UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

UNIVERSITY OF PRETORIA

FACULTY OF LAW

The transformation objectives of the National Credit Act 34 of 2005

A research paper submitted in partial fulfilment of the requirements for a Master's degree in Mercantile Law, University of Pretoria, South Africa

Supervisor: Professor Stefan Renke
(University of Pretoria)

Student: Linda Khumalo
Student Number: 21684732

DECLARATION

I, Linda Khumalo, declare that this dissertation which is hereby submitted for the award of Legumes Magister (LLM) in Mercantile Law under the topic *Transformation objectives of the National Credit Act 34 of 2005* is my own work. It has not been previously submitted for the award of a degree at this or any other tertiary institution. All the sources I used or quoted have been indicated and acknowledged by means of complete references.

Signed **.....**

Linda Khumalo

January 2023

Pretoria

South Africa

ACKNOWLEDGMENTS

First and foremost, I owe deep gratitude to the One whom seas and winds obey, GOD, for life, love, the wisdom, and the strength to complete this dissertation. He always answered my prayers when I was in need, and always ensured that I found whatever I needed to allow me to complete this dissertation.

"AND IN GOD ALL THINGS HOLD TOGETHER"

This dissertation is dedicated to:

1. my mother, Mary Goretti Sibongile Khumalo, who is the source of all my wisdom, hard work, dedication, excellence, resilience, going the extra mile, 'I can' attitude, and KUZOLUNGA;

2. my late father, Moffat Themba Khumalo, who always believed in the excellence in me;

3. my best friend, Lucky Moholo, who always supports me; and

4. my supervisor, Professor Stefan Renke. Thank you for the skill you have entrusted me with in order to complete this dissertation. Your meticulous and incisive guidance helped to shape this dissertation. I would like to further thank you for the patience and timeless assistance you displayed! MAY GOD BLESS YOU.

CHAPTER 1

GENERAL INTRODUCTION

1.1 Background information and introduction

My dissertation concerns the transformation objectives of the piece of legislation regulating the South African credit industry at present, the National Credit Act 34 of 2005,[1] which, together with enactments such as the Consumer Protection Act 68 of 2008[2], forms part of a raft of post-Constitution[3] legislation aimed at the protection of consumers and making financial services, including credit, more accessible to the broader South African population, particularly lower-income earners and previously disadvantaged persons.[4] Scholtz remarks that these legislative enactments "constitute perhaps the most comprehensive change of the legal landscape since the adoption of the Constitution in 1996". The NCA, which came into operation in stages (on 1 June 2006, 1 September 2006, and 1 June 2007[5]), repealed and replaced the Credit Framework, which existed for nearly three decades.

The predecessors to the NCA were the Usury Act 73 of 1968[6] and the Credit Agreements Act 75 of 1980.[7] The Usury Act regulated the financial aspects (interest rates *et cetera*) of the credit agreements it applied to, namely moneylending transactions and instalment transactions that were concluded in respect of movable goods, and the Credit Agreements Act regulated the contractual aspects (for example, the compulsory and prohibited content of a credit agreement) of instalment transactions relating to movable goods.[8] The implication, therefore, was that, although the Credit Agreements Act did not apply to moneylending

[1] "NCA". All references to sections and regulations hereinafter will refer to the NCA, unless indicated otherwise.
[2] "Consumer Protection Act" or "CPA".
[3] The Constitution of the Republic of South Africa 1996 ("the Constitution").
[4] Scholtz ed "The implementation, objects and interpretation of the National Credit Act and related matters" in *Guide to the National Credit Act* (2008) par 2.1.
[5] See Proc 22 in *GG* 28824 of 11 May 2006.
[6] "Usury Act". The Usury Act was preceded by the Usury Act 37 of 1926 ("1926 Usury Act"), which was the first consolidated consumer credit enactment in South Africa. The 1926 Usury Act was repealed and replaced by the Limitation and Disclosure of Finance Charges Act 73 of 1968 ("LADOFCA"), which became effective on 1 April 1969 and was renamed the "Usury Act" in 1986. See Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005*, LLD thesis University of Pretoria (2012) ("Renke thesis") par 6.1.
[7] "Credit Agreements Act". The Credit Agreements Act, which became effective on 2 March 1981, was preceded by the Hire-Purchase Act 36 of 1942 ("Hire-Purchase Act"). Renke thesis par 6.1.
[8] Renke thesis par 6.1.

transactions[9], different enactments regulated different aspects of the same contracts. Importantly, the NCA's predecessors were pre-Constitution, and thus did not comply with constitutional imperatives, values, norms, and standards, such as equality. According to Scholtz[10], the predecessors to the NCA were drafted to adapt to the needs of the credit market that existed prior to the Constitution, a market to which the majority of the black working class had limited access.

The topic of my dissertation is the transformation objectives of the NCA. The Collins English dictionary[11] defines 'transformation' as "a change or alteration, especially a radical one". The Cambridge dictionary[12] defines it as "a complete change in the appearance or character of something or someone, especially so that that thing or person is improved". The word 'improved' in the latter definition is notable.

The Constitution, which became effective on 4 February 1997, is the supreme law of the country, and its provisions cannot be superseded by any other law.[13] "Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law."[14] It is a long-term project including constitutional, legislative, interpretive, and effective enforcement mechanisms committed to transforming a country's political, social, and economic institutions and power relationships in a democratic, participatory, and egalitarian direction.[15] The transformative nature of the Constitution provides a normative framework that guides "the redress of the injustices of the past as well as to facilitate the creation of a more just society in the future".[16] Transformation informs the construction of a new legal order with opportunities for all, particularly to eradicate material prejudices inherited from the past.[17]

In order to achieve the transformative agenda of the Constitution, subsidiary legislation has been enacted, such as the NCA, which is one of the legislative enactments foregrounded in the transformative constitutional principles. To elaborate, consumer credit legislation

[9] Renke thesis par 6.7.1.
[10] Scholtz par 2.1.
[11] https://www.collinsdictionary.com/
[12] https://dictionary.cambridge.org/
[13] See www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1, accessed on 1 April 2022.
[14] Klare "Legal culture and transformative constitutionalism" 1998 14 *SAJHR* 150.
[15] *Ibid*.
[16] Liebenberg "South Africa's new equality legislation: A tool for advancing women's socio-economic equality?" 2001 *Acta Juridica* 73-81.
[17] *Ibid*.

worldwide is heavily influenced by economic, social, and political considerations, and South Africa is no exception.[18] The transition from the apartheid regime to a democracy in South Africa included a plurality of political and economic upheavals. The NCA is an explicit governmental instrument aimed at addressing the inequalities, imbalances, and discriminations of apartheid by providing previously disadvantaged persons protection in the credit market.[19] The NCA is thus an essential part of the government's work towards transformation, and established a new, more balanced legislative scheme to govern the credit market, a legislative framework infused by broad, transformative constitutional principles.

According to Scholtz,[20] with reference to the NCA's preamble and objectives in section 3, the Act has pertinent socio-economic goals, "borne out of the stated purposes of the Act". The preamble refers to, *inter alia*, the promotion of a "fair and non-discriminatory marketplace for access to consumer credit" and "black economic empowerment and ownership within the credit industry". These sentiments are echoed in and elaborated on in the introductory sentence to section 3, providing the objectives of the Act, namely 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". Scholtz, in a discussion titled "National Credit Act and the Constitution", remarks that the NCA's socio-economic aims naturally caused the Act's provisions to be tested and interpreted to monitor its compliance with the Constitution and its imperatives.[21] Most cases in which the provisions of the NCA were tested constitutionally concerned the rights to equality and property.[22]

"Equality" is defined in section 9 of the Bill of Rights, and includes the right to be equal before the law, to have equal protection, "the full and equal enjoyment of all rights and freedoms", and the right to not be discriminated against, neither by the state nor by anyone.[23] Section 9(3) lists "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth" as

[18] Otto and Renke "Introduction and historical background to the National Credit Act" in Scholtz ed *Guide to the National Credit Act* (2008) ("Otto and Renke") ch 1 par 1.1.
[19] See Department of Trade and Industry South Africa *Consumer credit law reform: Policy framework for consumer credit* (2004) ("DTI Policy Framework") chs 1–3.
https://static.pmg.org.za/docs/2005/050608consumer.pdf
[20] Scholtz par 2.3.
[21] Scholtz par 2.5.
[22] Scholtz par 2.5.
[23] S 9(1) – (3).

unfair grounds for discrimination, and section 9(4) renders the development of national legislation to prevent and prohibit unfair discrimination obligatory.

The fact that the NCA introduced measures into the South African credit law landscape that did not exist before is, in itself, change and, therefore, transformation. Examples of such measures in the Act are sections 74 to 76, 78 to 88, and 92. Sections 74 to 76 are aimed at eradicating undesirable credit marketing practices, and sections 78 to 88 at the prevention of reckless credit and over-indebtedness, as well as the alleviation of the latter. Section 92 provides for a compulsory credit quotation, aimed at disclosure, which must be provided to the consumer by the credit provider after a successful credit application.

Finally, consumer credit legislation only fulfils its purpose if the particular enactment is applicable to a particular agreement. The NCA applies to credit agreements[24] concluded at arm's length[25] in South Africa,[26] provided that none of the exclusions[27] to the Act's field of

[24] The NCA applies to credit facilities, credit transactions and credit guarantees, or a combination of them (s 8(1)). Credit facilities are defined in s 8(3), and include contracts of sale of movable goods and service rendering- and moneylending contracts. However, in the case of a credit facility, consumers regulate their credit facility, such as an overdraft on a cheque account or credit card, and the payment of instalments by consumers to the credit provider usually create more credit that can be used by the consumer (Renke thesis par 7 2 2 2. S 8(4) lists eight credit transactions, including a mortgage (a credit agreement secured by the registration of a bond in the Deeds Office), an instalment agreement (the sale of movable goods secured by an ownership reservation clause, in other words, a provision in the sale contract reserving the passing of the ownership of the goods to the consumer until a condition is met by the latter, usually the payment of the full purchase price), a lease of movable goods (which will only be a lease if the ownership of the leased goods passes to the consumer upon the expiration of the lease), and other agreements. S 8(4) provides that a credit agreement where payment is deferred and interest is charged by the credit provider, but that does not fall under one of the definitions of the other credit agreements subject to the NCA, will still be covered by the NCA. Other credit transactions are pawn transactions, discount transactions, secured loans, and incidental credit agreements. All these credit transactions are defined in s 1, with the exception of the other agreements, which are defined in s 8(4)(f). See Otto and Renke "Types of credit agreement" in Scholtz ed *Guide to the National Credit Act* (2008), ch 8 par 8.2.3 and Renke thesis par 7 2 2 3 for credit transactions in terms of the NCA. The NCA also applies to a credit guarantee, which is an undertaking by one person, upon demand, to stand in for and take over the obligations of another consumer, such as a suretyship agreement concluded in respect of either a credit facility or a credit transaction subject to the NCA. See s 8(5), Otto and Renke ch 8 par 8.2.4, and Renke thesis par 7 2 2 4.

[25] The concept 'at arm's length' is not defined in the NCA, but means the parties to the credit agreement are independent of each other. S 4(2)(b) of the NCA provides for credit arrangements that are not concluded at arm's length, with the implication that the NCA does not apply in these instances. Examples are credit agreements between persons in a familial relationship who are co-dependent on each other, or the one is dependent on the other, and credit agreements between parties who are not independent of each other (the parties are, e.g., friends, and therefore do not necessarily strive to obtain the utmost possible advantage from the transaction). See Renke thesis par 7 2 3 2.

[26] The NCA is also applicable to credit agreements concluded outside South Africa that have an effect in the country. See Van Zyl "The scope of application of the National Credit Act" in Scholtz ed *Guide to the National Credit Act* (2008) ("Van Zyl") par 4.2.

[27] The most important exclusions are juristic persons as consumers with an asset value or annual turnover of R1 million or more, or with an asset value or annual turnover of less than R1 million that conclude a large credit agreement (s 4(1), read with the Determination of Threshold regulations GN 713, *GG* 28893, 1 June 2006, "Threshold regulations"). In terms of s 1, "juristic person" includes a partnership, association of persons

application applies.[28] The NCA, in summary, "applies to all credit agreements whether small or large and irrespective of their form, the type of movable goods (or services) or the amount of money involved", unless one of the exclusions to the Act's scope of application applies.[29] It is important to point out that the NCA also applies to informal credit providers, such as microlenders (provided that they conclude a credit agreement at arm's length, *et cetera*, with the consumer), and that consumers are now also protected in respect of these lenders with regard to, for instance, the cost of credit.[30]

1.2 Research statement

The purpose of my dissertation is to consider the transformation objectives of the NCA. This will be accomplished by, *inter alia*, aligning various provisions of the NCA with the transformative objectives of the Constitution, with a focus on equality, as discussed above.[31] The ultimate aim of my study, which is desk-top based and focusses on selected provisions of the NCA as interpreted and applied by the judiciary, is to indicate whether the NCA has, at least theoretically, transformed the South African credit market. This necessitates considering relevant aspects of the credit legislative framework preceding the NCA.

1.3 Research objectives and chapters

I formulated pertinent research objectives, with the aim to delineate the scope of my study. In Chapter 2, I consider the predecessors to the NCA, the Usury Act, and the Credit Agreements Act, with reference to the Framework of the Department of Trade and Industry ("DTI"), as it was then known, 2004), which highlighted the inefficacy of the previous credit regulatory regime, which necessitated significant change. I ultimately demonstrate that the old credit regime was not attuned to South Africa's modern complexities and the imperative of

(whether incorporated or not), and trusts with three or more natural persons as trustees, or with a juristic person as trustee. A large credit agreement is a mortgage agreement or any other credit transaction (except a pawn transaction) with a principal debt of R250 000 or more. See s 9(4), read with the Threshold regulations. See Van Zyl par 4.3 and Renke thesis par 7 2 3 for the exclusions to the NCA's scope of application.

[28] S 4(1). For a complete discussion of the NCA's field of application, see Van Zyl ch 4 and Otto and Renke ch 8; Kelly-Louw (assisted by Stoop) *Consumer credit regulation in South Africa* (2012); Renke thesis ch 7; Van Heerden and Steennot "Pre-agreement assessment as a responsible lending tool in South Africa, the EU, and Belgium: Part 1" 2018 (21) *PER/PELJ* par 2.2.

[29] Renke thesis par 7 2 3 3.

[30] Reg 39(2) of the Regulations made in terms of the NCA (GN R 489, *GG* 28864, 31 May 2006) ("National Credit Regulations") makes provision for the "short term credit transaction".

[31] See par 1.1.

substantive equality. The previous regime perpetuated inequality in the credit market that had to be addressed in subsequent legislation. Chapter 3 provides a discussion of the NCA's objectives as set out in its preamble and section 3, which serve as the interpretational lens with regard to the provisions of the Act.

Chapter 4 discusses selected provisions in the NCA aimed at the transformation of the legislative landscape that preceded it, together with provisions affording consumers rights and important protection. The focus is on addressing inequality that existed under the previous regime. In Chapter 5, I link the objectives and selected provisions of the NCA by means of case law and the Constitution, and Chapter 6 concludes my dissertation.

1.4 Delineations

Transformation is a broad concept, and the NCA *in toto* established a transformed credit framework with the aim to address the problems that existed before its promulgation. In this regard, Scholtz[32] remarks that the NCA is far more than a mere amendment of its predecessors, the Usury Act and the Credit Agreements Act. The Act constitutes "a wholesale replacement" of the legislation it has repealed. It has already been mentioned[33] that all the provisions in the NCA that did not exist before are transformative. Transformation is not an event, it is a continuous process.

The most recent amendment of the NCA, the National Credit Amendment Act 7 of 2019,[34] which was promulgated with the specific aim to introduce 'debt intervention' in the South African credit arena, is an example. Debt intervention, an alternative to debt review, which was introduced by the initial Act, is a debt-alleviation process for low-income consumers who do not qualify for debt review. It is not possible to discuss each and every provision in the NCA aimed at the transformation of the South African credit legislative framework, and the same holds for court decisions. As indicated by my research objectives,[35] the focus of my dissertation is selected provisions in the NCA and court decisions, to specifically indicate how inequalities that existed in the previous regime were addressed.

[32] Scholtz par 2.1.
[33] See par 1.1.
[34] "2019 Amendment Act". This Act has been signed into law, but has not been put into operation yet. See Otto and Renke ch 1 par 1.3.6.
[35] See par 1.3.

1.5 Frequently used concepts

The concepts 'credit', 'consumer', and 'credit provider' are used frequently in this dissertation. These concepts are defined in section 1 of the NCA, and are summarised below.

'Credit' is the deferral of payment.[36] A 'credit agreement' is the contract in terms whereof credit is granted. It creates rights and duties for both parties to the agreement. The 'consumer' is the receiver of credit in terms of a credit agreement that is subject to the NCA, and the 'credit provider', as the term indicates, provides credit to the consumer in terms of a credit agreement.[37]

[36] According to the DTI Policy Framework (2004) par 1.6, credit is required "where a person seeks to obtain a product or service for which the person cannot, or chooses not to pay in cash or by way of exchange in kind or barter".
[37] S 1.

CHAPTER 2

THE CREDIT DISPENSATION PRECEDING THE NCA

2.1 Introduction

This chapter discusses inequalities that existed in terms of the NCA's immediate predecessors, the Usury Act and the Credit Agreements Act, which Acts co-existed and had to be co-applied to ascertain the protection available to the credit consumer from 1981[38] to 1 June 2006.[39] South Africa has a long history of consumer credit legislation,[40] dating back to the former South African colonies. The 1926 Usury Act was the first attempt by the legislature to promulgate credit laws on a national level.[41] This Act, which applied to moneylending transactions, was repealed and replaced in 1969 by the Limitation and Disclosure of Finance Charges Act (Act 73 of 1968 ("LADOFCA"), which later became the Usury Act.[42] The Usury Act applied to credit transactions,[43] leasing transactions of movable goods, and moneylending transactions.[44] The Usury Act, for a number of years,[45] co-applied with the Hire-Purchase Act,[46] which became effective on 1 May 1942,[47] until the latter's replacement by the Credit Agreements Act in 1981. The Credit Agreements Act applied to 'credit agreements',[48] in other words, to credit transactions[49] and leasing transactions.[50] However, the Credit Agreements Act only applied to credit agreements or categories of credit

[38] The year the Credit Agreements Act became applicable.
[39] The date upon which s 172(4) of the NCA, which repealed the Usury Act and the Credit Agreements Act, became effective.
[40] See Renke thesis ch 6 for a complete discussion of the NCA's predecessors. See also Kelly-Louw (assisted by Stoop) par 1.2.
[41] Renke thesis par 6 1.
[42] See par 1.1.
[43] A "credit transaction" for purposes of the Usury Act was a contract of sale of movable goods or a contract for the provision of services on credit.
[44] Renke thesis pars 6 6 1 and 6 6 2.
[45] 1969 to 1981.
[46] The purpose of the Usury Act was to regulate hire-purchase agreements and instalment sales in relation to movable goods. Renke thesis par 6 5 1.
[47] Renke thesis par 6 1.
[48] See Renke thesis par 6 7 1 for the scope of application of the Credit Agreements Act.
[49] "Credit transaction" included an instalment sale transaction, and was a contract of purchase and sale of movable goods on credit. The instalment agreement contained an ownership reservation clause (see par 1 1 for the latter), while the plain credit transaction did not. Ownership of the movable goods in the latter case therefore passed to the consumer-buyer upon delivery of the goods to the consumer.
[50] The "leasing transaction" concerned a lease of movable goods on credit, but specifically excluded a lease in terms whereof the lessee would become the owner of the leased goods during or upon the expiration of the lease. The lease in terms of the Credit Agreements Act therefore differed materially from the "lease" in terms of the NCA.

agreements to which the relevant Minister rendered the Act applicable from time to time. It is important to note that the Usury Act and the Credit Agreements Act, in contrast to the NCA,[51] only afforded protection to consumers who were parties to credit agreements up to a ceiling of R500 000.[52] If a credit agreement exceeded the R500 000 ceiling, the consumer had to rely on the principles of common law and the provisions of the particular credit agreement for protection.[53]

The DTI's Policy Framework is an important document that preceded the promulgation of the NCA and provided the credit policy framework against which the NCA's predecessors were tested and found to be lacking, particularly in the post-Constitution dispensation. The Policy Framework also set the table for the NCA, which is no longer a recent piece of legislation.[54] The DTI's Policy Framework was published in 2004 and tabled as the National Credit Bill in Parliament in March 2005. Parliament adopted the Bill in December 2005, and the President assented to the NCA on 10 March 2006.[55]

It is important to note that the aim of government with the NCA was "to introduce consumer credit legislation and establish a regulatory framework that is modern and meets international consumer protection norms and standards, but that is adapted to cater for the needs of the South African population".[56] The DTI's Policy Framework (2004) is divided into different chapters, of which Chapters 1 to 3 are most relevant for purposes of my dissertation.

2.2 DTI Policy Framework (2004)

2.2.1 A regulated consumer credit market

Chapter 1 of the DTI Policy Framework addresses the need for a regulated consumer credit market, and criticises the inefficiency and the inappropriateness of the consumer credit regulatory system. The Policy Framework identifies two strata in the financial market, namely low-income consumers and small to medium enterprises (characterised by limited access to credit and at a very high cost) and high-income consumers and large corporates,

[51] See par 1.1.
[52] "Principal debt" in the Usury Act and "cash price" in the Credit Agreements Act.
[53] Kelly-Louw (assisted by Stoop) par 1.2.
[54] If 2006 is taken as the date upon which the NCA came into operation, the Act is more than 15 years old.
[55] See Kelly-Louw (assisted by Stoop) par 1.3 for a full discussion of the history of the NCA. See also Renke thesis par 8 2 1.
[56] DTI Policy Framework (2004) 39.

who enjoy access and preference.[57] The lack of access to credit by the black working class prohibited their investment in housing and hampered their economic activities.[58] Before 1994, the majority of black South Africans were excluded from the developed formal financial sector.[59] This relegated them to the informal and unregulated financial market, characterised by micro-lenders, pawn brokers, and loan sharks, who charge extremely high costs and interest rates.[60] The informal and unregulated market also offers credit to consumers, particularly those in the middle- and low-income groups, that they cannot afford. This reckless lending caused many consumers to become overindebted.

2.2.2 Why there was a need for reform

Chapter 2 of the DTI Policy Framework, which indicates the need to reform the credit dispensation and legislative framework that preceded the NCA, is significant. As mentioned above, South Africa's credit legislation prior to promulgation of the NCA was scant and fragmented,[61] and was not aligned to the socio-economic realities of South Africa and international trends.[62] The previous credit regulatory regime was highly centralised, and it distorted the credit market through differential treatment of credit products and affording different consumers different levels of protection, with the poorest and most vulnerable enjoying the least protection.[63] The Policy Framework further notes that, under the old credit regulatory regime, there was a lack of transparency in the credit market, to the extent that the cost of credit was inflated, made possible through non-disclosure of the applicable cost. Thus, there was a necessity to reform and modernise South Africa's credit laws in order to harmonise them with international best practice and respond to South Africa's unique socio-economic context.

2.2.3 Addressing the legacy of the past

The DTI Policy Framework highlights South Africa's history of systemic discrimination against the majority of the population, a legally entrenched scheme of discrimination that

[57] DTI Policy Framework (2004) 12.
[58] DTI Policy Framework (2004) 12.
[59] DTI Policy Framework (2004) 14.
[60] DTI Policy Framework (2004) 14.
[61] Otto "The history of credit legislation in South Africa" 2010 *Fundamina* 257-273.
[62] DTI Policy Framework (2004) 14.
[63] DTI Policy Framework (2004) 13.

stripped them of their asset base. Addressing this required a number of measures.[64] The new credit regulatory regime had to be *sui generis* in the sense that it had to specifically cater for South Africa's socio-economic issues, rather than merely conforming to or transplanting international trends. The majority of South Africans were not only excluded from the mainstream credit economy, but also from receiving a proper education to make informed financial decisions. The policy framework highlights the intricacies of credit agreements and their potential to be harmful to the average credit consumer, and proposes a simple and standardised credit contract, to enable consumers to make informed decisions.[65] Significantly, in recognising the diverse nature of South Africa, the NCA, in a response to the aforementioned, requires consumer credit contract to be available to consumers in their choice of official language.[66]

Consumer education also receives much attention in the Policy Framework.[67] As a point of departure, the credit industry has always been in favour of the credit provider. This is underscored by the fact that the majority of South Africans lack insight into and experience in this industry. The Policy Framework proposes widespread consumer education in credit, to ensure that credit consumers have adequate understanding of their rights and obligations. The Policy Framework also contends that a programme of consumer education would ensure that consumers make informed choices, which would lead to an increase in competition in the credit industry.[68]

2.3 Conclusion

The discussion in this chapter showed that the predecessors of the NCA, the Usury Act and the Credit Agreements Act, were not attuned to the complexities of the modern South African population and, as pre-1994 and pre-Constitution credit laws, did not conform to constitutional imperatives, such as the right to equality. Discrimination in the credit industry was rife. The industry was in the hands of the white minority, and access to credit, in particular credit offered by the banks and other formal lenders and providers, was grossly unequal. Government therefore conducted new investigations into the credit law framework

[64] DTI Policy Framework (2004) 17.
[65] DTI Policy Framework (2004) 26.
[66] S 63(1) of the NCA.
[67] DTI Policy Framework (2004) 27.
[68] DTI Policy Framework (2004) 27.

to revise the outdated, fragmented credit Acts, with the aim to introduce a new, single credit framework to specifically address the credit legacy of the past.

CHAPTER 3

THE OBJECTIVES OF THE NCA

3.1 Introduction

This chapter discusses the entrenchment of the policy objectives government had in mind with the NCA (which were selectively and briefly addressed in the previous chapter) with regard to the objectives of the Act, focusing on how the Act addresses inequalities that existed in the past. The NCA's preamble and section 3 are important in this respect. It has already been mentioned[69] that the Act's objectives serve as the interpretational lens in examining its provisions. Section 2(1) provides that "[t]his Act must be interpreted in a manner that gives effect to the purposes set out in section 3". The latter is also addressed in this chapter. An illustration of the application of the relevant objectives and the provisions of section 2(1) by the courts follows in later chapters.[70]

3.2 Section 3 (read with the preamble)

The preamble to the NCA introduces the Act by stating its broad aims, and is elaborated on in section 3, titled "Purpose of Act". The parts in the preamble that are pertinent to my dissertation read as follows:

> "To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry;… to promote responsible credit granting and use…; to establish national norms and standards relating to consumer credit and for that purpose to prohibit reckless credit granting;… to establish the National Credit Regulator…; to repeal the Usury Act, 1968, and the Credit Agreements Act, 1980."

The aims of promoting a "non-discriminatory marketplace for access to consumer credit" and the promotion of black economic empowerment within the credit industry are significant. It was indicated in the previous chapter[71] that the broader South African population, with particular reference to previously disadvantaged people and low-income consumers, had no or limited access to credit, and if these persons did have access to credit, it was, out of necessity, access to the more expensive forms of unsecured credit, such as microloans.

---

[69] See par 1.3.
[70] In ch 5.
[71] See par 2.2.

It was further shown that discrimination in the pre-Constitution credit market was rife, and that there was a glaring absence of pertinent anti-discrimination measures in the NCA's predecessors. The advancement of black economic empowerment and ownership in the credit market as a goal is in line with the Broad-based Black Economic Empowerment Act.[72] The DTI Policy Framework[73] emphasises that, pre-1994, the majority of black South Africans were excluded from the well-developed formal financial sector.[74] This relegated them to the informal and unregulated financial markets, which are characterised by microlenders and pawn brokers whose costs and interest rates are extremely high.[75] These informal and unregulated credit providers also offer consumers, particularly from the low- and-middle-income group, credit that they could not really afford.

This reckless lending caused many of these consumers to become overindebted.[76] The reference in the preamble of the NCA to the institution of a responsible lending regime and, in particular, combatting reckless lending is thus not surprising.[77] The intention of the legislature in enacting the NCA has been described as "to prevent reckless provision of credit by institutions to people who could not afford credit, promote equity in the credit market by balancing the respective rights and responsibilities, especially to those who have historically been unable to access credit under sustainable market conditions".[78]

The introductory sentence of section 3, which sets out the main goals of the NCA, has already been mentioned,[79] but will be repeated here for ease of reference. Section 3 is divided into a number of sub-objectives that give effect to the main objectives of the Act. Section 3 provides as follows (only the relevant subsections are quoted):

---

[72] Act 53 of 2003 ("Black Empowerment Act").
[73] See par 2.2.
[74] See par 2.2.2.
[75] See par 2.2.2.
[76] Otto *The National Credit Act explained* (2006) 5 makes the following remark: "It is a well-known fact that many poor South Africans have been enticed in recent years to enter into credit agreements that they could ill afford."
[77] See Van Heerden and Steennot 2018 (21) *PER/PELJ* (Part 1) par 1, where mention is made of the fact that the NCA introduced "responsible lending" in our credit law regime. The authors also mention that responsible lending practices "cover a wide array of measures" (such as consumer education, the restriction of negative credit-marketing practices), and accentuate the importance of the compulsory credit assessment as a responsible lending tool.
[78] See *Standard Bank of SA Ltd v Develex 879 and Another; In re: Develex 876 CC and Another v Standard of SA Ltd and Another* [2017] ZAGPPHC 675 at par 28.
[79] See par 1.1.

"The purposes of this 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, by –

(a) 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;
(b) …
(c) promoting responsibility in the credit market by –
    (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
    (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
(e) addressing and correcting imbalances in negotiating power between consumers and credit providers by –
    (i) providing consumers with education about credit and consumer rights;
    (ii) …
    (iii) …
(f) …
(g) addressing and preventing over-indebtedness of consumers,…
(h) …
(i) …"

Three main goals are discernible in the introductory sentence to section 3, which are all relevant to this dissertation: the promotion and advancement of the social and economic welfare of the South African population; the promotion of standards our credit market and industry have to comply with, of which the standards "fair", "responsible", and "accessible" stand out in particular; and the protection of credit consumers.

As far as the first goal is concerned: I already mentioned[80] Scholtz's undebatable remark that, if the purposes of the NCA are considered, it is clear that the Act has pertinent socio-economic goals. These goals are reinforced by some of the standards set for the credit market and industry, for instance, "accessible". A purposive reading of section 3 of the NCA, as decreed by section 2 of the Act, reveals that the Act is an ambitious (perhaps even idealistic) piece of legislation with pronounced socio-economic aims.[81]

The protection of the users of credit in South Africa by the NCA is an over-arching goal of the Act. However, some court decisions held that, although consumer protection is an important objective, it is one of the aims of the Act, and not its main objective.[82]

[80] See par 1.1.
[81] See Moseneke DCJ in *Nkata v FirstRand Bank Ltd* 2016 (6) BCLR (CC); 2016 (4) SA 257 ("*Nkata*") at par 94.
[82] See, e.g., *Standard Bank SA Ltd v Hales and Another* 2009 (3) SA 315 (D) par 13, which held that s 3 of the NCA lists several purposes without prioritising them.

Important subsections, and thus subobjectives, that aim to address inequality in our credit market are section 3(a), (d), and (e). However, section 3(a), which provides for the promotion of an accessible credit market to all South Africans with the focus on those who, in the past, could not access credit "under sustainable market conditions", encapsulates one of the main reasons underlying the promulgation of the Act. Section 3(d) and (e) clearly aim to level the playing field between the two parties to a credit agreement. Section 3(d) provides for a balancing process between the rights and obligations of credit providers and consumers, and emphasises the promotion of equity in the credit market as a pertinent subobjective. With regard to section 3(e), "addressing and correcting imbalances in negotiating power between consumers and credit providers" is noted as one of the objectives of consumer credit legislation in general.[83]

3.3 The interpretation of the NCA

The starting point to interpreting any legislation is the Constitution. Section 39(2) of the Constitution enjoins the court to interpret any legislation so as to promote the spirit and purpose of the Bill of Rights.[84] Additionally, the NCA also lays down its own stated purposes, which is an important consideration, because the Act must be interpreted in a manner that is consistent with those purposes.[85] In general, the purposes of the Act can be described as a contextualised expression of the values of the Bill of Rights.[86] The Constitutional Court has explained that our entire system of law is shaped by the Constitution, and that all laws owe their existence and being to the Constitution.[87] Section 39(2) of the Constitution, of course, also applies to the NCA, and the courts or the National Consumer Tribunal[88] therefore have to interpret the NCA in line with the Constitution and its imperatives as enshrined in the Bill of Rights.

Section 2 is titled "Interpretation", and contains a number of measures to assist the courts or the NCT in the interpretation of the NCA. For purposes of this subparagraph, section 2(1),

[83] Renke thesis par 11.4.1.
[84] S 39(2) of the Constitution.
[85] S 2(1), discussed below.
[86] Brits "The National Credit Act and the Bill of Rights: Towards a constitutional view of consumer credit legislation" 2017 *TSAR* 470-497.
[87] *Pharmaceutical Manufacturers Association of South Africa: In Ex parte President of RSA* 2000 (2) SA 674 (CC) par 44.
[88] "NCT". The NCT adjudicates matters arising from the NCA and the CPA, and was established in terms of s 26 of the NCA.

which was quoted above,[89] is relevant.[90] The subsection renders it compulsory (indicated by the use of the word "must") for a court or the NCT to interpret the NCA in a way that gives effect to its section 3 objectives. Scholtz[91] remarks that "[i]t would be a mistake, therefore, to dismiss section 3 as simply a wish-list of lofty ideals", and that "[section 3] will have a real and often decisive effect on the interpretation of the Act". Scholtz further remarks on the fact that the interpretation of the Act's provisions should always be purposive "in the real sense of the word", and concludes that, as far as section 2(1) is concerned, "any construction of the National Credit Act's provisions should be done in a manner that achieves the purposes of the Act". However, as indicated above, section 3(d) provides for a balancing of the rights of the parties to a credit agreement. This has been reiterated by the courts.[92]

3.4 Conclusion

It is patent that the NCA cannot be viewed from a traditional private- or commercial law perspective, but has to be considered from a transformational and constitutional perspective, which inform the application of the Act. The purposes of the NCA, noted in its preamble and in section 3, are specifically aimed at giving effect to government's policy objectives that were published in the DTI Policy Framework, discussed in the previous chapter. However, it is obligatory to also interpret the NCA through the lens of its objectives. The courts must follow a purposive approach and give effect to these objectives. However, the courts have also made it clear that, in accordance with section 3(d), the interpretation of the provisions of the NCA is a balancing process.

In the next chapter, selected provisions of the NCA are addressed, including the promotion and advancement of the right to access to credit by previously disadvantaged persons. The aim is to discuss what the legislature did with regard to the ensuing provisions to the section 3 objectives, discussed above, to give effect to the objectives. For purposes of this dissertation, the right to equality, as affirmed by the introductory sentence to section 3, and also by section 3(a), is pertinent.

---

[89] See par 3.1.
[90] S 2(6) provides a definition of a "historically disadvantaged person", discussed below (see par 4.) S 2 further, *inter alia*, provides that foreign and international law may be considered by the courts or the NCT, where appropriate, and what the concept "business days" means for purposes of the NCA, and how such days provided for between the occurrence of two events should be calculated.
[91] Scholtz par 2.4.
[92] See, e.g., *First National Bank v Lukhele and seven other cases* [2016] ZAGPPHC 616 (16 May 2016) par 23.

CHAPTER 4

SELECTED NCA PROVISIONS

4.1 Introduction

It has already been mentioned[93] that the NCA as a post-Constitution tool to transform the South African credit legislative framework and industry cannot be discussed comprehensively in a dissertation of this format. Most of the Act's provisions are ground-breaking, and therefore transformative in nature. In addition to the examples already mentioned above[94] and the NCA's scope of application, which differs drastically from that of its predecessors,[95] the following have to be considered: the establishment of the new consumer credit institutions, namely the National Credit Regulator[96] and the NCT; consumer credit industry regulation[97] (which includes the registration of credit providers in terms of the Act)[98] unlawful agreements[99] and provisions;[100] pre-agreement disclosure;[101] a wholly different approach to the regulation of the cost of credit;[102] new rights, such as the consumer's right to surrender the goods;[103] alternative dispute settlement mechanisms; [104] and the right to file a complaint with the NCR[105].

More important than the aforementioned are pertinent transformation measures introduced by the NCA, which are not discussed in this dissertation, such as consumer education. Overall, it is a pertinent aim of the Act to address and correct imbalances between the powers of credit providers and consumers in negotiations by, *inter alia*, "providing consumers with education

[93] See par 1.4.
[94] See pars 1.1 and 1.4.
[95] See pars 1.1 and 2.1.
[96] "NCR", established in terms of s 12, stipulates, amongst others, registration of credit industry role players' functions and enforcement functions. See ss 14 and 15.
[97] Ch 3.
[98] S 40.
[99] S 89.
[100] S 90.
[101] S 92.
[102] Ch 5 Part C. Included are the codification of the *in duplum* rule and the fact that, in contrast with the Usury Act that made provision for the Minister to set fixed maximum interest rates, the NCA contains formulas in reg 42 of the National Credit Regulations, which must be used to calculate the maximum interest rates that may be charged in respect of different types of credit agreement.
[103] S 127.
[104] Ch 7 Part A.
[105] E.g., if a credit provider contravenes provisions of the NCA. See Ch 7 Part B.

about credit and consumer rights".[106] The responsibility for ensuring consumers' rights rests with the NCR.[107] The importance of consumer education as a transformation tool is emphasised by Schraten[108] in an informative article titled "The transformation of the South African credit market", which refers, *inter alia*, to Kelly-Louw[109]. Consumer education and some of the transformation provisions or aspects in the Act, which are addressed below, such as access to credit and the promotion of black economic empowerment and ownership in the credit market, are subjects for separate research, due to their scope.[110]

In what follows, selected transformation provisions in the NCA are considered, measures that, in terms of the DTI Policy Framework[111], were enacted with the particular aim of addressing the inequalities that existed in the South African credit market prior to promulgation of the NCA. These are: the promotion of a more accessible credit market, black economic empowerment and ownership in the credit industry, and pertinent consumer rights mentioned in Chapter 4 Part A[112], which include the NCA's anti-discrimination measures, the prevention of reckless lending, and the introduction of the "developmental credit agreement" to the South African credit industry.

The NCR, which is responsible for the development of an accessible credit market,[113] registration functions,[114] enforcement of the Act,[115] and research and providing information to the public,[116] is a key role-player in ensuring that transformation of the credit industry in terms of the Act is achieved. Other significant role players are, of course, the courts and the NCT, which must interpret the Act as discussed above.[117] Campbell[118] refers to "the large number of illiterate and uneducated consumers" in South Africa's credit industry, which

[106] S 3(e)(i).
[107] In terms of s 16(1)(a), the NCR must "increase knowledge of the nature and dynamics of the consumer credit market and industry" and "promote public awareness of consumer credit matters" by, *inter alia*, the implementation of education and information programmes.
[108] Schraten "The transformation of the South African credit market" 2014 *Transformation* 85 at 6, 9, and 12.
[109] Kelly-Louw "The prevention and alleviation of consumer over-indebtedness" 2008 *SA Merc LJ* pars 5 and 6.1.
[110] See Renke thesis 599.
[111] See Ch 3.
[112] Ss 60 – 64, and 66.
[113] S 13.
[114] S 14.
[115] S 15.
[116] S 16.
[117] See par 3.3.
[118] Campbell "The consumer's rights and the credit provider's obligations" in Scholtz ed *Guide to the National Credit Act* (2008) ("Campbell ch 6"), par 6.2.1.

indicates the need for extensive consumer protection "in the form of a wide variety of consumer rights".

4.2 Access to credit by historically disadvantaged persons

One of the main reasons underlying the promulgation of the NCA was to make credit, and in particular credit provided by the mainstream credit providers, which is a more affordable form of credit, available to all South Africans.[119] It has been established[120] that, pre-Constitution, the majority of the South African population was dependent on unsecured and expensive forms of credit, such as microloans, while the minority — white, affluent members of society — had access to secured credit, such as mortgages, which is less expensive. It was a specific aim of the government to address this inequality between the two credit markets.[121] Therefore, it is not surprising that a "non-discriminatory marketplace for access to consumer credit" is mentioned in the preamble to the Act and subsequently embodied in section 3, the NCA's purpose provision. To recap, the promotion and development of an accessible credit market and industry is one of the pertinent goals of the NCA,[122] an objective that is linked to the vision of a non-discriminatory credit marketplace, equity in the credit market,[123] and black economic empowerment and ownership in South Africa's credit industry. This is discussed below. It was also to be expected that government would focus on persons who are regarded as previously or historically disadvantaged as the primary target group for remedial treatment in the Policy Framework that gave rise to the Act.[124] I will come back to the concept "historically disadvantaged person".

It is interesting, but also understandable, that the NCA does not contain pertinent provisions on how credit should be made more accessible. The fact is, provided that no discrimination is involved,[125] no credit provider can be compelled to make specific forms of credit available to a particular group of consumers, especially in the case where the consumers do not possess collateral as security for loans. Section 3(a) refers to the promotion and development of an accessible credit market to all South Africans, but in particular to those who, historically,

[119] See ch 3. See also Schraten 2014 *Transformation* 85 2.
[120] Par 3.
[121] Par 3.
[122] S 3(a), discussed in par 3.2.
[123] S 3(e).
[124] See par 2.2.
[125] See par 4.5.

were not in a position to access credit "under sustainable market conditions". Schraten[126] regards section 3(a) as an economic objective of the NCA. There seems to be two contrasting objectives in the preamble and section 3 — on the one hand, making credit more accessible, but "encouraging responsible borrowing … by consumers" and "discouraging reckless credit granting by credit providers",[127] on the other.[128] However, I do not see any contradiction. The legislature did not intend making credit accessible to the point of it being irresponsible.

Campbell, [129]with reference to the consumer's right to apply for credit in terms of section 60 of the Act,[130] remarks that "the entrenched right to apply for credit gives effect to one of the main purposes of the NCA which is to promote an accessible credit market and industry that is accessible to all South Africans". She further argues that it is possible that the Regulations regarding the "Removal of adverse consumer credit information and information relating to paid up judgments"[131] "enhance the consumer's right to apply for credit".[132] The Amnesty Regulations, in brief, provide for a once-off, but also continuous, process of removal of adverse consumer information relating to paid up judgments by credit bureaux from their records, and also prohibit credit providers from using such information in their compulsory credit assessments in terms of section 81(2), or to re-submit such information to the credit bureau.[133] Campbell[134] finally submits that the Affordability Assessment Regulations[135] that became effective on 13 March 2015 and provide for the way in which a credit provider must conduct its credit assessment in terms of section 81(2) "curtail [the consumer's or prospective consumer's] right to apply for credit".

The term "historically disadvantaged person" appears five times in the NCA. Section 2(6) provides for circumstances where a person must be regarded as historically disadvantaged "[f]or all purposes of [the] Act". The main criterion is that the person is of a category of

[126] Schraten 2014 *Transformation* 85 6 and 7.
[127] S 3(c)(i) and (ii).
[128] Also see Schraten 2014 *Transformation* 85 13.
[129] Campbell ch 6 par 6.2.2.
[130] Discussed in par 4.4.
[131] GN R144 in *GG* 36889, 30 September 2013. "Amnesty Regulations". See the discussion of these regulations by Kelly-Louw "The 2014 credit-information amnesty regulations: What do they really entail" 2015 *De Jure* 92-115, particularly par 2.
[132] Campbell ch 6 par 6.2.2.
[133] Kelly-Louw 2015 *De Jure* 92 and Campbell ch 6 par 6.2.2.
[134] Campbell ch 6 par 6.2.2.
[135] *GG* 38557 of 13 March 2015, "Affordability Assessment Regulations". See Van Heerden "Over-indebtedness and reckless credit" in Scholtz ed *Guide to the National Credit Act* (2008) ("Van Heerden ch 11"), par 11.6.6(f).

natural persons who, before the Constitution of the Republic of South Africa of 1993 (Act 200 of 1993) came into operation, were disadvantaged by unfair discrimination on the basis of race.[136] Kelly-Louw contends that the South African financial sector has not always been equally accessible to all South Africans. The majority of historically disadvantaged groups of consumers were excluded from the highly developed formal financial market. The result was that they were forced to obtain credit from the informal, unregulated financial sector.[137] Hence, there is a clear intention by the legislature, through section 2(6), to point out that the Act is directed at historically disadvantaged persons.

From section 2(6), it can be discerned that the NCA is remedial legislation. Remedial legislation is legislation that is umbilically linked to the Constitution and its broad principles and values.[138] It is legislation that is engineered to protect and advanced previously disadvantaged persons, especially those who were excluded from the mainstream credit market. As discussed above with regard to the Policy Framework and the preamble of the NCA, the principal purpose of the NCA is to address South Africa's historical legacy of systemic discrimination against the majority, the black population.[139]

Section 3(a) has already been dealt with.[140] Although reference is made to "those who have historically been unable to access credit", and not directly to "historically disadvantaged persons", it is clear that the legislature had the latter in mind when the provisions of section 13(a)(i) are considered. The success of every credit regulatory regime relies on the existence of an institution that enforces and implements the rules effectively. Reference has already been made to the establishment of the NCR[141] and the NCT[142], two autonomous consumer credit institutions,[143] in the NCA. The roles and functions of these two institutions are to guard, preserve, and enforce consumers' rights in the credit industry. Section 13 sets out one of the functions or responsibilities of the NCR, titled "Development of accessible credit market". The title alone of section 13 makes apparent the duty of the NCR to ensure the realisation of the section 3(a) objective in the Act. Section 13(a) provides as follows:

---

[136] S 2(6)(a).
[137] Kelly-Louw (assisted by Stoop) par 1.3.
[138] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at par 54.
[139] See pars 2.2.3 and 3.2.
[140] See par 3.2.
[141] See par 4.1.
[142] See par 3.3.
[143] For more detail on these institutions, see Scholtz ed "Consumer credit institutions" in *Guide to the National Credit Act* (2008) ch 3.

"The National Credit Regulator is responsible to –

(a) promote and support the development, where the need exists, of a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry to serve the needs of –
    (i) historically disadvantaged persons;
    (ii) low income persons and communities; and
    (iii) remote isolated or low density populations and communities,
    in a manner consistent with the purposes of this Act."

Specifically for the purposes of section 13(a), the NCR should promote, support, and advance the circumstances of historically disadvantaged persons in the credit market. Kelly-Louw contends that this provision is consistent with the promotion of the development of a credit market that is accessible to everyone, particularly those who were historically unable to access credit under sustainable market conditions.[144]

Section 16(1)(d) and (e) of the NCA provide that the NCR is also responsible for increasing knowledge of the nature and dynamics of the consumer credit market and industry, and to promote public awareness of consumer credit matters, by establishing demographic patterns of the credit market and investigating socio-economic trends in the credit market, particularly amongst historically disadvantaged persons. The NCR is further responsible for the monitoring of trends in the consumer credit market with respect of the needs of historically disadvantaged persons and the promotion of black economic empowerment and ownership in the credit industry.[145]

These provisions impose a fundamental duty on the NCR to actively and proactively ensure that historically disadvantaged persons are well informed regarding the credit market. The desired effect of these measures is the enabling of previously disadvantaged persons to convert credit information into effective knowledge by, amongst other things, ensuring that they have the required basic literacy and numeracy skills to engage meaningfully in the credit market. These measures are aimed at creating more knowledgeable consumers who are capable of understanding the risks attached to credit, and thus make informed choices, which could lead to increased competition in the credit industry.[146]

[144] Kelly-Louw (assisted by Stoop) par 1.4.
[145] Discussed in par 4.4.
[146] Stoop "South African consumer credit policy: Measures indirectly aimed at preventing consumer over indebtedness" 2009 *SA Merc LJ* par 3.1.

The last instance where the term "historically disadvantaged person" is used in the NCA is in section 61(7)(a). Section 61 affords consumers protection against discrimination in the credit arena, which is addressed later.[147]

Stokvels, which are related to the accessibility of credit to the larger portion of the South African population, are recognised in the NCA, and are defined as follows in section 1:

> "**'stokvel'** means a formal or informal rotating financial scheme with entertainment, social or economic functions, which –
> (a) consists of two or more persons in a voluntary association, each of whom has pledged mutual support to the other towards the attainment of specific objectives;
> (b) establishes a continuous pool of capital by raising funds by means of the subscription of the members;
> (c) grants credit to and on behalf of members;
> (d) provides for members to share in profits from, and to nominate management of, the scheme, and
> (e) relies on self-imposed regulation to protect the interest of its members."

A stokvel in terms of the NCA is therefore a formal or informal financial scheme, which may have different functions. These functions may be social or economic, as illustrated below. Importantly, a stokvel is empowered by the Act to grant credit to and on behalf of its members. I will return to the discussion of stokvels in terms of the NCA after providing brief information on stokvels and their purposes in general.

Hutchison, in an article on stokvels in Khayelitsha[148], provides much insight into stokvels, and mentions that a stokvel may take on a variety of forms or models.[149] These forms and their characteristics are, in summary, as follows:[150] members of the stokvel make regular contributions into a 'pot'. Depending on the model of the stokvel, the pot could be paid to each member in full at regular, pre-determined intervals, or could be allowed to mature up to a specified date, whereafter the contribution of each member of the stokvel is paid to the member in full, with interest. It is important to note that the money of certain stokvels may be used to effect loans to the members of the stokvel, which are usually repayable with interest. Some stokvels bank their money with a formal-sector bank in the interim. According to Hutchison,[151] in Khayelitsha, the stokvel is an important "economic organization". Stokvels are informal financial associations formed between friends, relatives, and neighbours. In

[147] See par 4.5.
[148] Hutchison "Uncovering contracting norms in Khayelitsha stokvels" 2020 52 *Journal of legal pluralism and unofficial law* 3-27.
[149] See Hutchison 2020 52 *Journal of legal pluralism and unofficial law* par 2.2.
[150] See Hutchison 2020 52 *Journal of legal pluralism and unofficial law* par 2.2.
[151] Hutchison 2020 52 *Journal of legal pluralism and unofficial law* par 1.

summary, a stokvel may be a plain savings scheme, but it could also be a credit provider if it extends interest-bearing loans to its members. If the stokvel is a client of a bank as a borrower, or a purchaser of goods or services on credit, the stokvel is a consumer.

It is significant that, with reference to stokvels in South Africa in general, "a sizeable proportion of the population" participates in these schemes. The reason is that "[s]tokvels provided a source of capital in the face of the previous financial exclusion of many Black South Africans". In addition, "the vast majority of South African stokvels are unincorporated and choose not to opt into the formal sector laws". These institutions are therefore, with regard to the Banks Act[152], exempt from acquiring a licence before taking deposits from the public. According to Hutchison, the exemption was probably granted in an attempt to "cure the lack of access to formal sector capital".[153]

The NCA's definition of a stokvel correlates with the aforementioned general information on these schemes, and is therefore a statutory embodiment of the aim of the NCA. With regard to the NCA, a particular stokvel, based on its model or form, may be a credit provider. However, it may also be a consumer-borrower or consumer-purchaser.

For reasons similar to those mentioned by Hutchison in respect of the Banks Act, the NCA also relieves the stokvel as a credit provider from the burdensome provisions of the NCA by providing that a transaction between a stokvel and a member thereof[154] is not a credit agreement for purposes of the NCA, which immediately excludes such a transaction from the scope of application of the Act.[155] The implications are that the stokvel is exempt from the registration requirements of credit providers in terms of section 40 of the NCA[156], and also from the maximum interest rates and limitation on other credit costs in terms of the Act.[157] Hutchison[158] makes the valid point that a stokvel may therefore ask any interest rate.

[152] Banks Act 94 of 1990.
[153] Hutchison 2020 52 *Journal of legal pluralism and unofficial law* par 2.2.
[154] In accordance with the rules of the stokvel.
[155] See par 1.1 for the scope of application of the NCA.
[156] Due to a 2016 determination by the Minister, all credit providers now have to register as such with the NCR. In terms of the decision by the SCA in *Du Bruyn NO v Karsten* 2019 (1) SA 403 (SCA), even *ad hoc* or once-off credit providers have to apply for registration in terms of the NCA.
[157] See Ch 5 Part C and regs 39 – 48 of the National Credit Regulations.
[158] Hutchison 2020 52 *Journal of legal pluralism and unofficial law* par 2.2.

The definition of "juristic person" in section 1 of the NCA[159] specifically excludes stokvels, which only makes sense if the legislature considered the fact that a stokvel could be a consumer-borrower (or purchaser) and wanted stokvels to enjoy the full protection of the NCA in their capacity as credit consumers.[160] The NCA has only limited application in the case of a juristic person as a consumer,[161] and the important provisions in the Act in respect of over-indebtedness and reckless credit, for example, do not apply to such consumers.[162] Scholtz[163] remarks that, "[n]o doubt *stokvels* are protected by and largely exempt from the workings of the Act because they are viewed as one of the few means of savings and sources of credit available to historically disadvantaged and low-income people". Hutchison[164] concludes that "stokvels are prevalent throughout South Africa and have an important social and economic role in society. To the extent that statute law deals with stokvels, it serves largely to exempt them from the financial regulatory system. This lack or regulation allows these entities to act as the banks of the informal economy, providing access to capital for those who need it."

4.3 Developmental credit agreements

Developmental credit is inextricably linked to improving the accessibility of credit to historically disadvantaged persons, and is thus briefly discussed here. Scholtz,[165] with reference to the NCA's transformation objectives, remarks that, "[p]ursuant to the above objectives[166] the Regulator must also set appropriate conditions for the supplementary registration of credit providers wishing to enter into developmental credit agreements to promote access to credit for the persons or communities mentioned in section 13(a)".[167]

The "developmental credit agreement" is defined in section 10, and, as its name indicates, is a type of credit agreement. A credit agreement will only qualify as a developmental credit agreement if the credit provider, at the time of entering into the agreement, holds a

[159] See par 1.1.
[160] Scholtz par 2.3 1 compares the protection of a stokvel to that of a natural person in terms of the NCA if the stokvel transacts with a third party.
[161] See par 1.1.
[162] S 6 read with s 78(1).
[163] Scholtz par 2.3.1.
[164] Hutchison 2020 52 *Journal of legal pluralism and unofficial law* par 2.2.
[165] Scholtz par 2.3.1.
[166] The transformation objectives in the NCA.
[167] S 13(b). See par 4.2 for the provisions of s 13(a).

registration certificate issued by the NCR in terms of section 41.[168] Furthermore, the credit agreement must be between a credit co-operative[169] (as the credit provider) and a member of that credit provider (as the consumer),[170] an educational loan,[171] an agreement to develop a small business,[172] for the "acquisition, rehabilitation, building or expansion" of "low income housing",[173] or for another purpose prescribed by the Minister in regulations.[174]

Credit providers are encouraged to apply for supplementary registration and get involved in developmental credit agreements by the high interest rates and fees they are permitted to charge in respect of this type of agreement.[175] Finally, the developmental credit agreement receives "special treatment in the Act".[176] Section 75(2) to (4), which prohibits the marketing and sales of credit at the consumer's home or work, unless the consumer takes the initiative

[168] S 10(1)(a). In terms of s 41, the credit provider that applies for supplementary registration in respect of developmental credit must already be a registered credit provider, or must have already applied for registration as a credit provider in terms of s 40. S 41(1)(a) provides that the credit provider applying for supplementary registration must be a "close corporation, company, credit co-operative, trust, statutory entity, mutual bank or bank", and thus not a natural person. Before the NCR may grant the supplementary registration, it must be satisfied that the credit provider has sufficient "human, financial and operational resources" to function effectively in terms of the NCA, and "adequate administrative procedures and safeguards" to justify the "statutory exceptions" from the NCA. S 41(2)(a) and (b). "Statutory exception" is defined in s 1 as a provision in the NCA that "specifically provides for the special treatment of developmental credit agreements".

[169] The NCA defines the concept 'co-operative' as "an autonomous association of persons united voluntarily to meet their common economic and social needs and aspirations through a jointly owned and democratically controlled enterprise organised and operated on co-operative principles". The NCA further defines 'credit co-operative' as a co-operative with the predominant objective to offer financial services (credit) to its members. See S 1.

[170] Provided that the principal debt in terms of that credit agreement does not exceed a prescribed (by the Minister in terms of s 10(2)(b)) maximum and that profit is not the main reason for the conclusion of the credit agreement. S 10(1)(b). The Minister may prescribe criteria and standards that the NCR must apply to determine whether the dominant purpose is to make a profit. In this respect, the extent to which the particular credit agreement contributes to the "socio-economic development and welfare" of "historically disadvantaged persons," "low income persons and communities", and "remote, isolated or low density populations and communities" is one of a few factors to be considered. See S 10((1)(c).

[171] Educational loans include student loans, school loans, or any other credit agreement entered into by the consumer for the latter's "adult education, training or skills development". School loans and student loans are also defined, and relate to credit agreements in respect of school fees or education fees payable to tertiary institutions. See S 1.

[172] The NCA defines 'small business' as a business in terms of the "National Small Business Act, 1996 (Act 102 of 1996)".

[173] Defined in s 1.

[174] S 10(1)(b)(i) – (iii). S 10(2)(a) empowers the Minister to prescribe such additional objectives, and also to prescribe a maximum principal debt in respect of credit agreements between a credit co-operative and its members, as well as criteria and standards that the NCR must apply to determine if the making of profit was a credit provider's dominant purpose for entering into an agreement. With this in mind, the Minister may also consider the "extent to which the credit agreement concerned contributes to the socio-economic development and welfare of persons contemplated in s 13(a).

[175] See the interest rate and maximum initiation fees tables in reg 42 of the National Credit Regulations. See also Scholtz par 2.3.1.

[176] Otto and Renke ch 8 par 8.5.

in entering the agreement at one these places,[177] serves as an example. Credit providers involved in the developmental credit market are thus not subject to these marketing restrictions, to allow them free reign to, for example, conclude a credit agreement at the home of a consumer who lives in a rural area, instead of expecting the consumer to approach the credit provider or to travel to the credit provider's place of business.[178]

4.4 The promotion of black economic empowerment and ownership

The preamble to the NCA makes specific reference to the promotion of "black economic empowerment and ownership within the consumer credit industry". This ideal is not pursued as an objective in section 3. However, in terms of section 13(c)(ii), it is one of the NCR's functions to monitor and report, on an annual basis, to the Minister on the market share of previously disadvantaged persons in the credit industry. The same holds for the structure of the industry, which must include aspects such as the extent to which historically disadvantaged persons own, control, or participate in the industry. In terms of section 16(e)(ii), the NCR is also responsible for monitoring trends in respect of the "promotion of black economic empowerment and ownership within the credit industry", which is a verbatim quote of the wording used in the preamble.

The registration of credit providers' requirement in terms of the NCA, which has been referred to above,[179] is a powerful enforcement tool in the hands of the NCR.[180] Natural or juristic persons may assume the role of credit provider in terms of the NCA,[181] but irrespective of whether a natural or juristic person is involved, all credit providers must apply to the NCR[182] to be registered as a credit provider in terms of the Act, even if only to conclude an *ad hoc* or once-off credit agreement.[183] The Act empowers the NCR to impose conditions of registration on an applicant for registration as a credit provider, and requires the

[177] The prohibitions in s 75(2) – (4) are subject to exceptions.
[178] Scholtz par 2.3.1
[179] See par 4.2.
[180] Van Heerden and Renke "Perspectives on selected aspects of the registration of credit providers in terms of the National Credit Act 34 of 2005 (1) 2014 (77) *THRHR* 625; Van Heerden and Renke "Perspectives on selected aspects of the registration of credit providers in terms of the National Credit Act 34 of 2005 (2) 2015 (78) *THRHR* 100.
[181] Ss 46 and 47.
[182] S 45(1).
[183] See par 4.2.

NCR to inform the applicant of such conditions in writing.[184] The applicant is then afforded an opportunity to respond to the NCR regarding the conditions of registration.[185] However, the conditions of registration imposed by the NCR, if any, must relate to "the objects and purposes of [the] Act, the circumstances of the application", and, importantly, "the applicable criteria set out in subsection (1)".[186] Section 48(1)(a) provides as follows:

> "**48. Conditions of registration.** – If a person qualifies to be registered as a credit provider, the National Credit Regulator must further apply the following criteria in respect of the application:
>
> (a) to the extent it is appropriate having regard to the nature of the applicant, the commitments, if any, made by the applicant or any associated person in terms of black economic empowerment considering the purpose, objects and provisions of the Broad-based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003)."

Accordingly, the commitment of an associated person of the applicant to black economic empowerment must also be considered by the NCR. An "associated person" of a natural person as a credit provider includes, but is not limited to, the person's spouse or business partners.[187] In the case of an applicant that is a juristic person, persons with a direct or indirect controlling interest in the credit provider, or that the credit provider directly or indirectly controls, are associated persons.[188] The same holds for a person that, in turn, has a direct or indirectly controlling interest in a person mentioned in (aa), or that is directly or indirectly controlled by such a person.[189] A credit provider that is a joint venture partner of any of the aforementioned persons is also an associated person.[190]

4.5 The NCA's anti-discrimination provisions

The NCA's predecessors did not contain any anti-discrimination measures. This is not surprising when considering that the Usury Act and Credit Agreements Act[191] were pre-1994 and pre-Constitution. However, the prevention of discrimination is naturally closely related to rendering credit more accessible to previously disadvantaged persons and to the promotion of black economic empowerment and ownership in the credit market, discussed in the preceding subparagraphs. The anti-discrimination provisions in the NCA, sections 61 and 66, form part

[184] S 48(3).
[185] S 48(5).
[186] S 48(3).
[187] S 40(2)(d)(i).
[188] S 40(2)(d)(ii)(aa).
[189] S 40(2)(d)(ii)(bb).
[190] S 40(2)(d)(ii)(cc).
[191] And their predecessors.

of Chapter 4 Part A in the Act, respectively titled "Consumer credit policy" and "Consumer rights". Campbell[192] remarks that "Consumer rights are mainly dealt with in Part A of Chapter 4 of the Act".

It is, first of all, important to note that the NCA affords every person, whether a natural person or a juristic person or association of persons, the right to apply for credit with a credit provider.[193] However, a prospective consumer does not have the absolute right to have such credit granted. The NCA[194] stipulates specifically that a credit provider may refuse to enter into a credit agreement with a prospective consumer if the credit provider's decision is based on reasonable commercial grounds that are in line with its "customary risk management and underwriting practices". The proviso is that the decision to refuse the credit must, firstly, not constitute discrimination against the applicant in terms of sections 61 and 66.[195] A credit provider may, for instance, refuse the credit if it is not economically viable to enter into a credit agreement with a particular consumer, provided that another prospective consumer in more or less similar financial circumstances would have been treated the same by that credit provider. This is despite the fact that section 60(1) only affords the right to apply for credit, and not for the credit to be granted.

Arbitrariness is mitigated by section 60(2). The effect of section 60(2) is to circumscribe the grounds that permit the credit provider to refuse to enter into a credit agreement. South Africa has a fragmented past, in which the majority of South African were regarded as deceitful and unable to meet their credit undertakings, and they were consequently, on this irrational and discriminatory basis, regularly and unjustifiably refused credit. Section 60(2) is a bridge between that culture of arbitrariness and a new culture of justification, which permits the credit provider to refuse to enter into a credit agreement, but only based on reasonable commercial grounds. It has been contended that infusing our law with a culture of justification-based reasoning is more in keeping with the transformation objectives of the Constitution.[196]

[192] Campbell ch 6 par 6.2.1.
[193] S 60(1). For a discussion of this right, see Campbell ch 6 par 6.2.2.
[194] S 60(2).
[195] S 60(2).
[196] Mureinik "A bridge to where? Introducing the interim bill of rights" 1994 *SAJHR* par 31 32.

The title of section 61,[197] "Protection against discrimination in respect of credit", indicates that consumers are protected against any discrimination in the credit market. Whether discrimination has taken place in respect of a particular consumer or prospective consumer by a credit provider is measured against the treatment that was received by another consumer or prospective consumer by the same credit provider.[198] Section 61(1) prohibits discrimination by a credit provider on one or more of the grounds of unfair discrimination in terms of section 9(3) of the Constitution, or chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act,[199] such as religion or race, mentioned above,[200] if one of eight listed events is pertinent.[201] These events are:[202] (a) the ability of a person to meet the obligations in terms of the credit agreement is assessed;[203] (b) the decision is made whether to enter into the credit agreement; (c) determining any aspect of the cost of a credit agreement to a consumer;[204] (d) the terms or conditions of a credit agreement are proposed or agreed on; (e) an assessment is made whether the person has complied with the terms of the credit agreement, or when compliance with the latter is required; (f) the credit provider exercises any of its rights in terms of the credit agreement or the NCA;[205] (g) the credit provider decides whether to continue with the credit agreement or to enforce or seek judgment in respect thereof,[206] or to terminate the agreement;[207] or (h) the credit provider determines whether to report, or is reporting, "any credit information or record".[208] Section 61(3)

[197] Campbell ch 6 par 6.2.3 discusses this right.
[198] S 61(1).
[199] Act 4 of 2000 ("PEPUDA"). The grounds of discrimination in the Constitution and in the PEPUDA overlap, but the PEPUDA adds family responsibility and HIV/AIDS status as "prohibited grounds". The PEPUDA also contains criteria that may be applied by the courts to determine which other characteristics are prohibited grounds.
[200] Par 1.1.
[201] It is irrelevant whether the consumer or prospective consumer is a natural person, juristic person, or an association of persons.
[202] S 61(1)(a) – (h).
[203] The s 81(2) compulsory credit assessment is pertinent. The assessment is discussed in par 4.6.4.
[204] It has already been mentioned that the NCA restricts the maximum interest rates and other costs and charges that may be charged by a credit provider (see par 4.2). However, the legislature did not prescribe minimums in respect of interest and other credit charges. Consumers entering into credit agreements with the same credit provider and who have more or less the same risk profile should therefore be treated more or less equally by that credit provider regarding the cost of credit.
[205] Or provincial legislation.
[206] "Debt enforcement by repossession or judgment" takes place in terms of Ch 6 Part C of the NCA.
[207] The termination of a credit agreement by a credit provider before the date noted in the agreement is provided for in s 123. Default by the consumer is a prerequisite for such termination.
[208] See s 69(2). S 61(2) provides that the provisions of s 61(1) apply equally to credit bureaux, the ombud with jurisdiction or alternative dispute resolution agents, debt counsellors, and trade unions or employers when fulfilling certain functions in terms of the NCA.

provides that section 61(1)[209] also applies to prohibit and prevent discrimination in respect of a juristic person or an association of persons based on the characteristics, such as race, of any natural person who is involved with that juristic person or association of persons.[210]

If a credit provider refuses to receive or consider an application for credit from an unemancipated minor, it is not discrimination based on age. The same holds for the refusal to offer or enter into an unlawful credit agreement with such a minor.[211]

Credit providers make use of their own scoring models and evaluative mechanisms to determine, manage, underwrite, and price credit risks. This is permitted, provided that the mechanism or model is not based on any analysis, statistical or otherwise, in which the basis for the categorisation of the credit provider's risk, or differentiation or assessment, amounts to unfair discrimination in terms of section 9(3) of the Constitution.[212] A credit provider may therefore not, for instance, use statistics based on gender in any analysis to determine its credit risk, which would differentiate the costs charged along gender lines.

Section 61(6) is important in that it provides a remedy to a person (consumer or prospective consumer) who is a victim of any prohibited discrimination in terms of section 61. Proceedings may be instituted by or on behalf of such a person[213] in an equality court in terms of Chapter 4 of the PEPUDA, or a complaint may be filed with the NCR, which is obliged to refer any complaint that appears to be valid to an equality court.[214]

Section 61(7) was referred to above[215] as the final instance where the concept "historically disadvantaged person" appears in the NCA. The subsection empowers a court to draw an interference of unfair discrimination by the credit provider against a consumer or prospective consumer under certain circumstances. Section 61(7) consists of three subsections, which must be read together. A semi-colon and the word "and" divides section 61(7)(a) and (b) and (b) and (c) respectively. Section 61(7)(a) provides that, if the credit provider "knew or reasonably could have known" that the consumer (or prospective consumer) was a

[209] And s 61(2).
[210] Whether as a member, associate, owner, manager, employee, client, or customer.
[211] S 61(4). It is a well-established principle of our law that a minor person who is not emancipated cannot enter into a binding contract. S 89(2) lists such an agreement as unlawful, and if entered into, it will be declared void by a court in terms of s 89(5).
[212] S 61(5).
[213] S 20(1) of the PEPUDA provides who may institute proceedings in terms of the PEPUDA.
[214] S 61(6)(a) and (b).
[215] Par 4.2.

"historically disadvantaged person", or a natural person referred to in section 61(3) above. Section 61(7)(a) is therefore the starting point for the application of section 61(7).

Section 67(1)(b) and (c) refer to, and are linked to, section 62,[216] which compels the credit provider to provide reasons to a consumer or prospective consumer for refusing credit. Section 62(1) provides that, if requested by the consumer,[217] the credit provider must provide and advise the consumer, in writing, of the "dominant reason" for certain decisions taken by the credit provider. The decisions are: (a) to refuse entering into a credit agreement with the consumer; (b) offering the consumer a lower credit limit under a credit facility[218] than the limit the consumer applied for, or reducing the limit under an existing credit facility;[219] (c) refusal to increase the limit under an existing credit facility;[220] or (d) refusal to renew the consumer's or prospective consumer's credit card, or a similar type of credit facility. If the credit provider has made any of the section 62(1)(a) to (d) decisions and "has refused, or failed without reasonable cause" to respond to the consumer's request for the reason for the credit provider's decision (and if the credit provider knew or could have reasonably known that the consumer or prospective consumer was previously disadvantaged), the court may infer unfair discrimination.[221]

Section 61(7) basically removes any onus of proof.

---

[216] See Campbell ch 6 par 6.2.4.

[217] The NCA just refers to a request, and the consumer's or prospective consumer's request may therefore be orally or in writing.

[218] The "credit facility" which is defined in s 8(3) was mentioned in par 1.1. However, the credit facility is usually a revolving credit contract, where the payments of instalments by the consumer create new or additional credit for the consumer. Examples of credit facilities are store cards, credit cards, and overdrafts on cheque accounts. See Renke thesis par 7 2 2 2. Of importance here is that, when a consumer applies for a credit facility, the facility, if approved after the compulsory s 81(2) credit assessment, is approved with a certain limit, which may be used by the consumer at his or her discretion.

[219] S 118 provides for the reduction of the credit limit under a credit facility. Such as reduction must take place by the credit provider upon a written request by the consumer to reduce the credit limit (s 118(1)-(2)), or may be effected by the credit provider, by written notice to the consumer, provided that the reduction does not amount to discrimination in terms of ss 61 and 66. The reduction in the latter instance takes effect when the notice is delivered to the consumer. S 118(3). See Renke thesis par 8 3 4 5 for more detail.

[220] Increases in the limit under a credit facility may take place in terms of s 119(4). Increases may be done on a temporary basis (s 119(1)(a) read with s 119(2)), by agreement with the consumer (s 119(1)(b) read with s 119(3)), or unilaterally by the credit provider (s 119(1)(c) read with s 119(4)). An increase by agreement between the parties may be made upon a written or an oral request by the consumer. The credit provider may also propose in writing to the consumer that the credit limit be increased, but the consumer's written consent is required to effect the increase. A unilateral increase of the credit limit by the credit provider may only take place subject to the limitations stipulated in s 119(4), for instance, only once a year and only by a certain amount. Importantly, such an increase must be specifically requested by the consumer in writing at the time the credit facility is applied for, or at any later time. See Renke thesis par 8 3 4 5 for a discussion of this aspect.

[221] S 61(7)(b) and (c).

Broadly speaking, the right to reasons also entails a duty of the credit provider to rationalise the decision. Provision for the right to reasons also strives to justify the decision of refusal, and by doing so, seeks to advance the fundamental purposes of the NCA, which are to ensure fairness and transparency in the credit market. [222] Consequently, this boosts confidence and legitimacy in the credit market. Reasons also enable credit consumers to rectify theirs adverse credit records and again apply for credit. This is also consistent with broadening access to the credit market.[223]

Continuing with section 62 (the consumer's right to request the reasons for credit being refused), if the credit provider has based any section 62(1)(a) to (d) decision "on an adverse[224] credit report" provided by a credit bureau, the name and contact particulars of that credit bureau must be provided to the consumer by the credit provider in response to the consumer's request. The reason for the provisions of this subsection is self-explanatory; credit providers are protected in respect of "frivolous" or "vexatious" requests by a consumer.[225]

As one of the NCA's objectives is to protect the consumer, the Act is interspersed with provisions affording rights to the consumer, for instance the rights already discussed in this dissertation, the right to be protected against reckless lending, to apply for debt review,[226] to receive protection in respect of the credit costs that a credit provider may recover from the consumer,[227] to receive statements of account,[228] to rescind or terminate a credit agreement,[229] to settle the credit agreement, or to surrender the goods.[230] These rights of the consumer, and those stipulated in the credit agreement, must be protected. Section 66(1)(a) accordingly provides that a credit provider may not discriminate against the consumer, either directly or indirectly,[231] in reaction to the consumer "exercising, asserting or seeking to uphold" any of the consumer's rights in terms of the Act or the credit agreement. Similarly,

[222] S 3 of the NCA.
[223] S 3 of the NCA.
[224] An example of an "adverse report" is the particular consumer having been blacklisted, or being in arrears with the payment of instalments.
[225] In terms of s 62(3), the credit provider may apply to the NCT to limit its obligations to provide reasons in such as case.
[226] Ch 4 Part D.
[227] Ch 5 Part C.
[228] Ch 5 Part D.
[229] Ch 5 Part E.
[230] Ch 6 Part A.
[231] Once again, the credit provider's response is tested with reference to its treatment of any other consumer under similar circumstances.

the penalisation of the consumer, altering (or proposing to alter) the terms or conditions of the credit agreement, and any action to "accelerate, enforce, suspend or terminate" the credit agreement with that consumer are also prohibited.[232]

4.6 The prevention of reckless lending

4.6.1 Introduction

While much has been written on the reckless lending provisions in the NCA, only a few provisions have given rise to a notable number of court decisions.[233] The reckless lending provisions, sections 78 to 84, contained in Part D of Chapter 4 in the Act, were introduced in the NCA, and never before formed part of the South African credit industry, which action, in itself, renders these provisions transformative. The inclusion of a discussion of the reckless lending sections in this dissertation was motivated by Schraten's publication. Schraten indicates the relationship between the transformation purpose of the Act, discussed above,[234] to promote the development of a more accessible credit market, in particular for previously less privileged members of society (which he calls "the economic focus of the NCA"), the dangers attached to this,[235] and the realisation of the NCR's warning.[236] He specifically refers to the growth in unsecured credit, which is defined in regulation 39 of the National Credit Regulations.[237]

Schraten, in addition to discussing the section 3(a) subobjective,[238] also refers to one of the standards set in section 3 for a the newly envisaged credit market under the new NCA regime, namely to develop a competitive credit market.[239] He subsequently mentions that the NCA, soon after it became effective, changed the structure of our credit market and resulted, to a great extent, "in a replacement of informal money lenders by institutionalised banks and the substitution of personalised lending procedures by technical assessment of credit-

[232] S 66(1)(b) – (d).
[233] See, for instance, Van Heerden ch 11 par 11.6, the sources Van Heerden mentions in the text and footnotes, and Renke thesis par 8.3.2.5.
[234] Par 4.2.
[235] A warning by the NCR in 2012 that "the current credit market framework is geared towards encouraging access to credit and there is an inherent likelihood that large numbers of consumers will face challenges in meeting their debt commitments".
[236] Schraten 2014 *Transformation* 85 6-7.
[237] In terms of reg 39(3), a credit transaction is unsecured if the debt is not secured by any form of personal security, such as a pledge or other right in property.
[238] Schraten 2014 *Transformation* 85 2-4.
[239] Schraten 2014 *Transformation* 85 2 and 7.

worthiness.[240] Finally, Schraten mentions four main rules in the NCA to protect consumers against over-indebtedness, *inter alia* by what he calls the "reckless lending rule".[241] In what follows, the reckless lending provisions as a transformation tool are briefly discussed.[242]

4.6.2 The limited application of the reckless lending provisions

The reckless lending provisions in the NCA enjoy limited application. It is important to note that sections 80 to 84, read with section 79, which provides the definition of over-indebtedness, do not apply to juristic-person consumers.[243] The provisions also do not apply to, *inter alia*, pawn transactions,[244] incidental credit agreements,[245] or a temporary increase in the limit of a credit facility.[246]

4.6.3 The compulsory credit assessment and the credit provider's complete defence

Section 81(2) is an important responsible-lending tool, and provides that a credit provider, before entering into a new credit agreement with a prospective consumer ("consumer"), or grant additional credit to the latter in terms of a credit facility, must conduct a reasonable assessment to assess the consumer's understanding of the risks, costs, and obligations in terms of the credit agreement,[247] the consumer's debt repayment history under credit agreements and the consumer's "existing financial means, prospects and obligations",[248] and

[240] Schraten 2014 *Transformation* 85 7.
[241] Schraten 2014 *Transformation* 85 2 7. The other rules are the disclosure of the cost of credit, the codification of the common law *in duplum* rule (in terms of section 103(5)), and debt counselling.
[242] For a full discussion of these measures, see the sources mentioned in par 4.5.1. See also Kelly-Louw (assisted by Stoop) pars 12. 1 and 12.2 and Van Heerden and Renke "Perspectives on the South African responsible lending regime and the duty to conduct pre-agreement assessment as a responsible lending practice" 2015 *Int. Insolv. Rev.* 68ff.
[243] S 78(1). See the discussion of the NCA with regard to juristic person consumers in par 1.1.
[244] The pawn transaction, one of the credit transactions subject to the NCA, is defined in s 1, and involves the typical situation where movable goods are pawned as security for the payment of the price of goods purchased or the repayment of the credit granted to the consumer. The pawned goods must be returned by the pawnshop to the consumer if the debt is paid in time by the latter.
[245] The incidental credit agreement, also a credit transaction, concerns the case where goods or services are provided to the consumer. The consumer is not required to pay for the goods or services immediately, but is billed by the provider of the goods or services. If the account is not settled by the consumer on the specified date, the provider may start to charge interest for the late payment of the account. S 5(2) provides that an incidental credit agreement is deemed to have come into operation 20 business days after the date upon which the interest was first charged by the credit provider. The agreement therefore comes into operation incidentally.
[246] S 78(2). Increases in the credit limit of a credit facility were mentioned in par 4.4. See Renke thesis par 8 3 2 2 for detail of s 78(2).
[247] S 81(2)(a)(i) and *Absa Bank v Kganakga* [2016] ZAGPJHC 59 (18 March 2016).
[248] In terms of s 78(3)(a) "existing financial means, prospects and obligations include "income, or any right to receive income, regardless of the source, frequency and regularity of that income, other than income that the

whether there are reasonable bases to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit.[249]

The credit provider must therefore conduct a dual assessment, determine the consumer's understanding of the credit agreement and affordability, and act like any reasonable, objective credit provider would in similar circumstances.

Credit providers must base their credit assessment on information received from credit bureaux and the consumer. The latter, who is probably the credit provider's main source of information, is compelled to answer the credit provider's questions fully and truthfully during the assessment.[250] If the consumer fails to do this, the credit provider is afforded a complete defence in terms of the NCA upon an allegation by the consumer that the credit extended to the consumer was reckless. However, this defence rests on two legs: the credit provider must establish the consumer's failure to answer its questions fully and truthfully, and the presiding court or NCT must find that the consumer's failure materially affected the credit provider's ability to conduct an accurate credit assessment.[251]

4.6.4 The forms of reckless lending

The compulsory credit assessment that has to be conducted by the credit provider is the determining factor in this regard, and three forms of reckless credit are distinguished in the Act.[252] If no assessment whatsoever was conducted by the credit provider, the credit granted or the increase in the limit of a credit facility[253] is *per se* reckless, irrespective of what the outcome of the assessment would have been had it been conducted.[254] The credit provider is penalised for failure to conduct an assessment.[255] In the case of the second form of reckless lending, an assessment was conducted. However, despite ascertaining that the consumer did

---

consumer or prospective consumer receives, has a right to receive, or holds in trust for another person; (b) the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily (i) share their respective financial means; and (ii) mutually bear their respective financial obligations; and (c) if the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the reasonably estimated future revenue flow from that business purpose". See also *Standard Bank v Panayiotts* 2009 (3) SA 363 at 366E – F.

[249] S 81(2)(b).

[250] S 81(1).

[251] S 81(4).

[252] S 80, titled "Reckless credit".

[253] With the exception of s 119(4) unilateral increases, mentioned in par 4.5.

[254] S 80(1)(a).

[255] Van Heerden ch 11 par 11.6.2

not understand the credit agreement, that is, that risks, costs, and obligations are involved, the credit provider still concluded the credit agreement with the consumer.[256] In this instance, the credit provider's disregard of the consumer's ignorance constitutes reckless credit.[257] The third form of reckless credit is related to over-indebtedness as a result of entering into a new credit agreement with the consumer, or by giving extra credit to the consumer in terms of a credit facility by increasing the limit of that facility. Section 79(1) of the defines "over-indebtedness" as the inability of the consumer to satisfy all obligations arising from the credit agreement in a timely manner, taking into consideration the consumer's financial means, prospects, and obligations, and "probable propensity" to satisfy all debt obligations in a timely manner. The consumer's ability is determined with reference to the consumer's debt repayment history.[258]

If an assessment was conducted and the credit provider entered into the credit agreement with the consumer despite the assessment indicating that the conclusion of the new credit agreement or the increase of an existing credit limit would cause the consumer's over-indebtedness, the credit is reckless.[259] This form of reckless credit thus involves the credit provider's disregard of the consumer's inability to satisfy the new or additional debt obligations.[260] Van Heerden[261] makes the point that the conclusion of the proposed credit agreement with a consumer under circumstances where the credit provider is aware of the fact that the consumer is already over-indebted when applying for new or additional credit also constitutes reckless lending.[262]

When a court or the NCT must determine whether reckless lending took place, the person presiding must apply the aforementioned reckless-lending criteria in terms of section 80(1) as they existed at the time the agreement was concluded.[263] The fact that the consumer currently, at the time of the court- or NCT proceedings, can meet the debt obligations, or appreciates the consequences, risks, costs, *et cetera*, of the credit agreement, must be

[256] S 80(1)(b)(i).
[257] Van Heerden ch 11 par 11.6.2.
[258] S 79(1)(a) and (b).
[259] S 80(1)(b)(i).
[260] Van Heerden ch 11 par 11.6.2.
[261] Van Heerden ch 11 par 11.6.2.
[262] Van Heerden ch 11 par 11.6.2.
[263] S 80(2).

disregarded.[264] The determination whether reckless credit occurred is thus with reference to a date in the past, namely the date of conclusion of the credit agreement.[265]

4.6.5 The powers of the courts and the NCT

For purposes of this discussion, any reference to a court will include the NCT, unless indicated otherwise. The reason is that both the court and the NCT have the power to determine reckless credit[266], and have the same powers in terms of section 83 to address any reckless lending that occurred. In addition to section 83, the NCT (but not the courts) is also empowered by the NCA to impose administrative fines on the credit provider,[267] or even to order the cancellation of the credit provider's registration upon request by the NCR.[268]

Before the powers of the courts in terms of section 83 are mentioned, the question arises how the reckless credit matter came to serve before the court. In terms of section 83(1), the court may of its own accord, *mero motu*, take cognisance of reckless lending.[269] However, the court will, naturally, only be in a position to do this if the credit agreement, for whatever reason, is already before the court.[270] If the credit agreement is not before the court, the consumer must, in terms of section 86, approach a debt counsellor and seek a declaration of reckless credit.[271]

The section 83 powers of the courts depend on the form of reckless credit involved. The NCA provides for one set of court orders in respect of the first two forms of reckless lending, and

[264] S 80(2)(a) and (b). S 80(3)(a) – (c) provides which value must be taken into consideration for the reckless credit determination in the case of a credit facility and credit guarantee (see par 1.1 for a brief discussion of these credit agreements). The credit limit in terms of the facility is considered, as well as the settlement value of the credit agreement that is guaranteed by the credit guarantee, discounted by a prescribed factor. No factors are prescribed in the regulations, and it unsure what this entails.
[265] Van Heerden ch 11 par 11.6.4.
[266] S 83(1) initially empowered only the courts in respect of reckless lending cases, but the subsection was amended to include the NCT in terms of the National Credit Amendment Act 19 of 2014, Proc R10 of 13 March 2015 in *GG* 38557, the "2014 Amendment Act". The 2014 Amendment Act became effective on 13 March 2015.
[267] S 151.
[268] S 57(1). Reasons for cancellation are: failure to comply with the credit provider's conditions of registration, imposed by the NCR (see par 4.3), failure to meet a black economic empowerment commitment in terms of s 48(1) (discussed in par 4.3), and a contravention of the NCA. S 57(1)(a) –(c).
[269] This is despite "any provision of law or agreement to the contrary".
[270] E.g., as a result of debt enforcement against a consumer who is in default of the obligations in terms of the credit agreement.
[271] S 86(6)(b). In this instance, the debt counsellor must determine whether any of the consumer's credit agreements appear to be reckless, and if affirmative, issue a proposal to the Magistrate's Court that the particular credit agreement or agreements be declared reckless credit. See s 86(7)(c)(i).

another in respect of the third.[272] If the credit provider failed to conduct a credit assessment, or entered into the credit agreement with the consumer despite the fact that the consumer did not understand the risks, costs *et cetera* involved in the agreement, the court may set the reckless credit agreement aside *in toto* or partially, or suspend the particular agreement.[273] These powers may thus be exercised in the alternative. In the case where the reckless credit caused the consumer's over-indebtedness, the court must, first of all, determine if the consumer is still over-indebted at the time of the proceedings.[274] If it is concluded that the consumer is over-indebted, the court may suspend the agreement and restructure or re-arrange the consumer's obligations in terms of the consumer's other credit agreements, which include credit agreements with other credit providers.[275]

The consequences of suspension, a court order which may be made in respect of all the forms of reckless credit, are that, during the period of suspension, it is not required of the consumer to effect any payments in terms of the agreement, the consumer is exempt from any interest or cost charges, and the credit provider's rights under the agreement are unenforceable.[276] After the suspension has come to an end, the rights and obligations of both parties to the agreement are revived and become fully enforceable, except if ordered otherwise by a court.[277] Section 84(2)(b) provides that, after the suspension has come to an end, the credit provider may still not charge any interest, fees, or charges in respect of the period of suspension.[278] Thus, during the period of suspension and after the suspension has been lifted, no costs may be charged to the consumer in respect of the period for which the agreement was suspended.

Restructuring or re-arrangement of the consumer's obligations is done in terms of section 86(7)(c)(ii). The court may extend the period of the agreement, simultaneously reducing the amount of each instalment "accordingly", postpone the payment dates under the credit

[272] For a comprehensive discussion and assessment of the powers of the courts, see Van Heerden ch 11 par 11.6.7, Renke thesis par 8 3 2 5 5, Boraine and Van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" 2010 *THRHR* 650ff, and Van Heerden and Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act" 2011 *De Jure* 392ff.
[273] S 83(2)(a) and (b).
[274] S 83(3)(a).
[275] S 83(3)(b)(i) and (ii).
[276] S 84(1)(a) – (c).
[277] S 84(2)(a)(i) and (ii).
[278] S 84(2)(b).

agreement, or both.[279] The court may also recalculate the consumer's obligations because of a contravention of certain of the Act's provisions.[280]

4.7 Conclusion

The NCA clearly gives effect to its transformation objectives, which are based in the Constitution. The consumer credit institution responsible for the enforcement of these rights, reporting thereof to the Minister, and their publication to the public — the NCR — plays a key role in ensuring these objectives do not remain mere ideals. The same holds for the NCT, which, together with the courts, must adjudicate on the NCA. This is illustrated in the next chapter.

[279] S 86(7)(c)(ii)(aa) – (cc).
[280] S 86(7)(c)((ii)(dd). Recalculations may be done when there is contravention of Parts A or B of Ch 5 or Part A of Ch 6.

CHAPTER 5

THE NCA AND THE CONSTITUTION

5.1 Introduction

This chapter illustrates, by means of selected court decisions, that the objectives in the NCA and its provisions that give effect to its objectives, discussed in this dissertation,[281] are inextricably linked to the Constitution and its objectives. Reference has already been made[282] to Scholtz's remark[283] that the NCA, because of its socio-economic aims, would, naturally, "be tested against and interpreted in the light of the Constitution". In the fifteen years since the NCA became effective, its provisions were considered thirteen times by the Constitutional Court ("CC"). The constitutionality of certain NCA provisions and the National Credit Regulations promulgated in terms of the Act also served before superior courts. The right to equality in section 9 of the Constitution[284] is pertinent to my dissertation.

5.2 NCA provisions

As mentioned above, in *Standard Bank of South Africa Ltd v Dlamini*,[285] Pillay J, with reference to the NCA, remarked that "the constitutional right to equality comes to mind immediately. The preamble to the Constitution and to the NCA connect them."[286]

In *Sebola and Another v Standard Bank of South Africa*,[287] the CC, with reference to the NCA's preamble and objectives, but also to the right to equality encapsulated in section 9 of the Constitution, confirmed that a purposive approach must be followed when interpreting the provisions of the NCA. The following remark by Cameron J[288] is significant:

> "[T]he preamble to the [NCA] indicates that it was enacted to promote 'a fair and non-discriminatory marketplace for access to credit' and 'black economic empowerment'. The means by which the statute's purposes are to be achieved include 'promoting a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit'… These goals,

[281] Chs 3 and 4.
[282] Par 1.1.
[283] Scholtz par 2.5.
[284] See par 1.1.
[285] 2013 (1) SA 219 (KZD) ("*Dlamini*").
[286] See par 3.3.
[287] 2012 (5) SA 142 (CC) ("*Sebola*").
[288] *Sebola* par 36.

> and the means by which they are to be pursued, are intimately connected to the Constitution's commitment to achieving equality."

Zondo AJ, in a minority judgment in *Sebola*,[289] focused on the receipt via the postal service of a section 129(1)(a) debt enforcement notice by people living, for instance, on farms in rural areas and the significance of considering the living conditions of such persons when the provisions of the NCA are interpreted by the courts.

The CC, in *Kubyana v Standard Bank of South Africa Ltd (Socio-Economic Rights Institute of South Africa as Amicus Curiae)*,[290] revisited its earlier decision in *Sebola*, but reaffirmed the discussion in *Sebola* regarding the principles of equality. The CC held as follows in respect of the interpretation of the NCA's provisions in section 129(1)(a) and (b), read with section 130(1):

> "[T]he interpretation of the Act's notice provisions implicates fundamental notions of equity in, and transformation of, the credit market. Such an interpretation is therefore inherently linked to the constitutional objective of achieving substantive equality."[291]

The CC, in *Kubyana*, further emphasised that section 2(1) of the NCA requires of the courts or the NCT to follow a purposive approach when interpreting the provisions of the Act, and remarked that "[f]urthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms".[292] Finally, the CC pointed to the fact that "[o]ne of the mains aims of the Act is to enable previously marginalised people to enter the credit market and access much needed credit".[293]

In conclusion, in respect of the NCA's objectives and the interpretation of its provisions, the following significant remarks were made by the CC in *Nkata v FirstRand Bank Limited*:[294]

> "Section 2 of the Act, somewhat redundantly, enjoins us to interpret the provisions of the Act in a way that gives effect to its purposes. The purposes are described in section 3. They are optimistic but sometimes in tension. They are about credit markets made up of credit providers and consumers of credit. Section 3 makes the point that the legislation is meant to advance both 'social and economic welfare'. It hopes to find a balance between the rigour of an 'efficient, effective and accessible credit market and industry', often driven by profit, and measures 'to protect consumers' propelled by social good. It places a premium on 'sustainable market conditions', but also helps access to credit."[295]

---

[289] Pars 160–162.
[290] 2014 (4) BCLR 400 (CC); 2014 (3) SA 56 (CC) ("*Kubyana*").
[291] *Kubyana* par 16.
[292] *Kubyana* par 18.
[293] *Kubyana* par 38.
[294] *Nkata*.
[295] *Nkata* par 93.

The CC further remarked as follows with reference to *Sebola*:

> "Cameron J observed that at the core of the Act is the objective to protect consumers. This protection, however, must be balanced against the interests of credit providers and should not stifle a 'competitive, sustainable, responsible, efficient [and] effective… credit market and industry'. The Act, the Court noted, replaces the apartheid era legislation that regulated the credit market, and infuses constitutional considerations into the culture of borrowing and lending between consumers and credit providers. The purposes of the Act are directly attributable to the constitutional values of fairness and equality."[296]

5.3 National Credit Regulations

The Affordability Assessment Regulations,[297] in particular regulation 23A(4), were subjected to constitutional scrutiny by the superior court in *Truworths Ltd v Minister of Trade and Industry*.[298] Regulation 23A(4) concerned validation of the consumer's gross income, and prescribed that the following proof had to be required by the credit provider in this regard: (a) the latest three payslips or bank statements reflecting the latest three salary deposits in the case of consumers who are paid a salary by an employer;[299] (b) documented proof of the latest three income payments or latest three months' bank statements if the consumers do not receive a salary from an employer;[300] or (c) the latest three months' bank statements or latest financial statements in respect of consumers who are self-employed, informally employed, or employed in such a way that they do not receive a payslip or have proof of income as mentioned in (a) or (b).[301]

The court in *Truworths* set aside 23A(4) and declared it unconstitutional on the basis that it unfairly discriminates against unbanked, informally employed, and self-employed individuals. The court adopted the view that it is manifestly unfair to require unbanked and informal traders to produce financial statements to validate their gross income, because most cannot comply with such a requirement.[302] The court expressed the view that, even if these informal traders earn relatively well and are able to repay credit, requiring of them to produce bank- or financial statements presents an insurmountable obstacle to their accessing credit.[303] Furthermore, the court noted that, although regulation 23A is meant to prevent reckless lending, regulation 23A(4) undermines the purpose of the Act, which is to open the credit

[296] *Nkata* pars 95 and 96.
[297] See par 4.6.6.
[298] 2018 (3) SA 558 (WCC) ("*Truworths*").
[299] Reg 23A(4)(a)(i) and (ii).
[300] Reg 23A(4)(b)(i) and (ii).
[301] Reg 23A(4)(c)(i) and (ii).
[302] *Truworths* par 45. See also reg 23A(4)(c).
[303] *Truworths* par 45.

market to all South Africans, specifically those who historically could not access credit under sustainable conditions. [304] The court therefore concluded that the regulation is neither reasonable nor rationally connected to the purpose for which it was enacted. Furthermore, the court held that unfair discrimination against low-income earners is in contravention of sections 14(2) and 14(3) of the PEPUDA.[305]

5.4 Conclusion

The excerpts from the CC and superior court decisions in this chapter illustrate the courts' endorsement and application of the NCA's objectives, as well as the measurement of these objectives against the constitutional values of equality and others, such as fairness. They also illustrate the courts' commitment to utilising the NCA's objectives and the values enshrined in the Constitution as an interpretational tool in respect of the provisions of the NCA.

[304] *Truworths* par 52.
[305] *Truworths* par 53. See Section 14 of the PEPUDA, which provides, amongst other things, factors that have to be taken into account when determining whether discrimination is fair. Some of the factors include whether discrimination impairs or is likely to impair dignity, the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage.

CHAPTER 6

FINAL CONCLUSIONS AND REMARKS

Transformation, the topic of this dissertation, with particular reference to the provisions of the NCA, connotes drastic change, which also reflects the provisions introduced by the Act that did not exist previously. In my dissertation, such transformation is considered evident in the legislature's intention to transform the credit industry that existed pre-1994 and pre-Constitution, regulated by the NCA's predecessors, the Usury Act and the Credit Agreements Act.[306] The intention of transformation is reflected in the DTI Policy Framework (2004)[307] and in the NCA's objectives in its preamble and section 3,[308] and is realised by giving effect to these objectives in the provisions of the Act. I focused on access to credit by previously disadvantaged persons, the promotion of black economic empowerment and ownership in the credit industry, developmental credit agreements, the anti-discrimination measures in the Act, and the provisions regarding prevention of reckless lending. Section 2(1), regarded redundant by the CC in *Nkata*,[309] which specifically provides that the objectives of the NCA must serve as a lens through which the NCA's provisions must be interpreted, was also addressed.[310] Finally, the preceding chapter provided a brief overview of the courts' interpretation and views of the NCA's objectives in light of constitutional imperatives, in particular the right to equality.

The transformation of the credit legislative framework that preceded the NCA was inevitable. This framework, which served the pre-1994 apartheid credit regime, was outdated and fragmented. Consumer credit regulation is a very contentious issue in South Africa because of the history of systemic disempowerment, which caused economic inequality and precluded the majority of South Africans from involvement in mainstream economic activities, including the credit market.[311]

In summary, the white minority's interests in the credit market were served, and no protection in this arena was afforded the majority members of our population, with specific

[306] See ch 2.
[307] Government's policy document that preceded the NCA. See par 2.2.
[308] Par 3.2.
[309] Par 5.2.
[310] Par 3.3.
[311] DTI Policy Framework (2004) 47.

reference to historically disadvantaged persons and low-income earners.[312] The NCA is a single legislative framework with pertinent transformation aims.[313] Consumer credit legislation worldwide is heavily influenced by economic, social, and political considerations, and South Africa is no exception.[314] The NCA is *sui generis* in nature, as it specifically caters for South Africa's socio-economic context, rather than merely conforming to or transplanting international trends. It is an explicit governmental instrument aimed at addressing the inequalities, imbalances, and discrimination of apartheid by giving previously disadvantaged persons and low-income earners protection in the credit market.[315]

The NCA has, undoubtedly, at least in theory, transformed the South African credit industry. In the words of Jafta J in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice*:

> "The democratic dispensation rendered legislation that governed the credit markets ill-suited to the economy and open to the entire population. The black population was afforded the opportunity to participate in the financial credit market, both as creditors and consumers of credit. The democratic government realised that the credit market was the lifeblood of economic development. This is because credit enabled consumers to acquire assets like houses, cars and furniture which they could not afford without credit finance."[316]

These remarks point directly to the transformation objectives of the NCA, which seek to broaden access to the credit market to the black population. They succinctly summarise the key objectives of the NCA, which are aimed at transforming the credit market. However, transformation is not an event or an occurrence, it is a continuous process, as indicated by the debt intervention process in terms of the 2019 Amendment Act, which brought about progressive "debt intervention" in the South African credit arena. Debt intervention is an alternative to debt review, which was introduced by the NCA before its amendment. It is a debt-alleviation process for low-income consumers who do not qualify for the debt review.[317] These amendments provide "honest but unfortunate debtors" access to a fresh-start procedure, i.e., a complete discharge.[318]

---

[312] Ch 2, in particular pars 2.2.2 and 2.2.3.
[313] Par 3.2.
[314] Par 1.1.
[315] Chs 3 – 5.
[316] *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice* 2016 (6) SA 596 (CC) par 15.
[317] See Par 1.4.
[318] Coetzee and Roestoff "Rectifying an unconstitutional dispensation? A consideration of proposed reforms relating to no income no asset debtors in South Africa" *Int. Insolv. Rev* 2020 par 1.

BIBLIOGRAPHY

Books

Campbell N "The consumer's rights and the credit provider's obligations" in Scholtz ed *Guide to the National Credit Act* (2008) LexisNexis: Durban

Kelly-Louw M (assisted by Stoop PN) *Consumer Credit Regulation in South Africa* (2012) Juta: Cape Town

Otto JM & Otto R-L *The National Credit Act explained* 4th ed (2016) LexisNexis: Durban

Otto JM and Renke S "Introduction and historical background to the National Credit Act" in Scholtz ed *Guide to the National Credit Act* (2008) LexisNexis: Durban

Otto JM and Renke S "Types of credit agreement" in Scholtz ed *Guide to the National Credit Act* (2008) LexisNexis: Durban

Scholtz JW "Consumer credit institutions" in *Guide to the National Credit Act* (2008) LexisNexis: Durban

Scholtz JW ed "The implementation, objects and interpretation of the National Credit Act and related matters" in *Guide to the National Credit Act* (2008) LexisNexis: Durban

Scholtz JW ed "Commentary" in *Guide to the National Credit Act* et seq (2008) with updates (last update 2022) LexisNexis: Durban

Van Heerden C "Over-indebtedness and reckless credit" in Scholtz ed *Guide to the National Credit Act* (2008) LexisNexis: Durban

Van Zyl E "The scope of application of the National Credit Act" in Scholtz ed *Guide to the National Credit Act* (2008) LexisNexis: Durban

Journal publications

Boraine A and Van Heerden C "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" 2010 *THRHR*

Brits R "The National Credit Act and the Bill of Rights: Towards a Constitutional view of consumer credit legislation" 2017 *TSAR*

Coetzee H and Roestoff M "Rectifying an unconstitutional dispensation? A consideration of Department of Trade and Industry South Africa making credit markets work: A policy framework for consumer credit (2004) *Int. Insolv. Rev*

Hutchison A "Uncovering contracting norms in Khayelitsha stokvels" 2020 52 *Journal of legal pluralism and unofficial law*

Kelly-Louw M "The 2014 credit-information amnesty regulations: What do they really entail?" 2015 *De Jure*

Kelly-Louw M "The prevention and alleviation of consumer over-indebtedness" 2008 *SA Merc LJ*

Klare K "Legal culture and transformative constitutionalism" 1998 14 *SAJHR*

Liebenberg S "South Africa's new equality legislation: A tool for advancing women's socio-economic equality?" 2001 *Acta Juridica*

Mureinik "A bridge to where? Introducing the interim bill of rights" 1994 *SAJHR*

Otto JW "The history of credit legislation in South Africa" *Fundamina: A Journal of Legal History* https://hdl.handle.net/10520/EJC34391

Schraten J "The transformation of the South African credit market" 2014 *Transformation*

Stoop PN "South African consumer credit policy: Measures indirectly aimed at preventing consumer over indebtedness" 2009 *SA Merc LJ*

Van Heerden C and Boraine A "The money or the box: perspectives on reckless credit in terms of the National Credit Act" 2011 *De Jure*

Van Heerden C and Renke S "Perspectives on selected aspects of the registration of credit providers in terms of the National Credit Act 34 of 2005 (1) 2014 (77) *THRHR*

Van Heerden C and Renke S "Perspectives on selected aspects of the registration of credit providers in terms of the National Credit Act 34 of 2005 (2) 2015 (78) *THRHR*

Van Heerden C and Renke S "Perspectives on the South African responsible lending regime and the duty to conduct pre-agreement assessment as a responsible lending practice" 2015 *Int. Insolv. Rev*

Van Heerden C and Steennot R "Pre-agreement assessment as a responsible lending tool in South Africa, the EU and Belgium: Part 1" 2018 (21) *PER/PELJ*

Legislation

Banks Act 94 of 1990

Broad-Based Black Economic Empowerment Act 53 of 2003;

Constitution of the Republic of South Africa 1996;

Constitution of the Republic of South Africa Act 200 of 1993;

Consumer Protection Act 68 of 2008

Credit Agreements Act 75 of 1980

Hire-Purchase Act 36 of 1942

Limitation and Disclosure of Finance Charges Act 73 of 1968

National Credit Act 34 of 2005

National Credit Amendment Act 19 of 2014

National Credit Amendment Act 19 of 2019

National Small Business Act 102 of 1996

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Usury Act 37 of 1926

Regulations

National Credit Act Regulations Proc 22, 2006 in GG 28824 of 09.05.2006

Case law

Absa Bank v Kganakga [2016] ZAGPJHC 59

Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd 2007 (6) SA 199 (CC)

Du Bruyn NO v Karsten 2019 (1) SA 403 (SCA)

First National Bank v Lukhele and seven other cases [2016] ZAGPPHC 616

Kubyana v Standard Bank Ltd 2014 (3) SA 56 (CC)

Moseneke DCJ in *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257

Nkata v FirstRand Bank Limited 2016 (6) BCLR 794 (CC); 2016 (4) SA 257 (CC)

Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)

Sebola and Another v Standard Bank Ltd 2012 (5) SA 142 (CC)

Standard Bank of SA Ltd v Develex 879; Another; In re: Develex 876 CC and Another v Standard of SA Ltd and Another [2017] ZAGPPHC 67

Standard Bank of South Africa Ltd v Dlamini 2013 (1) SA 219 (KZD)

Standard Bank SA Ltd v Hales and Another 2009 (3) SA 315 (D)

Standard Bank v Panayiotts 2009 (3) SA 363 (G)

Truworths Ltd v Minister of Trade and Industry 2018 (3) SA 558 (WCC)

University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice 2016 (6) SA 596 (CC)

Internet sources

https://www.collinsdictionary.com/

https://dictionary.cambridge.org/

https://static.pmg.org.za/docs/2005/050608consumer.pdf

www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1

Dissertation

Renke An Evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005, LLD thesis University of Pretoria (2012)