UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

A legal analysis of credit provision and debt relief during the Covid-19 crisis

By

Ipeleng Tsoanamatsie

(10488342)

Submitted in partial fulfilment of the requirements for the degree

Master of Laws (Banking Law)

In the Faculty of Law,

University of Pretoria

December 2021

Supervisor: Prof R Brits

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.
2. I declare that this thesis is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.
3. I have not used work previously produced by another student or any other person to hand in as my own.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Ipeleng Tsoanamatsie

December 2021

Summary

Based on the South African Reserve Bank's object in ensuring the maintenance of financial stability and economic growth as well as considering key principles as outlined in The Code of Banking Practice, this dissertation analyses the role which banks play in the provision for financial relief, in the form of both lending and extending debt relief, during times of crisis such as the Covid-19 pandemic. This dissertation will commence by providing context in terms by highlighting the responsibility placed on the banks by the Code as well as the National Credit Act. This will then be followed by the overview of the types of debt relief afforded to consumers as contained in other legislation such as the Insolvency Act and the Magistrate Court Act. I will also include the application of these various forms of debt relief. Further to this I will proceed to discuss the avoidance of reckless credit granting and measures taken by credit providers such as banks to avoid it. The focus will be mainly on individual consumers. The overall analysis will include deliberations as to how credit provisions and debt relief were applied during the pandemic as well as the introduction of other relief measures such as the Covid-19 Loan Scheme Guarantee.

Acknowledgements

[to be added after the examination process is completed]

Table of contents

Chapter 1:
Introduction

1.1 Background and research objective

Access to credit is an essential part of any strong economy. The need to regulate the accessibility and prevent the recklessness is a balance which South African legislation such as the National Credit Act[1] a[illegible][2] It is important to level the need for credit and ensure that consumer debtors do not also become over indebted. This balance is necessary for all credit provision and not only for those that fall within the ambit of the NCA. There are also other economic factors and circumstances, such as unemployment, that propel the need for consumers to obtain credit or seek financial relief. The Covid-19 pandemic can be seen as one of those factors which have added to the financial strain on consumers, which increases the need for credit provision as well as debt review for all those existing credit agreement that cannot be serviced.

The South African Reserve Bank, being the central bank of the country, has several objectives, such the maintenance of financial stability and ensuring sustainable economic growth by protecting the value of the currency. These standards are based on key principles such as "fairness, transparency, accountability and reliability". Based on these responsibilities, as outlined in the Code of Banking Practice, I will explore the role of creditors, such as the bank, to provide financial relief (in the form of the both lending and extending debt relief) during times of crisis, specifically during the Covid-19 pandemic.

The research objective is to critically analyse the existing credit provisions in South Africa as well the debt review measures available, whilst considering the debt review measures introduced as a result of the Covid-19 pandemic. The primary objective of the analysis will focus on the legislative provisions available for individuals. An ancillary discussion pertaining to newly introduced debt relief initiatives for small to medium business will also be briefly discussed. The essential objective of this analysis is to establish whether the existing credit provisions and debt review are adequate and whether creditors uphold their responsibility when the need for providing financial relief arises.

---

[1] 34 of 2005 (hereafter referred to as the NCA).
[2] S 3(1) of the NCA.

1.2 Methodology

This dissertation entails desk-based research as well as a critical legal approach. The comparative analysis of current legislation will be the basis for pragmatic approach used in this dissertation. The critical legal approach will be used to establish whether the existing credit provisions and debt review practices are sufficient, whilst further considering the social economic changes that the Covid-19 pandemic has brought about in this regard.

1.3 Overview

Chapter 2 introduces an overview of the various credit provisions as well as the guidelines, requirements and principles relating thereto. The chapter will investigate how credit is provided in terms of the Code of Banking Practice and National Credit Act.[3] The chapter further explores the effect of Covid-19 with regard to credit provision and the "newly" introduced short term debt relief procedures.

Chapter 3 elaborates on the debt relief measures available to debtors. The chapter investigates the existing statutory debt relief measures and further discusses the procedures followed. The chapter highlights the need for creditors to provide financial assistance and discusses the recommendation of moratoriums and loan scheme guarantees.

Chapter 4 briefly outlines the prevention of reckless credit granting and the regulatory requirements available in South Africa to ensure responsible lending. The chapter further analyses the NCA's requirements for pre-assessment, the general understanding of risk as well a brief discussion of the defence against reckless credit.

Chapter 5 concludes the dissertation assessing the overall credit provisions available in South Africa and debt relief measures, including moratoriums and loan scheme guarantees, as introduced in response to Covid-19.

[3] 34 of 2005.

Chapter 2:
Context of credit provision, forms of debt relief and the effect of COVID-19

2.1 Introduction

One of the primary purposes of a bank is to provide credit to its customers. There are measures and parameters to which can be done. This chapter considers how credit is granted as well as how the granting of credit is applied in legislation such as the National Credit Act 34 of 2005 (NCA) as well as the Code of Banking Practice. An understanding of how credit is granted will serve as a foundation for the various forms of debt relief, for instance when a customer can no longer service his or her credit facility.

Whereas it is important to look at the existing long-term debt relief measures contained in legislation, it is equally important to investigate debt relief for short-term and temporary purposes as well. The need for the latter is illustrated well by the Covid-19 pandemic and its adverse economic impact on credit consumers.

2.2 Overview of credit provision

2.2.1 Credit provision in terms of the Code of Banking Practice

In accordance with the Code of Banking Practice (the Code), banks are to afford credit in a responsible manner that is aligned to their borrowing requirements as well the financial capabilities of the customer.[4] The Code further states that banks are not to extend credit "beyond financial means" of the customer or the institution.[5] Banks are to rely on the customers' co-operation and "full disclosure" of their finances as comprehensively as possible, which will form part of the customers' application for credit.[6] The latter relies on the customer being transparent as well as disclosing all their financial activities. This transparency and disclosure will enable the banks to assess the extent to which they can provide the customer with credit. The Code further states that banks are to ensure that the individual fully comprehends the implication of

[4] Para 8.1 of the Code.
[5] Para 8.1 of the Code.
[6] Para 8.1.2 of the Code.

the credit provided.[7] The customer would need to fully understand the agreement, including the costs and duties imposed should the application for credit be successful.[8]

The Code further outlines certain factors which are to be considered when a credit assessment is conclude, which will discuss in greater detail in the chapters to follow.[9] In line with these guidelines, when a customer is facing financial difficulties in upholding their obligation in terms of the agreement entered into, they are to timeously approach the bank.[10] Upon so doing, the bank and the customer will then review their finances in order to seek a sol  he customer with their financial difficulties.[11] The Code also contains guidelines for the enforcement and recovery of debt but for purposes of this dissertation, the focus will solely be on credit provision and the debt relief, not enforcement.

2.2.2 Credit provision in terms of the NCA

The obligation to provide credit in a responsible manner is also highlighted in the NCA and this credit provision should be done in manner where over-indebtedness and reckless lending is avoided.[12] Section 3 of the NCA provides for instances where credit providers are encouraged to allow customers access to the credit market, whilst improving consumer credit information.[13] The duty on banks to fulfil this responsibility and provide credit in a manner that is not reckless, is a duty that is reliant on the customer providing accurate information enabling the banks to correctly asses the risks involved.[14]

The NCA further states, as part of its purpose, that the protection of customers by preventing over-indebtedness and finding appropriate methods to resolve over-indebtedness should be upheld by credit providers.[15] This is an additional aspect added by the NCA to assist customers in finding debt relief measures, for instance in the form of debt re-arrangement.[16] Although the NCA focuses mainly on the measures

[7] Para 8.1.3 of the Code.
[8] Para 8.1.3 of the Code.
[9] Para 8.1.4 of the Code.
[10] Para 8.5 of the Code.
[11] Para 8.5.2 of the Code.
[12] S 3 of the NCA.
[13] S 3(a)–(f) of the NCA.
[14] S 81(1) of the NCA.
[15] S 3(g) of the NCA.
[16] CM van Heerdern "Over-indebtedness and reckless credit" in JW Scholtz, JM Otto, E van Zyl, CM van Heerden & N Campbell *Guide to the National Credit Act* (eds) Durban: LexisNexis ch 11 para 11.1.

for debt relief resulting from the over-indebtedness and reckless credit,[17] no provision is made for debt relief outside of these circumstances.

This is in line with the business of the bank, as defined in the Banks Act,[18] where the provision of credit by banks must be done in a reasonable manner and much reliance is placed on the customer being forthcoming with the information. Furthermore, credit provision must be done without reckless lending.

2.3 Overview of debt relief

2.3.1 Types of debt relief

The Code outlines the duty of customers to disclose their financial obligations when seeking credit.[19] Creditors, such as banks, will aim to obtain maximum returns on the credit granted. There are, however, inevitable circumstances where customers are unable to repay their debt. The introduction of debt relief measures for customers who cannot service their debt therefore becomes necessary. South African law has various debt-relief measures, contained in legislation, for those instances where the customers are no longer able to service their debt, such as sequestration,[20] administration and debt review.[21]

With regard to debt review, applications that may be bought about in terms of section 86 of the NCA, and a debt counsellor will be appointed to assess the consumer's application. The Insolvency Act 24 of 1936 provides for another debt relief measure whereby debtors may be sequestrated provisionally or finally as result of their insolvency. There is also debt relief in the form of an administration order[22] for smaller estates which, for cost reasons, cannot be done by way of sequestration.

These existing legislative debt relief measures seem to address issues relating to either credit agreements, where the dispute is made based on reckless credit granting or over-indebtedness, as in the case where the NCA is applicable, unless the agreement is already under enforcement. Alternatively, as in the instances of sequestration and administration orders, this form of debt relief relates to credit

[17] Ch 4, Part D of the NCA.
[18] S 1 of Banks Act 94 of 1990, herein referred to as the Banks Act.
[19] Para 8.1.2 of the Code.
[20] Insolvency Act 24 of 1936.
[21] S 86 of the NCA.
[22] S 74 of Magistrates' Courts Act 32 of 1944.

agreements for all creditors in relation to the customer's overall debt, even for those that fall outside the ambit of the NCA.

As will be seen in the chapters to follow, these forms of debt relief are primarily for customers who seek long-term relief. The same is true for customers who are over-indebted or recipients of reckless credit granting where the agreement can then be set aside. This then raises the investigation as to which measures are available for those customers who seek short-term debt relief.

2.3.2 The effect of Covid-19

As of 15 March 2020, the President of South Africa declared a national state of disaster.[23] This was declared in accordance with section 27 of the Disaster Management Act 57 of 2002. According to section 27(3)(b) of the Disaster Management Act, the powers which may be exercised include the provision of relief to the public. Under the recommendation and support of the South African Reserve Bank (SARB), South African banks started implementing debt relief measures for customers suffering from financial difficulties because of the Covid-19 pandemic. The banks understood that the cause of such financial strains was due to no fault on the part of customers. This form of debt relief imposed was intended to serve as short-term relief for these customers.[24]

In as much as this short-term relief would differ from bank to bank, it was intended to be made available for all good standing customers, who because of the pandemic, could temporarily no longer meet their obligations for payment of their credit agreements. The customer, who received such debt relief, should then likely be able to meet their payment obligations again after the expiration of the relief period granted.

It is of importance that the customers seeking such relief were in good standing with their respective banks. The criteria used to determine who should receive such relief shall be discussed in greater detail in the chapters to follow.

As confirmed by the Banking Association of South Africa (BASA), its member associates understand the financial burdens bought about by the pandemic as well as the national lockdown and note that it is their responsibility as banks to assist their

[23] https://www.gov.za/speeches/statement-president-cyril-ramaphosa-measures-combat-covid-19-epidemic-15-mar-2020-0000 (accessed 13-05-2021).
[24] https://www.banking.org.za/news/may-update-debt-relief-for-customers/ (accessed 13-05-2021).

customers who are in financial strains and economic difficulty.[25] In fact, the classification of banks as an essential service by the President and the government has enabled the banks to uphold their role in supporting their customers.

At the request of the board of BASA, a consultation was held by the Minister of Trade and Industry together with the Competition Commission, in accordance with section 10(10) and section 78(1) of the Competition Act 89 of 1998 to make regulations that would be published in the Government Gazette.[26] This consultation allowed banks to collectively discuss how they strengthen their support for their customers during the pandemic.[27]

Various regulations were recommended within the published Gazette. For purposes of my analysis, we will only look closely into debt relief[28] as recommended by the Gazette. These recommendations considered the agreements and development of policies with regard to payment holidays and debt relief for both the individuals and entities under financial strain.[29] It further provided for limitations on the repossession of assets and extension of credit for those customers who are under financial stress.[30] The extent of these measures was limited to agreements in responds to the Covid-19 pandemic.[31]

The banks committed themselves to working within the current regulations and for BASA to continue to have discussions with the National Treasury and the SARB to assess where they could provide further relaxation where it best suited the customers. The possible debt relief solutions for the customers would include possible payment deferrals, the restructuring of debt and the provision for bridging financing.[32] This led to several banks offering payment holidays, also known as moratoriums, for three months or alternatively extending the term of their agreement to customers who prior to Covid-19 were in good standing with the bank.

This form of debt relief was different from the previously stated legislative provisions that were in place prior to the pandemic. This form of relief was mostly for the short term and applicable across various credit agreements without necessarily

[25] https://www.banking.org.za/news/debt-relief-assistance-for-customers/ (accessed 13-05-2021).
[26] Government Notice No 11058, Vol 657 No 43127 (the Gazette).
[27] https://www.banking.org.za/news/banks-respond-to-covid-19/ (accessed 14/05/2020)
[28] Para 3.2 of the Gazette.
[29] Para 3.2.1 of the Gazette.
[30] Paras 3.2.2 and 3.2.3. of the Gazette.
[31] Para 4 of the Gazette.
[32] https://www.banking.org.za/news/banks-respond-to-covid-19/ (accessed 14/05/2020).

cancelling the existing agreement. Each bank, however, still had its own criteria as to how this would be implemented.[33]

2.3.3 Loan scheme guarantee

Considering the pandemic, the government together with the National Treasury, SARB and BASA began to implement the loan guarantee scheme. This is a debt relief initiative by the government to assist businesses with a turnover of R300 million or less. This loan scheme entailed a g by the National Treasury to SARB. SARB would then lend money to the banks at the repo rate plus 0.5 percent, which banks would lend out to businesses in need, at the repo rate plus a fixed spread of 3.5 percent.[34] This form of debt relief ensured that the participating banks[35] and the National Treasury shared the risk. Initially an amount of R100 billion was allocated to the scheme for this purpose. Should a recipient under the loan scheme not be able to repay the amount granted, the bank would be able to claim such an amount from SARB, which would in turn claim the funds for the National Treasury.[36] This form of debt relief, however, does not offer a debt write-off as such.

The loan scheme guarantee is a form of debt relief which is afforded specifically for operational expenses of qualifying small to medium sized business. These include salaries, rent and supplier payments, which were to be disbursed to the customers in three instalments. A further three months after the last instalment was made, the customer will not be expected to make repayment. Following that, the customer will have a five-year period to repay the credit granted.[37] Despite the loan scheme guarantees being an initiative by several banks, each bank had its own discretion as to whether they extended the loan to certain customers, considering their own risk evaluation processes.

---

[33] https://www.businessinsider.co.za/all-the-help-south-african-banks-are-offering-consumers-during-covid-19-2020-4 (accessed 14-05-2021).

[34] https://www.banking.org.za/wp-content/uploads/2020/04/2020-04-21-Loan-Guarantee-National-Treasury.pdf (accessed 14-05-2021).

[35] The commercial banks party to this include ABSA, Merchant Bank, First National Bank, Investec, Nedbank and Standard Bank.

[36] "Answering your questions about the COVID-19 LOAN GUARANTEE SCHEME" Issued by the National Treasury, South African Reserve Bank and Banking Association of South Africa on 12 May 2020.

[37] "Answering your questions about the COVID-19 LOAN GUARANTEE SCHEME" Issued by the National Treasury, South African Reserve Bank and Banking Association of South Africa on 12 May 2020 (para 6).

2.4 Conclusion

The aim of this chapter was to set out the origin of credit granting, whilst the customer could still service the credit agreement and the foundation requirements for credit. It can be concluded that from the Code to legislation such as the NCA, the customer must be forthcoming with regards to his or her financial information.

Furthermore, we then investigated instances where customers could no longer service such credit agreements and required debt relief. As it stands, the legislative provisions for debt relief seem to fng-term relief measures, as in the case of debt review. Alternative debt relief measures for short-term requirements came to light recently as a result of the pandemic. These new forms of debt relief, such as moratoriums and loan scheme guarantee, assisted many banking customers throughout the COVID-19 pandemic.

The next chapter will continue to look further into the application of debt relief whilst considering the discretion used by the banks when considering the application of these debt relief measures.

Chapter 3:
The various forms debt reliefs available to debtors in need of financial assistance

3.1 Introduction

When a customer defaults or goes into arrears in terms of the agreement with the bank or any other credit provider, a dec  de regarding the appropriate debt relief method to be implemented. In the ordinary course of the business, after having notified the customer of the default and the issuing of a letter of demand,[38] the ideal steps to be followed include contacting the customer and re-arranging the debt to ensure that the necessary payments will now be made. In these instances, the objective of the banks would be to ensure the receipt of payments due in the most cost-efficient manner, prior to instituting legal action against the client.

In this chapter, I will consider the various debt relief measures available to credit providers, together with the requirements relating to the reliance on them. South African legislation contains a number of options for debt relief, each having their own advantages and disadvantages depending on who relies on the relief. Legal and economic changes have also brought about other forms of debt relief such as the Covid-19 moratoriums and Loan Scheme Guarantees, which will be discussed briefly.

3.2 Statutory debt relief measures

3.2.1 Sequestration: The Insolvency Act

The pursuit of repayment of debt in terms of the Insolvency Act 24 of 1936 clearly aims at ensuring the orderly distribution of moneys owed to creditors. This extensive form of debt repayment can be seen as more concerned about the needs of the creditors over that of the indebted customer. It is aimed at ensuring a fair and equitable distribution of the indebted customer's asset as opposed to the over-indebtedness of the customer. This allows for either voluntary or compulsory sequestration applications to be brought by the creditors,[39] such as banks. Should a High Court[40] grant such an

[38] This is inclusive of s129(1)(a) notices in instances where the NCA is applicable. Also the seeking of a debt counsellor or any such measures which enable there being a hold on the debt enforcement.
[39] S 9 of Insolvency Act.
[40] S 149(1) of the Insolvency Act.

application for compulsory sequestration, the customer's estate will vest in the trustee, as appointed by the Master of the High Court.[41] The granting of such an order will have an impact on the status of the debtor by limiting their contractual capacity and their ability to hold several offices,[42] until rehabilitation. Save for instances where a high court application is made, automatic rehabilitation of a debtor who was declared insolvent would take place after 10 years, at which point their debts would then be discharged.[43]

In instances where credit pr banks, submit an application for compulsory sequestration, the requirements in terms of section 9 must be met. This includes providing a certificate of security[44] and serving of the application on the relevant parties including the debtor.[45] Section 10 allows for the court to grant a provisional sequestration order prior to a final sequestration order being granted. The court may grant a final sequestration order if it is satisfied that the creditor has a claim, the debtor is in fact insolvent, after having proved insolvency and that this would be to the advantage of creditors.[46]

For a voluntary sequestration to be successful, the court would need to satisfy itself of the fact that: the debtor is in fact insolvent, there is sufficient funds for the cost of the sequestration, the sequestration is for the advantage of the creditor as well as all other formalities in respect of Section 4 have been complied with. The debtor has the onus to prove these requirements.[47]

For compulsory sequestration, the onus to prove sequestration rests on the creditors with no onus on the debtor to disprove any of the requirements. The court in this instance will have the discretion to grant the application if it is satisfied that: the applicant has a claim, the debtor is insolvent or has committed and act of insolvency, there is reasonable belief that it would be for the advantage of the creditors and all the formalities of section 9 have been complied with.[48]

This form of relief is more concerned with the interests of creditors, such as banks, than it does for the debtors. It may therefore be considered incidental debt relief

[41] S 20(1) of the Insolvency Act.
[42] S 23(3) of the Insolvency Act.
[43] S 127A of the Insolvency Act.
[44] S 9(3) of the Insolvency Act.
[45] S 9(4) of the Insolvency Act.
[46] S 12 of the Insolvency Act.
[47] S 3 – 7 of the Insolvency Act.
[48] S 8 – 12 of the Insolvency Act.

and not the intention of the creditor to relieve the debtor of their obligation but rather ensure that the creditors receive equal distribution of what is owed to them, as a means of debt enforcement. The reasoning behind a strict approach for voluntary sequestration might include the prevention of abuse, as this form of debt enforcement entails a discharge of debt after rehabilitation. It does nonetheless place a heavier burden on the debtor, in comparison to other forms of debt relief.

3.2.2 Administration order: Ma[UNIVERSITEIT VAN PRETORIA UNIVERSITY OF PRETORIA YUNIBESITHI YA PRETORIA]ts Act 32 of 1944

This form of debt relief, unlike sequestration, does not discharge the debtor's debt after rehabilitation. In accordance with section 74, it aims to provide debtors who are in financial distress with the option to reschedule their debt by way of a court order. Intended for small estates, this inexpensive procedure for obtaining an administration order issued by the magistrates' court is relatively straightforward.

The purpose of an administration order is primarily to protect overcommitted debtors with smaller estates and, secondly, to ensure that creditors receive their payment due. This was confirmed in the case of *Bafana Finance Mabopane v Makwakwa*,[49] namely that the administration orders are intended for the public interest. Although some authors[50] may categorize administration procedures as a form of insolvency, the legal consequences and primary objectives differ. Administration orders are granted to assist in the rescheduling of debt and in some cases may include the realisation of assets with the objective to settle the outstanding debt, also referred to as the "modified insolvency".[51] Conversely, in the instance of insolvency there is the possibility of a debt write-off.

The application for administration orders may be brought by a debtor who is unable to meet his or her financial obligations and whose total debt does not exceed the prescribed amount as determined by the Minister of Justice.[52] A submission of the full statements of the debtor's affairs, including the list of creditors, must accompany the application.[53]

This form of debt relief is available for use by the debtors as opposed to the creditors, such as banks. It requires the application to made by a debtor. The process

[49] 2006 (4) SA 581 (SCA) 586.
[50] Roestoff 2000 De jure 130.
[51] Weiner No v Broekhuysen 2003(4) SA 301 (SCA) 305.
[52] S 74(1) of the Magistrates' Courts Act. Currently being R50,000.00
[53] S 74A of the Magistrates' Courts Act.

for obtaining an administration order entails an application to the court and copies of such application to be given to creditors to enable them to interrogate and examine claims made by the debtor.[54] The court will then, after considering the application, grant the administration order and appoint an administrator with the amount set to be paid to the administrator.[55]

3.2.3 Debt review: National Credit Act

Section 86 of the National Credit Act (NCA) makes provision for a debt review process which can also be referred to as debt counselling. This form of debt relief is only applicable to debts under specific credit agreements as defined by the NCA.[56] The extent to which the NCA is applicable is important as this determines the debts which fall with the ambit of the debt review in terms of section 86. The parties cannot exclude the application of the NCA should their agreement fall with its scope.[57]

Section 4 provides for the general application when dealing with credit agreements being that they must be at arm's length, entered in the Republic and classified as a credit agreement. The NCA also lists specific agreements which are excluded from the ambit of the NCA.[58] For the purposes of this dissertation, I will not focus on the classification of credit agreements but rather the application of debit relief.

The debt relief in terms of the NCA does not apply to credit agreements where a juristic person is a consumer.[59] It is also important to note that, once an application by a credit provider has been made to enforce a credit agreement in accordance with section 129, a debt review application may not be made in respect of that agreement.[60]

Despite one of the objectives of the NCA being to provide debt re-arrangement for over-indebted consumers,[61] this does not entail completely the discharging of one's debt. In the Supreme Court of Appeal matter of *Collet v First Rand Bank Ltd*,[62] the court noted that the purpose of debt review is "to achieve debt re-arrangement".

---

[54] S 74 A(1) of the Magistrates' Court Act.
[55] S 74 C(1)(a) and S 74E Magistrates' Courts Act.
[56] S 8 of the NCA.
[57] S 90(2)(b) of the NCA.
[58] S 8(2) of the NCA.
[59] S 78(1) of the NCA. See also s 1 of the NCA: a trust may in some instances be referred to as natural person.
[60] S 86(2) of the NCA.
[61] S 3(g) of the NCA.
[62] 2011 (4) SA 508 (SCA) 514.

For this debt review process to take place, the consumer must apply to a debt counsellor and declare over-indebtedness. This has been confirmed as a "pre-emptive duty" whereby the consumer must take steps the moment they realise that their financial position has declined and that the debtor is no longer able to meet his obligations to credit providers.[63] If an application for debt review is made by a debtor, the credit providers, after having been notified by the debt counsellor, will not be able to take further measures in executing their agreement should the debt review application proceed.[64] It is in this r[illegible]rs are to take the necessary steps in enforcing their debt prior to the debtor instituting a debt review application in terms of section 86. In accordance with Regulation 24(1)(a), this application is to be done by the completion of Form 16, which includes a section for the noting of the consumer's income, debt obligations and monthly commitments.

A debt counsellor[65] will then be appointed[66] who must notify all credit providers, such as banks, as well as register with the credit bureau.[67] Such notification must be made in the prescribed forms within five business days of receipt of the application by the debt counsellor.[68] This allows for the debt counsellor to authenticate the information as received from the consumer and offering the creditors an opportunity to submit their claims, in order to vet submitted information. The importance of this is to ensure that the assessment is done in the most accurate manner to enable a reasonable debt re-arrangement for all creditors involved. This also requires good faith from the creditors to achieve the objective of debt re-arrangement.[69] The duty to exercise good faith is required by all parties including the debt counsellor[70] and the consumer. Following the consumer's application, the debt counsellor will assess and determine if there is over-indebtedness in accordance with section 79 and reckless credit.[71]

---

[63] JW Scholtz "Over-indebtedness" in JW Scholtz, JM Otto, E van Zyl & CM van Heerden (eds) *Guide to the National Credit Act* (Service Issue 12, July 2020) para 11.3.3.2(c) read together with *SA Taxi Securitisation (Pty) Ltd v Ndobela102* (2011) ZAGPJHC para 15.
[64] S 86(1) – (2) of the NCA.
[65] A "neutral person" registered in terms of S 44 of the NCA.
[66] S 86(3) of the NCA.
[67] S 86(4) of the NCA.
[68] Regulation 24 of the NCA, Government Gazette No 37882 01 August 2014 under notice 10242..
[69] S 86(5) of the NCA.
[70] This was confirmed in *Motor Finance Corporation v Jan Joubert* 2013 JDR 1912 (GNP) para 27.
[71] S 86(6) of the NCA.

There are three possible outcomes from the conclusion of the debt counsellor regarding the debt review application.[72] Firstly, should the debt counsellor come to the finding that the consumer is not over-indebted, the application must be rejected despite the possibility of one or more of the agreements being concluded recklessly.[73] Secondly, if the consumer is found to not be over-indebted but is experiencing or is likely to experience difficulty in upholding their obligations for payment of their credit agreements in time, the debt counsellor and the credit providers can voluntarily agree on a plan of debt re-arrangement.[74] The credit providers, such as banks, in the same position as prior to the application whereby they will be able to enforce their credit agreement and consider re-arranging the payment plans for the consumer's debt.

The third possible outcome of the application is where the consumer is found to be over-indebted. The debt counsellor may then issue a proposal recommending that the Magistrates' Court make one or more of the following orders. Firstly, it can declare one or more of the consumer's credit agreement as over-indebtedness or reckless credit, which is to then be re-arranged.[75] This may be done by either extending the period of the agreement and reducing the amount payable by the consumer[76] or postponing the dates on which such payments are due.[77] The other forms of re-arrangement include the extension of the period of the agreement or the recalculating of the consumer's debt.[78] This is another vital step when the creditors' review their agreement to enable court to make the relevant order.

Section 86(10) states that in instances where a consumer's application to the debt counsellor is being reviewed by the creditor and such debtor subsequently defaults under the rearranged agreements, the credit provider may terminate the review. The creditor would have to give notice to the consumer, the debt counsellor, and the National Credit Regulator, at least 60 business days after the date which the consumer applied.[79] The willingness to exercise this provision to set aside the debt review must also be done in good faith. This implication for the need of good faith by

[72] S 86(7) of the NCA.
[73] S 86(7)(a) of the NCA.
[74] S 86(7)(b) of the NCA.
[75] S 86(7)(c) of the NCA.
[76] S 86(7)(c)(ii)(aa) of the NCA
[77] S 86(7)(c)(ii)(bb) of the NCA
[78] S 86(7)(c)(ii)(cc) and (dd) of the NCA
[79] S 86(10) (a)-(c) of the NCA.

the credit provider was confirmed in *Mercedes Benz Financial Services of South Africa (Pty) Ltd v Dunga*.[80] Should the credit provider decide to proceed with the application, after the serving of the notice to terminate, an order by the Magistrates' Court would be required to either enforce the agreement or make provision for any other orders as they deem fit.[81]

Section 88 provides for the effect of debt review or re-arrangement. It states that a consumer who has applied for debt review must not obtain any further credit other than in the form of a consolidatio  or to either of the following three scenarios occurring: firstly, if the debt counsellor rejected the application and the time in which the consumer could approach the court has expired;[82] secondly, if the court found that the consumer is not over-indebted and has rejected the proposal by the debt counsellor or the consumer's application;[83] or thirdly, should all the obligations in accordance with the debt re-arrangement order or the agreement between the consumer and the creditors be fulfilled by way of a consolidation agreement.[84] The section goes on to prohibit credit providers from instituting other forms of litigation or judicial process in terms of their agreement, after receiving notice of court proceedings.[85] Once the consumer is in default[86] or the occurrence of the above-mentioned instances according to section 88(1)(a) to (c) or defaulting on the newly re-arranged obligations as ordered by court or tribunal, creditors may not proceed to litigate in terms of the agreements.[87]

Should a credit provider enter into any other credit agreement, save for a consolidation agreement, with the consumer who has applied for debt review and such re-arrangement is still in force, the credit agreement would be regarded as reckless credit, this will be further discussed in the next chapter.[88] This then limits the credit provider's discretion in granting credit after an application for debt review has occurred.

---

[80] 2011 (1) SA 374 (WCC).
[81] S 86(11) of the NCA.
[82] S 88(1)(a) of the NCA.
[83] S 88(1)(b) of the NCA.
[84] Ss 88(1)(c) and 88(2) of the NCA.
[85] S 88(3) of the NCA, referring to notices in terms of s 83 (reckless credit) and s 85 (court ordered debt relief) as well as s 86(4)(b) debt review application.
[86] S 88(3)(a) of the NCA.
[87] S 88(3)(b) of the NCA.
[88] S 88(4) of the NCA.

The provisions of the NCA regarding debt review contain clear parameters with regard to the instances in which the credit providers, such as banks, may enforce their rights when considering the application for debt relief. True to its objective, the NCA seems to aim to protect the consumers who enter into any form of credit agreement even if it is the re-arrangement of the existing credit due to a default. Although this form debt relief might seem to favour the consumer, considering that there is not any limitation to the number of times this may be used, it does not provide for a discharge of the debt[89] or even the releasing in terms of the agreement to settle debt. It is worth mentioning that, despite the seemingly clear objectives of the NCA as contained in sections 3 and 86, there have been some of the procedural provisions contained in this debt review process which we challenged and lead to judicial interpretation, hence the ironing out of its application can be seen in the various court cases.

3.3 COVID-19 moratorium and loan scheme guarantee

The Covid-19 moratorium was bought about by the recommendation of the South African Reserve Bank (SARB) in collaboration with the Banking Association of South Africa (BASA) and South African banks to alleviate individuals and entities who have incurred financial strain as a result of the Covid-19 pandemic. This brought into effect the short-term debt relief measure implemented by all BASA member banks to their existing customers. The guidelines provided by BASA with regard to the criteria each bank would use in determining who is eligible was to check which clients are considered in good standing and have kept up to date with their monthly repayments prior to the pandemic.[90]

A moratorium is the temporary prohibition of an activity such as the legal authorisation or postponement of payments by debtors.[91] A general moratorium on legal proceedings is the stay in legal action where no enforcement action may be made.[92] Based on these definitions, the hold on the enforcement of a repayment which may categorised as either a capital holiday, interest holiday or both, whereby the customer would not be required to service their repayment with regard to the

[89] Apart from non-compliance in accordance with s 86(7)(i)(dd) of the NCA.
[90] https://www.businessinsider.co.za/all-the-help-south-african-banks-are-offering-consumers-during-covid-19-2020-4 (accessed 14-05-2021).
[91] Oxford Advance dictionary 10th edition.
[92] S133 Companies Act, Act 71 of 2008.

instalment for a brief period as agreed upon by the creditors, would constitute as a moratorium. This indulgence, by way of moratoriums granted to customers under existing agreements, is to assist in managing the impact of the pandemic on customers' cashflow. Considering that moratoriums are temporary, upon the expiry of the indulgence period, the customer would be obliged to commence paying the instalments unless a further agreement is entered into.

In instances where the NCA is applicable to the original loan agreement and an indulgency in terms of a moratoriu[boilerplate] provisions of the NCA will remain applicable.[93] The moratorium would constitute a waiver of amounts under the existing agreement and such amendment is not treated as creating a new credit agreement and therefore no new credit assessment would be required.[94] However, in instances where the moratorium includes additional changes, such as extension of the term of the agreement, a NCR Form 27[95] was to be sent to the customer to ensure compliance with the NCA provisions where applicable.[96]

The provision of the moratorium was not intended to affect the terms of the existing agreement with regard to the security, but mainly to postpone the due payments by the debtors. The conditions of the agreement are to remain in force, save for the changes with the hold on the repayment amount as granted by the moratorium.

The loan scheme guarantee is an initiative which contains the administrative processes, as supported by SARB, to allow the banks to claim any losses that may be incurred from the National Treasury.[97] The initiative grants the banks with this form of debt relief offered only to businesses, considering factors such as their turn-over to establish eligibility.[98] The loan scheme guarantee was to be granted to small and medium business who, upon application to their respective banks, would receive a loan to allow for liquidity as a matter of last resort. The entity would not be liable for the payment of interest and capital for a maximum of 6 months and at the end of this period the capital amount granted will be payable over a 5-year period to ensure no further strain is placed on the entities' finances. The loan is intended to cover

[93] S 4 of the NCA.
[94] S 95 of the NCA.
[95] In accordance with s 124(2) of the NCA.
[96] S 117 of the NCA.
[97] "Answering your questions about the COVID-19 LOAN GUARANTEE SCHEME" Issued by the National Treasury, South African Reserve Bank and Banking Association of South Africa on 12 May 2020.
[98] The businesses had to have a turnover of less than R300 million.

operational expenditures necessary to generate income, including salaries, insurance and rent.[99] Considering that this is a new credit agreement, a credit assessment would still be required, and should the agreement fall within the ambit of the NCA, compliance is required to ensure that no reckless credit is granted.[100]

3.4 Conclusion

Having considered the statutory relief measures as well as the newly imposed Covid-19 moratoriums, it is evident that t  forms of debt relief which may be considered by creditors. Each one creates the specific instances in where it will be applicable. The provision of the legislations and the procedural aspect relating to each is a big factor when the considering which relief is best suited for the debtor. In as much as debt relief should be aimed at protecting the debtor, one cannot disregard the importance of creditors and ensuring that their agreements are upheld.

Reckless credit and sequestration being the forms of debt relief that allow for the possibility of a write-off, it seems understandable why the provisions of the Insolvency Act would lean more in favour of the creditor. It is important to note however that with sequestration, the write-off will only be applicable to the remaining debt after the sale of assets and distribution. The administration procedure as well as debt review in terms of the NCA seem to operate fairer on the part of the consumer, but their implementation is limited depending on the total debt or type of agreement. These three statutory forms of debt relief seem to be best suited for long-term relief, whereas the introduction of the Covid-19moratoriums seem to provide short-term relief.

Despite creditors being able to decide which of these debt relief measures to use, their discretion is largely limited based on the procedural aspects of each relief measure. In addition, the applicable legislation and regulations, as well as the types of agreements entered into in terms of the Covid-19moratoriums, have added to the limitations for creditors in executing their relief.

In the next chapter, I will consider the prevention of reckless credit granting and how creditors can be more responsible, especially during a pandemic, which has financial implications for debtors.

---

[99] "Answering your questions about the COVID-19 LOAN GUARANTEE SCHEME" Issued by the National Treasury, South African Reserve Bank and Banking Association of South Africa on 12 May 2020.

[100] S 4, 81 and 82 of the NCA.

Chapter 4:

The prevention of reckless credit granting

4.1 Introduction

When considering the availability of credit which may be provided to a consumer, the creditors, such as banks, are faced with the challenge of ensuring that such consumer is not over-indebted. According to the World Bank Report,[101] defining what constitutes as reckless lending differs in various countries. The European Commission defines the general term as having the insufficient resources to meet the minimum financial obligations, without reducing the standard of living below the required normal minimum levels of the applicable country.[102] The importance of establishing when a consumer is over-indebted is vital for credit providers and credit regulators to ensure economic stability.

The World Bank Report had previously highlighted some of the key drivers of over-indebtedness to include carelessness, where there is a lack of understanding resulting in poor decision making with regard to finances.[103] Another driver is the occurrence of an unexpected event such as the loss of income or unforeseen expenses, such as medical fees or natural disasters.[104] The third driver is poverty, which is caused by the inability to service their existing expenses and further seeking credit.[105]

Besides the above listed drivers, which contribute towards over-indebtedness due to consumers' circumstances, there are also many other instances where the root cause of the indebtedness is a result of credit providers having extended credit to consumers who cannot afford credit. This extension of credit recklessly to consumers leads to over-indebtedness and does not comply with what the Word Bank's term "responsible lending".[106]

---

[101] World Bank Report on Responsible Lending (2013) par 5.
[102] European Commission (2010), Towards a common operation European definition of over-indebtedness. Four common features being the economic, temporal, social and psychological which contributes toward the consideration of over-indebtedness.
[103] World Bank Report on Responsible Lending (2013) par 8.
[104] World Bank Report on Responsible Lending (2013) par 9.
[105] World Bank Report on Responsible Lending (2013) par 10.
[106] World Bank Report on Responsible Lending (2013) par 2.

Similar to many other countries,[107] South Africa has its own credit regulatory requirements to ensure responsible lending and preventing consumers' over-indebtedness as contained in the NCA.

4.2 National Credit Act

The provisions contained in Part D of the NCA relate to consumers who are natural persons[108] with regard to over-indebtedness and reckless credit.[109] This proactive measure in ensuring the avoidanc  lit-granting and over-indebtedness stems from section 3(c). Section 79 defines a consumer as being over-indebted when the prevalence of the information illustrates that, at the time, the consumer will be unable to timeously satisfy their obligations for the payment of the debt, as entered into in terms of the credit agreement. Consideration is to be made regarding the consumer's financial means, financial prospects as well as the probability of the consumer being able to satisfy all credit agreement obligations, to which they are a party.[110]

Apart from a few listed exceptions, reckless credit granting may apply to various credit agreements such as secured loans, mortgage agreements or unsecured loans as well as suretyships and guarantors.[111] This prevention of the consumer becoming over-indebted is the main factor in the avoidance of reckless credit granting, as this is prohibited conduct.[112] Moreover, the regulations introduce sanctions which are to be applied in instances where reckless credit has occurred.[113]

In terms of section 81(1) of the Act, when a consumer applies for a credit agreement, they must provide full and truthful information as requested by the credit providers when conducting this pre-assessment application. The purpose of the assessment is to establish affordability by the consumer for the repayment of the proposed credit.[114] In accordance with section 80, at the time when the agreement is

---

[107] World Bank Report on Responsible Lending (2013) par 12.
[108] *Gestalt Fund Managers (Pty) Ltd v Secura Systems Security (Pty) Ltd* 2015 JDR 1284 par 15.
[109] S 78(1) of the NCA. Specific credit agreements are excluded as per s 78(2)(a) –(f) of the NCA.
[110] S 79(a) –(b) of the NCA.
[111] S 78(2) of the NCA. All credit agreement entered prior 1 June 2007.
[112] S 1 of the NCA provides for the definition read together with s 81(3) of the NCA.
[113] CM van Heerden "Over-indebtedness and reckless credit" in JW Scholtz, JM Otto, E van Zyl, CM van Heerden & N Campbell (eds) *Guide to the National Credit Act* Durban: LexisNexis ch 11 para 11.6.1.
[114] CM van Heerden "Over-indebtedness and reckless credit" in JW Scholtz, JM Otto, E van Zyl, CM van Heerden & N Campbell (eds) *Guide to the National Credit Act* Durban: LexisNexis ch 11 para 11.6.2.

made, there are three instances where it can be considered as reckless credit granting.

The first is the lack of an affordability assessment by the credit provider.[115] This is considered reckless, irrespective of the consumer being able to afford such credit, as the obligation to conduct an assessment is compulsory. The second type of reckless credit is when the credit provider has conducted the assessment in accordance with section 81(2) but based on the information received, it was evident that the consumer lacked the understanding of the risk as well as cost included in terms of that credit agreement, and the credit provider proceed to enter into the agreement with the consumer.[116] The requirement is for the credit provider to inform the consumer of all risks, costs such as the interest to be charged, and obligations imposed on the consumer as result of the agreement. The third type of reckless credit applies after the conducting of the credit assessment as well as establishing that the client understands the risk and costs involved. It is then recognised that the client is not currently over-indebted but it becomes evident from such information that the consumer would be over-indebted should they enter into the proposed agreement and the credit provider still proceeds. The disregard for such facts is considered the third instance where there is reckless credit granting.[117]

4.2.1 Pre-assessment and defence against reckless credit

In analysing these instances, it is clear that the pre-agreement assessment is one of the first measures in place to avoid reckless credit granting. The NCA states that irrespective of the outcome, the failure to conduct this assessment prior to entering into the new credit agreement will be considered as reckless.[118] This pre-emptive measure is placed on the credit provider to ensure reasonable steps are complied with prior to the reckless granting of credit. This requires the consumer to provide the "full and truthful answers" as well as all other information as requested by the credit provider in enabling them to conduct the assessment.[119] It is prohibited for the credit provider to enter into such an agreement without first reasonably assessing the proposed consumer's general understanding of the risk, cost, and obligations in

[115] S 81(1)(2) of the NCA.
[116] S 81(2)(a)(i) of the NCA.
[117] CM van Heerden in JW Scholtz *et al* para 11.6.2
[118] S 81(1)(2) of the NCA
[119] S 81(1)(2) of the NCA.

relation to the credit to be granted.[120] The debt re-payment history and existing financial means of the consumer must also be considered.[121] Consideration to the reasonable prospective commercial success must be made in instances where this is the purpose of the credit agreement.[122] The record keeping of such an assessment is important as it serves as proof for the conducting of the credit pre-agreement assessment. This is despite the fact that there is no prescribed mechanisms or procedures in evaluating these pre-assessment obligations. The only objective is for credit providers to ensure that thi  air and objective" manner without being contrary to the affordability assessment regulation as prescribed by the Minister.[123]

This requirement has been tested multiple times in our courts.[124] Some of the key decisions relating to this include that in *Standard Bank Ltd v Kelly*[125] where it was held that mere allegation of there not being a pre-assessment would not suffice as a defence. Any allegation of the credit provider not having conducted the pre-assessment would have to be substantiated.[126] It was also in the matter of *Absa Bank Ltd v De Beer*[127] where the importance of record keeping of the pre-assessment came to light, as the court held that due to the absence of the record, the credit provider cannot prove that it indeed conducted the pre-assessment.

In as much as section 61(5) of the NCA allows for credit providers to determine scoring and evaluation mechanisms with regard to the credit risks, the consumer's part is key in ensuring that the pre-assessment is conducted correctly. They are required to answer honestly and in full all the information required by the credit provider. Failure by the consumer would mean that they would not be able to rely on the fact that the credit agreement was reckless.[128] This could in turn be used as a defence by the credit provider when the consumer alleges reckless credit granting. This is a two-part

[120] S 81 (2)(a)(i) of the NCA.
[121] S 81(2)(a)(i) to (ii) of the NCA.
[122] S 81 (2)(b) of the NCA.
[123] S 82 of the NCA.
[124] CM van Heerden in JW Scholtz *et al* para 11.6.3 sets out a clear chronological sequence of cases in relation to the application of pre-assessment requirement.
[125] (2011) ZAWCHC 1.
[126] *Benade and Another v Absa Bank Ltd* (2014) ZAWCHC 84 and *African Bank Ltd v Greyling* (2015) JOL 33071 (GJ) per 18.
[127] (2015) ZAGPPHC 903.
[128] S 81 (4) (a) of the NCA.

requirement as it requires there to be non-disclosure or dishonesty from the consumer and this must have a material effect on the credit provider's pre-assessment ability.

The first part of the reliance on this defence requires the consumers' honesty. This can be seen in the matter of *Howard v Firstrand Bank Ltd*[129] where the court dismissed the consumer's claim that the credit provider should not merely have relied on the information provided by the consumer but should have vetted same. The court held that the lack of a reasonable indication that information provided would alert to the contrary, the credit providers ar[illegible]formation as truthful. It was further highlighted that the credit provider's "reasonable steps to assess" will not be seen as reckless if the information provided by the consumer was untruthful or incomplete.[130]

This defence is in line with the provisions of section 81(4)(a) where the credit provider can prove that the consumer failed to answer the requested information truthfully and completely to allow the credit provider to do the relevant pre-assessment. The reliance on this defence should be subsequent to a section 81(2) pre-assessment being conducted. A credit provider may not simply rely on the defence of false or incomplete information being provided by the consumer if they had not initially complied with the section 81(1)(2) requirements.[131]

The second part of this defence requires that a court or the Tribunal should determine whether such failure by the consumer materially affected the credit provider's ability to make the assessment. This would mean that not all dishonest or incomplete information by the consumer will suffice for a complete defence. Instead, such information must be material to the assessment. In *Mahomed v Standard Bank of South Africa Ltd and Another*,[132] where credit was provided to a consumer who was a businessman nearing retirement in three years, sought to reply on the reckless credit granting defence, the court held that such non-disclosure was material and granted the credit provider a complete defence.[133]

4.2.2 General understanding of the risk

Following the pe-assessment criteria, section 81(2)(a)(i) of the NCA provides for the second type of reckless credit. This entails the situation where, after the assessment,

[129] (2011) ZAGJPJHC 121.
[130] Par 7 of the judgment in the Howard case.
[131] *Absa Bank Ltd v COE Family Trust and Others* 2012(3) SA 184 (WCC).
[132] (2019) ZAGPPHC 241 par 19.
[133] CM van Heerden in JW Scholtz *et al* para 11.6.5

on the preponderance of the information available, it is evident that the consumer was ignorant or lacked the understanding with regard to the risk, costs and obligations in terms of the credit agreement. This is to be determined objectively on the facts and circumstances of each credit agreement.[134] Consideration is to be made with regard to the consumer's repayment history as well as their existing financial means and prospects.[135] This application can be seen in numerous cases.

In *Absa Bank Ltd v Kganakga*,[136] the consumer's ability to understand the risk pertaining to the credit agreement before the court. As confirmed in the judgment, the creditor is responsible for taking reasonable steps in ensuring that the consumer has a general understanding of the risk of the transaction. This is not only limited to the risk and costs of the credit, but also the risk associated with the failure to pay interest or instalments timeously, and the obligations and rights which may be exercised by the credit provider.[137]

In *Desert Star Trading 145 (Pty) Ltd and another v No 11 Flamboyant Edleen CC and another*,[138] the issue of affordability and the repayments came to light. The court held that in accordance with section 81(2)(a)(i)-(iii) of the NCA, no investigation was concluded in this matter. There was no reasonable prospect of the consumer being able to repay the amount borrowed and therefore reckless credit was granted.[139] This decision also referred to the financial prospect and obligation requirement, considering that if there is no possibility of repayment, it illustrates that the consumer's financial means were not taken into account.

In *Firstrand Bank Ltd v Van Coller*[140] the defendant tried to rely on the defence claiming that no pre-assessment was concluded and therefore the credit agreement was reckless. The court however found that the clause in the agreement, which the consumer had agreed to, clearly stated that they understood and have read the agreement and that the information provided was true and complete.[141] The inclusion of this clause together with the confirmation that it is understood would possibly assist many creditors in proving the general understanding requirement of section 81(2)(a).

---

[134] *Horwood v Firstrand Ltd* (2011) ZAGPHJPHC 121 para 5.
[135] S81(2)(ii) – (iii) of the NCA.
[136] (2016) ZAGPJHC 59.
[137] *Absa Bank Ltd v kganakga* paras 24 to 29.
[138] 2011 (2) SA 266 (SCA).
[139] *Desert Star Trading 145 (Pty) Ltd* case para 15.
[140] (2017) ZAGPPHC 85.
[141] *Van Coller* case para 5. Also see CM van Heerden in JW Scholtz *et al* para 11.6.3.

4.2.3 Affordability assessment

Seeing as the NCA does not intend to discourage credit granting, and as remarked in the case of *SA Taxi Securitisation (Pty) Ltd v Mbatha*,[142] it also does not intend to be over-critical in evaluating reckless credit. The balance of the interest of the consumer and credit provider may become challenging. The introduction of the affordability assessment was made to reduce the granting of reckless credit. In accordance with regulation 23A(2)(a) of the National Credit Regulations, when conducting the affordability assessment, this r[illegible]alculated using the consumer's discretionary income.[143] This affordability assessment goes hand in hand with the pre-assessment requirement of the section 81(2).

This concept of affordable assessment came as a result of the media statement by the Chairman of BASA and the Minister of Finance in trying to ensure responsible conduct for banks when lending.[144] In so doing, BASA and the National Credit Regulator agreed to formulate standard measures to be incorporated when determining affordability. These guidelines were to be used not only by member banks, but the media statement also encouraged this to be used by all other creditors as good practice.[145] This was followed by affordability guidelines which were drafted as an introduction to the regulations to be placed in effect.[146] The principles established by the regulations include: credit being extended on a verified incomes basis, the references to the credit records as held by the credit bureaux; minimum living expenses; and consistency of the consumer's income.[147] Together these principles formed the basis of the affordability assessment rules and regulations. They require the credit provider to take reasonable practical steps in assessing a consumer's financial means. With regard to the validation of the consumers income, the regulations suggests that at least three months' payslips or bank statements must be

[142] 2011 (1) SA 310 (GSJ) para 37
[143] This is defined in regulation 1 of the NCR as the gross income less statutory deductions like tax and UIF etc.
[144] Minister of Finance Republic of South Africa and The Banking Association of South Africa, Joint Statement "Ensuring Responsible Market Conduct for Bank Lending" November 2012. Herein referred to as the Media Statement.
[145] Para 3 of the Media Statement.
[146] September 2013 Draft Guidelines.
[147] Department of Trade and Industry Notice 224 of 2018, Regulation 23A, Government Gazette, 4 May 2018.

supplied in cases where the salary is received as deposits into the consumer's account.[148]

The Minister of Trade and Industry is to prescribe measures to determine the outcome of the affordability assessment, this being done through regulations.[149] The credit providers have the ability to determine their own evaluation and assessments of the consumers financial standing while taking into account the regulation of the affordability assessments.[150]

4.1 Conclusion

The prevention of reckless credit is based on ensuring responsible lending. The NCA has measures in place to ensure that credit providers in South Africa are compliant with "responsible lending" best practice. This can be seen in the extensive pre-assessment requirements together with the affordability assessment regulations. These provisions have been tested in many court cases, including the applicable defences and when they can be relied upon. Even with the pandemic, creditors are to always ensure that they do not grant credit which might entail reckless lending. This would mean that credit assessments would have to conducted when a consumer approaches the creditor for "new" credit.

[148] Regulation 23A par 4, Government Gazette, 13 March 2015. This is specific to consumers who earn a salary from an employer, similar alternatives are prescribed to who don't receive an income or are self-employed.
[149] S 15(c) of the NCA.
[150] S 82 of the NCA.

Chapter 5:
Conclusion

5.1 Research objective

The main objective in this dissertation was to critically analysis the existing credit provision, for creditors such as banks, which are available to South Africans in accordance with our current legis[illegible]y to this objective was to further analyse the debt review measures available whilst considering the impact of the COVID-19 pandemic. This included new recommendations for debt review such moratoriums and loan scheme guarantees.

5.2 Overview of credit provision and debt relief

The initial discussion of the dissertation focused on the need for creditors, such as banks, to provide credit as one of their primary purposes.[151] The analysis is centred around an individual's need for credit and the responsibilities imposed on banks according to the Code of Banking Practice. It was identified that certain factors such as the conducting of credit assessments by the banks must be done in a cautious manner. This required the customer's co-operation, by fully disclosing the relevant information required to enable the banks to conduct such assessments. The Code makes it clear that the credit being extended must not be stretched beyond the banks' means.[152]

Responsible credit granting is in line with the legislative provisions contained in the Banks Act.[153] The NCA provided further legislative obligations to be considered when granting credit. Whilst also encouraging the access to credit it further cautioned the need for credit granting to not be reckless and prevention of over-indebtedness by the customers.[154]

The access to credit, even in circumstances when granted in responsible manner, may lead to the need for debt relief. This occurs when customers can no longer service their debt, usually as a result of changes to their financial standing. As

[151] Ch 2 para 2.1.
[152] Ch 2 para 2.2.1.
[153] 94 of 1990.
[154] Ch 2 para 2.2.2.

discussed, the effect of Covid-19 and the declaration of a national state of disaster lead to changes in many individuals' financial standing.[155] Even though our progressive legislative provisions provide for various forms of debt relief raging from sequestration, administration, and debt review, which are available for customers in financial distress.[156] The pandemic having effected many South Africans, the additional short-term debt relief measure was imposed together with the loan scheme guarantee.[157]

In summary, it can be noted tlredit has always been an essential part of any economy. With the guidance of our legislation, our banks contribute greatly to ensuring that customers have such access. This responsibility, however, goes further than just granting credit as it also requires access for debt relief, should circumstances change. The changes in the global economy caused by factors such as the pandemic further urges our creditors to develop and improve the existing provisions for both credit provision and debt relief.

5.3 Forms of debt relief

Having established and discussed the need for creditors to provide debt relief, the secondary objective of this dissertation related to the types of debt relief measures available to South African's. The one discussed first was the sequestration procedure, voluntary or compulsory, in terms of the Insolvency Act[158] which has to be for the creditors advantage.[159] Sufficient assets are then required to cover the application and results in an impact on the customers legal status to hold office and other contractual capabilities.[160]

The other debit relief measure explained was the administration orders in terms of section 74 of the Magistrates' Court Act, which has financial limitations, and such application needs to made by the debtor.[161] As discussed, this form of debt relief does not discharge debt prior to the settlement of all debt and only restructures the money

[155] Ch 2 para 2.3.2.
[156] Ch 2 para 2.3.1.
[157] Ch 2 paras 2.3.2 and 2.3.3.
[158] 24 of 1936.
[159] Ch 3 para 3.2.1.
[160] Ch 3 para 3.2.1.
[161] Ch 3 para 3.2.2.

payable.[162] This is done through a process of court application where an administrator would be appointed.[163]

Debt review in accordance with section 86 of the NCA was also discussed. This form of debt relief, despite not having a financial limitation, is still limited to specific credit agreements which must fall with the ambit of the NCA. The NCA also has additional restrictions regarding when debt review will not be applicable, similar to when there already is an existing enforcement proceeding in place. It is distinctively identifiable that this form of debt re the protection of the consumer.[164]

These existing debt relief procedures each have their own shortfalls as well as various restriction to their application. This opened up the need for Covid-19 moratoriums as recommended by the SARB and BASA, together with loan scheme guarantee which was only brief discussed as it is applicable to entities.[165]

5.3 Deterrence of reckless credit granting

Precautionary measures must be taken when considering the granting of credit. The aim of credit granting was not to encourage reckless lending or over-indebtedness. This is also emphasised by the World Bank in its report when it mentions key drivers with regard to over-indebtedness.[166]

The NCA provides for a clear legislative provision which discusses over-indebtedness by consumers and proactive measures in combating reckless credit granting. It provides for procedural processes for determining when a credit agreement may be considered reckless.[167] The compliance to the Act is also protected by the ability for sanctions to imposed to credit agreements which are considered reckless.

As is evident in my discussion for the prevention of reckless credit, the reliance of truthful and accurate information from the consumer is vital. The requirement for truthful and accurate information assists creditors with their pre-assessment requirement, according to section 80.[168] The section further elaborates that the lack of

[162] Ch 3 para 3.2.2.
[163] S 74 C(1)(a) and S74E of the Magistrates' Court Act.
[164] Ch 3 para 3.2.3.
[165] Ch 3 para 3.3.
[166] Ch 4 para 4.1.
[167] Ch 4 para 4.2.
[168] Ch 4 para 4.2.

an affordability assessment, failure to consider the risk and lack of understanding by the consumer would be considered reckless credit.

The importance of the pre-assessment requirement in accordance with section 81 is so key that regardless of what the outcome would have been, failure to conduct such an assessment would warrant the credit agreements reckless.[169] These criteria have been tested before our courts multiple times and has stood so solid that even amongst a pandemic, this credit requirement would still be applicable.

5.4 Final remarks

The stated objective of this dissertation was to critically analyse the existing credit provisions. I identified banks as an example of creditors which I would use thorough the dissertation. The accessibility of credit and the need to grant such credit was explored by looking at the Code of Banking Practice. The purpose of the bank, as defined in the Banks Act, was also investigated. This solidified the need for the granting of credit to consumers. These existing provisions, inclusive of the NCA, goes to illustrate that there are adequate credit provision regulations in South Africa. It is however important to note that as the world changes, so does the consumers' needs and this applies to credit granting as well.

Th existing debt relief measures we currently have are a testament to the need for growth and adaption when it comes to assisting consumers. The individually identifiable debt relief measures from the administration order, insolvency and debt review, all have limited application based on their restrictions. These shortcomings were exposed by the need for a Covid-19 moratorium and Loan Scheme Guarantees, which were introduced to assist consumers during a pandemic. This, however, illustrated how creditors such a banks, with the guidance of SARB and BASA, were willing to uphold their responsibility in ensuring credit and debt relief can be granted to consumers. For years very little changes have been made with regard to developing new means for credit granting and debt relief. These recent recommendations have shown that our banks have a great responsibility in protecting our economy, by simply ensuring non-reckless credit granting and extending debt relief when required.

[169] Ch 4 para 4.3

Bibliography

Literature

- "Answering your questions about the COVID-19 LOAN GUARANTEE SCHEME" Issued by the National Treasury, South African Reserve Bank and Banking Association of South Africa on 12 May 2020.
- CM van Heerden "Over-indebtedness and reckless credit" in JW Scholtz, JM Otto, E van Zyl, CM van Heerden & JT Campbell *Guide to the National Credit Act* (eds) Durban: LexisNexis
- European Commission (2010), Towards a common operation European definition of over-indebtedness. Four common features being the economic, temporal, social and psychological which contributes toward the consideration of over-indebtedness
- JW Scholtz "Over-indebtedness" in JW Scholtz, JM Otto, E van Zyl & CM van Heerden (eds) *Guide to the National Credit Act* (Service Issue 12, July 2020)
- Oxford Advance dictionary 10th edition
- World Bank Report on Responsible Lending (2013)

Case law

- *Absa Bank Ltd v COE Family Trust and Others* 2012(3) SA 184 (WCC).
- *Absa Bank Ltd v De Beer* (2015) ZAGPPHC 903
- *African Bank Ltd v Greyling* (2015) JOL 33071 (GJ)
- *Absa Bank Ltd v Kganakga* (2016) ZAGPJHC
- *Benade and Another v Absa Bank Ltd* (2014) ZAWCHC 84
- *Bafana Finance Mabopane v Makwakwa*, 2006 (4) SA 581 (SCA) 586
- *Collet v First Rand Bank Ltd* 2011 (4) SA 508 (SCA) 514
- *Desert Star Trading 145 (Pty) Ltd and another v No 11 Flamboyant Edleen CC and another* 2011 (2) SA 266 (SCA).
- *Firstrand Bank Ltd v Van Coller* (2017) ZAGPPHC
- *Gestalt Fund Managers (Pty) Ltd v Secura Systems Security (Pty) Ltd* 2015 JDR
- *Howard v Firstrand Bank Ltd* (2011) ZAGJPJHC 121

- *Mahomed v Standard Bank of South Africa Ltd and Another* (2019) ZAGPPHC 241
- *Motor Finance Corporation v Jan Joubert* 2013 JDR 1912 (GNP)
- *SA Taxi Securitisation (Pty) Ltd v Mbatha* (2017) ZAGPPHC
- *Standard Bank Ltd v Kelly* (2011) ZAWCHC
- Weiner No v Broekhuysen 2003(4) SA 301 (SCA) 305

Legislation

- Banks Act 94 of 1990
- Code of Banking Practice
- Insolvency Act 24 of 1936
- Magistrates' Courts Act 32 of 1944
- National Credit Act 34 of 2005.

Other

- https://www.gov.za/speeches/statement-president-cyril-ramaphosa-measures-combat-covid-19-epidemic-15-mar-2020-0000 (accessed 13-05-2021)
- https://www.banking.org.za/news/may-update-debt-relief-for-customers/ (accessed 13-05-2021)
- https://www.banking.org.za/news/debt-relief-assistance-for-customers/ (accessed 13-05-2021).
- https://www.banking.org.za/news/banks-respond-to-covid-19/ (accessed 14/05/2020)
- https://www.businessinsider.co.za/all-the-help-south-african-banks-are-offering-consumers-during-covid-19-2020-4 (accessed 14-05-2021).
- https://www.banking.org.za/wp-content/uploads/2020/04/2020-04-21-Loan-Guarantee-National-Treasury.pdf (accessed 14-05-2021).
- Leathern R, "Consideration of The Proposed Debt Interventions Procedures From A Debt Relief Perspective"(LLM Thesis, University of Pretoria 2018)(.
- Mahlale N, "Aspects Of The Debt Review Process Under The National Credit Act 34 of 2005" (LLM Thesis, University of Pretoria 2016)
- Department of Trade and Industry Notice 224 of 2018

- Government Notice No 11058, Vol 657 No 43127 (the Gazette).
- Government Gazette No 37882 No 10242
- Minister of Finance Republic of South Africa and The Banking Association of South Africa, Joint Statement “Ensuring Responsible Market Conduct for Bank Lending” November 2012