Reckless credit lending: The credit provider's duty to ascertain the true financial position of the consumer.

by

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DECLARATION

I, Tahlia Lee Pillay, declare that this mini-dissertation, unless specifically indicated otherwise, is my work and that all references have been adequately made. This dissertation has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or qualifications.

It was signed at Durban on this 06th day of February 2025.

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Signature

DEDICATION

This mini-dissertation is dedicated to my partner, Adil, who has, in more ways than one, been a pillar of unconditional love and unwavering support throughout this challenging and introspective journey.

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To God, my mother, grandmother and Tinkie; Thank you for giving me all that I have today.

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ABSTRACT

The National Credit Act 34 of 2005 (hereinafter referred to as 'the NCA') was promulgated with one of its primary aims: that consumers are treated fairly and, by extension, not subjected to over-indebtedness by eager credit providers. When the NCA was introduced, credit providers were given latitude to devise their own pre-agreement assessments that would be used to ascertain whether credit should be granted to prospective consumers. Several inherent flaws in the credit-lending legislation were brought to light over the years, with judicial bodies having to determine whether reckless credit lending had occurred. Numerous National Consumer Tribunal (hereinafter referred to as 'Tribunal' or 'NCT') judgments pointed out instances where credit providers such as banks and retailers had taken advantage of consumers by granting credit, which led to their over-indebtedness. This is when the Department of Trade and Industry (hereinafter referred to as 'the DTI') realised that there was a need for a regulatory addition to the NCA to curb reckless credit lending further. As a result, the Affordability Assessment under Regulation 23A came into operation.

The Regulation called for all pre-lending assessments to follow a set of compulsory practices. The objective of the Affordability Assessment Regulation was to create strict parameters for credit providers to fall within so as to avoid granting credit to consumers who could not afford another debt. Credit providers are also given the discretion to grant credit when consumers fall below the threshold in the minimum expenses table when exceptional circumstances justify such deviation. No indication has been given as to what constitutes exceptional circumstances in relation to the Affordability Assessment.

Recent case law dealing with the Affordability Assessment Regulation has concluded that an investigation needs to be conducted by credit providers if consumers make a disclosure relating to their financial status. However, these decisions have yet to set out the parameters of such investigation and when the investigation should be prompted. This leaves the question of whether it is at the discretion of credit providers based on what information consumers have disclosed. Alternatively, should there be a list of categories that will determine which disclosures should be investigated? Currently, the Affordability Assessment Regulation and literature remain silent on these issues, and recent case law needs to be analysed in order to answer these questions. The

purpose of this mini-dissertation is, therefore, to investigate the credit provider's duty to ascertain the consumer's true financial position.

CHAPTER 1

INTRODUCTION

1.1 Background

Having access to credit is fundamental to a country's socioeconomic development.[1] Nearly 28 million South African consumers were active credit users by the first quarter of 2024.[2] By having access to credit, consumers were able to start businesses, purchase large assets such as houses or motor vehicles and pay for their children's education.[3] Business creation and higher education of consumers also contributes to an increase in job availability and economic opportunities within a country.[4] Therefore, an economy that prioritises a fair and transparent credit market enables socioeconomic growth.[5] Although having access to credit is very important, it was described as a "double-edged sword" by the Department of Trade and Industry (hereinafter referred to as the 'DTI').[6] This is due to many consumers relying on credit to purchase products and services that they are not able to afford in one payment, thus leading to a cycle wherein credit is used to fund most, if not all financial aspects of consumers' lives.[7] If credit is granted without regard to whether consumers can actually afford it, it greatens the risk of reckless credit lending practices and over-indebtedness, which is not only problematic for consumers but for society as well.[8] Therefore, the balancing act of enabling vulnerable consumers to have access to credit, without credit providers granting it recklessly, has been an ongoing challenge for legislators.[9]

The granting of credit to consumers and businesses is the business of credit providers.[10] Credit providers such as banks accumulate a large portion of their funds by charging interest and fees.[11]

[1] South African Department of Trade and Industry, National Credit Regulator *Credit Law Review, Making Credit Markets Work: A policy framework for consumer credit* (2004) 6.
[2] NCR *Annual Consumer Credit Market Report- First Quarter; March* (2024) 17.
[3] Ibid.
[4] Ibid.
[5] NCR *Credit Law Review* 6-7.
[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] T Wazvaremhaka & PC Osode 'The implications of Truworths Limited v Minister of Trade and Industry 2018 (3) SA 558 (WCC) for access to credit by historically disadvantaged and low-income consumers' (2019) 23 *Journal of Law, Democracy and Development* 4-5.
[10] Ibid, 2.
[11] Ibid.

If they were unable to charge interest and fees, it would not be rewarding to provide credit.[12] Credit providers such as banks and other formal credit lending institutions were reluctant to provide credit to vulnerable consumers due to the higher risk of their inability to pay back the credit.[13] This resulted in financial exclusion of vulnerable consumers.[14] Vulnerable consumers still required access to credit, and throughout the history of credit regulations, the legislation has tried to be more financially inclusive.[15] This is evident by the introduction of the Exemption Notices, which encouraged banks and other credit providers to lend to vulnerable consumers.[16] This allowed vulnerable consumers to have access to micro-loans and be included in the formal financial sector.[17] This unfortunately, led to an unintended consequence of the mushrooming of the micro-finance lending industry, wherein credit was granted to vulnerable consumers at excessively high interest rates and fees.[18] This encouraged reckless lending practices which resulted in over-indebtedness.[19] The unintended consequence of credit becoming too expensive for vulnerable consumers and the increase in reckless credit lending led to the introduction of legislation that was aimed at attempting to control the charging of interest and fees, however this was not properly regulated.[20] The legislation focused on disclosures of information by credit providers to consumers, with the hope that consumers would make informed choices when applying for credit.[21] Unfortunately, this did not solve the problem of reckless credit lending and over-indebtedness.[22] This led to the eventual introduction of The National Credit Act 34 of 2005 (hereinafter referred to as the 'NCA').[23]

The NCA was promulgated with the aim that consumers are treated fairly and, by extension, not subjected to reckless credit lending and over-indebtedness by eager credit providers.[24] The Act therefore requires that credit providers must ensure that consumers could afford the credit that they were applying for and it has extensive provisions which relate to reckless credit lending and over-

[12] Ibid.
[13] Ibid, 3.
[14] Ibid, 3-4.
[15] NCR *Credit Law Review* 16-17.
[16] Ibid.
[17] Ibid.
[18] Ibid, 22-23.
[19] Wazvaremhaka & Osode 'The implications of Truworths Limited' 4-5.
[20] NCR *Credit Law Review* 29-30.
[21] Ibid, 23.
[22] Ibid, 29-30.
[23] Ibid, 23.
[24] Section 3 of the NCA.

indebtedness.[25] When the NCA was first introduced, credit providers were given latitude to devise their own pre-agreement assessments that would be used to ascertain whether credit should be granted to prospective consumers.[26] This discretion that the NCA provided included the provision that such pre-lending assessments should be fair, objective, and reasonable in the circumstances.[27] However, it must be noted that the responsibility of conducting a fair assessment was shared with consumers, who were required to answer questions by credit providers truthfully and fully.[28] Credit providers are therefore offered a defence to an allegation of reckless credit lending if it can be shown that consumers failed to answer fully and truthfully, thus materially affecting the outcome of the assessment.[29]

A number of inherent flaws in the credit-lending legislation have been brought to light since the introduction of the NCA, with judicial bodies having to determine whether reckless credit lending had occurred.[30] Numerous National Consumer Tribunal (hereinafter referred to as 'Tribunal' or 'NCT') judgments pointed out instances where credit providers such as banks and retailers had taken advantage of consumers by granting credit, which led to their over-indebtedness.[31] This was when the DTI realised that there was a need for a regulatory addition to the NCA to curb reckless credit lending further.[32] As a result, the Affordability Assessment under Regulation 23A came into operation.[33]

The Regulation called for all pre-lending assessments to follow a set of compulsory practices.[34] Among others, these included non-discretionary validation of consumers' gross income, which pointed out specific procedures to follow when dealing with both formal and informal employees.[35] Credit providers must also calculate consumers' current financial income, obtain their debt repayment history, and disclose their fees, costs, and credit services to consumers.[36] The

[25] Section 81 of the NCA.
[26] Section 82 of the NCA.
[27] Ibid.
[28] Section 81(1) of the NCA.
[29] Section 81(4) of the NCA.
[30] NCR *Annual Consumer Credit Market Report* (2022/2023) 35-38.
[31] See *NCR v Mobimoola Financial Services (Pty) Ltd* NCT-18256-2014-140(1); *PN Tavern & Boyce Mathibela v South Africa Breweries*-NCT 33413-2015-114(1).
[32] NCR *Credit Law Review* 11-15.
[33] GN 10382 in GG 38557 of 13 March 2015. Chapter 3 of the National Credit Regulations now includes the Affordability Assessment under Regulation 23A.
[34] The Affordability Assessment under Regulation 23A.
[35] Ibid.
[36] Ibid.

objective of the Affordability Assessment Regulation was to create strict parameters for credit providers to fall within so as to avoid granting credit to consumers who could not afford further debt. However, credit providers are also given the discretion to grant credit when consumers fall below the threshold in the minimum expenses table when exceptional circumstances justify such deviation.[37] Despite this important deviation from the requirements, no indication has been given as to what constitutes exceptional circumstances in relation to the Affordability Assessment.

Recent case law provides that an investigation needs to be conducted by credit providers if consumers make a disclosure relating to their financial status.[38] However, these decisions do not set out the parameters of such investigation and when the investigation should be prompted. This leaves the question of whether it is at the discretion of credit providers, based on the disclosures which have been made by consumers. Alternatively, should there be a list of categories that will determine which disclosures should be investigated? Currently, the Regulation and literature remain silent on these issues, and recent case law needs to be analysed in order to answer these questions.

1.2 Purpose Statement & Research Questions

The purpose of this dissertation is, therefore, to investigate the extent of the credit provider's duty to ascertain the consumer's *true* financial position. In achieving the object of this study, the following sub-questions will need to be analysed and answered:

i. Why was there a need to introduce further Regulation?
ii. What exactly do credit providers need to do now before granting credit?
iii. What types of disclosures made by consumers need to be further interrogated by credit providers during the pre-credit lending assessment?
iv. To what extent do credit providers need to investigate the disclosure made by consumers during the Affordability Assessment?
v. What constitutes exceptional circumstances that allow for credit providers to grant credit to consumers who fall below the minimum threshold of the expense table?

[37] Ibid.
[38] *Capitec Bank Limited v Mahlangu and Another* (A16/2020) [2021] ZAMPHC 28 (25 October 2021); *Truworths Limited v Minister of Trade and Industry* 2018 (3) SA 558 (WCC).

1.3 Rationale

The introduction of Regulation 23A has provided a positive advancement in ensuring consistency among credit providers regarding the framework to be followed before granting credit. However, there is still a lack of clarity in the credit industry, which may mean that credit providers are still granting credit recklessly. This has important implications for consumers and can result in credit providers facing heavy penalties for failing to comply properly with the NCA.[39]

The contribution that this study will make to the legal fraternity is a critical analysis of consumer-credit legislation throughout the years and recent case law that points to instances where credit providers have still granted credit recklessly, despite legal advancements and provisions to curb same, such as Regulation 23A. Further, by using the relevant sources of literature and legal precedent to attempt to answer the questions posed above, this dissertation will attempt to provide suggestions that will aid in ensuring instances where credit practices may be improved and where responsible credit lending may be achieved.

1.4. Research Methodology

This dissertation will only conduct desktop research. Relevant legislation, case law and legal literature will be critically analysed as part of the research in order to answer the research questions. This desktop research will be conducted in KwaZulu-Natal.

1.5. Structure of the research paper

i. Chapter 1: This chapter will include the Research Proposal. The Research Proposal will contain a background, purpose statement, research questions, and rationale.
ii. Chapter 2: This chapter will include a brief history of South Africa's credit legislation and how credit was granted prior to the NCA and Regulation 23A's promulgation. Case

[39] The NCA provides for serious consequences and extensive penalties which can be imposed by a court or the NCT if credit providers grant credit recklessly and in some instances, the debt may even be cancelled. See sections 78-88. An examination of these sections in the NCA is beyond the scope of this mini-dissertation.

law and legislation will be analysed and discussed, highlighting the challenges related to reckless credit lending.

iii. Chapter 3: This chapter will discuss the NCA and its introduction to South African law, as well as its aims, application, and regulatory bodies. In addition, this chapter will discuss reckless credit lending, the responsibilities of credit providers and consumers prior to the conclusion of a credit agreement, the defences that credit providers may raise to allegations of reckless credit lending and the shortcomings of the NCA.

iv. Chapter 4: This chapter will discuss The Affordability Assessment under Regulation 23A and the need for its introduction into law. Case law relating to this Regulation will be discussed. It will focus on what credit providers need to do in order to grant credit. The aim of the Regulation, as well as its advantages and shortcomings, will be analysed. Recent case law will be examined, focusing on the lacuna in the law and literature. A discussion regarding whether the Regulation has achieved its intended purpose will be discussed.

v. Chapter 5: This chapter is the concluding chapter. It will summarise what was discussed in prior chapters by attempting to answer the research questions and provide recommendations to aid with the problem of reckless credit lending.

1.6. Concluding remarks

The principle upon which this dissertation is based is that the literature and legislature have yet to consider the implications that have emerged from recent case law, which seem to broaden the duty placed on credit providers. The duty to not grant credit recklessly is guided by the NCA and the Affordability Assessment under Regulation 23A, which sets out strict guidelines that credit providers have to follow. A study of recent case law however suggests that credit providers would need to go even further than these standards prescribe, and also investigate in further detail any disclosures made by consumers. The courts and the regulatory bodies, however, do not set out in detail the extent to which credit providers must go in order to conduct such investigations. Neither do they classify what types of disclosures by consumers warrant further investigation by credit providers. Stemming from such, the literature has yet to comment on the court's or regulatory bodies' reasoning and provide any insight into what the credit provider's duty truly entails. This dissertation aims to provide a critical analysis of the recent case law and offer suggestions regarding how the current approach can be enhanced.

CHAPTER 2

A BRIEF HISTORY OF SOUTH AFRICA'S CONSUMER CREDIT LEGISLATION

2.1 Introduction

Prior to 1858, there was no legislation governing interest rates.[40] This meant that credit providers had an unfettered discretion regarding what interest rates they could charge consumers for loans.[41] From 1858 however, there was an attempt by legislation to introduce some form of consumer protection as the statute allowed for unencumbered trading in money and interest, only if credit providers and consumers were in consensus regarding the loan amount and the interest rate of their choosing.[42] Through Act 41 of 1908 in Natal,[43] there was an attempt to enforce consumer protective legislation by ensuring that contracts met the requirements of the Act if they were in writing and signed with a magistrate or justice of the peace being present.[44] The contract would be void if prescribed interest rates were exceeded.[45] The Usury Act 23 of 1908, enacted by the Cape Colony, only applied to sales and purchase agreements where interest was allowed to be charged on the outstanding amount.[46] This was the advent of consumer protective legislation, which required statutory disclosures with interest rates being dependant on the amount of money lent.[47]

Otto and Grové coined this as "first-generation consumer-credit legislation."[48] The 1926 Usury Act was the first piece of consumer legislation that was applicable on a national level to moneylending transactions.[49] Interest rates were dependent on the loan amount required, with lower interest rates being charged for higher amounts of credit.[50] The 1926 Usury Act did not apply

[40] Chapter 98 of the *Free State Law Book*; JM Otto & NJ Grové *The Usury Act and Related Matters SALC Working Paper 46*, Project 67 (1991) 22.
[41] Ibid.
[42] Section 1 of Securing Free Trade in Money Law 6 of 1858.
[43] The Elliot Commonages Sub-division Act 41 of 1908.
[44] Section 2 and 3 of Act 41 of 1908.
[45] Ibid. For example, contracts of sale could not exceed 8% per annum on the outstanding amount.
[46] Section 15 of The Usury Act 23 of 1908.
[47] Ibid, Sections 3, 4 and 5.
[48] Otto & Grové *SALC Working Paper 46* at 22. There was no consistency in the manner in which each Union dealt with matters relating to interest.
[49] The Usury Act 37 of 1926
[50] Otto & Grové *SALC Working Paper 46* at 22.

to banks, hire-purchase contracts and commercial contracts that did not involve credit providers.[51] This was deemed as the "second-generation consumer credit legislation."[52] In order to be considered as valid, credit agreements under this Act needed to be in writing regarding the credit lent, with specific mention of the principal amount and agreed interest rate.[53] Furthermore, credit providers were not allowed to collect more than the sum of the loan amount and the interest, save for incidental costs.[54]

Although the 1926 Usury Act was applicable nationally, there was no consistency throughout South Africa and no way of enforcing its application.[55] So although the aim of the Usury Act of 1926 was to address the problem of high interest rates and financial charges, it failed to curb the excessive interest charged by credit providers.[56] Then from 1943, the 1926 Usury Act operated alongside the Hire-Purchase Act of 1943, with each Act catering to different types of transactions.[57] The 1926 Usury Act governed moneylending transactions to the exclusion of transactions involving banks, hire-purchase contracts or commercial contracts lacking credit, whilst the 1943 Hire-Purchase Act primarily governed the contractual aspects of transactions involving movable items.[58] Each Act had its own set of requirements and governed interest rates differently.[59] This became problematic as the scope of application and provisions regarding non-compliance with each Act resulted in a lack of uniformity when each Act essentially dealt with a credit transaction.[60]

In 1967, the Franzsen Committee was assembled and tasked with improving the 1926 Usury Act by establishing whether the Act should include hire-purchase and leasing transactions, together with determining the maximum interest rates that could be charged.[61] The Committee was further

[51] Section 14(2)(c), 14(3) and 14(4) of The Usury Act 37 of 1926.
[52] Otto & Grové *SALC Working Paper 46* at 22.
[53] Section 5(1) of The Usury Act of 1926.
[54] Ibid, Section 2(1)(a) and 2(1)(d).
[55] Otto & Grové *SALC Working Paper 46* at 13.
[56] H Chitimira 'Historical Aspects of the Statutory Regulation of Financial Inclusion for the Poor and Low-Income Earners in South Africa' (2020) 16(5) *AUDŒ* 273.
[57] Otto & Grové *SALC Working Paper 46* at 26.
[58] Ibid 28.
[59] Ibid.
[60] Ibid.
[61] Ibid and G Franzsen *Commission of Inquiry into the Usury Act of 1926: Franzsen Report I* (1967) 15.

tasked with deciding whether disclosures should be made to consumers regarding interest rates and incidental fees borne out of the credit transaction. [62]

The Franzsen Committee's recommendations led to the 1926 Usury Act being repealed and thereafter, the Limitation and Disclosure of Finance Charges Act 73 of 1968 was promulgated, which later went on to be named the 1968 Usury Act.[63] The 1968 Usury Act was promulgated because of the need to address the high interest rates that were being charged by credit providers.[64] However, an unforeseen consequence of this new legislation was that low-income earners were unable to participate in the formal financial market or to gain access to credit.[65]

The 1943 Hire-Purchase Act remained in effect with the Sale of Land on Instalments Act.[66] The 1968 Usury Act did not provide a standard interest rate but provided for maximum interest rates depending on the type of transaction.[67] This rate was not fixed and depended on the rate fixed by the relevant Minister at the time.[68] The purpose of the 1968 Usury Act was to prevent credit providers from charging interest and finance charges that exceeded the prescribed maximum rate, thus amounting to the crime of usury.[69] However, there was a serious problem in that credit legislation was not well integrated and the legislators did not attempt to consolidate these statutes.[70] This fragmented approach resulted in credit providers escaping the legislation by restructuring credit transactions in order to avoid being subjected to the interest rate regulations.[71] Chitimira argues further that another problem with the 1968 Usury Act is that it excluded vulnerable consumers from the formal financial sector.[72] Since interest rates were capped, large credit lending institutions such as banks were deterred from lending money to low-income earners due to a fear of them defaulting and ultimately not seeing their transactions as viable or largely profitable.[73]

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[62] Chitimira 'Historical Aspects of Statutory Regulation' 273.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] The Sale of and on Instalments Act 72 of 1971.
[67] The Usury Act of 1968.
[68] Ibid. This was tasked to the Minister of Finance at the time.
[69] NJ Grové & JM Otto *Basic Principles of Consumer Credit Law* 2 ed (2002) 97. The term "finance charges" included all incidental charges where a loan was extended.
[70] Otto & Grové *SALC Working Paper 46* at 28.
[71] Ibid.
[72] Chitimira 'Historical Aspects of Statutory Regulation' 274.
[73] Ibid.

The "third generation" of consumer credit legislation saw the passing of the Credit Agreements Act of 1971.[74] This Act replaced the Hire-Purchase Act.[75] The Sale of Land on Instalments Act was replaced by the Alienation of Land Act.[76] Notwithstanding the promulgation of these Acts, the fragmented approach to consumer credit legislation remained.[77] This fragmented legislation led to the eventual introduction of the National Credit Act,[78] which sought to bring legislation in line with the changing credit market.[79] A study of the history of consumer credit legislation in South Africa demonstrates that there has been a concern regarding the interest rates and finance charged by credit providers when consumers borrow money.[80] Consumers often fail to understand the financial implications of these charges and this leads to consumer over-indebtedness. In order to combat this problem, the legislature has over time sought to introduce regulations that deal with the interest and finance charges if it is only to the extent that consumers are properly informed of these charges in the hopes that they will make informed decisions before accessing credit. The focus of this mini-dissertation is on the responsibilities which credit providers have to inform consumers. In order to understand the responsibilities that credit providers currently bear prior to granting credit to consumers, their responsibilities under the previous credit law regime need to be examined.

2.2 The Credit Agreements Act 75 of 1980.

2.2.1 Application

The Credit Agreements Act was applicable to specified credit agreements that related to movable goods.[81] Additionally, this Act was applicable to all credit agreements or transactions determinable by the Administrator General in the Government Gazette and transactions under R500 000.[82] This

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[74] Otto & Grové *SALC Working Paper 46* at 28.
[75] Ibid.
[76] 68 of 1981.
[77] NCR *Credit Law Review* 29.
[78] Act 34 of 2005.
[79] NCR *Credit Law Review* 1.
[80] Ibid.
[81] The Credit Agreements Act 75 of 1980.
[82] JM Otto & R-L Otto, *The NCA explained* 2 ed (2016) 4.

was to the exclusion of agreements that related to goods purchased or hired using credit for the sole purpose of business, or credit transactions wherein the State was the credit provider.[83]

The Administrator General had the power to exempt any person or transaction from any part of this Act as they deemed necessary.[84] This would be done via the Official Gazette.[85] If the Administrator General made any amendments or revocations, this would need to be published in the Official Gazette.[86] This would allow the interested parties to raise written objections or representations by the given date in said notice.[87] The revocation or amendment would only come into operation 60 days after the notice was published, save for instances wherein the written objections or representations altered such notice.[88]

2.2.2 Aims

The aim of the Act was to repeal the Hire-Purchase Act and all incidental matters and to regulate credit transactions that related to movable goods or services.[89]

2.2.3 Requirements that credit providers had to meet before granting credit

Section 4 of the Act provided that before credit providers entered into credit agreements at places other than their place of business, consumers needed to be aware that they could cancel credit agreements within five days upon written notice or return the goods to credit providers.[90] Furthermore, consumers needed to be aware that the five-day period was calculated by excluding the first day of the agreement and any public holidays or weekends.[91] This means that it was the duty of credit providers to inform consumers of their right of cancellation. If credit agreements were cancelled by consumers, credit providers were required to refund all monies that were paid

[83] Section 2(1) of The Credit Agreements Act 1980.
[84] The Credit Agreements Act 75 of 1980, Section 2(2).
[85] Ibid.
[86] Ibid, Section 2(3).
[87] Ibid.
[88] Ibid, Section 2(4).
[89] The Credit Agreements Act 1980 Preamble.
[90] Ibid, Section 4.
[91] Ibid.

by consumers within ten days after receiving written notice.[92] Section 8 also provides that credit providers had a duty not to induce consumers to enter credit agreements via promises of benefit or reward unless such would be because of the agreement.[93]

2.2.4 Analysis of the requirements that credit providers have to meet prior to granting credit to consumers

From the above limited discussion, it can be seen that the Act imposed no requirements on credit providers before they granted credit to consumers, save for informing them of their right to cancellation of the agreement. Beyond this, there was no inspection or investigation into the financial means of consumers and their ability to be a party to and fulfil the requirements of credit transactions. This leads to the inevitable conclusion that there was no responsibility on credit providers under this legislation to prevent reckless credit lending. There was also no limit on the fees which could be charged by credit providers.

2.3 The Usury Act 73 of 1968

2.3.1 Introduction

Prior to the promulgation of this Act, vulnerable consumers were excluded from the formal financial market and having access to credit due to the excessive interest rates charged by private creditors.[94] Although this Act did not provide standard interest rates, it did provide an interest rate cap for specified transactions, which was determinable by the Minister of Finance. [95] This was a step forward in ensuring that consumers were not taken advantage of when it came to interest rate charges.

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[92] Ibid, Section 13(2) and (3).
[93] Ibid, Section 8.
[94] Chitimira 'Historical Aspects of Statutory Regulation' 273.
[95] The Usury Act 73 of 1968.

2.3.2 Application

The Act applied to moneylending, credit, and leasing transactions and those matters incidental to such transactions between credit providers and consumers.[96] This Act was restricted to money lending transactions under R500 000 and lease agreements that did not exceed R100 000 in value.[97] This meant that the Usury Act only afforded protection to consumers if the principal debt did not exceed the above monetary restrictions.[98]

2.3.3 Aims

The aim of the Act was to limit and disclose finance charges payable by consumers with respect to credit, moneylending, leasing transactions, and all incidental costs that arose because of such transactions.[99] This Act served to repeal the Usury Act of 1926.[100] It was also aimed at curbing the unreasonably high interest rates charged by financial institutions and increasing the credit market's range by aiming to include low-income earners and vulnerable consumers who were previously unable to access credit.[101]

2.3.4 Requirements that credit providers had to meet before granting credit

Before moneylending or credit transactions were concluded, credit providers had to disclose the finance charges attached to the transaction if consumers demanded disclosure.[102] The disclosure had to be separate, distinct, and in writing.[103] If consumers did not themselves make such a demand, credit providers had to disclose the finance charges that were attached to each transaction separately and distinctly on every instrument of debt that was to be used within the transaction.[104] This disclosure had to include the relevant transaction amount, all other charges, either included or not included in the principal amount, the principal debt and the amount of finance charges

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96 Ibid.
97 The Usury Act 73 of 1968.
98 Otto & Otto *The NCA explained* 4.
99 The Usury Act 73 of 1968, Preamble.
100 Ibid.
101 Chitimira 'Historical Aspects of Statutory Regulation' 274.
102 Section 3(1) of The Usury Act 73 of 1968.
103 Ibid.
104 Ibid.

applicable, the annual rate for finance charges and the date when said charges were payable and how such dates were determined.[105]

2.3.5 Analysis of the requirement that credit providers had to meet before granting credit as per the 1968 Usury Act

The Act made provision for mandatory disclosures to consumers in relation to finance charges, principal debts, dates when these amounts were payable and how. Although this was a positive advancement in providing consumers with the necessary information relating to their transactions, it in no way sought to establish the capability of consumers to enter or fulfil such agreements. By allowing for maximum interest rates, the Act worked counterproductively as banks were reluctant to grant credit to low-income consumers at lower rates, for fear of them being unable to honour their credit repayments.[106] This furthered the financial exclusion of vulnerable consumers from the formal credit market.[107]

2.4 The Exemption Notices

2.4.1 Introduction

In order to facilitate the granting of loans to vulnerable consumers, the legislature in 1992, introduced an exemption to the Usury Act. It only applied to loans less than R6000.[108] The aim of this legislation was to open up the credit market to vulnerable consumers.[109] The purpose of the 1992 Exemption was to remove interest rate restrictions on applicable transactions.[110] This was done to allow small loans to be granted to vulnerable consumers and to promote the micro-financing of Small, Medium and Micro-Enterprises (hereinafter referred to as SMMEs) in South Africa.[111] What this in effect meant was that consumers who were constrained by the requirements

[105] Ibid, Section 3(1) a-f and 3(2)a-g and 3(2)A.
[106] A Schoombee A 'South African Banks and the Unbanked: Progress and Prospects' 2004 *South African Journal of Economics* 586 & 603.
[107] Section 3(2A) of the The Usury Act 73 of 1968.
[108] Chitimira 'Historical Aspects of Statutory Regulation' 275-276.
[109] GN R3451 in GG 14498 of 31 Dec 1992.
[110] Chitimira 'Historical Aspects of Statutory Regulation' 275.
[111] NCR *Credit Law Review* 5.

of the Credit Agreements Act when it came to buying household goods such as furniture and television sets, could now apply for a loan from a micro-lender which was entitled to charge whatever interest rate they preferred. The only real restriction was that the micro-lender had to be registered with the Micro Financing Regulator.[112] This allowed vulnerable consumers to purchase household goods that were less than R6000 without having to pay a deposit. This also resulted in consumers applying for multiple micro-loans at once so that they could buy items that were more expensive (in excess of R6000).[113] There was thus no restrictions on the loans from the micro-lender. This led to consumers owing up to or more than six times the original cash price item over a three-year period. Consumers were not aware of the consequences of these micro-finance loans.[114] This resulted in over-indebtedness as there was no restrictions on the number of loans that could be granted to a single consumer. In 1992, the Exemption of the Usury Act meant that loans became easily available, which allowed consumers to have unfettered discretion as to what the loan money would be used for.[115] As a result of the 1992 Exemption Notice, small loans were exempted from interest rate restriction, and this led to an increase in micro-lending and, consequently, high interest rates and abusive practices by predatory credit providers.[116] These loans were short-term in nature and did not allow for proper financing of long-term assets.[117] In effect, this led to consumer protection concerns and indebtedness. Hence, there was reliance on the provisions of the Exemption Notice of 1992 in order to access credit to fulfil short-term needs.[118]

These shortcomings of the 1992 Exemption Notice precipitated the introduction of the 1999 Exemption Notice.[119] This Exemption exempted the Usury Act from transactions under R10 000. The 1999 Exemption Notice was introduced with the aim of providing low-income consumers with the opportunity to have access to credit products.[120] This, however, was not achieved as the lack of regulatory oversight on applicable transactions led to the mushrooming of micro-finance

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112 Chitimira 'Historical Aspects of Statutory Regulation' 276.
113 Ibid.
114 NCR *Credit Law Review* 16.
115 Ibid.
116 M Kirsten 'Policy Initiatives to expand financial outreach in South Africa' 2006 *Paper delivered at World Bank/Brookings Institute Conference* 4.
117 NCR *Credit Law Review* 16.
118 Kirsten 'Policy Initiatives to expand on financial outreach' 4.
119 NCR *Credit Law Review* 5.
120 Chitimira 'Historical Aspects of Statutory Regulation' 276.

lending institutions.[121] This, in turn, left low-income consumers unprotected and vulnerable to exploitation of high interest rates and unscrupulous credit terms.[122] In the same year, the Micro Finance Regulatory Council (hereinafter referred to as 'the MFRC') was established to regulate unfettered interest rates amongst vulnerable consumers.[123] Micro-finance credit providers had to register with the MFRC in order to be exempt from the Usury Act interest tariffs.[124] The aim of this body was to provide consumer protection to consumers who fell within this category of being exposed to unlimited and unregulated interest rates.[125] If micro-lenders did not belong to the MFRC, they had to charge the interest rate specified in the Usury Act.[126] The MFRC tried to introduce some restrictions aimed at consumer protection, but was ultimately unable to solve the increasing problem of reckless credit lending and over-indebtedness.[127]

2.4.2 Requirements that credit providers had to meet before granting credit

In order for the 1992 Exemption to apply, credit providers could not grant credit in excess of R6000 or have a repayment period that exceeded 36 months.[128] The 1999 Exemption Notice was applicable to transactions under R10 000 with a repayment period not exceeding 36 months.[129] This meant that if credit transactions fell below these amounts, the statutory interest rates per the Usury Act did not apply.

2.4.3 Consequences and Analysis of the Exemption Notices

Micro-lending ensured that vulnerable consumers who were excluded from the formal credit market had an opportunity to access credit, however, at an extremely high interest rate and without any regulation. This resulted in vulnerable consumers remaining poverty-stricken and over-

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121 Ibid, 275.
122 Ibid, 276-277.
123 NCR *Credit Law Review* 4.
124 Chitimira 'Historical Aspects of Statutory Regulation' 275.
125NCR *Credit Law Review* 7.
126 Ibid.
127 Ibid.
128 Chitimira 'Historical Aspects of Statutory Regulation' 275-276.
129 GN R713 in *GG 20145* of 1 June 1999.

indebted.[130] This led to the DTI establishing the MFRC. The MFRC provided regulations for micro-finance lenders to register with the relevant regulatory bodies in order for their conduct to be monitored.[131] Those that did not were unable to grant credit under the 1992 Exemption. The 1992 Exemption Notice had the opposite effect of its intended aims, despite the DTI trying to regulate the granting of micro-finance credit. It had led to over-indebtedness and mushrooming of the micro-finance credit industry as the inadequate regulations and poor enforcement enabled credit providers to take advantage of the system.[132]

In order to address growing concerns about the over-indebtedness of consumers in the micro-lending industry after the 1999 Exemption notice, the MFRC introduced the National Loans Register together with disclosure obligations. However, this was not enough to combat the financial exclusion of vulnerable consumers in South Africa.[133]

2.5 Analysis of the credit legislation

According to the DTI, there was a lack of consistency in the transactions that were protected within the consumer credit legislation at that time, with the 1968 Usury Act being more comprehensive.[134] The Credit Agreements Act only applied to transactions listed by the Minister of Trade and Industry in a Government Notice.[135] Credit agreements with respect to items that were not listed were not covered by the Act. This inconsistency of the legislation relating to consumer credit created a legal dilemma in that some items were regulated by either one Act, both or neither.[136] The result of this meant that some transactions were not regulated, whilst others were too regulated.[137]

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[130] FN Okurut 'Access to Credit by the Poor in South Africa: Evidence from Household Survey Data 1995 and 2000' (2006) 13(06) *Stellenbosch Economic Working Papers* 1-33.
[131] M Whittaker 'South Africa's National Credit Act: Possible Model for the Proper Role of Interest Rate Ceilings for Microfinance' 2008 570-571.
[132] Chitimira 'Historical Aspects of Statutory Regulation' 275-276.
[133] P Meagher & B Wilkinson 'Filling the Gap in South Africa's Small and Micro Credit Market: An Analysis of Major Policy, Legal and Regulatory Issues' (2011) 02(11) *IRIS Discussion Papers on Institutions and Development* 1-56. See also Schoombee 'South African Banks and the Unbanked' 586-603.
[134] Chitimira 'Historical Aspects of Statutory Regulation' 275-276.
[135] NCR *Credit Law Review* 22.
[136] Chitimira 'Historical Aspects of Statutory Regulation' 275-277.
[137] Ibid.

With the inconsistencies that this regulatory framework brought and with different regulatory requirements that applied to credit transactions that were fundamentally similar, it was clear that a change needed to be explored.[138] In addition, there was an unwillingness on the part of reputable credit providers to enter into credit agreements with vulnerable consumers and so these consumers had to find credit elsewhere.[139] This led to the mushrooming of the micro-lending industry and an increase in unscrupulous credit providers that failed to follow the limited laws that did exist.[140] The lack of enforcement of the legislation enabled this, which ultimately resulted in consumers becoming over-indebted.[141]

Although the predecessor legislation did not consider when court orders were granted against consumers that suggested that over-indebtedness could be a result of reckless credit lending, credit providers were not always to blame as the weakness in insolvency laws had an indirect influence on reckless behaviour by consumers.[142] This was because consumers would sometimes incur debt to pay off existing debt and not disclose the entirety of their existing liabilities.[143]

As a result of the increasing problems within the consumer credit legislation, the DTI highlighted several inconsistencies relating to, among other things; the standards of compliance, registration costs and compliance costs that were applicable to moneylending (including loans from banks) that fell under the Usury Act and the Exemption Notice and credit for items bought that were listed under the Credit Agreements Act and those items not listed or regulated by any statute.[144]

In 1994, the South African Law Reform reviewed the 1968 Usury Act (now repealed), and the DTI recognised a need for a legislative review of South Africa's consumer credit legislation.[145] Following this, several other reports reviewed the lack of enforcement and effectiveness of the consumer credit legislation.[146] Kelly-Louw suggested that a number of flaws with the NCA's predecessors existed, which gave rise to legislative reform, which, among others, included the rise

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[138] Ibid.
[139] Ibid.
[140] NCR *Credit Law Review* 23.
[141] Chitimira 'Historical Aspects of Statutory Regulation' 275-277.
[142] NCR *Credit Law Review* 30.
[143] Chitimira 'Historical Aspects of Statutory Regulation' 275-277.
[144] NCR *Credit Law Review* 22.
[145] M Kelly-Louw 'Introduction to the NCA: A survey of a recent important statute and its regulations' (2007) *JBL* 142.
[146] Ibid. The Strauss Report on Rural Finance; *The National Small Enterprises Promotion Agency in 1999; The Policy Board for Financial Services and Regulations reports on SME's access to Finance in SA* (2001).

in reckless credit lending by credit providers, unscrupulous credit practices and debt collection processes by micro-lenders and other role players, with weak protection for vulnerable consumers.[147]

Kelly-Louw further suggested that the legislation was piecemeal and non-cohesive, and this affected vulnerable consumers' access to finance.[148] This led to consumers seeking credit from micro-finance credit providers which resulted in a cycle of over-indebtedness. Due to the fragmented approach of the legislation, there was a lack of enforcement and, thus, a lack of accountability.[149]

In 2002, the DTI mandated the Technical Committee to undertake a credit law review to investigate these problems and provide recommendations.[150] This review was organised by the MFRC.[151] The MFRC tried to implement measures to promote financial inclusion amongst low-income earners and thereby reduce the level of reckless credit lending and over-indebtedness.[152] They also tried to learn from the shortcomings of the 1992 Exemption by providing regulations that monitored micro-finance lenders and curtailed reckless credit lending. By allowing low-income earners to access credit for transactions below R10 000 under the 1999 Exemption, vulnerable and low-income earners were still charged unreasonable interest rates and were thus taken advantage of as the fragmented legislation resulted in consumers turning to unsecured credit.[153] This led to predatory credit practices such as reckless credit lending with consumers becoming over-indebted as they were unable to afford the unreasonable interest rates.[154] Consequently, formal financial institutions such as banks were not eager to lend money to low-income earners as a result of their credit standing and inability to pay back credit. This caused vulnerable consumers to continue to rely on the micro-finance credit industry due to desperation, and the cycle of over-indebtedness continued.

[147] Kelly-Louw 'Introduction to the NCA' 142.
[148] NCR *Credit Law Review* 30.
[149] Ibid.
[150] NCR *Credit Law Review* 30. See Kelly-Louw 'Introduction to the NCA' 142.
[151] Kelly-Louw 'Introduction to the NCA' 142.
[152] NCR *Credit Law Review* 22.
[153] Kelly-Louw 'Introduction to the NCA' 142.
[154] Ibid.

The adverse effect of the predecessor consumer credit legislation led to government intervention with the decision to have a single piece of credit legislation that was monitored and regulated by a statutorily mandated regulator.[155] This gave rise to the DTI investigating the shortcomings of the credit legislation in South Africa and compiling a report with one of the recommendations being the promulgation of a single comprehensive piece of credit legislation that ensured the modernisation and simplification of the existing laws.[156] This led to the introduction of the NCA. The DTI's mission to transform the legislative framework made several other recommendations to strengthen the effect of the single piece of credit legislation it was advocating for.[157] Amongst those, was the aim of addressing the reliance on debt and targeting reckless credit lending. In doing so, it aimed at establishing a regulator that would monitor the compliance of credit providers by meting out severe penalties for non-compliance.[158] The DTI further endeavoured to require credit providers to conduct affordability assessments prior to approving credit applications.[159] In doing so, the DTI suggested improving the credit information infrastructure in order to assist credit providers in conducting affordability assessments.[160] The recommendations were considered and accepted by government, and the NCA was promulgated thereafter.

[155] Ibid.
[156] NCR *Credit Law Review* 17-18.
[157] Ibid.
[158] Ibid.
[159] Ibid.
[160] Ibid.

CHAPTER 3

THE NCA AND RECKLESS CREDIT LENDING PRIOR TO THE INTRODUCTION OF REGULATION 23A

3.1 Introduction to the NCA

As of March 2024, out of nearly 28 million active credit consumers in the South African economy, 10.45 million were not in good standing.[161] This amounted to 36.29% of South African consumers that were not in good standing. Authors such as Adewale worry that extremely high credit consumption is concerning for a country with an extremely high unemployment rate and one of the lowest saving ratios to household income.[162]

Prior to the introduction of the NCA, the credit market was primarily regulated by the Usury Act and the Credit Agreements Act, together with the Exemption Notices.[163] Whilst these pieces of legislation existed to regulate credit agreements between consumers and credit providers, this was unfortunately insufficient in offering any meaningful protection to consumers.[164] According to the authors Renke, Roestoff and Haupt, this legislation only offered limited remedies to consumers and was not comprehensive enough to protect the interests of consumers. [165] Vulnerable consumers were taken advantage of by micro-lenders and were falling victim to reckless credit lending. Credit was being lent at unfair rates, and the consequences of failing to repay the credit were excessive and unscrupulous.[166]

The 1926 Usury Act governed credit providers' ability to charge for the loans that they granted and anything incidental thereto.[167] It was a very complex piece of legislation that prompted its replacement with the Limitation and Disclosure of Finance Charges Act 73 of 1968. This Act was then renamed the Usury Act 73 of 1968 and contained several amendments that made it difficult

[161] *NCR Annual Report (2022/2023*) 21.
[162] AR Adewale 'Financial Regulation, Credit Consumption And Economic Growth – An Analysis Of The National Credit Act In South Africa' (2014) 30 *Journal of Applied Business Research* 376.
[163] Kelly-Louw 'Introduction to the NCA' 142.
[164] Adewale 'Financial Regulation, Credit Consumption and Economic Growth' 376.
[165] Renke, Roestoff & Haupt 'The National Credit Act: New parameters for the granting of credit in South Africa' 2022 *Obiter* 28.
[166] Ibid.
[167] J Otto 'The History of consumer credit legislation in South Africa' (2010) 16(1) *Fundamina* 266.

to comprehend.[168] The 1968 Usury Act was very cumbersome and did not effectively promote the principle of fairness within the credit market.[169]

Although these Acts were introduced to exist simultaneously and to complement each other, it became challenging to apply the laws without also having to rely on principles of the common law and other pieces of legislation.[170] After the South African Constitution was introduced,[171] the economy had to make a progressive shift and make active changes to address the shortcomings of consumer credit legislation.[172] The Usury Act and Credit Agreements Act left much to be desired as they still did not address the apparent disparities in consumer law that resulted in reckless credit lending and over-indebtedness. Both the Usury Act and the Credit Agreements Act needed to be applied when dealing with credit agreements in the past.[173] Practically, this made it cumbersome to apply as each Act had different scopes of application, especially in circumstances where both Acts applied to one agreement.[174] These pieces of legislation left consumers relying on the law in a piecemeal fashion, and it became apparent that a single precedent needed to be codified that effectively addressed the concerns within the credit market.[175]

Vulnerable consumers were not financially aware and were, therefore, unable to protect themselves against discriminatory and unfair practices such as reckless credit lending.[176] The DTI realised that a change needed to be made and that such a change would need to address the inherent flaws that existed within consumer credit law.[177] The government tasked the DTI with assessing the credit market. The failures of the Usury Act and Credit Agreements Act were noted, and solutions were proposed.[178] These efforts were drawn from commentaries and representations made by various academics, legal consultants, and policymakers. In 2006, The NCA was assented to by the South African president.[179] The NCA came into effect in a piecemeal fashion in order to allow for role players within the credit industry to register under the Act and align themselves with

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[168] Ibid 261-262.
[169] Otto 'The history of consumer credit legislation in South Africa' 261-262.
[170] Ibid.
[171] The 1996 Constitution of the Republic of South Africa.
[172] Ibid.
[173] Otto & Otto *The NCA explained* 4.
[174] Ibid.
[175] NCR *Credit Law Review* 22.
[176] Ibid.
[177] Ibid.
[178] Ibid 17-18.
[179] GN 230 in GG28619 of 15 March 2006.

the provisions of the Act.[180] The National Credit Regulator (hereinafter referred to as 'the NCR') and other role players were registered under the NCA first, and the NCT and its regulations were established thereafter.[181] Different from its predecessors, the NCA's enactment gave rise to provisions that specifically deal with reckless credit lending, over-indebtedness, and debt relief measures.[182]

3.2 Application

The NCA applies to consumers who are categorised as natural persons and applies only to juristic persons under limited circumstances wherein certain credit agreements or transactions are involved.[183] The NCA protects natural persons regardless of the amount of credit involved.[184] To determine which transactions will qualify as credit agreements, the definitions section of the Act needs to be considered. The definition of a credit agreement is broad, and the Act, therefore, includes a wide variety of agreements within its scope of application.[185] Unlike its predecessors, the NCA applies to any credit agreement, irrespective of the amount of credit involved.[186]

Simply put, the NCA applies to three categories of persons, namely, those who grant credit, those who receive credit, and those who regulate credit.[187] The Act, therefore, applies whenever a loan of money is made to a consumer, and the consumer is given an extended time to repay the loan, with interest being charged on that loan, which is an arms-length transaction.[188] The NCA is applicable to credit providers who register with the National Credit Regulator.

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[180] Ibid.
[181] Otto & Otto *The NCA explained* 8.
[182] NCR *Annual Report* (2022/2023) 23. Debt counselling is a formal legal relief measure to over-indebtedness that is allowed by the NCA to assist consumers in engaging in responsible and manageable repayment of their debt.
[183] Section 1 of the NCA.
[184] Otto 'The history of consumer credit legislation in South Africa' 15.
[185] Ibid.
[186] Otto & Otto *The NCA explained* 4.
[187] Ibid.
[188] Ibid.

3.3 Aims

The NCA was enacted to promote a consistent credit framework by ensuring that consumers have equal access to credit markets that are fair, transparent, and reasonable.[189] The NCA repeals the Usury Act and the Credit Agreements Act.[190] The purpose of the NCA was to address the unfair credit practices, anti-competitive behaviour and lack of disclosures by role players.[191] The NCA aims to ensure that adequate information is provided and that credit standards and regulations are improved.[192]

The Act allocates specific sections for reckless credit lending and predatory lending and offers regulations on how this can be avoided.[193] The Act promotes strategies to combat over-indebtedness and to further consumer education relating to reckless credit practices.[194] The NCA's aims are promoted by the establishment of regulatory bodies such as the NCR and the NCT.[195]

3.4 Institutions

3.4.1 National Credit Regulator

The NCA established the NCR that is tasked with ensuring that credit lending occurs lawfully and fairly.[196] The NCR serves as the "watchdog" of the credit industry and oversees the behaviours of credit bureaux, debt counsellors and registered credit providers.[197] The NCR polices South Africa's credit industry, controls credit bureaux, and allows alternative dispute resolution mechanisms.[198] The NCR aims to ensure that the rights of consumers are considered and enforced.[199] The NCR is aimed at enforcing the NCA by holding relevant role players accountable

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[189] Otto 'The history of consumer credit legislation in South Africa' 7. See also The National Credit Act 34 of 2005, Section 3 "to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient and accessible credit market and industry, and to protect consumers."
[190] Kelly-Louw 'Introduction to the NCA' 145.
[191] Ibid.
[192] Ibid.
[193] Chapter 4, Part D of the NCA.
[194] Kelly-Louw 'Introduction to the NCA' 145.
[195] NCR *Credit Law Review* 13.
[196] NCR *Annual Report* (2022/2023) 17. The PFMA classifies the NCR as a public entity that falls within the ambit of Schedule 3. Section 12 and Section 40 of the NCA.
[197] Ibid, NCA Section 12. See ML Vessio 'What does the NCR regulate?' 2008 *SA Merc LJ* 228.
[198] Otto 'History of consumer credit legislation in South Africa' 15.
[199] Chitimira 'Historical Aspects of Statutory Regulation' 279.

for non-compliance.[200] This enforcement is effected by referring matters to the NCT and other relevant bodies.[201]

The NCR also monitors and facilitates the registration, suspension and cancellation of registration of credit providers, debt counsellors and credit bureaux.[202] The NCR can monitor role players via remote/desktop mechanisms, on-site visits, reviewing mandatory reports, analysis of market conduct and studies that monitor registrations.[203] It must act as a medium to receive and initiate complaints and conduct investigations into allegations of contraventions of the Act.[204] In instances of over-indebtedness or reckless credit lending, the NCR has the authority to instruct an inspector to investigate complaints and to refer a complaint to a debt counsellor, ombud or consumer court for alternative dispute resolution.[205] The NCR has a mandate to act on behalf of consumers due to the historic imbalance of negotiating and bargaining power that existed between credit providers and consumers.[206] This is especially useful for vulnerable consumers who cannot negotiate and litigate on their own.[207]

3.4.2 National Consumer Tribunal

Due to the expected influx of complaints and respective investigations that would have to be carried out , the NCT was established by the NCA with jurisdiction over the entirety of South Africa.[208] The NCT was established to adjudicate credit disputes and to ensure that the NCA was correctly complied with.[209] For the most part, the NCT is very similar to a court. However, it cannot pass specific orders and is limited to its powers as directed by the NCA.[210] The NCT has a mandate to pass interim and final orders, to issue interdicts, confirm consent orders, issue administrative fines, and issue suspensions or cancellations of a person's registration under the NCA. It has the ability to declare certain conduct as prohibited by the NCA, and any order issued

[200] Vessio 'What does the NCR regulate?' 228.
[201] Ibid.
[202] Section 14 and 53 of the NCA.
[203] NCR *Annual Report* (2022/2023) 31.
[204] Section 15 and 136 of the NCA.
[205] Section 139(1) of the NCA.
[206] Ibid.
[207] NCR *Credit Law Review* 34.
[208] Otto & Otto *The NCA explained* 35 and NCR *Credit Law review* 34.
[209] Chitimira 'Historical Aspect of Statutory Regulation' 279.
[210] Section 89(5) & 131 of the NCA.

by the NCT has the force and effect of an order issued by a High Court.[211] Matters of reckless credit lending are among those that are referred to the NCT by the NCR.[212]

The Tribunal's orders are binding on the NCR, consumer courts, ombuds, magistrates courts, debt counsellors and provincial credit regulators.[213] The NCT may decide that credit providers have a complete defence against allegations of reckless credit lending if consumers fail to disclose or provide information that was material in the pre-lending assessment.[214] The list of powers by the NCT is not exhaustive and is found in various sections of the NCA.[215]

3.5 Reckless credit lending before Regulation 23A

3.5.1 What constitutes reckless credit lending?

Section 81, which deals with reckless credit lending, may be one of the most critical sections of the NCA.[216] Credit providers must be aware of what behaviour constitutes reckless credit lending and must guard against engaging in such prohibited conduct.[217] Reckless credit lending can lead to over-indebtedness.[218] Responsible credit lending needs to be attained to achieve the purpose of the NCA and to promote the protection of consumers against unfair credit practices.[219] It is however, important to note that over-indebtedness can occur without reckless credit lending.[220] Renke suggests that consumer education surrounding concepts such as reckless credit lending, amongst others, is key to ensuring that consumers do not fall victim to such predatory practices.[221]

The enactment of the NCA introduced new concepts in South Africa, such as reckless credit lending, over-indebtedness and corresponding preventative measures.[222] The NCA regulates

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[211] Section 149, 150 and 152(1) of the NCA.
[212] NCR *Annual Report* (2022/2023) 33.
[213] Section 152(1) of the NCA.
[214] Section 81(4)(b) of the NCA.
[215] Sections 62(1) & (3), 65(4) & (5), 72(6), 110(5), 113(4), 99(2), 114, 128(2), 71(3), 57(1), 55(1), 54; 56(1) of the NCA.
[216] S Renke 'Measures in South African Consumer Credit Legislation aimed at preventing reckless credit lending and over-indebtedness' 2011 *THRHR* 15.
[217] ML Vessio 'Beware the provider of reckless credit' 2009 TSAR 274.
[218] Renke 'Measures in South African Consumer Credit Legislation' 1.
[219] Ibid.
[220] Ibid, 2.
[221] Ibid, 1.
[222] Otto 'The history of consumer credit legislation in South Africa' 16.

interest rates and service fees of credit agreements, with the conclusion and termination of such agreements and enforcement of consumers' and credit providers' rights.[223] An essential goal of the NCA is to address the issue of reckless credit lending and reduce consumers' over-indebtedness. Credit providers must conduct affordability assessments to establish consumers' ability to repay the borrowed credit and meet their obligations under the credit agreement.[224]

Reckless credit lending, over-indebtedness and consumer protection are dealt with in Sections 78-88 of Chapter 4 of the NCA.[225] Specifically, reckless credit lending is governed by Part D of the NCA.

When consumers apply for credit, credit providers have a duty to ensure that consumers can afford to repay the credit and that the granting of credit would not result in reckless credit lending.

Section 81 (3) gives a general prohibition on reckless credit lending. [226] According to Section 80 of the NCA, credit is said to have been granted recklessly in three instances, when:

a. Credit providers fail to conduct an affordability assessment.

b. Credit providers conduct the affordability assessment but fail to consider the information provided.

c. Credit providers grant credit despite indications that the consumers could not afford the credit.[227]

As per the first instance, if credit providers fail to conduct a pre-lending assessment to assess consumers' creditworthiness, it is automatically deemed reckless.[228] This means that consumers were granted credit without knowing their financial status.[229] As per section 81 of the NCA, the outcome of the assessment is immaterial. In other words, credit granting would have been deemed

[223] Ibid.
[224] Ibid.
[225] The National Credit Act 34 of 2005.
[226] Ibid.
[227] Ibid, Section 80.
[228] CM Van Heerden & A Boraine 'The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005' 2011 *De Jure* 650-651.
[229] I Nel *Affordability Assessments in South African Law* (unpublished PhD thesis, University of Johannesburg, 2020) 114.

reckless if no assessment had been conducted, even if the outcome had yielded that consumers were creditworthy. [230]

In *NCR v Parsons Home Appliances*,[231] the Respondent was the co-owner of a furniture store and had a number of clients that he had extended credit to. He had conceded to conducting informal assessments prior to granting credit and did not have any proof to detail the steps taken when deciding to grant credit.[232] The NCA and Regulations do not make provision for credit providers to conduct informal assessments.[233] Due to the Respondent failing to conduct a formal affordability assessment as per Section 81(2), credit was deemed to have been granted recklessly.[234] This is despite the fact that the Respondent argued that consumers would have been creditworthy if the formal assessment was conducted.[235] The NCT held that the Respondent failed to consider the financial means, prospects and obligations of consumers consistently.[236] The Respondent would request credit bureaux information for some consumers but not all.[237] The Respondent also did not use the prescribed minimum expense table when deciding to grant credit.[238] Consequently, the NCT held that reasonable steps were not taken by the Respondent to ascertain the creditworthiness of consumers. The court ordered that the credit agreements be set aside.[239]

In *Desert Star Trading v No 11 Flamboyant Edleen*,[240] two unemployed consumers alleged that credit was granted recklessly as the credit providers failed to conduct an affordability assessment. They alleged further that had the assessment been conducted, credit would not have been granted to them.[241] The court made no finding on the allegation of reckless credit and merely ordered the setting aside of the order to wind up the consumers' estate.[242] Although the court did not find whether reckless credit lending occurred, it is submitted that since it was not disputed that no affordability assessment was conducted, reckless credit lending occurred.

[230] The National Credit Act 34 of 2005.
[231] *NCR v Parsons Home Appliances cc Parsons Furniture* NCT/183002/2021/140(1) 1-23.
[232] Ibid, 12.
[233] Ibid, 10.
[234] Ibid, 6-12.
[235] Ibid, 15.
[236] Ibid, 10.
[237] Ibid.
[238] Ibid, 11.
[239] Ibid, 21.
[240] 2011 (2) SA 266 SCA.
[241] *Desert Star Trading v No 11 Flamboyant Edleen* 2011 (2) SA 266 SCA.
[242] Ibid.

The adage "he who alleges must prove" applies when an allegation of reckless credit lending is proffered. In *SA Taxi Securitization (Pty) Ltd v Mbatha,*[243] the court held that the onus rested upon consumers to prove that reckless credit lending had occurred. The plaintiff had applied for summary judgment against the defendant, who had defaulted on their credit agreement by failing to honour their monthly repayments in terms of purchased taxis.[244] The defendants raised a defence that reckless credit lending had occurred as the credit providers did not conduct any affordability assessment.[245] The court held that it was insufficient to merely state that reckless credit lending had occurred without placing some factual evidence before the court.[246] Nel,[247] suggests that "verificatory detail" includes averments relating to the negotiation and application for credit. This is what the court required to consider their defence.[248]

In *Mercantile Bank Ltd v Hajat*,[249] the applicant showed that they conducted an affordability assessment of the respondent, establishing that he was creditworthy.[250] This was proven by the production of the respondent's financial statements, which were obtained upon request by the applicant.[251] This, along with meetings and negotiations at their offices, proved to the court that they had conducted a proper affordability assessment.[252] The respondent did not dispute this.[253]

If as per the second instance, credit providers conduct affordability assessments yet fail to take cognisance of information that indicates that consumers are ignorant of the risks, costs and responsibilities under the agreement and are nevertheless granted credit, it amounts to reckless credit lending.

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[243] *SA Taxi Securitization (Pty) Ltd v Mbatha* 2011 (1) SA 310 (GSJ) 26 and 56.
[244] Ibid.
[245] Ibid.
[246] The court held that the defendant's allegations were "inherently and seriously unconvincing" and that averment should contain "verificatory detail."
[247] Nel *Affordability Assessments* 119.
[248]Ibid.
[249] 2013 JOL 30499 (GSJ).
[250] *Mercantile Bank Ltd v Hajat* 2013 JOL 30499 (GSJ).
[251] Ibid.
[252] Ibid.
[253] ibid.

As per the third instance, if credit providers conduct the pre-lending assessment, and the findings suggest that consumers could not afford the credit, however, they had granted the credit despite having such knowledge, thus causing consumers to become over-indebted, then credit was granted recklessly.[254]

In *Horwood v FirstRand Bank Ltd*,[255] it was alleged that credit providers failed to conduct a proper affordability assessment before credit was granted. It was alleged further that had an adequate assessment been conducted, little credit would have been lent.[256] The court found that a proper affordability assessment was conducted; however, it did not mention how it had come to that decision.[257] The court did not mention how the assessment was carried out and what deemed it proper.[258] The allegation of reckless credit lending had failed.[259]

When a credit agreement is before a court for consideration, a court may, of its own accord, find that credit was granted recklessly.[260] This contrasts with a finding of over-indebtedness, which can only be established once it is alleged.[261] Thus, the question for the court to answer is whether the reckless granting of credit caused the consumer to be over-indebted.[262]

The NCA expressly states that courts may order that reckless credit lending occured in any matter involving a credit agreement. This means that the court may make a finding of reckless credit lending even if it is not alleged. This is contrary to the court's finding in the matter of *SA Taxi Securitization (Pty) Ltd v Mbatha,*[263] which favoured the approach that placed the burden of alleging reckless credit lending on consumers. This approach is however, contrary to the purpose of section 83(1) of the NCA. Therefore, courts are obliged to *mero motu* consider if reckless credit lending occurred.

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[254] Section 80(1)(b)(ii) of the NCA.
[255] 2011 JDR 1151 (GSJ).
[256] *Horwood v FirstRand Bank Ltd* 2011 JDR 1151 (GSJ).
[257] Ibid.
[258] Ibid.
[259] Ibid.
[260] Nel *Affordability Assessments* 136.
[261] Ibid.
[262] Van Heerden in Sholtz par 11.4.5. See Section 80(1) of the NCA and section 79(2) which both prescribe when a determination for reckless credit lending and over-indebtedness are respectively made. Whether credit was granted recklessly is determined at the time of the conclusion of the credit agreement. On the other hand, over-indebtedness is determined when the allegation is made.
[263] *SA Taxi Securitization (Pty) Ltd v Mbatha* 2011 (1) SA 310 (GSJ) 26 and 56.

Another way for it to be determined if reckless credit lending had occurred is when consumers apply for a debt review by a debt counsellor when over-indebted.[264] The debt counsellor will take the necessary steps to establish what had led to over-indebtedness, including if it resulted from reckless credit lending.[265]

Specific debt relief measures are available to consumers where a court has determined that credit was granted recklessly. However, these are not always related; there can exist instances where the over-indebtedness of consumers was not a result of reckless credit lending.[266] Credit providers must comply with all reasonable requests made by the debt counsellor even if the finding may lead to one of reckless credit lending.[267]

3.5.2 Duties of credit providers to prevent reckless credit lending

The NCA makes provision for a three-pronged test that credit providers need to abide by in order to establish consumers' creditworthiness. Failure to conduct the test will result in a finding of reckless credit lending.[268] The three-pronged test must be used to determine if reckless lending occurred when the agreement was concluded, irrespective of the consumers' ability to honour the obligations under the agreement at the time the determination is being made.[269]

The three-pronged test involves three requirements that credit providers must abide by:

a. Credit providers are required to take reasonable steps to establish the prospective consumers' general understanding and appreciation of the costs and risks of the prospective credit, together with the rights and obligations expected of prospective consumers under the credit agreement.
b. Credit providers must have regard to the prospective consumers' debt repayment history under credit agreements.

[264] Kelly-Louw 'Introduction to the NCA' 142.
[265] Ibid.
[266] Van Heerden & Boraine 'The money or the box' 392-415.
[267] Kelly-Louw 'Introduction to the NCA' 145.
[268] Renke 'Measures in South African Consumer Credit Legislation' 15.
[269] Ibid,16.

c. Credit providers must have regard to the prospective consumers' existing financial means, prospects and obligations. [270]

According to Nel, the first requirement deals with the subjective understanding and acceptance of the costs and risks of consumers.[271] Even though consumers had signed agreements that included clauses that stated that they acknowledged their rights, responsibilities, risks and costs of the agreement, it does not automatically mean the requirement by credit providers has been fulfilled.[272]

In *Standard Bank of South Africa Ltd v Dlamini*,[273] the court held that since Mr Dlamini was illiterate and could not understand and appreciate the terms and conditions of the agreement, there was no consensus. Since Standard Bank and its agents facilitated the conclusion of the credit agreement, the court held that it was their duty to facilitate the reading, interpreting or explaining of the material aspects of the agreement to Mr Dlamini.[274] Since they had failed to do so, Mr Dlamini was not bound, and his defence that reckless credit lending occurred, succeeded.[275]

The NCA promotes the rights of consumers to receive information in an official language of their choice and that such be in plain and understandable language.[276] Although there is no express provision in the NCA that requires credit providers to explain what is contained within credit agreements with prospective consumers, Nel argues that the NCA implicitly requires that credit providers take reasonable steps to ensure that consumers have a general understanding and appreciation of all material aspects of credit agreements, even if it is not expressly stated in the NCA.[277] In order to fulfil the requirement that ensures consumers have a general understanding and appreciation of credit agreements, it can be explained to them in instances where explanations are required. Thus, the reasoning of the court in the matter of *Dlamini* is preferred.

Guidelines on how credit providers can take reasonable steps to ensure that consumers understand and appreciate the salient terms of the agreement were provided in the case of *ABSA Bank v*

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[270] Section 81(2)(a)(i) of the NCA.
[271] Nel *Affordability Assessments* 120.
[272] *ABSA Bank Ltd v COE Family Trust* 2012 (3) SA 184 (WCC).
[273] 2013 JOL 30897 (KZD).
[274] *Standard Bank of South Africa Ltd v Dlamini* 2013 JOL 30897 (KZD).
[275] Ibid.
[276] NCA, Section 63 and 64.
[277] Ibid, Section 80 and 81.

Kgamakga, where it was held that reasonable steps must be taken to understand and appreciate the following:

a. The meaning of credit/loan/instalment amount that is payable.

b. The meaning of interest and how the rate is calculated.

c. The risks and penalties that will follow if consumers default.[278]

Nel submits that although it is not an exhaustive list, it is still a step in the right direction.[279]

A positive obligation is placed on credit providers to ask the correct questions and gather the required information.[280] There is also a duty placed on credit providers to ensure that consumers understand the credit agreement they are entering.[281] This means that before entering into credit agreements, consumers must clearly understand their obligations and rights.[282] This includes disclosures regarding the total cost of credit, including all fees and costs incidental to the agreement.[283] The quotation and pre-agreement statement must be in the prescribed form and explained to consumers before the agreement is accepted.[284] The explanations and forms provided must be in plain language and may be explained in a language that is understandable to consumers.[285] The result of providing a comprehensive explanation is that consumers will be fully aware of their rights and responsibilities under the agreement.[286] Whilst credit providers are obliged to ensure consumers understand the credit agreement fully, they are prohibited from going to the extent of engaging in undesirable marketing practices that induce consumers into entering agreements that are marketed as having easy terms and conditions.[287]

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[278] 2017/26467 (ZAGPJHC) (unreported).
[279] Ibid. See Nel *Affordability Assessments* 120, 129-130. It is argued that courts must investigate whether reckless credit lending occurred, irrespective of why the credit agreement is under consideration in court. This gives effect to the purpose of section 3 of the NCA and provisions relating to preventing reckless credit lending.
[280] Vessio 'Beware the provider of reckless credit' 279.
[281] Nel *Affordability Assessments* 113.
[282] Renke 'Measures in South African Consumer Credit Legislation' 2-6. Pre-agreement disclosures involve quotations that are binding for five business days from the date it was given to consumers as per S92(3)(a)(b). Quotations are to include a full breakdown of intended costs as a result of and incidental to all credit agreements.
[283] Ibid 4-5.
[284] Section 93 of the NCA.
[285] PN Stoop & C Churr 'Unpacking the right to plain and understandable language in the Consumer Protection Act 68 of 2008' (2013) 16(5) *PER/PELJ* 329-341.
[286] Nel *Affordability Assessments* 113.
[287] Renke 'Measures in South African Consumer Credit Legislation' 5.

Once credit providers have discharged their duty of ensuring that consumers understand the terms, rights and responsibilities borne out of the credit agreement, they can proceed to conduct the pre-lending assessment. Should the assessment yield a result that consumers will be able to afford the credit that had been applied for, consumers have a choice on whether to accept the credit agreement.[288] Credit providers will not fulfil the role of financial advisors, who will advise their clientele on whether a specific financial decision is in their best interests.[289] Credit providers will merely advise on whether the assessment was successful and will provide the pre-agreement statement and quotation.[290] Consumers can decide whether or not to accept or withdraw from such an agreement, provided they do so within the allotted time frame.[291] Credit providers should act cautiously and not engage in abusive conduct when enforcing the credit agreement.[292] A further duty that rests upon credit providers is to ensure that all reasonable steps are taken to ensure that consumers are notified of their default and rights in terms of the credit agreement and NCA.[293]

The National Credit Amendment Bill proposed several important amendments to section 82 of the NCA that place specific duties upon credit providers and debt counsellors.[294] Section 82(A)(1) proposed that if credit providers conducting an affordability assessment notice that an existing credit agreement of prospective consumers was granted recklessly, they are duty-bound to report it to the NCR.[295] This places an obligation on credit providers to investigate existing credit agreements of prospective consumers as part of their affordability assessment and to ascertain whether such agreements were granted recklessly.[296] Section 82(A)(2) places the same duty on debt counsellors to establish whether consumers are over-indebted.[297] Should they ascertain that reckless credit was granted, they must report it to the NCR or a magistrate's court.[298] Should credit

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[288] CM Van Heerden & R Steennot 'Pre-Agreement Assessment as a Responsible Lending Tool in South-Africa, the EU and Belgium: Part 1' (2018) 21 *PER/PELJ* 25.
[289] Ibid.
[290] Ibid.
[291] Van Heerden & Steennot 'Pre-Agreement Assessment' 25. See Section 121 of the NCA.
[292] *Sebola and Another v Standard Bank of South Africa Ltd and Another (*CCT 98/11) (2012) ZACC 11 paras 4-177- warnings and notices must be issued first per Section 129 of the NCA before litigation.
[293] *Kubyana v Standard Bank of South Africa Ltd* (CCT 65/13) [2014] ZACC 1 Par 2-100.
[294] GN922 in GG41274 of 24 November 2017.
[295] Ibid.
[296] Ibid.
[297] Ibid.
[298] Section 86(7)(b) of the NCA.

providers or debt counsellors fail to report evidence of reckless credit lending, the NCT may impose an administrative fine as per section 82(A)(3).[299]

3.5.3 Consequences of reckless credit lending

Reckless credit lending provides consumers with various relief measures. It cannot be used as a means to plead over-indebtedness, as consumers must be able to prove that credit was lent recklessly to them.[300] Once this has been proven, the judicial body will suggest a remedy that is appropriate in the circumstances.

In the case of *Engelbrecht*,[301] it was alleged that the Respondent was not only conducting business as a credit provider whilst not being registered under the NCA, but also granting credit to consumers without conducting any pre-lending assessments.[302] It was further alleged that the Respondent would charge interest at six-times more than the allowed rate as per the NCA, and that he would also repossess the property of consumers who had defaulted.[303] The NCR argued that their investigator seized bank cards, identity documents, pension cards and loan agreements of consumers that were illegally taken and retained by the Respondent as part of 'collateral' for consumers' defaults on their repayments.[304] The NCT held that the conduct of the Respondent was prohibited and illegal and he was found to have granted credit recklessly.[305] Section 83 (2) (a) empowers the NCT to set aside all or part of consumers rights and responsibilities under credit agreements if it is declared that reckless credit lending occurred. The NCT set aside all credit agreements of the Respondent.[306] The NCT further interdicted him from continuing to illegally practice as a credit provider.[307] The NCT also administratively fined the Respondent R800 000.[308] This case is a clear example of how the NCT invokes it powers under the NCA.

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[299] GN922 in GG41274 of 24 November 2017.
[300] *NCR v JAS Engelbrecht t/a Sizabantu Cash Loans* NCT/243378/2022/140(1) 3-24.
[301] Ibid.
[302] Ibid.
[303] Ibid, 5.
[304] Ibid, 7.
[305] Ibid, 11.
[306] Ibid, 24
[307] Ibid.
[308] Ibid.

Reckless credit agreements may also be suspended to allow consumers time to be able to pay off their debts.[309] This is a provisional measure and will suspend the obligations under the agreement. As a result, consumers should not be entitled to remain in possession and use of the property during the period of suspension, as this would result in the deterioration/depreciation of the property at the unfair expense of creditors.[310] Van Heerden and Steenot question what should be done in a case where immovable property is involved as the authors posit that, indeed, it was not the intention of the legislature to cause the consumer to have to find alternative accommodation as this may be too financially cumbersome.[311] If consumers may still use the immovable property under the suspended credit agreement whilst not having to pay under said agreement, this would result in inconsistency within the legislation that may cause equality claims to be lodged and could thus become problematic.[312]

It is argued that the regulators and judicial bodies will need to decide whether a suspension order is granted or whether an order that partially or entirely sets aside the agreement is better suited to the situation.[313] The provisions of the NCA do not indicate which remedy a court should impose when it is established that a credit agreement was entered into recklessly. Whether the agreement should be set aside or suspended is still an area of confusion and will possibly depend on the facts and merits of each case.[314] Although the provisions make no mention of credit providers' rights when setting aside is ordered, it is argued that credit providers may be entitled to claim restoration in these instances.[315] It is further concluded that a credit agreement may be suspended, with the rights and obligations of the consumer also being suspended, where it is proven that the granting of reckless credit caused the consumer to become over-indebted.[316] This will apply to financed property under the agreement, which is movable. However, the position regarding immovable property is still uncertain and may become a litigious problem. [317] Since reckless credit lending is

[309] Section 83 of the NCA.
[310] Van Heerden & Boraine 'The money or the box' 407.
[311] Ibid.
[312] Ibid.
[313] Ibid, 402.
[314] Ibid, 407.
[315] Ibid ,403.
[316] Renke 'Measures in South African Consumer Credit Legislation' 5.
[317] Van Heerden & Boraine 'The money or the box' 407.

regarded as prohibited conduct within the NCA, if evident, credit providers may be ordered by the NCT to pay an administrative fine.[318]

3.6 Defences that credit providers can raise to allegations of reckless credit lending

Section 81(1) of the NCA provides a defence to credit providers, which states that consumers must answer their questions truthfully and fully. If consumers fail to do so, and their failure to disclose said information materially affects the outcome of the assessment, credit providers can raise such issues as their defence of an allegation of reckless credit. Each case, however, is decided on its own merits when considering the surrounding circumstances.[319] Failing to disclose having an existing credit agreement can be argued as not being truthful or fully transparent. It can be argued as a defence against an allegation of reckless credit lending, as such, could materially affect the outcome of an assessment.[320] The NCA places the burden on consumers to make disclosures fully and truthfully.[321] In other words, if the disclosure is not made and such non-disclosure materially affected the assessment outcome, it will be regarded as a material disclosure that credit providers can raise in their defence to an allegation of reckless credit lending.

3.7 Were the provisions in the NCA sufficient to prevent reckless credit lending?

According to Otto the NCA is a drastic improvement from its predecessors; however, it is "not without serious shortcomings."[322] Over the years, several studies have been conducted to shed light on the debt crisis within South Africa.[323] The studies show that a large number of reckless credit lenders were banks.[324] Banks have fast become the biggest corporations in the world.[325]

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[318] Section 151 of the NCA.
[319] *Horwood v Firstrand Bank Ltd*.
[320] *Volkswagen v Pillay* 6. The plaintiff argued that the defendant failed to disclose that she had entered into a credit agreement a few days before she applied for credit; hence, same did not reflect on her credit bureau report. The plaintiff argued that this constituted a material disclosure. Although the defendant did not expressly aver an allegation of reckless credit lending, it is evident that that was what she was trying to allege which contributed to her over-indebtedness. The court made no findings on this.
[321] Section 81(1) of the NCA.
[322] Otto 'The history of consumer credit legislation in South Africa' 271.
[323] NCR *Annual Report* (2022/2023) 31.
[324] Ibid.
[325] '10 Biggest Banks in the World' available at https://www.investopedia.com/articles/investing/122315/worlds-top-10-banks-jpm-wfc.asp, accessed on 2024/06/02

Therefore, the responsibility rests not only on consumers but also on credit providers.[326] Current legislation promotes the usage of responsible credit facilities and tries to balance consumers' needs and rights with credit providers' duties.[327]

Despite the improvements within our law, credit is still granted recklessly.[328] Nel suggests that a shortcoming of the NCA was that courts did not consider the validity and fairness of affordability assessments by credit providers.[329] It was merely enough for courts to establish that the assessments were carried out. According to the NCA, nothing more was required as the Act remained silent on how to test the effectiveness of the affordability assessments.[330]

Balancing both the right to have access to credit and the right not to be subjected to reckless credit lending is a goal that South Africa continues to strive towards. In *SA Taxi Securitization (Pty) Ltd v Mbatha,*[331] it was held that the purpose of the NCA was to facilitate access to credit and that a harsh approach by courts when imposing penalties on creditors may hamper such access to vulnerable members of society.

According to Adewale, literature indicates that an increase in household consumption directly relies on an increase in credit consumption, which, in turn, grows the economy.[332] Adewale uses an empirical study to confirm a correlation between increasing credit consumption and economic growth.[333] However, caution should be noted as the increase in credit consumption is mainly due to unsecured lending.[334] According to Adewale, this is because unsecured loans are highly profitable to credit providers and to the detriment of consumers.[335] Adewale's study shows that unsecured lending had increased over the years, whilst asset-backed (collateral) lending had

[326] M Kelly-Louw 'A credit provider's complete defence against a consumer's allegation of reckless lending' (2014) 26 *SA Merc LJ* 24-59.
[327] Chapter 4, Part D of the NCA.
[328] NCR *Annual Report* (2022/2023) 31. See *Shoprite Investments Limited v National Credit Regulator* (GP) (A509/2107, 18- 12-2019).
[329] Nel *Affordability Assessments* 119.
[330] Van Heerden & Steennot 'Pre-Agreement Assessment' 20.
[331] *SA Taxi Securitization (Pty) Ltd v Mbatha* "Consequently, an over-critical armchair approach by the court towards credit providers when evaluating reckless credit, or the imposition of excessive penalties upon lenders who have recklessly allowed credit, would significantly chill the availability of credit, especially to the less affluent members of our society."
[332] Adewale 'Financial Regulation, Credit Consumption and Economic Growth' 376.
[333] Ibid.
[334] Ibid.
[335] Ibid.

decreased.[336] As a result, the inability of consumers to pay back their outstanding credit could potentially result in a crash in the financial market.[337] Although the NCA strictly prohibits reckless credit lending, financial institutions take advantage of the loopholes in the NCA that do not expressly deal with unsecured lending.[338] Adewale commends the NCA for curbing reckless credit lending that extends to asset-backed lending transactions. However, he suggests that the practical aspects of the Act need to be reviewed as it does not entirely solve the problem of reckless credit lending.[339]

[336] Ibid.
[337] Ibid.
[338] Ibid.
[339] Ibid.

CHAPTER 4

THE AFFORDABILITY ASSESSMENT UNDER REGULATION 23A

4.1. Why was there a need to introduce a further Regulation?

Despite the positive advancements that the NCA brought about in increasing inclusivity within the credit industry, several shortcomings were not adequately addressed when the Act was first introduced. One of the problem areas was reckless credit lending. Although the NCA makes provisions for curbing reckless credit lending, it still provided leeway for credit providers when deciding whether to grant credit or not.[340] The NCA afforded credit providers broad discretion to conduct their pre-lending assessments in the form and manner they deemed appropriate, provided that the assessment be fair and objective.[341] The legislature gave no other indication regarding how these assessments were to be conducted or how to test its effectiveness.[342] This led to credit providers being free to conduct their assessments as they chose.[343] This resulted in consumers applying for credit they could not afford.[344] This was not protective of consumers as the only way to establish if the assessment was fair and objective was if the matter was before a court or NCT. Courts, however, had not decided on this aspect and have chosen only to ascertain whether the assessment was conducted.[345] This left room for a rubber-stamping approach, thus increasing the risk of reckless credit lending.[346] This allowed for inconsistency among the assessments being conducted within the credit industry.[347] With the lack of consistency came the rise in allegations of reckless credit lending and the over-indebtedness of consumers.[348] The NCT was inundated with complaints, and each matter would require extensive evidence to be produced to determine whether reckless credit lending occurred because no two pre-lending assessments used by credit

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340 H Kawazda 'Remarks on lending reforms ushered in by regulation 23A of the Affordability Assessment regulations' (2018) *De Jure* 167.
341 Section 81(2) of the NCA.
342 Van Heerden & Steennot 'Pre-Agreement Assessment' 12.
343 Wazvaremhaka & Osode 'The implications of Truworths Limited'5.
344 Ibid.
345 Section 82 (1) of the NCA.
346 Van Heerden & Steennot 'Pre-Agreement Assessment' 12.
347 Section 80 of the NCA.
348 Wazvaremhaka & Osode 'The implications of Truworths Limited'5.

providers were the same.[349] Section 81 (2) remained silent on how exactly credit providers were to ensure their assessments were reasonable and objectively fair.[350]

The interpretation of section 81 by the courts was used as a guiding tool when trying to establish whether reckless credit lending had occurred.[351] This, however, did not solve the persisting problem.[352] The legislators realised that to promote conformity and consistency within the credit market, stricter guidelines would have to be put in place to ensure that the rate of reckless credit lending decreased.[353]

In order to deal with this problem, in May 2013, the NCR proposed a set of draft guidelines that were to be followed by credit providers when conducting affordability assessments. This was precipitated by a joint statement of relevant industry players such as banks, wanting to curb reckless credit lending.[354] The banks were losing business as they hesitated to offer credit to vulnerable consumers without guidelines to follow when conducting their pre-lending assessments.[355] As a result, the NCR then published the September 2013 Draft Guidelines. The guidelines provided that consumers' discretionary or allocable income would be verified against bank statements, salary slips or any other acceptable proof of earnings.[356] This had to be offset against consumers' expenses (as per an expense table suggested by the guidelines), which were to be verified using information stored by the credit bureau.[357]

The Draft National Credit Regulations was published in 2014, which retained salient aspects of the predecessor guidelines. [358] This resulted in the National Credit Amendment Act introducing the Affordability Assessment under Regulation 23A and its eventual inclusion in Chapter 3 of the National Credit Regulations. [359] Regulation 23A includes the process credit providers must follow

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349 Van Heerden & Steennot 'Pre-Agreement Assessment' 10-12.
350 Section 81 of the NCA.
351 Van Heerden & Steennot 'Pre-Agreement Assessment' 14. See *ABSA Bank v COE Family Trust* – a defence to an allegation of reckless credit lending was raised by the Bank who stated that their credit agreement released them from liability, in that the consumer was fully aware of the consequences of the agreement.
352 Van Heerden & Steennot 'Pre-Agreement Assessment' 14.
353 Ibid, 1,30.
354 Joint Statement by the Minister of Finance and the chairperson of the Banking Association of South Africa *Ensuring Responsible Market Conduct for Bank Lending* (2012).
355 Ibid.
356 September 2013 Draft Guidelines.
357 Ibid.
358 GN10242 in GG37882 of 1 August 2014.
359 National Credit Amendment Act 19 of 2014.

when assessing affordability of consumers, prior to granting credit.[360] The Affordability Assessment under Regulation 23A is therefore the standard that credit providers must meet when conducting their pre-lending assessments in order for their obligations under section to be met.[361]

4.2 Regulation 23A

As briefly discussed in Chapter 3, when the NCA was introduced, credit providers were obliged to investigate consumers' income and credit history before credit was granted. A failure to do such investigations meant that credit was granted recklessly, regardless of the financial status of consumers.[362] However, the NCA did not detail what the investigation had to contain before granting credit. They were allowed to decide for themselves what steps were necessary.[363]

Regulation 23A introduced several mandatory steps that credit providers must observe when conducting pre-lending assessments.[364] Although a pre-lending assessment is only peremptory for natural persons, it is prudent to conduct the same when dealing with juristic persons, should the NCA be applicable.[365] Section 81(1) of the NCA requires credit providers to ask consumers questions to gather necessary information to establish their financial status for the assessment.[366] While the 2015 Regulations mention a standard form, it is not mandatory.[367] There is also no limit on how many questions credit providers may ask. This gives credit providers discretion on how the assessment may be conducted.[368] Their assessment however, must be in line with that which is prescribed by the Affordability Assessment under Regulation 23A.[369]

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[360] GN10382 in GG38557 of March 2015.
[361] Wazvaremhaka & Osode 'The implications of Truworths Limited' 6.
[362] Van Heerden & Steennot 'Pre-Agreement Assessment' 1-30.
[363] Ibid.
[364] Ibid..
[365] Ibid 6.
[366] Section 81(1) of the NCA.
[367] Nel *Affordability Assessments* 169.
[368] Ibid 170.
[369] Wazvaremhaka & Osode 'The implications of Truworths Limited'5.

4.3 What exactly do credit providers have to do now before granting credit?

Regulation 23A introduces a number of peremptory procedures and policies to be followed by credit providers prior to granting credit, with the most important aspects are analysed below.[370]

4.3.1 Validating gross income[371]

This mandatory process requires credit providers to validate consumers' disclosed income. This is necessary so that credit providers may ascertain whether consumers can financially pay back the credit.[372] The process involves confirming the earnings of consumers.[373] If consumers claim that they are formally employed, then credit providers must ask for at least a three-month bank statement (showing three months' worth of salary being deposited) or three months' payslips of consumers.[374] Credit providers must fulfil this mandatory step by taking practicable steps to validate this disclosure.[375] In *Volkswagen v Pillay*,[376] the plaintiff alleged that they had conducted the necessary affordability assessment by reviewing the defendant's bank statements, salary slips, and credit bureau reports, thus adhering to the Regulation. The defendant argued that the plaintiff had failed to assess her properly, as they had only reviewed the bank statement.[377] The court stated that the defendant failed to argue what else the plaintiff should have done to conduct a proper affordability assessment.[378] The court mentioned nothing further about what conducting a proper affordability assessment meant.[379]

When an assessment involves an employee who does not receive a salary or an informal employee, credit providers must require the latest three months' worth of proof of income, bank statements, or financial statements. [380] Notably, there is no definition or precise rules given for 'practicable

370 Kawazda 'Remarks on lending reforms ushered in by regulation 23A of the Affordability Assessment regulations' 167-170.
371 Affordability Assessment under Regulation 23A(3).
372 Van Heerden & Steennot 'Pre-Agreement Assessment' 1-30.
373 Kawazda 'Remarks on lending reforms ushered in by regulation 23A of the Affordability Assessment regulations' 167.
374 Van Heerden & Steennot 'Pre-Agreement Assessment' 1-30.
375 Affordability Assessment under Regulation 23A(3).
376 *Volkswagen SA v Pillay* (P 7330/2020) [2022] ZAKZPHC 19 (1 April 2022).
377 Van Heerden & Steennot 'Pre-Agreement Assessment' 6.
378 *Volkswagen v Pillay* 8.
379 Ibid.
380 Affordability Assessment under Regulation 23A.

steps' that credit providers must take, nor is there any guideline on what form of proof of income would be acceptable.[381]

As of 2024, 17.4 million people are employed in South Africa, with 8.5 million employed informally.[382] In the case of *Truworths Limited v Minister of Trade and Industry*,[383] the applicants were retailers and sought to set aside Regulation 23A (4).[384] The applicant argued that this Regulation required credit providers to collect proof of income in a manner that fundamentally discriminated against a vast majority of South Africans who were informally employed or self-employed.[385] They argued this as they were losing out on business since they were not able to extend credit to consumers who were informally employed.[386] The court found in favour of the applicants.[387] It held that this provision was unjustifiably unfair as it did not do enough to achieve the spirit of the Bill of Rights.[388] It excluded a vast majority of society who could not provide financial statements.[389] The court further held that other similar credit information would be acceptable for conducting the pre-lending assessment. It is argued that although this case improved access to credit for the self-employed and unbanked consumers, it did not promote the inclusion of South Africans into the formal financial services sector where having a bank account supports such inclusion.[390] Whilst the court set aside Regulation 23A(4) on the basis that vulnerable and unbanked consumers were being unfairly discriminated against, it has also been argued that this regulation was the only provision that stipulated exactly how gross income of consumers should be validated.[391] The Draft Regulation did propose that affidavits or other credible information be acceptable proof of income should consumers fall under the unbanked or informal employee category.[392] However, no other explanation was provided by the Regulation nor the court in ascertaining what other forms of credible information would be acceptable in order to establish

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[381] Ibid.
[382] 'FinScope statistics' available at https://www.finmark.org.za , accessed last on 2024/11/10.
[383] *Truworths Limited v Minister of Trade and Industry* para 44-67.
[384] Ibid, para 9.
[385] Ibid.
[386] Ibid, para 44-45.
[387] Ibid.
[388] Ibid, para 45.
[389] Ibid.
[390] Wazvaremhaka & Osode 'The implications of Truworths Limited'10-11.
[391] B Kolweni & S Sacks 'The effects of the Truworths judgement on Regulation 23A(4)(c) of the NCA' 2022 *Sabinet African Journals* 1-3.
[392] GN 224 in GG 41604 of 4 May 2018 25.

creditworthiness of consumers when verifying their gross income.[393] Credit providers must then submit their affordability assessment model, mechanisms and process to the NCR.[394]

Moreover, credit providers must use the disclosed income to calculate the disposable income of consumers. Credit providers must consider the gross income of consumers from any source without it being subject to deductions and thereafter minus the statutory deductions, essential expenses and all other payments that consumers disclose.[395] This should be done against the current credit obligations of consumers and the credit records that exist with the relevant credit bureaux.[396] It is argued that credit bureaux information may not be completely accurate as it fails to encompass the consumers' entire credit history.[397] This may also affect the outcome of the assessment.

Although consumers' income is considered under the Affordability Assessment, assets are not considered despite it being an indication of wealth.[398] Generally, assets are used as a form of security.[399] For purposes of the NCA, assets and their value are only relevant if they are to be used as collateral.

4.3.2 Calculating consumers' existing financial income

The Regulation provides a minimum expense norms table that assists credit providers in calculating consumers' existing financial means, prospects, and obligations as per section 81(2)(iii). It directs that credit providers must account for the gross income, minimum living expenses, statutory deductions, and current debt obligations in order to establish creditworthiness.[400] Salary falls under the category of financial means and credit providers are obliged to verify consumers' salary disclosures against their expenses.[401] Regarding expenses, credit providers must determine whether consumers' financial obligations and expenses exceed

393 Wazvaremhaka & Osode 'The implications of Truworths Limited'11.
394 Section 81(2)(a) of the NCA.
395 Regulation 23A(10).
396 Van Heerden & Steennot 'Pre-Agreement Assessment' 11.
397 Ibid11. See Section 81(2)(a) of the NCA.
398 Ibid, 22.
399 Ibid.
400 Section 81(2) of the NCA.
401 Van Heerden & Steennot 'Pre-Agreement Assessment' 22-23.

the minimum threshold.[402] The Regulation therefore makes provision for an expenses questionnaire that has to be completed by consumers when credit providers use their discretion to grant credit to someone who does not fall within the categories listed in the minimum expense table, if exceptional circumstances exist.[403] Whilst the questionnaire does assist in curbing misrepresentations made by consumers, it does not however, constitute *prima facie* proof of consumers' expenses.[404] Furthermore, there is no distinct definition of exceptional circumstances that has been provided in the NCA or the Regulations. It is argued that the table alone is insufficient in calculating the existing financial income of consumers.[405]

Van Heerden and Steenot point out that the NCA does not instruct credit providers to verify the veracity of the disclosures made by consumers concerning their expenses.[406] This could mean that consumers could understate their expenses, knowing that it would not be verified. Van Heerden and Steenot argue further that if the income of consumers has to be verified, then it is equally important that their ability to reserve some of that income be verified as well.[407] They suggest that this could be done by establishing some form of proof of expenditure.[408] Despite use of the questionnaire to promote truthfulness of consumers regarding their expenses, Van Heerden and Steenot are of the view that proof of consumers' actual living expenses will still need to be requested by credit providers for verification purposes.[409]

The NCT had a different view to Van Heerden and Steenot regarding proof of expenses in the matter of *Summit*,[410] wherein Summit contended that the respondent, Direct Axis, granted credit recklessly to several consumers which resulted in their over-indebtedness. Summit did not agree with the finding of the NCR that no reckless credit occurred.[411] Summit argued that Direct Axis conducted the Affordability Assessment, however, deviated from the minimum norms expense

402 Ibid.
403 Ibid.
404 Ibid, 18.
405 Kawazda 'Remarks on lending reforms ushered in by regulation 23A of the Affordability Assessment regulations' 168.
406 Ibid, 22.
407 Ibid, 22-23.
408 Ibid.
409 Ibid, 11-14.
410 *Summit Financial Partners v Direct Axis and 3 others* NCT/177859/2021/141(1)(b) 1-23.
411 Ibid, 1-5.

table in Regulation 23A(10) which is peremptory.[412] Summit averred that there were no exceptional circumstances from consumers that justified the deviation.[413]

Summit argued that Direct Axis incorrectly considered payment of expenses made by third parties (such as spouses or family members of consumers) as exceptional.[414] Summit averred that Direct Axis allowed the deviations without even establishing if exceptional circumstances existed, by using the questionnaire in Regulation 23A(11) as their general assessment mechanism. The deviations ranged from R1000-R3000 which allowed for consumers to appear as creditworthy.[415] Summit went on to argue that credit providers have a duty to verify third parties' ability to pay for the expenses disclosed by prospective consumers, because it could be possible that consumers had understated or misrepresented their expenses, including misrepresentations regarding third party payments.[416] Summit alleged that Direct Axis's failure to verify the third party payments amounted to prohibited conduct under the NCA. [417]

Direct Axis denied using Regulation 23A(11) as an exception in order to grant credit, by stating that all consumers' expenses fell below the minimum expense threshold.[418] In response to Summit's allegations, Direct Axis contended that since the NCA and its Regulations do not require credit providers to verify and obtain proof of consumers' living expenses, they were not obligated to verify prospective consumers' disclosures regarding their expenses, and therefore did not breach any of the legislative provisions.[419]

The NCT held that Regulation 23A(11) allows credit providers where exceptional, to accept consumers' disclosed expenses if they fall below the minimum threshold, if they complete the required questionnaire.[420] The NCT held further that they would not be able to give a rigid definition of what exceptional circumstances mean.[421] The NCT did however state that exceptional circumstances must be established on its own merit and would be regarded as "something out of

[412] Ibid.
[413] Ibid.
[414] Ibid, 8.
[415] Ibid, 9-10.
[416] Ibid.
[417] Ibid.
[418] Ibid, 14-15.
[419] Ibid, 15.
[420] Ibid, 16-17.
[421] Ibid.

the ordinary and unusual in nature."[422] The NCT found in favour of Direct Axis and held that third party payments constituted exceptional circumstances that warranted a deviation from the minimum expense table.[423] Whilst Summit accepted that third party payments could amount to exceptional circumstances, they argued that such payments still had to be verified.[424] The NCT held that Summit could not provide legislative support for their argument that living expenses had to be verified by consumers during the Affordability Assessment.[425]

The NCT held further that it is not reasonable to expect credit providers to verify consumers' expenses and that they are allowed to accept the veracity of the disclosures made.[426] In support of its finding, the NCT favoured the approach in *Sebola*,[427] where it was held that whilst the NCA and courts are duty bound to promote the rights of consumers in an effort to prevent reckless credit lending and over-indebtedness, this however, does not mean that the rights of credit providers are overlooked. The NCT held that there should be a balance of rights and responsibilities.[428]

The NCT found that Direct Axis did take reasonable and practicable steps to calculate the financial means, prospects and obligations of consumers as required by the NCA and Regulation and dismissed Summit's application.[429]

Although a directive has been given by the NCT as to how exceptional circumstances may be established, it is submitted that more could be done to ensure that unnecessary deviations are not made. It is submitted that in addition to making consumers complete the questionnaire after credit providers warrant the deviation of the minimum expense table, the matter should be referred to the NCR to confirm whether the deviation had merit, i.e. whether exceptional circumstances did indeed exist to justify the deviation. This will assist in avoiding reckless credit lending.

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[422] Ibid, 19-23.
[423] Ibid.
[424] Ibid.
[425] Ibid.
[426] Ibid.
[427] *Sebola and Another v Standard Bank* para 40.
[428] Ibid.
[429] Section 81(2). The NCT went further to clarify its interpretation of the term 'practicable steps' since no express definition occurs within the current credit legislation. The NCT held that whilst the NCA does not provide the definition for 'practicable steps', the Regulations do stipulate that such steps would be in the form of Regulation 23A. The NCT used the example of when credit providers have to assess and verify existing debt repayment obligations thereby stating that a practicable step would be to reasonably verify same with the relevant credit bureaux.

4.3.3 Consumers' Debt Repayment History

Seven days before granting credit to consumers, credit providers must ensure that they assess and evaluate any existing credit obligations that consumers have and their debt repayment history under that obligation.[430] This period is increased to fourteen days when mortgages are applied for.[431] This practice allows credit providers to identify any default trends on the part of consumers. By establishing a reasonable payment pattern based on consumers' ability to pay off existing credit obligations, credit providers can deduce the probability of consumers paying off the proposed credit instalments.[432]

4.3.4 Avoiding double counting

There may be instances wherein consumers apply for credit to settle other credit accounts. This means that credit providers must explicitly note the purpose for which the credit is being applied for and take practicable steps to ensure it is used for its intended purpose.[433] When assessing, credit providers may not subtract the credit amounts owing for the other smaller accounts from the net income, as this will be included in the instalment that consumers are applying for.[434] Again, the Regulations give no definition or indication of what 'practicable steps' entail and therefore the view in the case of *Summit* is preferred.[435]

4.3.5 Disclosing the credit cost multiple and the entire cost of credit

Credit providers must inform consumers of the multiple credit costs and the total cost of credit in their quotation. Credit providers must ensure that such disclosure is based on one year of the total credit amount used.[436] Credit providers must further ensure that consumers fully understand what the quotation entails and must draw attention to the principal debt amount, the interest that shall be charged and the initial fee that is payable upon entering the agreement. If consumers are

430 Van Heerden & Steennot 'Pre-Agreement Assessment' 15.
431 Ibid.
432 Van Heerden & Steennot 'Pre-Agreement Assessment' 14-15 .
433 Regulation 23A(14)(a) & (B).
434 Van Heerden & Steennot 'Pre-Agreement Assessment' 19.
435 *Summit Financial Partners v Direct Axis* 23 .
436 Regulation 23A(15).

uncertain about the credit agreement, credit providers must provide sufficient information to ensure that consumers understand the risks, costs and obligations under the agreement. [437]

4.4 What types of disclosures made by consumers need to be further investigated?

In the case of *Capitec v Mahlangu*,[438] Mr Mahlangu applied to Capitec for a loan in 2013 and was granted credit by Capitec. During the initial stages of the application, Capitec conducted an affordability assessment, and the information obtained suggested that Mr Mahlangu earned an income that could allow for additional expenses.[439] Mr Mahlangu disclosed that save for his household income, he had a combined household disposable income after expenses.[440] This meant that Mr Mahlangu provided an additional disclosure relating to his combined household disposable income from himself and his partner. Capitec did not request documentary proof to confirm the disclosures made by Mr Mahlangu. The loan was granted based on the disposable income of Mr Mahlangu alone.[441]

After some time, in 2018, Mr Mahlangu had become over-indebted and approached a debt counsellor for assistance.[442] The debt counsellor sent notices to all of Mr Mahlangu's creditors, informing them of his over-indebtedness and requesting credit agreements each credit provider had with Mr Mahlangu.[443] Capitec did not provide any documentation as per the notice sent by the debt counsellor.[444] When the matter went on review in 2019, a preliminary finding was made by the debt counsellor that the credit agreement between Capitec and Mr Mahlangu was reckless.[445] The presiding officer tasked with hearing the matter held that Capitec was obliged to account for

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[437] Van Heerden & Steennot 'Pre-Agreement Assessment' 24. See Section 92 of the NCA.
[438] *Capitec Bank Limited v Mahlangu and Another* (A16/2020) [2021] ZAMPHC 28 (25 October 2021). Mr Mahlangu applied to Capitec for a loan in 2013 and was granted credit of almost R100 000 to be paid in instalments of almost R2800 over a 64-month time frame. During the initial stages of the application, Capitec conducted an affordability assessment, and the information that was obtained suggested that Mr Mahlangu earned an income of almost R8100 and that his disposable income after expenses amounted to R5700. Mr Mahlangu disclosed that he had a household income of R5000, and the combined household disposable income after expenses was R6600. Capitec did not request documentary proof to confirm the disclosures made by Mr Mahlangu. The loan was granted based on the disposable income of Mr Mahlangu alone, which was R5700.
[439] Ibid.
[440] Ibid.
[441] Ibid.
[442] Ibid.
[443] Section 86(4) of the NCA.
[444] *Capitec Bank Limited v Mahlangu and Another*.
[445] Ibid.

Mr Mahlangu's household income and that of the other person in the household since Mr Mahlangu specifically made this disclosure. It was common cause that having a household income would indicate that the household expenses are also shared.[446]

Capitec took the matter on appeal and argued that they had based their decision to grant credit to Mr Mahlangu on his individual income, and because of this, there was no need for them to verify the disclosure relating to his household income.[447] Capitec further alleged that the magistrate in the court a quo erred in his finding that the Affordability Assessment under Regulation 23A was not in operation when the agreement was entered into and hence had no application to the proceedings at hand. Capitec further alleged that there was no indication that the disclosure relating to the household income was false. Capitec went on to raise a defence under section 81(4) stating that Mr Mahlangu failed to answer questions truthfully and fully. The court a quo held that the only way a defence under s81(4) would be successful was if there was a finding that Mr Mahlangu failed to answer fully and truthfully and that such failure materially changed the outcome of the assessment.[448] Capitec provided no proof to support its reliance on section 81(4). Capitec's sole reliance on section 81(4) was founded on their contention that they had no duty to verify the disclosure relating to household income by Mr Mahlangu. The court a quo rejected their defence and held that a defence which allowed credit providers to shy away from their duties to investigate the disclosures made by consumers would go against the purpose of the NCA.[449]

The court in casu took into account the submissions made by Capitec and the magistrates reasoning in coming to his decision.[450] In relation to section 81(4), the court held that there was no dispute that Mr Mahlangu was indeed over-indebted. Nor was it in dispute that he had a disposable household income. The court confirmed that although Regulation 23A was not in force and effect at the time the credit was granted, the court a quo's finding was sound as the laws within the NCA were applicable.[451]

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[446] Ibid.
[447] Ibid.
[448] Ibid.
[449] Ibid.
[450] Ibid.
[451] Ibid.

Upon examination of the NCA, section 78(3) defines "financial means, prospects and obligations" as follows:[452]

> "(a) income, or any right to receive income, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective consumer receives, has a right to receive, or holds in trust for another person;
>
> (b) the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily— (i) share their respective financial means, and (ii) mutually bear their respective financial obligations; and
>
> (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."

It is, therefore, evident that the criteria within section 78(3)[453], together with the court's reasoning in the *Mahlangu* judgement, indicate that any disclosure made in relation to the financial means, prospects and obligations of consumers warrant investigation and verification, irrespective of whether the other members of the joint household or immediate family are not a party to the credit agreement.

4.5. What extent do credit providers need to go to to investigate and verify the disclosures made by consumers during the Affordability Assessment?

From the court's reasoning in the *Mahlangu* judgement, together with section 78(3) of the NCA,[454] it is evident that when establishing the financial means of consumers, any other adult to whom the financial obligations are shared in their household should be considered under the Affordability Assessment. This will assist credit providers in obtaining an accurate result of consumers' creditworthiness. The court, *in casu,* did not go further to explain what steps credit providers

[452] Section 78(3) of the NCA.
[453] Ibid.
[454] The National Credit Act 34 of 2005.

should take in order to verify disclosures made by consumers. However, it is evident from the *Mahlangu* judgement that some form of investigation or verification process is necessary.

It is submitted that the criteria in Regulation 23A(3) be applied.[455] Regulation 23A(3) explicitly obliges credit providers to take practicable steps to validate consumers' financial means, prospects and obligations by requesting proof of income, depending on whether consumers are formal or informal employees.[456] It is submitted that the same criteria be adopted when validating disclosures from consumers regarding their financial obligations. In other words, practicable steps must be taken when consumers make disclosures regarding their own income, expenditure, financial obligations and anything incidental during the assessment.[457]

If credit providers had applied this in the *Mahlangu* judgement, they would have had to have taken practicable steps to verify Mr Mahlangu's financial income and obligations, together with that of the other person with whom he shared joint household income and expenses. As per Regulation 23(A)(4), practical steps would require credit providers to request a breakdown of the income and expenditure from both Mr Mahlangu and his partner in the joint household. This income and expenditure must be verified against bank statements, payslips, financial statements, or other documents.[458] By applying the criteria above, it can be deduced that taking practicable steps to verify disclosures made by consumers will entail requesting documentary proof to substantiate

455 Affordability Assessment under Regulation 23A(3); "A credit provider must take practicable steps to assess the consumer or joint consumer's discretionary income to determine whether the consumer has the financial means and prospects to pay the proposed credit instalments."

456 Regulation 23A(4). "A credit provider must take practicable steps to validate gross income, in relation to:-

(a) consumers that receive a salary from an employer:

(i) latest three(3) payslips; or

(ii) latest bank statements showing the latest three(3) salary deposits;

(b) consumers that do not receive a salary as contemplated in (a) above by requiring:

(i) latest three(3) documented proof of income; or

(ii) latest three(3) months bank statements;

(c) consumers that are self-employed, informally employed or employed in a way through which they do not receive a pay slip or proof of income as contemplated in (a) or (b) above by requiring:

(i) latest three (3) months bank statements; or

(ii) latest financial statements."

457 See the NCT's interpretation of 'practicable steps' discussed in the case of *Summit Financial Partners v Direct Axis* 20 as discussed on page 58 of this thesis.

458 GN 224 in GG 41604 of (2018) 25. Nel *Affordability Assessments* Affidavits can be used as alternate forms of proof of income.

their disclosures. It is further submitted that if the disclosures materially affect the outcome of the assessment, they should be investigated, verified, and considered in the Affordability Assessment.

CHAPTER 5

RECOMMENDATIONS AND CONCLUDING REMARKS

5.1 Has the Regulation achieved its intended purpose?

For the most part, it appears that the introduction of Regulation 23A has been a positive shift within the credit market. This however, cannot be viewed in isolation. Credit providers are now given strict parameters to conduct their affordability assessments. Unjustified and unreasonable deviations when establishing consumers living expenses may result in reckless credit being granted. This paper, therefore, submits that deviations should only be warranted in exceptional circumstances, only after it has been submitted to the NCR to establish whether they are reasonable or with merit. This would provide an added precautionary measure to ensure that credit providers do not unnecessarily deviate from the Regulation.

It is clear that a dual responsibility exists on both credit providers and consumers. Credit providers are obliged to conduct assessments that align with the Affordability Assessment under Regulation 23A, and consumers are obliged to participate truthfully and fully. Credit providers are also obliged to verify the information provided to them by consumers, to the exception of consumers' expenses. This means that a statutory duty rests on credit providers to ensure that the information they use to conduct their assessment is accurate. The problem lies in ascertaining the extent that credit providers must go to in order to verify such information. It is therefore submitted that credit providers must take practicable steps to ensure that consumers' disclosures are investigated and verified.

Van Heerden and Steennot highlight a few shortcomings within the current legislation, namely that there is no standard list of information required from consumers to be used in the assessment.[459] Although the Regulation indicates what information needs to be gathered, this is not an exhaustive list and serves as a guideline which creditors are not bound by.[460] There is a questionnaire annexed to the Regulation, however, this is not peremptory, and its use is merely

[459] Van Heerden & Steennot 'Pre-Agreement Assessment' 22.
[460] Ibid 23.

advisable or when exceptional circumstances exist that warrant deviation and use of the questionnaire.[461]

Practicable steps include credit providers being obliged to verify consumers' credit information with credit bureaus which will mitigate against the risk of credit being granted recklessly.[462] Simply requiring that a pre-lending assessment be conducted does not mean reckless lending or over-indebtedness will not occur. Credit providers are prohibited from granting credit if the pre-lending assessment indicates that consumers are unable to afford the credit or unable to understand the financial obligations required of them. Thus, it is submitted that when matters are in dispute, judicial bodies will play an instrumental role in establishing the following:

i. If the Affordability Assessment was conducted? If so;

ii. Was the Affordability Assessment appropriately conducted? If the answer is in the affirmative, that should be all that the court decides on in relation to the Regulation. If not;

iii. Was the improper conducting of the assessment what led to credit being granted recklessly, or was it a result of consumers failing to make complete and truthful disclosures?

It is submitted that this will provide the necessary legal precedent to aid in consistency among credit providers in the industry.

5.2 Recommendations to establish the true financial position of consumers

5.2.1 The Affordability Assessment

It is submitted that disclosures that would materially affect the outcome of the assessment will warrant investigation and verification by credit providers. However, the legislation will still need to clarify the extent to which credit providers must go to verify disclosures provided by consumers during the pre-lending assessments. It would also be prudent to advise credit providers as to what disclosures would warrant an investigation. By understanding what disclosures warrant an investigation, credit providers will be better equipped to elicit such information efficiently. For

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461 Van Heerden & Steennot 'Pre-Agreement Assessment' 22.

462 *Summit Financial Partners v Direct Axis* 20.

example, from the *Mahlangu* judgement, it is evident that household disposable income would form part of the disclosure list that warrants an investigation. Further to this, the other party's relationship with the applicant, as well as their household income needs to be investigated.

South African credit laws do not require any formal proof of expenditure from consumers. This mini-dissertation prefer the views of Van Heerden and Steenot who recommended that the legislation require proof of expenditure, either in the form of bank statements or receipts to establish recurring expenses. Although this is in contrast to the decision in Summit's case, it is submitted that it will assist credit providers in conducting an accurate assessment and deter consumers from making false disclosures during an assessment. Expenses fluctuate, so a mere disclosure by consumers relating to their expenses is insufficient.

The current minimum expenses and norms table under Regulation 23A must be revised to consider the increased cost of living and inflation. It is submitted that the table in its current form is insufficient to establish the threshold for consumers. It is confusing and no explanation or formula accompanies the table under the Regulations.

With regard to the verification of consumers' gross income, in particular, those that are unbanked or informally employed, the analysis of the *Truworths* judgement indicates that the legislation would need to attempt to provide credit providers with an explanation of what other credible forms of information would be acceptable when verifying gross income.[463] Leaving the decision solely to credit providers may cause inconsistency and lack of enforcement within the credit sector.

Credit providers must be given a non-exhaustive list to indicate what exceptional circumstances warrant a deviation. It appears that at present, the discretion lies solely with credit providers. As stated above, a possible suggestion is for any agreement that contains a deviation to have approval by the NCR before the credit can be offered to consumers.

According to Nel, it is recommended that credit providers should include a buffer in their Affordability Assessment which will allow consumers to be guarded against emergency expenses.[464] Having a buffer means that not all consumers' disposable income will be used to calculate their ability to repay credit.[465] Thus, consumers can manage their repayments without

[463] Wazvaremhaka & Osode 'The implications of Truworths Limited'12-13.
[464] Nel *Affordability Assessments* 379-380.
[465] Ibid.

becoming over-indebted if unexpected expenses arise.[466] Interest rate fluctuations should be considered together with the impact that they may have on consumers.[467] Nel suggests that 'stress tests' on interest rates should be conducted to assess consumers' financial ability to withstand interest rate fluctuations.[468] Nel further suggests implementing a statistical model, resulting in a personalised approach to conducting the Affordability Assessment.[469]

5.3 Concluding remarks

South Africa has come a long way in promoting access to a fair, transparent and equal credit market. The introduction of the Affordability Assessment under Regulation 23A was a necessary step forward in allowing for consistency and conformity amongst credit providers. Whilst the regulations aim to curb reckless credit lending, one would be ignorant to state that it has solved the problem entirely. From recent case law, it is evident that the Regulation remains unclear as it pertains to different yet important aspects. Legislators would need to revisit the current laws and regulations to make them more adaptable within a South African context while still addressing its apparent flaws.

[466] Ibid.
[467] Ibid.
[468] Ibid.
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