to debt prevention and that it is something that South Africans can be proud of.[33] However, it appears that even in light of the continued efforts to align consumer credit legislation to the needs of the most credit vulnerable in South Africa, the implementation and applicability of the Act is stifled in many respects by lagging land tenure legislation.

1.2 Research problem

The Act defines credit as "a deferral of payment of money owed to a person, or a promise to defer such a payment; or a promise to advance or pay money to or at the direction of another person".[34] In a cash economy or a society arranged around a system of barter, there would be no need for credit.[35] In our society, however, credit is a way of life for many individuals and businesses. Student loans, credit cards, mortgages, car loans, business loans and even utilities such as electricity are all examples of common credit products. It is, therefore, easy to see why credit is important. Although credit is fundamentally the lubricant of society, if used incorrectly things could go wrong. The Banking Association of South Africa has stated that "[c]redit enables people to spend money they don't have, spend more money than they earn, use credit for ordinary purchases, use credit even when they have cash and use debt to pay off debt. The use of credit and poor money management skills often leads people into a situation of over-indebtedness where they are unable to service credit agreements."[36]

In 2017, the South African National Treasury reported that South Africa's GDP growth was at 0.7%, which is expected to increase slowly, reaching a mere 1.9% in 2020.[37] On a global perspective, in 2011, the World Bank estimated that 2.5 billion working-age adults globally had no access to the types of formal financial services delivered by regulated financial institutions that wealthier people rely on. Instead,

[33] S Renke "Measures in South African consumer credit legislation aimed at the prevention of reckless lending and over-indebtedness : an overview against the background of recent developments in the European Union" (2011) 74 Tydskrif Vir Hedendaagse Romeins-Hollandse Reg 1-21 21.
[34] S 1.
[35] The Department of Trade and Industry South Africa's Consumer Credit Law Reform: Policy Framework for Consumer Credit August 2004.
[36] The Banking Association of South Africa, www.banking.org.za (hereinafter "BASA")
[37] 2017 Medium Term Budget Policy Statement p9.

they depend on informal mechanisms for saving and protecting themselves against risk. They buy livestock as a form of savings, they pawn jewellery and they turn to the informal and unregulated moneylenders for credit.[38] These mechanisms are risky and often more expensive than formal financial services.

In August 2017, Statistics South Africa released a report on the poverty trends in South Africa between 2006 and 2015. This report indicated that the number of people living in extreme poverty in South Africa (i.e. people living below the 2015 determined food poverty line of R441 per person per month) increased by 2.8 million, from 11 million people in 2011 to 13.8 million people in 2015. The report further highlighted that the most vulnerable people to poverty were children (aged 17 or younger), females, black South Africans, people living in rural areas (particularly in the Eastern Cape and Limpopo), and people with little or no education.[39]

It is said that numbers do not lie, and this is a clear indicator that the average South African would need to have adequate access to some form of credit, in order to venture into business, pursue an education or even sustain a family on a month to month basis. These numbers paint a picture of the increasing importance of access to credit for all South Africans, and even more strongly the need for regulated and controlled access to credit which must pair with the necessary education, in line with the objectives of the Act.

With South Africa's consumer credit market finally taking shape, ideally all consumers should be able to access safe credit. However, this does not appear to be case. The Act seems to be strained by the underdevelopment of land tenure legislation or the lack thereof. Without formalised rights to land, occupants of land are unable to exercise their rights over land and most importantly these occupants are unable to use their rights in land to access credit, which would in turn improve their standard of living and livelihood. As a result, these occupants are excluded not only from accessing the protection proclaimed by the Act but they also do not enjoy relief measures enjoyed by those with secure title should they find themselves in hot water.

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[38] www.worldbank.org.

[39] Stats SA Poverty Trends in South Africa: an examination of absolute poverty between 2006 and 2015.

This paper will therefore look at the relationship between the Act and land tenure legislation with a specific focus on the impact of land tenure security on the application of the Act (specifically whether it adversely affects the application of the Act with reference to previously disadvantaged persons) and whether there is a need for land tenure legislation to be developed parallel to the upgrading of consumer credit legislation. In other words, this paper takes a closer look at the purposes of the Act to determine whether insecure land tenure cripples the achievement of these purposes and objectives.

1.3 Purpose and relevance of the study

Issues surrounding the ownership of land and specifically section 25 of the Constitution[40] have been at the centre of great debate in the South African land reform context. The question of public interest has lifted its head as President Cyril Ramaphosa announced the appointment of an advisory panel on land reform. Therefore, the climate forms an excellent backdrop to discuss the ancillary issue of insecure land tenure and its impact on consumer credit legislation. Section 25(4)(a) of the Constitution provides that "the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources;".

In November 2017, the Department of Trade and Industry (the "DTI") published the National Credit Amendment Draft Bill (the "Amendment Bill")[41] on debt intervention, indicating that the end in the continuous effort in an attempt to develop solid, effective and far reaching consumer credit legislation is not in sight. Additionally, land tenure reform is a major part of the government's land reform programme, precisely because laws that perpetuated restrictions on the acquisition and utilisation of rights to land, based on race or membership of a specific population group, needed to be repealed or amended.[42]

[40] Section 25 deals with the right to property.
[41] The Portfolio Committee on Trade and Industry has published the Draft National Credit Amendment Bill, 2018 and the accompanying Memorandum on the Objects of the Bill.
[42] Department of Trade and Industry South Africa's Consumer Credit Law Reform: Policy Framework for Consumer Credit August 2004 (hereinafter "2004 Framework").

With this in mind, the purpose of this study is to draw a correlation between the right to and in land that a consumer may have and the consumer's enjoyment of the protection afforded by the Act. In terms of the Act, a consumer is either the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement; or the party to whom money is paid, or credit granted, under a pawn transaction; or the party to whom credit is granted under a credit facility; or the mortgagor under a mortgage agreement; or the borrower under a secured loan; or the lessee under a lease or the guarantor under a credit guarantee; or the party to whom or at whose direction money is advanced or credit granted under any other credit agreement.[43]

It is the duty of the legislature to develop the law where there are loopholes and this paper seeks to identify those loopholes in hopes to assist the legislature in fulfilling its role in the development of the law.

1.4 Methodology

In attempting to solve the research problem, this paper will examine the development of consumer credit legislation, looking at where it started to where it is at present. The South African property landscape will be mapped out and evaluated against the challenges posed by land tenure, resting specifically on insecure land tenure.

The limitations will be considered, if any, to the applicability of the Act posed by the lack of a comprehensive and stable land tenure framework. Ultimately, a number of recommendations will be put forward in an attempt to resolve the research problem. This paper aims to establish whether there is a limitation on the applicability of the Act by virtue of insecure land tenure and if this is the case, how this issue can be resolved. This paper seeks to trigger the reader to think "outside of the box" particularly in relation to the manner in which land tenure legislation affects the Act.

[43] S 1.

CHAPTER 2:
THE EVOLUTION OF CONSUMER CREDIT LAW IN SOUTH AFRICA

2.1 Background

Although the concepts “consumer”, “consumer protection” and “consumer legislation” are relatively new in the South African legal landscape, consumer credit legislation is not necessarily a new invention. Consumer credit legislation has a deep genesis in the historical foundations of legislation.[44] South Africa comprises a hybrid legal system, which is a mix of concepts stemming from Roman-Dutch law, English law, indigenous African law and modern legislation. For example, consumer credit concepts relating to the warranty against latent defects and the *in duplum* rule regarding arrear interests, have been carried forward from Roman-Dutch law to form part of South Africa’s common law,[45] to name a few examples.

Today, South Africa boasts of a National Credit Act[46] that is “part of a comprehensive credit legislation overhaul designed to protect the consumer in the credit market and make credit and banking services more accessible”.[47] As will be highlighted in the following paragraphs, this position was not arrived at overnight; it in fact remains a continuous joint effort to develop South Africa's consumer credit legislation to a point where it is aligned with international best practices and serves the best interest of those whom it regulates. This ongoing effort is highlighted by the changes proposed by the Amendment Bill, which will be discussed at a later stage.

2.2 The Usury Act

In South Africa, like elsewhere in the world, consumer credit legislation was and still is heavily influenced by economic, social, religious and political considerations. Usury involved the charging of excessive interest on loans. There are religious

[44] J Otto “The History of Consumer Credit Legislation in South Africa” (2010) 16 *Fundamina: A Journal Of Legal History* 257-273 257.
[45] J Otto “The History of Consumer Credit Legislation in South Africa” (2010) 16 *Fundamina: A Journal Of Legal History* 257-273 258.
[46] Act No. 34 of 2005.
[47] BASA.

associations with this concept where, for example, in the Old Testament of the Bible, the claiming of interest was not permissible.[48] This changed in the New Testament where profiteering became acceptable.[49] The biblical rules on usury led to great opposing views as the old church fathers differed in their interpretation of the texts. Since the times of the reformer John Calvin, it has been accepted that only excessive interest is disallowed.[50]

South Africa's consumer credit legislation slowly evolved from the Usury Act of 1926,[51] which was replaced by the Limitations and Disclosure of Finance Charges Act.[52] This Act, which was later amended and renamed the Usury Act of 1968,[53] was regarded as the one of most complicated pieces of legislation to ever be enacted in the history of South Africa.[54]

2.3 The Hire Purchase Act

The concept behind hire-purchase contracts was, for example, where a purchaser received delivery of a motor vehicle, paid the purchase price in instalments ("on credit") but only became the owner of the vehicle once the full purchase price has been settled and all his other obligations in terms of the agreement have been fulfilled. This effectively meant that a credit sale was concluded with a *pactum reservati dominii*[55] clause, which formed the basis of hire purchase.

In 1942, the Hire Purchase Act[56] was introduced to protect hire purchasers of movable goods by limiting the rights of sellers and by curtailing the cancellation of contracts. This Hire Purchase Act was subsequently replaced by the Credit Agreements Act.[57] During this period, the Usury Act and the Credit Agreements Act applied parallel to each other and together regulated consumer credit. The Usury Act and the Credit Agreements Act were meant to co-exist and complement each other,

[48] Exodus 22:25; Psalm 15:5; Proverbs 28:8 & Nehemiah 5:7. This is not an exhaustive list.
[49] Matthew 25:27 for example.
[50] J Otto "The History of Consumer Credit Legislation in South Africa" (2010) 16 *Fundamina: AJournal Of Legal History* 257-273 261.
[51] Act No. 37 of 1926.
[52] Act No. 73 of 1968.
[53] Act No. 73 of 1968.
[54] CF Tuker "Limitation and Disclosure of Finance Charges Act" (1980) 2 *De Rebus* 581-584 581.
[55] Ownership reservation clause.
[56] Act No. 36 of 1942.
[57] Act No. 75 of 1980.

but they instead made consumer credit an extremely confusing environment to navigate.[58]

2.4 Consumer credit reform

With each passing day, it became clearer that the South African consumer credit scene had become unconducive for South Africa's present and future political, economic and social ambitions. The need for credit law reform was proposed to the South African Law Commission as early as 1993 with the aim to simplify and consolidate consumer credit legislation.[59] In March 2002, the DTI set up a committee to undertake the review of consumer credit policy and to submit proposals for a new regulatory framework for consumer credit.[60]

The committee established that two credit markets co-existed, one comprising of historically disadvantaged low-income consumers and small to medium enterprises, which was largely characterised by limited access to credit at a high cost, and another market comprising of predominately white South Africans classified as middle and high income consumers and large enterprises with unchallenged access to credit at preferential rates.[61]

In addition, it was found that the low-income groups had little access to conventional credit products such as mortgages, credit cards or overdraft facilities. These low-income groups were relegated to non-bank credit, informal sector loans and other marginal credit providers. The products available to the lowest income groups consist mainly of micro-loans, store cards, hire purchase transactions and loans backed by provident or pension fund guarantees, which are generally available only at high costs, so that individuals in the poorest income category pay up to ten times the price paid by the wealthiest income groups.[62] This split was, to a great extent, the result of the regulatory framework for consumer credit at the time. Therefore, it

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[58] J Otto "The History of Consumer Credit Legislation in South Africa" (2010) 16 *Fundamina: A Journal Of Legal History* 257-273 266.

[59] R-L Aucamp "The incidental credit agreement: a theoretical and practical perspective" (1) (2013) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 377.

[60] 2004 Policy Framework.

[61] 2004 Policy Framework.

[62] 2004 Policy Framework.

was important for a comprehensive review of the regulation and institutions to ensure that the underlying structural problems were addressed.

Other aspects that were brought to light by the committee were that, although the South African credit market is characterised by a lack of access to reasonably priced credit for the majority of the population, it is also characterised by an over-supply of credit to those who were considered creditworthy. This meant that a large number of consumers were faced with an enticement of being over-indebted in the face of mechanisms which are not adequate to promote the rehabilitation of consumers, or even to assist already over-indebted consumers to deal with their debt.[63]

Additionally, it was found that the Usury Act and the Credit Agreements Act had become outdated and ineffective as the credit market had evolved significantly. There existed a heavy impetus to modernise consumer credit laws and to harmonise them with best international practices. The regulatory framework had distorted the credit market through its differential and unequal treatment of different credit products and credit providers, and this had the result of affording different consumers different levels of protection, with the poorest and most vulnerable having the least protection.[64] The committee further found that there was a lack of regulation and that the practices of less scrupulous credit providers had become the norm, thus discouraging reputable credit providers from venturing into the low-income market and from providing more affordable finance to low-income earners. This resulted in practices such as abusive debt collection and the abuse of administrative orders by legal practitioners amongst others.[65]

Based on these reasons, there existed an urgent need to review the regulatory framework in light of protecting the interests of all stakeholders.

2.5 New legislative framework

The Act was passed in 2005 and implemented in a piecemeal manner until it became fully operative in 2007, replacing the Usury Act and the Credit Agreements

[63] 2004 Policy Framework.
[64] 2004 Policy Framework.
[65] 2004 Policy Framework.

Act altogether.[66] It could be said that this was the turning point for South Africa's consumer credit legislation, since the Act changed the face of consumer credit legislation as it was known and applied in South Africa for decades. The Act also refreshingly bears very little resemblance to its predecessors.

As will be discussed more fully below, the Act gave way for tightened regulatory measures by introducing provisions pertaining to the registration of credit providers,[67] credit bureaux,[68] debt counsellors[69] and payment distribution agents[70] amongst other measures.

The Act, however, it is not without its shortcomings. In *Firstrand Bank Ltd t/a First National Bank v Seyffert*,[71] Willis J described the tiresome effort that goes into interpreting the Act as "going round and round in loops from subsection to subsection, much like a dog chasing its tail".[72] Otto phrases it quite correctly that, despite its short comings, the Act "is a modern and advanced consumer credit Act, which has served the South African credit industry relatively well so far. It will, no doubt be revised and amended from time to time and the legislature will be well advised to take cognisance of global developments in this regard".[73] It is also important to note that although the Act is the main focus of this paper, it is not the only consumer credit legislation in South Africa. Legislation such as the Consumer Protection Act[74], the Alienation of Land Act[75] and the Insolvency Act[76] make up the pieces of a greater consumer credit legislation puzzle.

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[66] J Otto "The History of Consumer Credit Legislation in South Africa" (2010) 16 Fundamina: A Journal Of Legal History 257-273 270.
[67] S 40.
[68] S 43.
[69] S 44.
[70] S 44A.
[71] 2010 6 SA 429 (GSJ) 434.
[72] 2010 6 SA 429 (GSJ) 434.
[73] J Otto "The History of Consumer Credit Legislation in South Africa" (2010) 16 Fundamina: A Journal Of Legal History 257-273 274.
[74] Act No. 68 of 2008.
[75] Act No. 68 of 1981.
[76] Act No. 24 of 1936.

CHAPTER 3:
THE NATIONAL CREDIT ACT APPLIED

3.1 The purpose of the Act

The Act unambiguously announces its purpose as being "to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers".[77]

For purposes of this paper, I will summarise the purpose of the Act, in broad terms as, *consumer protection*.

As further set out in section 3 of the Act, it seeks to achieve its purposes by-

(a) promoting the development of a credit market that is accessible by all South Africans, and particularly those who have historically been unable to access credit under sustainable market conditions;

(b) ensuring consistent treatment of different credit products and credit providers;

(c) promoting responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers and by discouraging reckless credit offering by credit providers and consumer default;

(d) correcting and addressing the negotiating power imbalances between parties by educating consumers of their rights and protecting them from unfair and or fraudulent conduct by credit providers and credit bureaux;[78]

(e) Making consumer credit information adequately available and providing consumers with adequate disclosure of standardised information in order to make informed choices;

[77] S 3.
[78] JM Otto & R-L Otto The National Credit Act explained (2 ed 2011) 14.

(f) preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based;

(g) providing a consistent and accessible system for dispute resolution;

(h) providing efficient debt restructuring, enforcement and judgment systems; and

(i) promoting equity in the credit market through the weighing up and balancing of rights and responsibilities of credit providers and consumers.[79]

3.2 The application of the Act

The Act was primarily enacted to promote consumer protection. The Act attempts to prevent the over-indebtedness of consumers and to assist them should they find themselves in financial trouble. It does this by introducing pre-credit offering exercises that must be undertaken by credit providers before advancing credit, debt review measures, credit bureaux regulation and guidelines for handling of confidential consumer information in line with its objectives. The Act also gives guidance to those who engage in its interpretation to do so in a manner that gives effect to its purposes.[80]

It should be noted from the outset that the Act should not be interpreted in a one-sided manner (that is, to favour the consumer only), as credit providers also have rightful interests that call for protection.[81] For example, in terms of section 64(5) of the Act, "when pre-approving any form of documents as contemplated in subsection (4), the National Credit Regulator must balance the need for efficiency of the credit provider with the principles of subsection (1)(b)". The principles in subsection (1)(b) refer to those principles relating to the fact that information disseminated to consumers should be in plain and understandable language *inta alia*. This interpretational approach was further reiterated in the case of *Standard Bank of*

[79] According to Otto whose sentiments I share, this calls for a balanced approach which leads to the reasonable protection of consumers, not forgetting that credit providers have rights too and the courts should therefore not apply the Act in a one-sided manner which only caters for the interests of consumers.

[80] S 2(1).

[81] JM Otto & R-L Otto The National Credit Act explained (2 ed 2011) 7.

South Africa Ltd v Hales,[82] where the court held that "a well-balanced approach" should be applied when interpreting the Act.

I will now consider the measures that the Act has put in place in order to achieve consumer protection.

3.2.1 Credit agreements

The Act applies to every credit agreement entered into between parties dealing at arm's length and made within or having an effect within the Republic.[83] The Act does not apply to agreements listed in section 4(1)(a)-(d). An agreement constitutes a credit agreement in terms of the Act if it is any of the following:[84]

(a) A credit facility[85]

(b) A credit transaction.[86] There are eight types of credit transactions in terms of the Act, namely pawn transactions, discount transactions, incidental credit agreements, instalment agreements, mortgage agreements, secured loans, leases of movable goods and other agreements (such as sale of land where payment is deferred in terms of the Alienation of Land Act).

(c) A credit guarantee;[87] or

(d) Any combination of these three transactions.[88]

The Act also recognises developmental credit agreements[89] and public interest credit agreements[90] as credit agreements falling within its ambit. Whilst the application of the Act is limited in respect of incidental credit agreements and agreements wherein the consumer is a juristic person, it is important to note that in terms of section 8(2)(a)-(c) a lease of immovable property, an insurance policy or

[82] 2009 (3) SA 315 (D) 322B-C.
[83] S 4(1).
[84] S 8.
[85] S 8(3).
[86] S 8(4).
[87] S 8(5).
[88] S 8 (1)(d).
[89] S 10.
[90] S 11.

credit extended by an insurer solely to maintain the payment of premiums on an insurance policy and stokvel transactions in accordance to the rules of the stokvel do not constitute a credit agreement and therefore does not fall within the ambit of the Act.

3.2.2 Consumer credit institutions

3.2.2.1 National Credit Regulator

In an effort to further strengthen consumer protection, the Act established a National Credit Regulator (the "NCR"), an independent juristic person with jurisdiction throughout the Republic.[91] The NCR has wide powers and duties as set out in the Act,[92] or assigned to it by other legislation.

In essence, the NCR must ensure that the Act is complied with. The NCR is tasked with the development of an accessible credit market that specifically serves the needs of historically disadvantaged persons, low income persons and communities and remote, isolated communities.[93] In addition, it is also responsible for the promotion of public awareness of consumer credit matters,[94] the registration and suspension or de-registration of credit providers, credit bureaux and debt counsellors as well as maintaining the relevant registries.[95] The powers of the NCR include receiving complaints, issuing and enforcing compliance notices, investigating alleged contraventions of the Act, referring matters to the Competition Commission under the Competition Act,[96] referring matters to the National Consumer Tribunal as permitted under the Act and reporting to the Minister of Finance as directed by the Act.[97]

The registration of credit providers is dealt with under section 40 of the Act. The Act defines a credit provider "the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement; the party who advances money or credit under a pawn transaction; the party who extends credit under a credit facility; the mortgagee under a mortgage agreement; the lender under

[91] S 12.
[92] Ss 12-18.
[93] S 13(a).
[94] S 16(1).
[95] S 14.
[96] Act No. 89 of 1998.
[97] S 18.

a secured loan; the lessor under a lease; the party to whom an assurance or promise is made under a credit guarantee; the party who advances money or credit to another under any other credit agreement; or any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into."[98]

Section 40(1) states that a person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42 (1). The current threshold as determined by the Minister of Finance is Nil.[99]

The question regarding the circumstances under which registration as a credit provider, in terms of the Act, is obligatory was recently considered by the Supreme Court of Appeal ("SCA") in the case of *Du Bruyn NO & others v Karsten*.[100] In this case, the SCA held that a credit provider must register as such where a credit agreement exceeds the threshold set out in section 42(1), irrespective of whether it is a single transaction or whether the credit provider is a regular participant in the credit industry.

This is a diversion from the widely held position founded in the case of *Friend v Sendal.*[101] The court in *Friend* held that the requirement to register as a credit provider applied only to those in the credit industry and did not apply to single transactions where credit was provided, irrespective of the amount involved was incorrectly decided. Therefore, the fact that an agreement may be a credit agreement in terms of the Act, this did not necessarily mean that the credit provider was obliged to register in terms of section 40 of the Act.

The SCA in the *Du Bruyn* matter commented that the amount of credit provided is the sole determining factor to ascertain whether a credit provider is obliged to register as such. Therefore every person (natural and juristic) who falls within the definition of credit provider must register as such.

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[98] S1.

[99]. Determination of thresholds issued under the Act issued under Government Gazette Number 39981.

[100] [2018] ZASCA 143.

[101] [2015] SA 395.

3.2.2.2 National Consumer Tribunal

In addition to the NCR, the Act has established a National Consumer Tribunal (the "Tribunal"). The Tribunal boasts wide powers to make orders in terms of the Act and similarly to the NCR, the Tribunal is a juristic body with jurisdiction throughout the Republic.[102]

Functioning as an adjudicator, the Tribunal or a member thereof may hear applications and allegations of prohibited conduct, as well as grant an order of costs or exercise any other power conferred to it by law.[103] The Tribunal is also required to report to the Minister of Finance annually[104] in line with the Public Finance Management Act.[105]

3.2.3 Consumer credit rights

3.2.3.1 The right to apply for credit

Section 60(1) of the Act provides that every adult natural person and every juristic person or association ("consumer") has a right to apply for credit.[106] The rights enjoyed by South African consumers are set out unambiguously throughout the Act and are discussed here as follows:

3.2.3.2 The right not to be discriminated against

Credit providers are obliged to conduct an affordability assessment prior to advancing credit to a consumer. Furthermore, credit providers must not discriminate directly or indirectly against a consumer of any grounds set out in section 9(3) of the Constitution, or one or more grounds set out in Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act.[107]

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[102] S 26(1).
[103] S 27.
[104] S 36(2).
[105] Act No. 1 of 1999.
[106] S 60 (1).
[107] S 61(1).

3.2.3.3 Documentary rights

The Act obliges a credit provider who has refused to grant credit to a consumer, on the request of the consumer, to advice the consumer in writing of the reasons for refusing to advance credit to that consumer under the circumstances.[108] A credit provider who has based its decision on an adverse credit report received from a credit bureau must advise the consumer in writing of the full particulars of that credit bureau.[109] There is an obligation on credit providers to maintain records of all applications for credit, credit agreements and credit accounts in the prescribed manner and form and for the prescribed time.[110]

Additionally, a consumer under the Act is entitled to receive information or any document produced in terms of the Act in plain and understandable language or in the prescribed form, if any.[111] For the purposes of the Act, a document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance, and import of the document without undue effort, having regard to factors such as the context, comprehensiveness and consistency of the document; the organisation, form and style of the document; the vocabulary, usage and sentence structure of the text; and the use of any illustrations, examples, headings, or other aids to reading and understanding.[112] In terms of section 68 of the Act, a person who deals with information concerning a consumer should do so in a confidential manner by using and/or releasing the information as permitted.

The Act imposes an obligation on a credit provider to deliver periodic statements of account to a consumer. For example, in respect of a mortgage agreement, a consumer should be provided with a statement of account biannually.[113] Further to this, a credit provider must deliver, without charge to the consumer, a statement of balance within the time frame set out in the Act.[114] Where a consumer disputes any

[108] S 62(10)(a)-(d).
[109] S 62(2).
[110] S170.
[111] S 64 (1).
[112] S 64 (2).
[113] SS 108(1) and 108(2)(c).
[114] S 110.

entries of the balance statement, the credit provider must give such a consumer written notice explaining the entry in reasonable detail or confirming the error and setting out the revised entry.[115] Where a consumer is ready to settle an agreement, the credit provider concerned must deliver without charge to the consumer a statement of the amount required to settle a credit agreement in accordance with the requirements of section 113 of the Act.

3.2.3.4 Other consumer rights

Where a consumer has experienced financial hardship, the Act extends certain obligations to debt counsellors and credit bureaus.[116] For example, a consumer has the right to be advised by a credit provider prior to any adverse information concerning that consumer is reported to a credit bureau and to receive a copy of such information on request, or to inspect any file containing such information, or to challenge the accuracy of such information.[117]

A consumer under the Act is protected against unscrupulous credit granting. A credit provider may not entice a consumer to enter into a credit agreement or make a proposal to alter or increase the credit limit under a credit facility, or engage in any negative option marketing in respect hereof.[118] Any advertisement for credit must comply with the requirements set out in section 76(4) of the Act. In particular, a regulated advertisement must be lawful, and may not be misleading, fraudulent or deceptive and must be accompanied by the necessary cautions or warnings.[119]

A credit provider is prohibited from harassing a person in an attempt to persuade them to enter into a credit agreement,[120] and the Act prescribes stringent rules in respect of credit agreements entered into at the consumer's private dwelling or place of employment.[121] The Act further regulates the fees and charges which may be charged under a credit agreement.[122] The Act sets out the form which credit

[115] S111.
[116] S 71.
[117] S 72.
[118] S 74 (1)-(3).
[119] S 76 (4).
[120] S 75(1).
[121] S 75(2).
[122] S 102.

agreements should take[123] and in terms of section 91 of the Act, unlawful provisions are prohibited from credit agreements and supplementary credit agreements. The Act further regulates how changes to a credit agreement should be made, as well as how reductions and increases to the credit limit should be affected.[124] Most important to note is that a credit provider may not make unilateral changes to the credit agreement.[125]

3.2.4 Prevention of reckless credit

In terms of the Act, a consumer is over indebted if, on the preponderance of available information at the time a determination is made, the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's financial means, prospects and obligations; and secondly, having regard to that consumer's probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.[126]

The Act obliges every credit provider to conduct an assessment of the consumer in order to establish whether the consumer has a general understanding of the proposed credit agreement and associated risks, the consumer's debt re-payment history and existing financial means, prospects and obligations.[127] Where a credit provider fails to conduct this assessment, the Tribunal or a court may declare that a particular credit agreement is reckless and set aside all or a part of the consumer's rights and obligations under the credit agreement, or suspend the force and effect of such credit agreement.[128] The court or Tribunal may also conclude that a consumer is over-indebted, in which case either institution may order that the credit agreement be suspended until a future date, and that the consumer's obligations be accordingly restructured.

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123 S 93.
124 Ss 117-119.
125 S 120.
126 S 79(1)(a) - (b).
127 S 81(2).
128 S 83(2).

Where it is alleged that a consumer under a credit agreement is over-indebted, the court may refer the matter to a debt counsellor to evaluate the consumer's circumstances, or declare that the consumer is over-indebted and make an order relieving the consumer.[129] Alternatively, the consumer may apply to a debt counsellor to be declared over-indebted (expect where the credit provider has taken steps to enforce the agreement).[130]

The Act regulates the circumstances under which and the process to be followed when a debt can be enforced by a creditor. [131] In certain instances, the court can make an attachment order in respect of a property that is subject to the credit agreement.[132]

3.2.5 Concluding remark

The threshold under section 42(1) was revised from R500 000 to R Nil in May 2016.[133] The implication being that every credit provider falling within the ambit of the Act is obliged to register as a credit provider in terms of the Act

It is evident from the above that the Act placed great effort in putting measures and structures in place to provide for the regulation of consumer credit and improved standards of consumer information, to prohibit certain unfair credit and credit-marketing practices and to promote responsible credit granting. However, the effectiveness of the Act is largely dependent on the broader legislative environment in which it functions. Especially with reference to the ability of consumers to exercise their right to apply for credit in under the Act, and to access the protection from unfair credit practices and irresponsible credit granting that is professed by the Act. In this regard, the next chapter will consider the impact of land tenure legislation on the Act.

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[129] S 85.
[130] S 86(1)-(2).
[131] Part C of the Act.
[132] S 131.
[133] Determination of thresholds issued under the Act issued under Government Gazette Number 39981.

CHAPTER 4:
LAND TENURE: THE SOUTH AFRICAN PROPERTY SYSTEM

4.1 Property

In law, the exact meaning of the term “property” depends entirely on the context in which it is used. Even on the most elementary level, this term signifies various, distinctly different concepts.[134] For example, Brits proposed that a creditor’s contractual right to receive payment in accordance with the terms of the contract qualifies as “property” for constitutional purposes under section 25 of the Constitution.[135] Property in the broad sense of the word may include patrimonial rights and patrimonial objects.[136] For purposes of this paper, this term will be limited to immovable property and in particular the earth or land under our feet. As a point of departure, it is difficult to discuss property without referring to the rights which such property could potentially attract.

4.1.1 Real rights versus personal rights

A right is a legally recognised and valid claim by a person in relation to a certain object and/or in relation to another person (or group of persons).[137] There are different types of rights namely real rights, personal rights and constitutional rights.

Real rights are rights which can be enforced against the whole world, such as the right to ownership. Personal rights on the other hand are rights held by one person against another person or persons. For example, the right of a lessee against a land owner under a lease contract constitutes a personal right.[138] Another class of rights which exist are limited real rights. These are rights held by third parties over the land of an owner such as servitude of right of way.

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[134] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5th ed 2006) 145.
[135] R Brits "The National Credit Act's Remedies for Reckless Credit in the Mortgage Context" (2018) 21 *PER* 1-34 1.
[136] Law of Property.
[137] L Kilbourn & M Botha *The ABC of Conveyancing* (3 ed 2014) 19.
[138] Law of Property.

In the South African context, in terms of the Deeds Registries Act[139], real rights in immovable property, such as the right to ownership, may only be conveyed from one person to another only by means of a deed of transfer registered in the deeds office in order to be valid.[140] . Personal rights, with a few exceptions, may not be registered in a deeds office.[141]

4.1.2 Ownership

Ownership is a form of real right. It is generally accepted that ownership is the most complete right.[142] The owner of a particular property has a bundle of rights in relation to that property, such as the right to use, enjoy, improve or even encumber the property which is subject to his or her ownership in so far as it is not forbidden by law. The right to ownership is generally limited by the real rights of others in a particular piece of land. However, by virtue of the owner being registered as the owner of the property and bearing registered title to that specific piece of land, such owner is able to defend his or her rights, flowing from the ownership, from interference from the public.

In South Africa, in order to prove ownership, one must have the title deed to the property registered in his or her name by the relevant deeds registry and any other real rights of third parties would be endorsed on such a title deed in favour of such third parties as a form of security of their right in a particular property.[143]

4.2 Land tenure

4.2.1 General

The term “land tenure” refers to various kinds of relationships pertaining to land. It is an institution which regulates how individuals and groups relate to land. Rules of tenure define how property rights to land are allocated and how access is granted to

[139] 47 of 1937.
[140] S 16.
[141] Law of Property.
[142] Law of Property.
[143] Law of Property. See also S 16 of the Deeds Registries Act.

use, control and transfer land.[144] It also refers, more broadly, to institutional and legal considerations of how land and its associated natural resources are held and used, and how these entitlements are limited.[145]

Tenure security refers to the legal and practical ability to defend one's ownership, occupation, use of and access to land from interference by others.[146] Land is held on a permanent basis by virtue of one of three forms of land tenure, namely ownership (freehold), perpetual quitrent (*erfpag*) or leasehold (*huurpag*). Tenure reform speaks to policies that are aimed at strengthening the property rights of those who already occupy land under various relatively insecure forms of tenure, notably in the communal areas and on commercial farms.[147]

Many other land tenure forms stem from relationships that cannot be traced back to real rights. This is due to the manner in which statutory and customary law was previously used to implement a double-tiered land law.[148] As discussed above, the apartheid policy allocated a degree of tenure security to non-white South Africans that was more precarious than the tenure security to which white South Africans were entitled. The rights in land which were created for non-white South Africans included tribal land rights and statutory rights such as site and residential permits, lodger's permits, hostel permits and certificates of occupation.[149] The past system meant that some land rights were afforded "second class status" to others. These rights were "generally subservient, permit-based or 'held in trust'" by the government or the South African Development Trust.[150]

4.2.2 Communal land tenure

Colonial administrators held significantly distorted perceptions regarding land tenure systems. One of the main misconceptions was that common tenure described a

144 Food and Agriculture Organisation of the United Nations Land Tenure and Rural Development available at www.fao.org, last accessed 14 August 2018.
145 *World Bank Discussion Papers* (1989).
146 Law of Property.
147 Law of Property.
148 F Du Bois *Wille's Principles of South African Law* (4 ed 2007) 407.
149 411.
150 412.

wholly collective system of land ownership that was void of notions of individual interest.[151]

The characterisation of communal land tenure systems as "collective" in nature belied the often complex and nuanced ways in which the interests over land fluctuated between more "exclusive" rights and interests and more "collective" rights and interests. Another misconception was the interpretation of communal tenure through the common law lens of European countries. In particular, notions of ownership had a profound impact on how colonial officials perceived communal tenure.[152] The concept of ownership, as interpreted, was characterised by the absolute and exclusive concentration of interests in land in a particular individual.[153] Colonial powers did not recognise this notion of ownership in communal tenure systems and, consequently, declared ownership alien to customary law systems.[154]

In their true nature, communal tenure systems are flexible and constantly adapting and changing based on prevailing circumstances. In this sense, communal tenure practices are similar to notions of living customary law.[155]

4.3 Legal framework

4.3.1 Introduction

Although more than two decades have passed since the Bantustans were reintegrated into a unitary South Africa, the legacy of apartheid continues to haunt a third of South Africa's population who still live in these former homelands because the full recognition of their land rights remains unrealised.[156] South Africa's land reform programme is designed to redress the racial imbalance in landholding and to secure the land rights of historically disadvantaged people. Although the South African government has developed legislation around land tenancy, it has failed to

[151] With What Land Rights, Tenure Arrangements and Support by E Lahiff (2001).
[152] With What Land Rights, Tenure Arrangements and Support by E Lahiff (2001).
[153] With What Land Rights, Tenure Arrangements and Support by E Lahiff (2001).
[154] With What Land Rights, Tenure Arrangements and Support by E Lahiff (2001).
[155] With What Land Rights, Tenure Arrangements and Support by E Lahiff (2001).
[156] Commissioned Report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa 2017 by M Clark and N Luwaya.

develop laws and policies that sufficiently capture the nuanced ways in which people experience and regulate relations of communal tenure in their everyday lives.[157]

A few of the Acts and Policies which the post-apartheid government introduced are briefly discussed below.

4.3.2 The Constitution

It has been mentioned previously that section 25 of the Constitution seeks to, among others, ensure that those whose tenure is legally insecure as a result of previously racially discriminatory laws are granted constitutional protection and compels Parliament to protect, secure and strengthen the rights of those with insecure tenure through legislation. The state is therefore constitutionally obliged to protect and strengthen the tenure rights of people living in communal areas. If the state fails to comply with this imperative it is in direct conflict with the Constitution.

4.3.3 Interim Protection of Informal Land Rights Act

In terms of the Interim Protection of Informal Land Rights Act[158] ("IPILRA"), an individual may not be deprived of his or her “informal rights to land” unless he or she consents to such deprivation (or the government expropriates the land in question and pays adequate compensation).[159]

The IPILRA broadly defines informal land rights to include the right to use, occupy or access land that falls within one of the former homelands (or was previously South African Development Trust land), the rights of beneficiaries of trust arrangements, the rights of individuals who previously had valid Permission to Occupy (PTO) certificates and the rights of beneficial occupiers from anywhere in the country (who have occupied land continuously since the beginning of 1993).[160]

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[157] Commissioned Report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa2017 by M Clark and N Luwaya.
[158] Act No. 31 of 1996.
[159] S 2(1).
[160] S 1(a).

4.3.4 Land Rights Bill

The draft Bill on Land Rights was drawn up and meant to become the first piece of legislation to regulate communal tenure. The Bill sought to upgrade customary land rights by giving them statutory recognition and provided for the possibility that protected rights could be registered. In terms of this Act, the Minister of Land Affairs would remain as the nominal owner of the land with "protected land rights" given to individuals or groups. The Bill was found to be too complicated and was never enacted into legislation.[161]

4.3.5 Communal Land Tenure Policy

The Department of Rural Development and Land Reform published the Communal Land Tenure Policy in 2014 in terms of which communal land was to be transferred into the name of traditional councils while the individuals or families who occupy and use the communal land would be granted "institutional use rights"[162]. This policy was widely criticised given that the institutional use rights granted to individuals and families could be trumped by the rights held by traditional councils and the policy made no provision for individuals and households with institutional use rights to hold traditional councils accountable for their decisions.[163]

4.3.6 Communal Land Tenure Bill

The Communal Land Tenure Bill[164] bears a tone similar to the Communal Land Tenure Policy discussed above. The main difference is found in clause 28(1), which states that a community can, by a resolution supported by at least 60% of the households in the community, choose to have its communal land managed and controlled by a traditional council or a Communal Property Association or the Ingonyama Trust.

[161] With What Land Rights, Tenure Arrangements and Support by E Lahiff (2001).
[162] Research by the Centre for Law and Society, Communal Land Tenure Policy (2015)..
[163] Research by the Centre for Law and Society, Communal Land Tenure Policy (2015).
[164] Published in 2017.

4.3.7 Communal Land Rights Act

The Communal Land Rights Act[165] gave traditional councils wide raging powers, including control over the occupation, use and administration of communal land. This Act was repealed in its entirety in 2010 on grounds of it denying security of tenure to at least 16 million South Africans living in former Bantustans.[166]

4.3.8 Extension of Security of Tenure Act

The Extension of Security of Tenure Act ("ESTA")[167] deals with the eviction of unlawful occupiers of rural or peri-urban land whose occupation was previously lawful, subject to certain conditions. An owner or person in charge of the land in questions may institute proceedings in terms of ESTA to evict unlawful occupants.[168] In terms of this Act, long term occupiers may not be evicted subject to certain conditions. Long term occupiers are those persons who have resided on a farm for more than 10 years and are over 60 years of age or cannot provide labour to a land owner as a result of ill health, disability or injury.[169]

4.4 The challenge of insecure land tenure

Tenure insecurity has compounded the socio-economic disadvantages experienced by people in communal areas. It is common cause that poverty in rural communities remains deep and widespread. Land in rural communities is not just a means of livelihood but also a source of wealth, tribal identity, social peace, and also source of conflicts.[170] As set out above, section 25(6) and (9) of the Constitution provides the impetus for legal recognition to the informal and customary land rights of people living in the communal areas. Without secure tenure, people are unable to exercise their rights over land and face the risk of losing these rights altogether.[171]

The collapse of land administration systems has severely impacted on the accuracy and reliability of official land records and registers in relation to land rights in

[165] Act No. 11 of 2004.
[166] Land and Accountability Research Centre on Communal Land Rights.
[167] Act No. 62 of 1997.
[168] S 8.
[169] S 8(4).
[170] Research by the Centre for Law and Society, Communal Land Tenure Policy (2015).
[171] Research by the Centre for Law and Society, Communal Land Tenure Policy (2015).

communal areas, specifically in traditional council offices and the provincial departments charged with maintaining these records.[172] In many instances, this has rendered individuals or families living on communal land insecure. This legal and administrative vacuum has created a fertile breeding ground for abuses of power by some traditional leaders and government officials such as unofficial land allocations by traditional leaders, "double" allocations over land to which individuals or families already hold pre-existing land rights and large-scale un-lawful land occupations.[173]

The most severe consequence of these challenges for our purposes is that these challenges result in a limitation of the applicability of the National Credit Act and therefore the Act is unable to reach those who need it most, namely those who have "historically been unable to access credit under sustainable market conditions".[174] As will be unpacked more fully below, land tenure rights which have, for example, not been converted from leasehold to freehold are not as strong as civil law land rights. By not formalising these rights to land, and by virtue of the weakened status of the manner in which they hold land, occupiers of land in former Bantustans or communal land are limited in their enjoyment of the consumer rights extended by the Act. This arguably further contributes to marginalisation and impoverishment and contradicts the objectives of the Act.

[172] Research by the Centre for Law and Society, Communal Land Tenure Policy (2015).
[173] Research by the Centre for Law and Society, Communal Land Tenure Policy (2015).
[174] S 3.

CHAPTER 5:
LIMITATIONS ON THE APPLICATION OF THE NATIONAL CREDIT ACT CAUSED INSECURE LAND TENURE

5.1 Limitations regarding the purpose and application of the Act

5.1.1 Introduction

It was mentioned in the preceding chapters that the purposes of the Act are to "promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers"[175] by affecting the objects set out in section 3(a)-(i). In this chapter, it will be considered how these purposes, and therefore how the Act, is impeded by the challenges associated with a lack of formalised tenure security experienced by many South Africans.

Prior to the revision of the threshold determined under section 42(1) of the Act, a person was only obliged to register as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements exceeded R500 000.[176]

The new position is that a person is obliged to register as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements exceeded R Nil.[177] By implication, every person who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement; or the party who advances money or credit under a pawn transaction; or the party who extends credit under a credit facility; or the mortgagee under a mortgage agreement; or the lender under a secured loan; or the lessor under a lease; or the party to whom an assurance or promise is made under a credit guarantee; or the party who advances money or credit to another under any other credit agreement; or any other person who acquires the rights of a

[175] S 3.
[176] Regulation for the determination of threshold required in terms of S 42(1).
[177] The threshold has been revised to zero rand (R Nil).

credit provider under a credit agreement after it has been entered into falls under the ambit of the Act and must register as a credit provider.

In this regard, it is important to take cognisance of the decision in *Vesagie NO & others* v *Erwee NO & another*[178] where the court held that, where a credit provider is unregistered, the agreement is unlawful and the court is required to declare the agreement null and void *ab initio*.

The revision of the threshold seeks to extend the application of the Act to regulate every credit provider which falls within the ambit of the Act and to cover consumers who may have been technically excluded from the Act prior to the amendment. On the surface of things, this is a win for consumers who rely heavily on informal loans or off-market loans as they too can enjoy the protection offered by the Act.

The following paragraphs will consider whether the amendment of the threshold under section 42(1) actually achieves what it seeks to achieve when measured against the objectives of the Act and especially how these purposes are limited by insecure land tenure.

5.1.2 Promote and advance the social and economic welfare of South Africans

A country's socio-economic policy on the wellbeing of its citizens is reflected in its welfare system.[179] It is not surprising that the promotion and advancement of the social and economic welfare of South Africans features widely in the government's policy documents.[180] Social and economic welfare refers to the improvement of living conditions of individuals or a particular group of persons.[181]

In the past, colonialism and apartheid shaped the nature, form and content of social welfare policy in South Africa.[182] It follows that the current democratic dispensation must shape the current and future welfare system by a complete change of course in

[178] [2014] ZASCA 121.

[179] A Lombaard Department of Social Work, University of Pretoria (1995) 2 *Africanus*, (Vol 25), Issue 2 59 - 66 61

[180] Department of Land Affairs, White Paper on South African Land Policy 1997.

[181] www.investopedia.com.

[182] L Patel Restructuring social welfare: Options for South Africa 1992.

welfare adoption which fundamentally divorces the old concepts and paradigms of a system of social welfare that was racially segmented, resulting in different racial welfare subsystems.[183]

In order to "promote and advance the social and economic welfare of South Africans", social welfare will have to shift from a piecemeal, charity model to a developmental approach which acknowledges the role of social welfare in promoting national development and reconstruction.[184] In 1994 South Africa implemented the Reconstruction and Development Programme which refocused the development needs of South Africans, with the aim of addressing the socioeconomic problems brought about as a consequence of the Apartheid regime. Specifically, it set its sights on alleviating poverty and addressing the massive shortfalls in social services across the country [185] Given South Africa's political and economic history, it is evident that social and economic welfare is a concept that speaks directly to the question of land, land ownership and land reform.

The United Nations has defined the developmental role of socio-economic welfare policies as being relevant to the total population, while recognising its particular responsibility to disadvantaged groups.[186] Development is limited by economic, political and cultural circumstances, as well as the priorities of governments and power groups. It is therefore necessary for development welfare to be linked with economic growth policies.[187] The lack of progressive legislation which adequately, formally and permanently secures the rights of occupants communal tenure directly cripples the promotion and advancement of the social and economic welfare.

Insecure title to land results in the occupants of such land being, to a certain extent, effectively locked out of participating in the formal market owing to the fact that these occupiers do not have real rights in land that may be burdened as security under a mortgage agreement, leased under a lease agreement, used to raise funds under a

[183] B W McKendrick "The future of Social Work in South Africa. Social Work" (1990) 26 *PELJ* 10-18 14.

[184] R J Parsons *Empowerment: purposes and practice principle in social work Social Work with Groups (1991) 14 7-21 9.*

[185] Amnesty International Statement to the United States, delivered on 4 February 1994.

[186] Resolution of the General Assembly adopted 25 September 2015.

[187] B W McKendrick "The future of Social Work in South Africa Social Work" (1990) 26 *PELJ* 10-18 14.

securitisation scheme or sold in terms of the Alienation of Land Act to mention a few examples.

Insecure title to land presents further limitations with regard to how land is used, by whom it can be used and under what conditions it can be used.[188] Even when this has been determined in a holding setting, holders of informal title stand a slim chance of obtaining secured credit in the formal credit market, thus having to opt for obtaining credit from credit providers in the informal credit market, such as loan sharks, under unregulated conditions and subject to high interest rates.[189]

All of this ultimately places the burden on tax payers as poverty will continue to increase, together with unemployment, which indirectly leads to an increase of social ills such as crime, increased levels of school dropout rates and dependence on social security such as grants, therefore resulting in a worsened socio-economic position for the most vulnerable consumers which contradicts the purpose of the Act in particular and social and economic welfare as a whole.

The impact of insecure title is largely in respect of secured loans such as Mortgage Agreements. The Act applies to mortgage agreements and secured loans.[190] The Act also regulates the form which the agreement must take and the fees and charges that a credit provider can charge.[191] People without recognised security to the land on which they live are excluded from obtaining mortgage agreements and other secured loans because they do not have necessary title to the land which they occupy. As such the land they live on cannot be used as security for bonds or loans, due to the weakened status or their rights to the land.

This being said, it has been mentioned above that the Act must not be interpreted in a one-sided manner to favour the consumer, since credit providers have legitimate rights which require protection too. It should always be borne in mind that the credit provider is a business and the objective of any business is to make a profit. Therefore, a case can be made that a credit provider will understandably be reluctant

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[188] E Iahiff With What Land Rights, Tenure Arrangements and Support (2001).

[189] The Banking Association of South Africa report on the state of unsecured lending in SA (2018).

[190] S 4(d).

[191] S 93 read with S 95.

to advance credit to a consumer where it is uncertain whether the consumer will be able to pay back the money on the terms agreed.[192]

In the case of a mortgage agreement, for example, the mortgage serves as security for an underlying agreement, to the effect that the credit provider can foreclose against the property should the consumer not be able to meet his or her obligations under the underlying agreement. The credit provider therefore requires certainty that the property is secure from external interference such as disputes regarding the ownership of the land. Communal land in particular makes it difficult because of certain statutory provisions in terms of the Deeds Registries Act which limit the encumbrance of property owned by various numbers of people in unequal shares.[193]

Furthermore, unsecured loans have high interest rates and usually do not offer the amounts that might be needed. Repayment is also only on a short term basis and cannot fit into a commercial farming seasonal cycle where the land is used for agricultural purposes. Therefore the problem of insecure land tenure directly hinders the promotion of social and economic welfare for a large number of South Africans.

It is clear from the above that in promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions, the legislature must develop adequate land tenure legislation to resolve the issue of insecure land rights.

5.1.3 Promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry

The formal financial market is often accused of not being accessible to rural, indigenous communities, most of whom do not have and cannot afford bank accounts.[194] The formal credit market has a long way to go before it is reckoned as an accessible credit market, as many provisions which regulate this market

[192] The Banking Association of South Africa report on the state of unsecured lending in SA (2018).

[193] S 24.

[194] R Dagada Why the informal financial sector needs a framework for real inclusion 13 June 2018 Business Day.

effectively make it impossible for certain groups of people to participate in the guise of responsible market practices.[195]

The Act regulates many aspects of the credit industry, including the granting of credit by a credit provider to a consumer, in an attempt to avoid over-indebtedness by the offering of reckless credit (that is, offering credit to a consumer who cannot afford it). One of the ways in which it does this is by placing a duty on a credit provider to ascertain whether the consumer can actually afford the credit he or she was seeking by conducting an obligatory assessment of the consumer's circumstances.[196] In a recent High Court judgment Engers AJ found that regulation 23(4) to the Act unfairly discriminated against a section of the population that represents the less privileged, and many previously disadvantaged persons.[197] In his judgment, Engers AJ used an example of a flower seller who does not have a bank account and opined that it is unlikely in the extreme that they would have financial statements. He noted that satisfying the documentary requirements in the regulation would be an insurmountable obstacle to obtaining credit of a relatively small amount, even if they earn a reasonable amount each month. He went further by giving an example of a parent who needs to buy a school uniform for his or her child in January, and would easily be able to pay the price over the next few months, but who cannot afford the entire amount in one go. As a result, the parent would be unable to access credit because they do not have the requisite documentation required by credit providers in the formal credit market.[198] -

This reasoning can be adapted to the case of insecure land tenure. It follows therefore that a person who does not bear title to the land on which they live will not meet the documentary requirements imposed on financial institutions (as accountable institutions) by legislation such as the Financial Intelligence Centre Act.[199] Therefore such a person would be limited in their ability to apply for credit in the formal market as documents confirming such persons residential address,

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195 R Dagada Why the informal financial sector needs a framework for real inclusion 13 June 2018 Business Day.

196 S 81.

197 *Truworths Limited and Others v Minister of Trade and Industry and Others* (4375/2016) [2018] ZAWCHC 41; 2018 (3) SA 558 (WCC) (16 March 2018).

198 Par. 53.

199 Act No. 38 of 2001.

business address or even bank account details would not be available. This does not only create a barrier against access to credit for those consumers who do not hold title to the land on which they live, it is also in direct conflict with the constitutional rights such as equality, freedom of movement and residence, freedom of trade, occupation and profession, property and housing.

The Constitution provides that rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable.[200] The consequence of insecure land tenure cannot be said to be reasonable and justifiable in its limitation of the rights mentioned above, therefore, it follows that insecure land tenure unlawfully limits the constitutional rights of those living on communal property without recognised secure title to such property.

5.3 Conclusion

It is clear from the above the purposes of the Act, as set out in section 3 of the Act is severely impacted by insecure land tenure systems. It is clear that South African courts are of the view that any agreement concluded with a non-registered credit provider is null and void from the outset. Even this poses a challenge for victims of insecure tenure in that, where they are unable to qualify for credit from licenced financial institutions, these victims will most likely fall into the hands of unregistered credit providers.[201] The challenge with this is that, where the agreement with an unregistered credit provider is voided, the consumer will automatically fall outside of the scope of protection of the Act, thereby placing such a consumer in an even worse position than before. Much has been done to align consumer credit legislation in South Africa to international standards and to get the Act to where it is at present. However, it is evident that the road ahead is still lengthy and much still needs to be done in order for consumer credit legislation to really serve all South Africans, and in particular to those who have historically been unable to access credit.

[200] S 36.

[201] R Dagada Why the informal financial sector needs a framework for real inclusion 13 June 2018 Business Day.

CHAPTER 6:
RECOMMENDATIONS

6.1 Recommendations

The recommendations provided in this paper do not suggest that this is a closed list of solutions, nor do they suggest conclusively that these are definite solutions to the research problem. They do however, taking into consideration the findings of this research paper, and in particular the challenges posed by insecure land tenure on the advancement of consumer credit legislation, suggest certain measures which the government should look into in order to propel its efforts in aligning communal land legislation with consumer credit legislation and ensuring that the Act achieves its purposes as set out in section 3 of the Act.

6.2 Development of land tenure regulatory framework

The core function of land law is to ensure the security of rights and interests in land.[202] Often the commitment to land reform has been coloured by hesitance in implementation. As we have seen in South Africa, insufficient and inappropriate policy-making and law-making on land administration translates into difficulties and complexities that hamper satisfactory solutions to the social, economic, cultural and political relations embodied by land-holding and control.[203] Take for example the Communal Land Rights Act,[204] which was found by the Constitutional Court to undermine rather than to promote security of tenure.[205]

In order to resolve this issue, legislation must be developed that sufficiently address the issues of land-holding, with a key focus on providing secure title to the millions of rural dwellers in the poorest and most isolated parts of South Africa. In September

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202 B W McKendrick "The future of Social Work in South Africa. Social Work" (1990) 26 PELJ 10-18 14.

203 R Dagada Why the informal financial sector needs a framework for real inclusion 13 June 2018 Business Day.

204 11 of 2004.

205 *Tongoane v National Minister for Agriculture and Land Affairs* (11678/2006) 2009 ZAGPPHC 127 (N&S Gauteng); *Tongoane v National Minister for Agriculture and Land Affairs* (CCT100/09) 2010 ZACC 10 (CC).

2018, South African President Cyril Ramaphosa appointed a land reform advisory panel that is tasked with advising the inter-ministerial committee on land reform on matters of restitution, redistribution, tenure security and agricultural support.[206] Perhaps this is the step in the right direction that will lead to a resolution of insecure tenure issues.

A secure registration system must be introduced for communal land in a way that appreciates individual rights while securing the rights of credit providers where needs be. Therefore, it is crucial that a registration system be introduced where occupiers are given title to the land on which they live to ensure the participation of communal dwellers into the market while balancing the rights of other players such as credit providers. One must also appreciate that conventional title deeds might not be appropriate and that the alternative might be to recognise the diverse forms of tenure that have crystallised under customary law, but reinforce them statutorily.

6.3 Good governance

Tenure security problems, such as those described above, emphasise the importance good governance. It highlights that resolving the problems relating to land tenure is a process dependent on "sound policy and manageable procedures".[207] It is trite that secure tenure and access to land are necessary for economic growth and social development.[208] Weak governance is the main culprit for poor tenure security, informal property markets, reduced private sector investments, land grabs, social and political instability and unsustainable resource management.[209]

To change the status quo, South Africa must adopt transparent processes of policy-making, supported by an accountable executive arm of government, civil participation in public matters and adherence to the rule of law.[210]

[206] Kusela Diko interview, Businesslive www.businesslive.co.za 21-09-2018.
[207] Pienaar 2009 *PER* 15.
[208] Zakout, Wehrmann and Törhönen 2009 www.fao.org 3.
[209] Zakout, Wehrmann and Törhönen 2009 www.fao.org 3.
[210] Zakout, Wehrmann and Törhönen 2009 www.fao.org 3.

CHAPTER 7:
CONCLUDING REMARKS

In November 2017, the Portfolio Committee on Trade and Industry published the Draft National Credit Amendment Bill 2018 (the "Bill") together with the Memorandum on the objects of the National Credit Amendment Bill, 2018.[211]

The question is whether the National Credit Act is limited in its application by the persistence of insecure land tenure. It is clear from this paper that the lack of statutory developments in the land tenure arena indeed presents a limitation on the applicability of the Act. The Act seeks to achieve worthy objectives, in particular the development of a credit market that is accessible to those who have been historically unable to access credit under suitable market conditions.[212] In this regard, the NCR in terms of section 13 of the Act is tasked with the development of an accessible credit market that specifically serves the needs of historically disadvantaged persons, low income persons and communities and remote, isolated communities.

This is aligned with South Africa's land reform program objective, which is designed to redress the racial imbalance in landholding and to secure the land rights of historically disadvantaged people.[213] However, this ambition is limited in its reach because there is no legislation that offers redress to those in remote, secluded communities and former Bantustans who are still without security of tenure.

The strengthening and protection of the tenure security of the people living in communal areas is therefore a critical objective of the post-apartheid government. The Constitution provides that legislation must be interpreted in light of the spirit, purpose and objects of the Bill of Rights. Therefore, the aspects of consumer credit legislation cannot be divorced from issues relating to land tenure in light of the constitutional framework in which both function. The Constitution further sets out that Parliament is the national legislature of the Republic, with both houses of Parliament,

[211] www.pmg.org.za.
[212] S 3(a).
[213] E Lahiff With What Land Rights, Tenure Arrangements and Support 2011.

namely the National Assembly and the National Council of Provinces playing a role in the law making process.[214]

However, it is important to bear in mind that major reform programmes are shaped not only by issues of technical design and effective implementation, but also by the prevailing political and economic environment, and it is to this environment that we must look for the underlying causes of the fundamental failures of tenure reform, and therefore the courts also have an important role to play in interpreting the law.[215]

Statistics South Africa ("Stats SA") has reported that the most vulnerable to poverty are children, females, black people and people in rural areas.[216] This category matches squarely with the LILA and NINA debtors who are currently excluded from the Act. The Amendment Bill proposes debt intervention measures which are in line with improving consumer credit legislation and ancillary insolvency measures.

It must be emphasised however that the process of law reform must involve a balancing or rights between consumers and credit providers, since both parties have interests which must be protected. Therefore, a holistic approach must be adopted. The inability on the part of the government to pass legislation that sufficiently captures the nuanced ways in which people experience and regulate relations of communal tenure in their every-day lives, means that those living on communal land have no means of securing their tenure. Without such a law, people are forced to rely on the poorly implemented and enforced interim measures provided for in IPILRA while they divert to the informal market to access credit.

President Ramaphosa has appointed a land reform advisory panel to look into issues surrounding land reform, including land tenure. It is undoubtedly urgent that land tenure legislation must developed accordingly, in order to protect the constitutional rights of all South Africans but more importantly those of the marginalised groups and to bring land tenure legislation in line with consumer credit legislation and the needs of the credit industry as a whole.

[214] S 43 read together with s 44.
[215] E Lahiff "With What Land Rights, Tenure Arrangements and Support" Ch 4.
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