

**Impact of the regulation of unsecured credit on
consumers: An Analysis of the National Credit Act 34 of
2005 and its Regulations**

by

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ABSTRACT

In 2012, the National Credit Regulator (hereinafter the 'NCR'), in its annual report, published a warning on the granting of unsecured credit, stating that the year saw an 'unprecedented growth' in the unsecured lending market. The aforementioned report noted an above average growth of 13,77 per cent over the course of the year.¹ Furthermore, the report contended that although unsecured credit was a vital part of the South African credit market, it was not impervious to reckless lending and abusive practices.² The NCR's warnings proved true in August 2012 when, due to calls for increased wages, violence erupted at a Rustenburg platinum mine that led to the death of thirty-four miners. It was subsequently revealed that high levels of debt as a result of unsecured credit was to be blamed for the 'Marikana Massacre'.³

Consequently, petitions were drafted for increased regulation, especially pertaining to unsecured credit and lending practices. In 2015, caps on interest and other fees applicable to various credit transactions were introduced to curb reckless lending.⁴ Although viewed by many as a safeguard for consumers, arguments have been put forward that the increased regulations and more stringent lending criteria have, in fact, reduced access to credit, especially to lower-income consumers.⁵

This dissertation will analyse whether the National Credit Act 34 of 2005 (hereinafter 'the NCA') and its regulations have impacted positively or negatively on consumers in relation to unsecured credit. Chapter 1 provides a contextual understanding for the dissertation, providing background to the research question, its rationale and methodology. To ensure the historical landscape of this research paper is understood, Chapter 2 examines the history of credit legislation in South Africa leading up to the implementation of the NCA and will explore the concept and history of unsecured credit. Chapter 3 provides an in-depth analysis of the

¹ National Credit Regulator *Annual Report (2012/13)* available at <https://www.ncr.org.za/documents/pages/Annual%20Reports/NCR+ANNUAL+REPORT+2012-13.pdf>, accessed on 11 March 2018 at 5.

² Ibid 5. Reckless lending, as provided by section 80 of the NCA, occurs when a credit provider fails to conduct an affordability assessment (as required by s81(2)) or the credit provider conducts such an assessment and enters into a credit agreement with the consumer, despite having information which indicates that the consumer did not comprehend or appreciate the risks, costs or obligations of said agreement; or information which indicates that the consumer will become over-indebted as a result of entering into the agreement.

³ M J Ellyne & B M Jourdan 'Did the National Credit Act Facilitate a Credit Boom or Bust in South Africa?' (May 2015) available at https://www.researchgate.net/publication/278618071_Did_the_National_Credit_Act_of_2005_Facilitate_a_Credit_Boom_and_Bust_In_South_Africa, accessed on 11 March 2018 at 4.

⁴ GN 1080 of GG 39379, 6/11/2015; 106-111 available at <https://www.thedti.gov.za/gazettes/39379.pdf>, accessed on 10 March 2018.

⁵ National Credit Regulator *Consumer Credit Market Report (2017)* available at <https://www.ncr.org.za/documents/CCMR/CCMR%202017Q4.pdf>, accessed on 11 March 2018 at 4 in which statistics show that the rejection rate for credit applications was a staggering 51,39% in 2017.

present credit legislation by analysing legislation, statistics and case law. This analysis is necessary to ascertain strengths or weaknesses of the current credit regime. In order to identify recommendations that can be applied to our jurisdiction, Chapter 4 seeks to provide a comparative international perspective on existing credit legislation by comparing South Africa, India and the United Kingdom. Finally, Chapter 5 comprises of recommendations and a conclusion of the research questions.

CHAPTER 1

1.1 BACKGROUND

Prior to the NCA, there existed inefficient consumer credit protection which consisted of the Usury Act 73 of 1968; the Credit Agreements Act 74 of 1980 and the Exemption Notices of 1992 and 1999.⁶ The collapse of microlenders such as Saambou and Unibank, which charged exorbitant rates, prompted a consumer credit evaluation by the Department of Trade and Industry which highlighted various issues concerning regulation in the credit market⁷. These included, but were not limited to, a lack of comprehensive credit legislation; fragmented and outdated legislation; a lack of access to credit by consumers; high credit costs; and reckless lending by creditors.⁸ In 2004, the Department of Trade and Industry released a Policy Framework for Consumer Credit, which subsequently led to the promulgation of the NCA in 2005, and its regulations in 2006.⁹

The purpose and objectives of the NCA is referenced in its preamble as well as section 3 and can be summarised as follows: to provide for a single, comprehensive system of credit; to promote and advance the social and economic welfare of consumers; and to ensure a fair, transparent and accessible market, especially to those who were previously disadvantaged.¹⁰ In addition, the NCA attempts to establish a balance between the expansion of access to credit for consumers, and the protection of those consumers whilst simultaneously providing safety for creditors.¹¹ Furthermore, by introducing the NCR and the National Consumer Tribunal (hereinafter the 'NCT'), the NCA provides for a system of checks and balances, thereby ensuring consistency of treatment amongst consumers.¹²

One of the forms of credit regulated by the NCA is that of unsecured credit or lending. Unsecured credit can be described as a loan which has no collateral mechanism, which means that the borrower does not provide any tangible assurance to satisfy the debt.¹³ Because

⁶ RP Goodwin-Groen & M Kelly-Louw 'The National Credit Act and its Regulations in the Context of Access to Finance in South Africa' (2006) available at http://www.finmark.org.za/wp-content/uploads/2016/01/Rep_NCA_AccesstoFinance_2006.pdf, accessed on 4 March 2018 at 12.

⁷ M Kelly-Louw 'Introduction to the National Credit Act' ;15 *Juta's Business Law* 147 (2007) 148.

⁸ South Africa Department of Trade and Industry *Credit Law Review: Setting the Scene* (2004) 1.

⁹ Kelly-Louw (note 7 above; 15).

¹⁰ *Ibid* 149.

¹¹ NCA 34 of 2005 section 3(a). See also ss 60-66 which deals with consumer's rights, including the right to information in a plain and understandable language; section 81(1) which requires a consumer to be truthful and honest when applying for credit; and section 97 which requires a consumer to disclose the location of his or her goods.

¹² Ellyne & Jourdan (note 3 above; 3).

¹³ *Ibid* 5.

lenders are undertaking more risks by granting unsecured credit,¹⁴ the fees and interest rates on unsecured loans are much higher, consequently proving a lucrative business opportunity for lenders.¹⁵ Despite this, unsecured credit is still increasingly popular amongst consumers due to its alluring factors. These factors include situations when consumers are denied access to formal financial assistance because of their poor credit profiles, and when consumers require money instantly.¹⁶

Unsecured loans can likewise be attributed to business growth, consumption and wealth creation.¹⁷ This is because unsecured credit allows individuals to accrue assets and to make and develop businesses, which in turn, generates employment opportunities.¹⁸

However, it can be argued that a failure to pay back excessive fees and interest can create a debt spiral which increases the vulnerability of consumers.¹⁹ The 'Marikana massacre' serves as evidence that indebtedness as a result of unsecured credit can cause political and social unrest.²⁰ Furthermore, it has been suggested that recent amendments to the NCA and its regulations might exclude consumers from the secured credit market. In September 2017 the high rejection rate for credit applications was followed by an increase in the number of unsecured loans being issued in South Africa, which suggests that in attempting to protect consumers, stringent criteria introduced by the legislation may have had an adverse effect.²¹

1.2 RATIONALE

¹⁴ 'Lower-income' or 'low-income' in the context of this paper refers generally to those who earn minimum wage (currently R20 per hour or R3500 per month) or lower resulting in an increased chance of defaulting on their loans, which is why they will be considered 'high risk' by lenders. Furthermore, it should be noted that lower-income consumers consist of varying races and professions, and consumers who are considered middle-class or wealthy can also apply for unsecured loans.

¹⁵ R Rom *The Impact of Unsecured Lending on the Financial Wellbeing of Consumers* (unpublished MBA research project, University of Pretoria, 2013) 3.

See also Virushka Kanniah *Bank's Adherence to the National Credit Act: Its effects on domestic indebtedness and fragility in South Africa* (unpublished MMFI thesis, University of Witwatersrand, 2015) 10.

¹⁶ Rom (note 15 above; 11).

¹⁷ Ibid

¹⁸ Ibid 3.

¹⁹ Ibid 11.

²⁰ Ibid 6.

²¹ National Credit Regulator (note 5 above; 4) which shows unsecured loans increasing from R20,07 billion to R22,29 billion. See also National Credit Regulator (Public Notice) *The NCR Calls for Caution in the Granting of Unsecured Credit* (2012) available at [http://www.ncr.org.za/documents/pages/articles/Advertorial%20NCR%20A4\(Press\).pdf](http://www.ncr.org.za/documents/pages/articles/Advertorial%20NCR%20A4(Press).pdf), accessed on 3 December 2018 in which a situation is illustrated whereby credit providers deny consumers secured loan products and instead offer them unsecured loans, thus ensuring lenders achieve a higher profit margin due to the increased maximum fees allowed on unsecured loans compared to secured loans.

The South African credit market has experienced a host of abuses,²² and the NCA thus seeks to ensure all parties conduct themselves responsibly.²³ However, there has always been international and national debate surrounding the need for credit regulation and it is therefore necessary to examine the opinions of those who endorse stringent regulation, and the views of those who oppose it.

Throughout history, advocates of regulation have put forward various arguments. For instance, it has been contended that credit legislation is needed to facilitate economic growth and investment within various economies.²⁴ In South Africa, the NCA encourages growth by theoretically providing for increased access to credit, particularly to low income, previously disadvantaged groups.²⁵ Furthermore, it is submitted that credit regulation is necessary to curb the excess of credit consumption, and that the NCA facilitates this objective by warding against predatory lending through its reckless lending provisions.²⁶

In addition, consumer protection frameworks, such as those aimed at the credit market, can be utilised to govern the relationship between users and suppliers of credit which facilitates transparency and fairness.²⁷ Similarly, the NCA has been described as a 'robust' consumer protection framework due to its establishment of enforcement mechanisms for consumers (such as the NCR) which ensures remedy and redress.²⁸ Furthermore, it has been contended that the Act's stringent regulations safeguards the interests of both consumer and creditors and promotes the financial literacy of consumers to ensure they make informed decisions.²⁹

²² South Africa National Treasury Discussion Paper *Treating Consumers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa* (2014) 6 available at <http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20With%20Ap6.pdf>, accessed on 28 November 2018. Such abuses include high fees, reckless lending, illegal debt collection practices and incomprehensible information.

²³ P Jordaan *The Credit Law of South Africa: a guide to consumers, credit users and credit grantors* (2007) 2.

²⁴ Ibid 1 whereby the author refers to regulation as a 'tool of economic growth'.

²⁵ Ellyne & Jourdan (note 3 above; 6). See also NCA 34 of 2005 section 3(a) which states that one of the purposes of the NCA is to promote access to credit, especially those who were historically unable to access it.

²⁶ NCA 34 of 2005 ss 79-88. See also A R Adewale 'Financial Regulation, Credit Consumption and Economic Growth-An Analysis of the National Credit Act in South Africa' (2014) 30(2) *The Journal of Applied Business Research* available at <http://uir.unisa.ac.za/bitstream/handle/10500/21894/Financial%20Regulation%20c%20Credit%20ConsumptionAnd%20Economic%20Growth%20An%20Analysis%20Of%20The%20National%20Credit%20Act%20In%20South%20Africa.pdf?sequence=1&isAllowed=y>, accessed on 20 March 2018 at 370.

²⁷ National Credit Regulator *Literature Review on the Impact of the National Credit Act has had on South Africa's Credit Market: Final Report* (2012) available at https://www.ncr.org.za/documents/pages/research-reports/jun13/NCR_NCA%20IMPACT%20LITERATURE%20REVIEW_FINAL%20REPORT_260612.pdf, accessed on 12 March 2018 at 19.

²⁸ South African Human Rights Commission *Human Rights Impact of Unsecured Lending and Debt Collection practices in South Africa* (2017) 31.

²⁹ Goodwin-Groen & Kelly-Louw (note 6 above; 47).

In addition, the NCA provides consumers with a degree of assurance when they are transacting with credit providers, as it aims to prevent risky behaviour by financial institutions by setting minimum standards that they must adhere to.³⁰

There is, however, a need to critically examine the balance between regulation and overregulation. Free market economy supporters contend that credit regulation obstructs market efficiency and impedes business activity, and are of the opinion that unencumbered markets will ensure that businesses, of their own accord, promote quality products and good services.³¹ The Free Market Foundation of Southern Africa reinforces this belief by arguing that over-regulation contributes to higher costs for consumers (especially the poorer population) in the form of higher prices, thereby impacting negatively on consumer growth.³²

Additionally, regulation has been labelled a 'toothless tiger' in that financial institutions, for fear of being accused of reckless lending, do not lend to lower-income markets.³³ Consequently, lower-income consumers seek alternate credit options and are often faced with increased costs of credit.

Although the NCA has been defined as a 'rigorous regulatory environment' it does possess many shortcomings.³⁴ Apart from the content of the Act, which some authors regard as deviations from South African Law, the NCA has been continually criticised.³⁵ It has been contended that consumers, for example, are often left vulnerable to exploitation by credit providers due to low levels of financial literacy, especially in the rural sectors.³⁶ Some critics even argue that the NCA favours credit expansion over consumer protection and that increased credit expansion to lower-income groups means that both lenders and consumers are facing higher risks, which in turn, could impact financial stability.³⁷

Ultimately, it can be contended that the detailed provisions of the NCA and its many regulations are cognisant of the history of the credit market.³⁸ However, in its attempts to improve and regulate access of credit to lower-income groups, the NCA may have contributed

³⁰ NCA 34 of 2005 ss 74-77 which deals with credit marketing practices and ss 79-82; which contains measures aimed at preventing over-indebtedness and reckless lending.

³¹ M Lipsky 'Rulemaking as a tool of democracy' 17 December 2014 at 2 available at <http://www.demos.org/publication/rulemaking-tool-democracy>, accessed on 28 May 2018 at 1.

³² The Free Market Foundation of Southern Africa (Submission) *Consumer Protection Bill* (2006) available at <http://www.freemarketfoundation.com/publications-view/submission-consumer-protection-bill>, accessed on 16 March 2018 at 6-7.

³³ M Kelly-Louw *Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (2008) 92.

³⁴ National Credit Regulator (note 27 above; 20).

³⁵ J M Otto *The National Credit Act Explained* (2006) 5.

³⁶ Ellyne & Jourdan (note 3 above; 5).

³⁷ Ibid 20.

³⁸ I Ramsay *Consumer Law and Policy: text and materials on regulating consumer markets* 2 ed (2007) 531.

to higher levels of over-indebtedness,³⁹ by facilitating the growth of unsecured credit.⁴⁰ Research has shown that due to NCA-imposed administration costs for lenders and caps on interest and fees for credit transactions, credit providers are reluctant to grant loans to higher risk, lower-income consumers.⁴¹ Consequently, consumers may be forced to make use of informal, unsecured forms of finance which attract higher costs.⁴²

Therefore, although the NCA provides consumer protection, it can be argued that the stringent criteria introduced by the Act and its regulations results in the unintended consequence of many consumers being denied access to finance.⁴³ Consequently, with unsecured credit as their only alternative, they are faced with higher credit costs whilst lenders achieve higher profit margins.⁴⁴ It can subsequently be reasoned that in an attempt to expand access to credit, the NCA may, in fact, have not achieved its other objectives.

This dissertation will answer the main research question by analysing related sub-questions. Such questions include whether the regulation pertaining to unsecured credit improves financial accessibility in the market in accordance with the aims provided for in the NCA. This is necessary to determine whether consumers are assisted by the Act's stringent regulation. It is therefore required that this research paper correspondingly examines the advantages of the current legislation in order to determine how consumers may benefit from its regime. In contrast, to determine the true scope of the NCA's impact on consumers, the extent to which consumers are over-burdened by the current regulation also requires inspection. Notwithstanding the impact on consumers, this research paper also seeks to investigate whether the NCA and its regulations promote a satisfactory balance between consumer protection and access to credit. Furthermore, having regard to the advantages and drawbacks of the current credit regime, as well as credit legislation existing in other countries, this research paper also attempts to determine whether more, or less regulation, is needed to improve the current state of affairs. In analysing foreign credit legislation, this research paper will additionally provide various recommendations that may applied to address the shortcomings in South Africa's current credit regime.

³⁹ M Kelly-Louw 'The prevention and alleviation of consumer over-indebtedness' (2008) 20(2) *SA Mercantile Law Journal* 204.

⁴⁰ SR de Wet, I Botha & M Booyens 'Measuring the effect of the National Credit Act on Indebtedness in South Africa' (2015) 8(1) *Journal of Economic and Financial Sciences* 99.

⁴¹ Goodwin-Groen & Kelly-Louw (note 6 above; 50) which provides an interview with Kuyasa, a non-profit organisation who supplies micro-loans to poorer consumers who are excluded from the formal finance sector. In its interview, Kuyasa contends that increased regulation, such as the caps imposed on interest rates, will create a 'hostile lending environment' and force lenders to refuse loans to lower-income consumers.

⁴² Kelly-Louw (note 39 above; 226).

⁴³ *Ibid*

⁴⁴ Rom (note 15 above; 47).

1.3 METHODOLOGY

This dissertation uses the qualitative approach of desktop research. This involves a review of case law, the relevant legislation, as amended, and academic writing including textbooks, journal articles, periodicals, unpublished theses, online statistics and web based data.

CHAPTER 2

2.1 THE INFLUENCE OF CREDIT ON CONSUMERS

Credit plays an important role in consumers' lives, with procuring items on credit even being described as an 'everyday occurrence'.⁴⁵ Credit additionally allows consumers who cannot afford to pay cash for certain items, the chance to purchase these items through credit finance.⁴⁶ Examples of these purchases include buying a vehicle or immovable property.⁴⁷

Credit can be described as a 'trade practice according to which goods or services are supplied to a receiver and where the parties agree that the receiver is entitled to pay for the goods or services at a future date'.⁴⁸ Furthermore, in exchange for allowing the receiver of the goods or services to settle payment later, the parties can agree that the borrower pay an additional amount called interest.⁴⁹

Delayed payment is an attractive characteristic of credit, allowing consumers to obtain resources without immediately reducing their bank balance. In South Africa, where many consumers are subjected to poverty, this factor is especially enticing.⁵⁰ Although it can be contended that credit facilitates materialistic spending and contributes to needless debt, it has also been viewed as an aid for financial empowerment,⁵¹ and enables consumers to satisfy their immediate desires.⁵² However, the temptation of unabated consumption and increasing levels of debt has given rise to the need for some sort of regulation.⁵³

2.2 THE HISTORY OF CREDIT LEGISLATION IN SOUTH AFRICA

Consumer credit legislation, globally, is influenced by social, political and economic factors which all need to be borne in mind by drafters, as this necessitates a balance between the protection of consumers and the rights of lenders to yield a fair profit.⁵⁴ In attempts to create this balance, South Africa implemented its first National Act, known as the Usury Act of 1926. This Act was subsequently repealed and replaced by the Limitation and Disclosure of Finance

⁴⁵ M Kelly-Louw 'Book Reviews' (2009) 21 *SA Mercantile Law Journal* 286.

⁴⁶ *Ibid*

⁴⁷ *Ibid*

⁴⁸ N J Grove & J M Otto *Basic principles of consumer credit law* 2 ed (2002) 1.

⁴⁹ *Ibid*

⁵⁰ Adewale (note 26 above; 370).

⁵¹ SR de Wet, I Botha & M Booyens (note 40 above; 84).

⁵² D James 'Deeper into a Hole? Borrowing and Lending in South Africa' (2014) 55(9) *Current Anthropology* S17

⁵³ Adewale (note 26 above; 368).

⁵⁴ J Otto 'The History of Consumer Credit legislation in South Africa' (2010) 16(1) *Fundamisa* 259.

Charges Act 73 of 1968. The Usury Act 73 of 1986 thereafter considerably amended the Limitation and Disclosure of Finance Charges Act of 1968.⁵⁵

South Africa's credit legislation, at that stage, consisted primarily of three main pieces of legislation namely: the Usury Act 73 of 1968 (the 'Usury Act'-now repealed); the Credit Agreements Act 74 Of 1980 (the 'Credit Agreements Act') and the Exemption Notices of 1992 and 1998 (the 'Exemption Notices').

2.2.1 Usury Act

The Usury Act covered loans of up to R300 000. The most noteworthy feature of the Usury Act was that it capped the interest rate of these loans to 26 per cent per annum (at the time of its repeal).⁵⁶ Legislation which curbs excessive costs and interest rates are not a modern invention. In fact, the earliest forms of usury regulation can be traced back over 4000 years ago.⁵⁷ In the South African context, the Usury Act, through its cap, had the unintentional effect of excluding lower income consumers from access to formal credit.⁵⁸ This was owing to the fact that the lower interest rate meant lower profit margins for the lenders and therefore, served as no incentive for credit providers to loan money to higher risk consumers.⁵⁹ The Usury Act however became outdated as it was promulgated in a time before credit cards and home loans.⁶⁰ This came as a relief to many as the Usury Act was regarded as 'one of the most complicated pieces of legislation enacted in South Africa'.⁶¹

2.2.2 Credit Agreements Act

While the Usury Act governed the financial features of credit agreements, the Credit Agreements Act was concerned with the regulation of the contractual features of credit agreements,⁶² such as the contents of said agreements, prohibited contractual terms, and requirements regarding deposits.⁶³ Although the Usury Act and the Credit Agreements Act covered different aspects of credit agreements and were meant to supplement each other,⁶⁴ their scopes sometimes overlapped and this created interpretive difficulties.⁶⁵

⁵⁵ Otto (note 54 above; 261).

⁵⁶ Kelly-Louw (note 39 above; 201).

⁵⁷ M Kelly-Louw & P Stoop *Consumer Credit Regulation in South Africa* (2012) 7. For a brief discussion on the earliest forms of usury laws, see Scholtz et al *Guide to the National Credit Act* (2009) para 1.2.1.

⁵⁸ Kelly-Louw & Stoop (note 57 above; 8).

⁵⁹ *Ibid*

⁶⁰ Kelly-Louw (note 39 above; 201).

⁶¹ Otto (note 54 above; 261).

⁶² Kelly-Louw (note 39 above; 203).

⁶³ Otto (note 54 above; 266).

⁶⁴ *Ibid*

⁶⁵ Kelly-Louw (note 39 above; 203).

2.2.3 Exemption Notices

The first Exemption Notice,⁶⁶ which aimed at improving access to credit for lower-income consumers, was issued in 1992 and covered loans that were below the amount of R6000 and were exempted from provisions contained in the Usury Act.⁶⁷ Furthermore, the interest rates which applied to these loans were uncapped, consequently resulting in the formation of a large but unregulated micro-lending industry,⁶⁸ in terms of which lower-income consumers, with no security or collateral, could obtain finance, albeit at a higher cost.⁶⁹

In 1999, this Notice was repealed and replaced by the second Exemption Notice which applied to loans up to R10 000 and which were payable over 26 months.⁷⁰ These loans, however, were exempted from both the Usury Act and from capped interest rates. Furthermore, microlenders were obliged to register with the Micro Finance Regulatory Council, providing regulatory oversight to lending bodies who were previously unregulated.⁷¹

2.2.4 Promulgation of the NCA

Despite various legislative interventions in the credit market, levels of over-indebtedness and reckless lending increased for a multitude of reasons, inter alia because previously disadvantaged consumers, who were formerly denied access to finance, now had access to credit.⁷² However, many lower-income consumers were still excluded from accessing formal credit and were forced to source alternative loans through usurers⁷³ and microlenders.⁷⁴ Owing to these factors, coupled with the collapse of Saambou and Unibank,⁷⁵ it became apparent that the credit market in South Africa was dysfunctional.⁷⁶ This prompted a review of

⁶⁶ See Notice 73 in GN R3451 of GG 14498, 31/12/1992.

⁶⁷ Kelly-Louw (note 39 above; 202).

⁶⁸ Ibid. See also Leriba Consulting Limited 'The risk of unsecured lending in South Africa' (2013) Occasional research report available at <http://www.leriba.com/wp-content/uploads/2013/06/Leriba-unsecured-lending-Report.pdf>, accessed on 26 April 2018 at 2 in which concern is expressed over the exemption framework creating a 'regulatory vacuum' which caused widespread abusive practices.

⁶⁹ Kelly-Louw (note 39 above; 202).

⁷⁰ See Notice 713 of GG 20145, 1/06/1999, as amended by Notice 910 of GG 20307, 16/07/1999. See also Kelly-Louw (note 39 above; 202).

⁷¹ Kelly-Louw (note 39 above; 202). It should be noted that the MFRC no longer exists, however all credit providers, including microlenders, are obliged to register with the NCR. Furthermore, there exist other regulatory organisations, such as *MicroFinance South Africa* which seek to ensure ethical practices by its members (microlenders).

⁷² Kelly-Louw (note 39 above; 204). See also Goodwin-Groen & Kelly-Louw (note 6 above; 13) where it is submitted that inappropriate legislation, together with a minimal enforcement contributed to an 'unacceptable state of affairs'.

⁷³ Another, more colloquial term is for this type of lender is 'loan shark'.

⁷⁴ Kelly-Louw (note 39 above; 204).

⁷⁵ Kelly-Louw (note 7 above; 148).

⁷⁶ Kelly-Louw (note 39 above; 204).

the Usury Act by the South African Law Reform Commission in 1994, and a need arose for the analysis of the existing legislation.⁷⁷

In response, the Department of Trade and Industry (the 'DTI') attempted to introduce various measures, such as those aimed at protecting micro-loans, but their attempts were futile.⁷⁸ In 2002, concerns were still mounting over the increasing levels of over-indebtedness and reckless lending by credit providers.⁷⁹ Therefore, in that same year, the DTI set up a Technical Committee which was tasked with identifying weaknesses in the credit market. The weaknesses identified by the Technical Committee included inadequate provisions relating to disclosing the cost of credit; unsuitable debt collection provisions; and a drastically low Usury Act cap,⁸⁰ which prevented low-income, higher risk consumers from obtaining formal credit.⁸¹

Once these weaknesses were identified, the DTI consolidated the findings of the Technical Committee with a Policy Framework for Consumer Credit in 2004, in which it was recommended by the Credit Law Committee that the Usury Act and the Credit Agreements Act should be repealed and replaced by a single, comprehensive statute and overseen by an independent, statutory regulatory body.⁸² The review subsequently resulted in the promulgation of the NCA in 2005 followed by the National Credit Regulations (the 'regulations') in 2006.⁸³ The NCA has been hailed a 'huge improvement'⁸⁴ in regard to its predecessors and although simpler, has a wider field of application and regulates other areas besides interest rates (such as initiation fees and charges). Furthermore, the NCA regulates many forms of credit, including unsecured credit.

2.3 THE HISTORY OF UNSECURED CREDIT IN SOUTH AFRICA

South Africa experienced its first major growth in unsecured lending between the year 1980 and the year 2000.⁸⁵ In 1992 when the Exemption Notice exempted certain loans from the Usury Act with the aim of increasing access to credit and other financial services, various banks contended that the caps introduced by the Usury Act made it increasingly difficult to provide small loans to poorer consumers who wanted to gain entry to the formal financial

⁷⁷ Kelly-Louw (note 7 above; 147).

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ The lid that was placed on the costs that lenders were allowed to charge consumers was set at a maximum rate so low that lenders did not consider it viable to lend to consumers who had no collateral and who were more likely to default on their loans.

⁸¹ Kelly-Louw (note 7 above; 148).

⁸² Ibid 149.

⁸³ Ibid

⁸⁴ Otto (note 54 above; 261).

⁸⁵ Leriba Consulting Limited (note 68 above; 2).

sector.⁸⁶ The exemption promoted the rapid growth of the micro-lending industry and by 1999, the number of micro-loans issued in the country totalled R15 billion.⁸⁷ Due to the regulatory framework which existed at the time, the activities of micro-lenders were largely uninhibited, and as a result, abusive practices were extensive.⁸⁸ Lenders opted to charge exorbitant interest rates whilst carrying little to no risk. In response to such abuses, the Micro Finance Regulatory Council ('MFRC') was established and all lenders providing loans in terms of the exemption notices had to be registered.⁸⁹

In the year 2000, there existed three major lenders in the industry, namely, Saambou, Unifer and African Bank Limited. Collectively, these banks possessed micro-loan books estimated at over R14 billion, with the majority of these monies being collected through deductions from civil servants' salaries, which was believed to be a 'fail-safe' strategy.⁹⁰ However, the government opted to end this deduction mechanism,⁹¹ which resulted in the collapse of Unifer and the curatorship of Saambou.⁹² Following this crisis, the government, with the aim of refurbishing the entire credit regime, introduced the NCA and its regulations.⁹³ The NCA promoted the development of the unsecured market by removing the exemption which had restricted unsecured lending in previous years.⁹⁴ Furthermore, as an additional safety measure, lenders were required to register with the NCR and all lending was governed by the NCA itself.⁹⁵ Some additional features of the NCA included different interest rate caps for various credit transactions.⁹⁶

However, the financial crisis in 2007 halted the development of unsecured credit and saw many credit providers becoming risk averse, refusing to lend to lower-income consumers who had no security.⁹⁷ Nevertheless, 2010 brought stability and control through the entrance of new participants into the unsecured market in the form of large banks such as Absa Bank,

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ Ibid. Furthermore, according to section 2 the MFRC Rules available at <http://www.microfinancegateway.org/sites/default/files/mfg-en-paper-south-africa-rules-of-the-microfinance-regulatory-council-jul-2002.pdf>, accessed on 20 November 2018 at 2, such lenders include a close corporation, company, trust, statutory entity or a bank.

⁹⁰ Leriba Consulting Limited (note 68 above; 3).

⁹¹ Leriba Consulting Limited (note 68 above; 3). This was inter alia due to the fact that banks rarely assessed the affordability of borrowers.

⁹² South African Human Rights Commission (note 28 above; 18).

See also Leriba Consulting Limited (note 68 above; 3) and Ellyne & Jourdan (note 3 above; 7).

⁹³ Leriba Consulting Limited (note 68 above; 4).

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ Ibid 5.

⁹⁷ Ibid

Nedbank, Standard Bank and FirstRand Bank.⁹⁸ Whilst Absa Bank made the decision to reduce its involvement in the sector, it was clear that unsecured credit was deliberately targeted by other banks due to the large profit margins.⁹⁹ This was highlighted in published NCR figures which showed consumers being charged beyond the cost of the loan itself, with hidden costs such as initiation fees and high interest.¹⁰⁰ These figures, together with figures released by the NCR in 2011 showing an increase in unsecured lending,¹⁰¹ and a rise in the number of impaired credit records, raised concerns.¹⁰² These apprehensions were echoed by African Bank Limited who had warned about the speed of growth of these loans.¹⁰³

Following the Marikana massacre in 2012, investigations revealed high instances of reckless lending in respect of unsecured loans and the Minister of Finance was forced to call a meeting with banks to request the tightening of unsecured lending.¹⁰⁴ An ensuing agreement known as the 'Ensuring Responsible Market Conduct for Bank Lending'¹⁰⁵ consequently resulted in unsecured loans being provided to higher-income earners who posed little to no risk.¹⁰⁶ This position is reflected today. In 2017, the NCR released statistics in its Consumer Credit Market Report ('CCMR') which showed that there was a decrease in the number of unsecured credit agreements being granted to consumers with a grossly income of less than R10 000 per month.¹⁰⁷ The same report highlighted the fact that more unsecured credit agreements were being granted to consumers with a monthly income of more than R15 000.¹⁰⁸ The aforementioned figures can be used to illustrate the reality of increased regulation leading to

⁹⁸ Ibid 5-6.

⁹⁹ South African Human Rights Commission (note 28 above; 20).

See also Ellyne & Jourdan (note 3 above; 11) in which it is contended that between the years of 2006 and 2007, lenders tried to extend as much unsecured credit as possible.

¹⁰⁰ Compliance & Risk Resources (Pty) Ltd (Final Report) *Research on the Increase of Unsecured Loans in South Africa's Credit Market* (2012) available at

<https://www.ncr.org.za/documents/pages/research-reports/aug12/UPL%20Report%2047%20Final.pdf>, accessed on 15 March 2018 at 63. See also

Leriba Consulting Limited (note 68 above; 8).

¹⁰¹ National Credit Regulator *Annual Report* (2011/2012) available at

<http://www.ncr.org.za/documents/pages/Financial%20Statement/NCR%20Annual%20Report%202011-12.pdf>, accessed on 3 December 2018 at 14 in which the NCR report submitted that there was an

increase in the number of South Africans relying on unsecured credit (as at December 2011, unsecured credit comprised of 24,58% of all new credit granted).

¹⁰² Leriba Consulting Limited (note 68 above; 8). See also National Credit Regulator (note 101 above; 19) which stated that, as of December 2011, the number of consumers with impaired records was 8,93 million which constituted 46,2% of credit active consumers). Additionally, see National Credit Regulator (note 21 above) in which the CEO, Nomsa Motshegare, acknowledges the concerns surrounding unsecured credit, identifies undesirable practices, and cautions credit providers.

¹⁰³ Ibid 9.

¹⁰⁴ Ellyne & Jourdan (note 3 above; 24).

¹⁰⁵ Ibid

¹⁰⁶ Ibid 16.

¹⁰⁷ National Credit Regulator (note 5 above; 15).

¹⁰⁸ Ibid

a prevention of access to credit, especially to lower-income consumers who rely on unsecured credit.

CHAPTER 3

3.1 INTRODUCTION

To properly assess the impact that the NCA has on consumers with regards to unsecured credit, it is necessary to analyse, and critique certain provisions of the aforementioned Act. This chapter will examine both the preamble and the purpose of the NCA and will assess whether certain provisions relating to unsecured credit fulfils the NCA's stated objectives of proving credit to low-income consumers.

3.2 THE PURPOSE OF THE NATIONAL CREDIT ACT 34 OF 2005

3.2.1 Preamble and Section 3¹⁰⁹

The Preamble contains the main objective of the NCA. It includes phrases which, for the purposes of this research paper, are of particular importance. Amongst other aims, the Preamble states that the NCA was implemented to provide for '*access to consumer credit*'. Furthermore, it declares that the NCA aims to ensure '*improved standards of consumer information*' and strives to '*promote responsible credit granting and use*'.¹¹⁰

Section 3 provides the over-arching purpose of the NCA which is to '*promote and advance the social and economic welfare*' of South African consumers and to promote, amongst other things, a '*transparent*', '*responsible*' and '*accessible*' credit market. Section 3 subsequently lists various means by which the NCA seeks to protect consumers, which includes: the promotion and development of '*a credit market that is accessible to all South Africans*' especially for those who, '*historically*', were '*unable to access credit*';¹¹¹ the certification of a responsible credit market by '*encouraging responsible borrowing*' and ensuring '*the avoidance of over-indebtedness*' and the '*fulfilment of financial obligations by consumers*';¹¹² and by the correcting of imbalances of bargaining power between consumers and credit providers by '*providing consumers with adequate disclosure of standardised information in order to make informed choices*'.¹¹³

The aforementioned objectives of the NCA have the recurring theme of improving access to credit, promoting responsible borrowing and improving the imbalance between consumers and credit providers through disclosure.

3.2.2 Significant Definitions

¹⁰⁹ 34 of 2005

¹¹⁰ Preamble of the NCA 34 of 2005

¹¹¹ Section 3(a) of the NCA 34 of 2005

¹¹² Section 3(c)(i) of the NCA 34 of 2005

¹¹³ Section 3(e)(ii) of the NCA 34 of 2005

When examining the provisions contained in the NCA and its regulations, it is necessary to first take cognisance of fundamental definitions to facilitate analysis and understanding.

Some of the most important definitions are contained in section 1 of the NCA,¹¹⁴ including the definitions of '*consumer*',¹¹⁵ '*credit*',¹¹⁶ '*credit agreement*'¹¹⁷ and '*credit provider*'.¹¹⁸ However, some terms, deemed necessary for the purposes of this research paper, are not defined in the NCA. For instance, the definition of '*interest*' is not included in the NCA and is therefore presumed to possess its ordinary meaning, being money charged for the extension of an amount of credit.¹¹⁹

It is also interesting to note that although the term '*secured loan*'¹²⁰ is defined in the NCA, there is no prescribed definition for '*unsecured loan*'. To establish its meaning, reference needs to be made to regulation 39(3) which provides a description of the term '*unsecured credit transaction*', stating that it is a '*credit transaction in respect of which the debt is not supported by any pledge or other right in property or suretyship or any other form of personal*

¹¹⁴ 34 of 2005

¹¹⁵ Section 1 of the NCA 34 of 2005 defines a *consumer*, in respect of a credit agreement as: (a) the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement; (b) the party to whom money is paid, or credit granted, under a pawn transaction; (c) the party to whom credit is granted under a credit facility; (d) the mortgagor under a mortgage agreement; (e) the borrower under a secured loan; (f) the lessee under a lease; (g) the guarantor under a credit guarantee; or (h) the party to whom or at whose direction money is advanced or credit granted under any other credit agreement.

¹¹⁶ Section 1 of the NCA 34 of 2005 defines *credit* as (a) a deferral of payment of money owed to a person, or a promise to defer such a payment; or (b) a promise to advance or pay money to or at the direction of another person.

¹¹⁷ Section 1 of the NCA 34 of 2005 defines a *credit agreement* as 'an agreement that meets all the criteria set out in section 8'. Section 8 provides that a credit agreement includes a credit facility, a credit transaction, a credit guarantee, or a combination thereof. It further excludes an insurance policy, a lease for immovable property and an agreement relating to a Stokvel.

¹¹⁸ Section 1 of the NCA 34 of 2005 defines a *credit provider* as (a) the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement; (b) the party who advances money or credit under a pawn transaction; (c) the party who extends credit under a credit facility; (d) the mortgagee under a mortgage agreement; (e) the lender under a secured loan; (f) the lessor under a lease; (g) the party to whom an assurance or promise is made under a credit guarantee; (h) the party who advances money or credit to another under any other credit agreement; or (i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into.

¹¹⁹ Otto (note 35 above; 91). See also South African Reserve Bank *Interest rates and how they work* available at <https://www.resbank.co.za/AboutUs/Documents/Interest%20rates%20and%20how%20they%20work.pdf>, accessed on 10 August 2018 at 2 whereby the South African Reserve Bank defines interest as the price paid to a lender of funds 'for the right to use the accumulated funds'. The English Oxford Dictionary further describes interest as 'money paid regularly at a particular rate for the use of money lent, or for delaying the repayment of a debt'.

¹²⁰ Section 1 of the NCA 34 of 2005 defines a *secured loan* as 'an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person (a) advances money or grants credit to another, and (b) retains, or receives a pledge or cession of the title to any movable property or other thing of value as security for all amounts due under that agreement.'

security other than credit life insurance.¹²¹ There seems to be no indication as to why the legislature excluded this definition from the NCA itself. A possible reason for not including a definition of unsecured credit is that at the time the NCA was drafted, unsecured lending was not as widespread as it is today.

3.3 COST OF CREDIT

3.3.1 Introduction

Sections 101-106 of the NCA deals with the fees and charges that credit providers are entitled to charge consumers, as well as regulations 40-44. The NCA also makes provision for maximum rates of interest, fees and other charges.

3.3.2 Fees, charges and the 'in duplum' rule

3.3.2.1 Section 101

Section 101¹²² contains a comprehensive list of fees, charges and interest that credit providers may charge,¹²³ and reference is given to them throughout this chapter. This section provides that, in terms of a credit agreement, a credit provider may not require payment by the consumer of 'any money or consideration' except for the following:¹²⁴

- a) *the principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102;*
- b) *an initiation fee;*
- c) *a service fee, which*
 - (iii) *must not exceed the prescribed amount relative to the principal debt;*
- d) *interest, which*
 - (ii) *must not exceed the applicable maximum prescribed rate determined in terms of section 105;*
- e) *cost of any credit insurance provided in accordance with section 106;*
- f) *default administration charges*
- g) *collection costs*

¹²¹ GN 1080 of GG 39379 (note 4 above).

¹²² 34 of 2005

¹²³ Otto (note 35 above; 89).

¹²⁴ Section 101(1) of the NCA 34 of 2005

Of particular importance is section 103 (5)¹²⁵ which provides a statutory 'in duplum' rule¹²⁶ and states that:

*'Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101 (1) (b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the **unpaid balance** [own emphasis added] of the principal debt under that credit agreement as **at the time that the default occurs.**'* [own emphasis added]

3.3.2.2 Analysis

Section 101 prevents creditors from charging consumers any money or consideration for items not listed in terms of a credit agreement. The term 'consideration' is not defined in the NCA, however, the court stated in *Evans v Smith and Another 2011 (4) SA 472 (WCC)*¹²⁷ that the exact nature of the consideration did not matter. The words 'charge, fee or interest' are therefore of 'wide import' and will include any amount payable in respect of a credit agreement where payment has been deferred.¹²⁸

For the purposes of this research paper, certain charges listed in section 101 will be considered.

An 'initiation fee' can be defined as the fee payable to a credit provider for the costs involved in initiating the credit agreement.¹²⁹ There have, however, been arguments that the exact purpose of the initiation fee is 'unclear',¹³⁰ and that this therefore 'allows for a loophole'.¹³¹ The reasoning behind this is that low-income consumers who are not able to afford such a fee in advance of obtaining the loan, will be lured by credit providers into taking another separate loan to cover the initiation cost.¹³²

A 'service fee' is charged periodically for routine costs relating to the administration of maintaining the credit agreement. Depending on the type of credit agreement, the service fee is charged monthly, annually or per transaction.¹³³ What is interesting to note is section 101(c)(iii)¹³⁴ which states that the service fee cannot exceed the prescribed amount relative to

¹²⁵ 34 of 2005

¹²⁶ Otto (note 54 above; 562).

¹²⁷ Page 10 para 17

¹²⁸ Otto (note 35 above; 89).

¹²⁹ Ibid 91.

¹³⁰ J Campbell 'The Excessive Cost of Credit on Small Money Loans under the National Credit Act 34 of 2005' (2007) 19 *SA Merc LJ* 262. For further implications regarding the initiation fee, see pages 260-262.

¹³¹ Ellyne & Jourdan (note 3 above; 80).

¹³² Ibid

¹³³ Otto (note 35 above; 91).

¹³⁴ 34 of 2005

the principal debt. According to the regulations,¹³⁵ the maximum service fee that consumers can be charged is a flat-rate of R60. This provision clearly does not differentiate between consumers who use their accounts frequently and are more 'financially active' as opposed to those who use their accounts sparingly.¹³⁶ Campbell portrays the negative effects of this 'flat-rate' by comparing the loan amount with the service fee amount expressed as a percentage relative to the loan amount.¹³⁷ In so doing, it becomes apparent that smaller loans are provided to consumers at inflated rates, thus allowing providers of small loans for short periods to make substantial profits. Whilst this may not be unduly cumbersome on wealthier consumers, lower-income consumers are excessively disadvantaged.¹³⁸

'Interest', as explained above, is not defined in the NCA but refers to money that is charged for the extension of credit.¹³⁹ Section 101(d)(ii)¹⁴⁰ prevents a credit provider charging a consumer more than what is allowed in terms of the regulations prescribing maximum rates.

Prior to the NCA, to prevent credit providers from exploiting consumers (especially in respect of interest) consumers could only rely on the common law 'in duplum' rule. The rule provided relief for consumers by ensuring that any arrear amounts and unpaid interest on a loan could not exceed the outstanding capital of the borrowed amount.¹⁴¹ In other words, interest stopped running when the amount of the unpaid interest equalled the outstanding capital amount.¹⁴² The consumer was therefore required to make payments on the loan amount in order to decrease the amount of interest charged.¹⁴³ The NCA has since enacted section 103(5)¹⁴⁴ to preserve this rule and to extend it by ensuring that the moment a consumer defaults on his or her loan (as long as it is a credit agreement in terms of the NCA), *all* amounts contemplated in section 101 will stop running when they reach the outstanding balance of the principal debt.¹⁴⁵

¹³⁵ Regulation 44 of GN 1080 of GG 39379 (note 4 above).

¹³⁶ Otto (note 35 above; 100).

¹³⁷ Campbell (note 130 above; 262). If we use the same example provided by Campbell but substitute the previous R50 with the current flat-rate of R60, the figures are as follows: If the loan amount is R200 and the service fee is R60, the monthly cost of the service fee relative to the loan amount is 30% per month, whilst the annual cost of the service fee relative to the loan amount is 360% per year. In contrast, if the loan amount is R10 000, the monthly cost of the service fee relative to the loan amount is only 0,6% per month, whilst the annual cost of the service fee relative to the loan amount is 7.2% per year.

¹³⁸ Ibid

¹³⁹ Otto (note 35 above; 91).

¹⁴⁰ 34 of 2005

¹⁴¹ Otto (note 35 above; 95).

¹⁴² Kelly-Louw & Stoop (note 57 above; 251).

¹⁴³ Ibid

¹⁴⁴ 34 of 2005

¹⁴⁵ Kelly-Louw & Stoop (note 57 above; 255). For example, if X, being the consumer, owes Y, the credit provider, R5000, the total amount of all costs owing on that loan, including interest, initiation

The NCA has therefore introduced vital amendments to the common law position,¹⁴⁶ by extending the ceasing of costs to all costs contemplated in section 101,¹⁴⁷ and not just to interest. In addition, the NCA only allows costs to accrue again once the consumer is no longer in default. This is as opposed to the common law which allows for interest to continue running the moment the defaulting consumer makes a payment.¹⁴⁸

3.3.2.3 Correspondence to the aims of the NCA

When considering the various costs prescribed by the NCA, several conclusions can be drawn. The first is that, when the prescribed costs are accumulated, smaller loans are more expensive.¹⁴⁹ This bodes negatively for lower-income consumers who commonly rely on small, short-term loans.

One of the fundamental aims of the NCA is to make credit cheaper and more accessible for consumers. Furthermore, the NCA aims to prevent the over-indebtedness of consumers. When comparing the costs of credit, the NCA is not achieving its objectives in this respect as the pricing structure appears to cater for larger loans which people with more money can afford. This means that poorer people who require smaller loans and whom the NCA aims to socially and economically advance, suffer the harsh consequences of not being able to repay these loans.

The 'in duplum' rule can perhaps be viewed as a 'saving grace' in this context as it effectively creates a lid on the amount of charges on a defaulting loan, to the amount of the loan and thus protects consumers from being trapped in a debt spiral that is impossible to escape from.¹⁵⁰ In this way, the NCA fulfils its aims of avoiding over-indebtedness.

In addition, the list of fees, interest and other charges may aid in concealing the true cost of the loan itself.¹⁵¹ For example, in a report released by the NCR, it showed that over 30 per cent of revenue generated from unsecured loans consisted of initiation fees, services fees and credit life insurance.¹⁵² Consumers, especially those who are financially illiterate, will not

fees, services fees etc, may not exceed the principal amount of R5000 during the time that X is in default.

¹⁴⁶ It should be noted that in *Nedbank Ltd and Others v The National Credit Regulator and Another 2011 (4) All SA 131 (SCA)*, the Supreme Court of Appeal held that although section 103(5) deals with the same subject matter as the common law rule, it is not a 'codification' of this position and is a self-standing provision-page 21 para 38

¹⁴⁷ 34 of 2005

¹⁴⁸ Kelly-Louw & Stoop (note 57 above; 262). For more differences regarding the statutory and common law 'in duplum' rule, refer to page 262.

¹⁴⁹ Campbell (note 130 above; 266). Refer to tabulated examples on the same page which show the costs of different types of loans at the different rates.

¹⁵⁰ Otto (note 35 above; 95).

¹⁵¹ Ellyne & Jourdan (note 3 above; 22).

¹⁵² Leriba Consulting Limited (note 68 above; 22).

comprehend the accumulation of these 'hidden' costs. This, in turn, defeats a further aim of the NCA, namely the ability of consumers to make informed choices.

It can therefore be contended that although the NCA seeks to ensure the cost of credit is always disclosed, the way it has been drafted may be overburdensome to consumers.

3.3.3. Maximum rates of interest, fees and other charges

3.3.3.1 Relevant provisions

Section 103(6) states that *'The Minister may make regulations prescribing the manner in which interest is to be calculated and disclosed for the purposes of this Act.'*¹⁵³

This coincides with section 105(1) of the NCA,¹⁵⁴ which allows the Minister of Trade and Industry (hereinafter 'the Minister'), after consulting with the NCR, to prescribe regulations for the calculation of a 'maximum rate of interest' and 'maximum fees' for each subsector of the consumer credit market.¹⁵⁵ Effectively this means that costs are capped at specific amounts in respect the charges contemplated in section 101, according to different types of credit agreements.¹⁵⁶

When determining these maximum rates, the Minister must also have due regard to the following factors, as per section 105(2):¹⁵⁷

*(a) the need to make credit available to persons contemplated in section 13 (a);*¹⁵⁸

(b) conditions prevailing in the credit market, including the cost of credit and the optimal functioning of the consumer credit market; and

(c) the social impact on low income consumers.

In this regard, reference must be made to regulation 42(1) and (2) which deal with maximum prescribed interest rates and maximum initiation fees respectively,¹⁵⁹ and regulation 44 which prescribes the maximum services fee.¹⁶⁰

¹⁵³ 34 of 2005

¹⁵⁴ 34 of 2005

¹⁵⁵ Section 105(1)(a) and (b) of the NCA 34 of 2005

¹⁵⁶ Ellyne & Jourdan (note 3 above; 8).

¹⁵⁷ 34 of 2005

¹⁵⁸ These persons include (i) historically disadvantaged persons; (ii) low income persons and communities; and (iii) remote, isolated or low density populations and communities.

¹⁵⁹ GN 1080 of GG 39379 (note 4 above).

¹⁶⁰ Ibid 56.

Regulation 42(1) states that the maximum interest rate for an unsecured credit transaction is Repo Rate ('RR') +21% per year.¹⁶¹ The formula for establishing the maximum rate of interest that can be charged for an unsecured loan is as follows:

RR (which is currently 6.5%) x 2.2 + 21% per annum.¹⁶² Therefore, the maximum rate of interest for unsecured loans is currently **35.3%** per annum.

Regulation 42(2)¹⁶³ prescribes the maximum initiation fee for unsecured credit transactions, being R165 per credit agreement, plus 10% of the amount in excess of R1 000¹⁶⁴ up to and not exceeding **R1 050**.

Regulation 44 states that the maximum service fee per month is **R60**, and further:¹⁶⁵

- (1) Where an annual service fee is levied, the applicable limit is*
- (a) the monthly limit on the service fee, multiplied by 12,¹⁶⁶ and*
- (b) where the period for which the fee is levied is less than 12 months, the monthly service fee multiplied by the number of months in such a period.*

In addition, regulation 45¹⁶⁷ obliges the NCR to periodically review the limitations on interest and other fees, and when providing recommendations to the Minister, take into consideration aspects such as access to finance for persons contemplated in section 13(a), including those persons historically unable to access credit. This occurred in 2015 when the Minister published a Draft Review regarding the limitations on fees and interest and invited public comment,¹⁶⁸ and thereafter published a Final Review.¹⁶⁹

3.3.3.2 Analysis

¹⁶¹ Ibid 53.

¹⁶² For example, if an unsecured loan amount is R1500, the amount of interest on that loan per annum is a R529.50.

¹⁶³ GN 1080 of GG 39379 (note 4 above; 54).

¹⁶⁴ For example, if an unsecured loan amount is R1500, the initiation fee will be R165+R150 (10% of R1500) which will total R315.

¹⁶⁵ GN 1080 of GG 39379 (note 4 above; 56).

¹⁶⁶ For example, if an unsecured loan is R1500, the service fee is a flat rate of R60X12 months which equals R720.

¹⁶⁷ GN 1080 of GG 39379 (note 4 above; 57).

¹⁶⁸ GN 655 of GG 38911, 25/06/2015 available at <https://www.thedti.gov.za/gazettes/39379.pdf>, accessed on 10 March 2018. For example, see page 9 which stated that the proposed maximum interest rate for unsecured credit agreements was (RRx1.7) + 15% per year, ad contrast this with the prescribed maximum in the final review on page 109, which states that the maximum prescribed interest rate for unsecured loans is RR+21% per year.

¹⁶⁹ GN 1080 of GG 39379 (note 4 above).

The regulations pertaining to the ability of the Minister to calculate and provide for maximum rates of interest and other costs will henceforth be referred to as the ‘enabling provisions.’

The enabling provisions allow the Minister to implement regulations affecting the maximum rates of interest, initiation fees and services fees, amongst other charges. It is necessary to note, however, that before implementing such regulations, the Minister is obliged to consult with the NCR.¹⁷⁰ The NCR consists of a body of economic experts and is led by a qualified Chartered Accountant as its CEO.¹⁷¹ Such consultation is beneficial to the Minister as the NCA requires the NCR to monitor and report on various matters such as the availability of credit, credit market conditions, access to consumer credit and participation in the credit market by historically disadvantaged persons.¹⁷² Furthermore, the Minister must consider various factors prior to enacting the regulations, such as the necessity for the availability of credit and the resulting impact that the Regulations will have on low-income consumers.¹⁷³

The requirement that the Minister consult with stakeholders and consider various factors ensures that the impact of the regulations does not derail the objectives of the NCA.

It is also necessary to note that the rates contained in the regulations are not determined arbitrarily by those with little to no experience or knowledge about the credit market.¹⁷⁴ Apart from consulting with the NCR, the Minister, prior to enacting the regulations, must consult with experts in the financial industry, and with participants of the industry itself.¹⁷⁵

It can be contended that credit legislation aims to create a ‘broad-stroke’ framework for credit, however, there still exists unintended consequences. For example, the second Exemption Notice attempted regulatory intervention, however, loopholes in the Notice were still exploited by credit providers who provided a series of loans to consumers under R10 000 and in doing so, exceeded the parameters of the Usury Act and were permitted to charge high interest rates.¹⁷⁶

¹⁷⁰ Section 105 of Act 34 of 2005.

¹⁷¹ M Whittaker ‘South Africa’s National Credit Act: A possible Model for the proper Role of Interest Rate Ceilings for Microfinance’ (2008) 28(3) *Northwestern Journal of International Law & Business* 573.

¹⁷² Section 13(c)(i)-(v) of Act 34 of 2005.

¹⁷³ Section 105(2)(a)-(c) of Act 34 of 2005.

¹⁷⁴ Whittaker (note 171 above; 573).

¹⁷⁵ *Ibid.* An example of such a participant is a credit lender such as a bank.

¹⁷⁶ Kelly-Louw (note 39 above; 203).

It is therefore clear that based on South Africa's consumer credit history, there was a need to regulate the costs of credit.¹⁷⁷ Similarly, there also existed a need to create a balance between the control of these charges to prevent exploitation of consumers, whilst simultaneously allowing credit providers to profit.

The NCA, through its regulations, introduced caps on various charges but increased the limits on these caps. This allowed lower income consumers to access formal credit and seek shelter from exploitation under the provisions of the NCA, whilst enabling credit providers to profit.¹⁷⁸ It can therefore be submitted that the NCA has a measured approach to credit in that it seeks to protect consumers whilst allowing credit providers to generate financial gain.

Advocates of these price controls state that they are a 'significant improvement'¹⁷⁹ to previous credit legislation in South Africa and uphold that the caps attract reliable creditors and safeguard consumers from excessive rates.¹⁸⁰ There are, however, opposing views to the price controls introduced by the NCA. Although the NCA introduced the caps to incentivise credit providers into providing credit to those who were previously excluded from the credit market, arguments have been made that these caps are not viewed by credit providers as 'maximum' rates, but rather as the *prescribed rate* they can charge for different forms of credit transactions.¹⁸¹ This, in turn, prevents consumers from obtaining access to credit at competitive rates.¹⁸² In relation to unsecured credit, some of these maximum rates are particularly high when compared to the more formal (secured) forms of credit, such as mortgage agreements.¹⁸³

Further, it has been contended that due to the imposed limits, especially with regards to the reduction in interest rates that credit providers are allowed to charge, consumers who are considered high risk will be denied access to formal finance.¹⁸⁴ This is due to the fact that lenders usually charge such consumers higher rates of interest to negate the risk they are undertaking by loaning them money.¹⁸⁵ Consequently, these consumers will have to satisfy their credit needs through alternative sources, who might not necessarily fall within the ambit of the NCA, such as usurers,¹⁸⁶ and will therefore be vulnerable to exploitation.¹⁸⁷

¹⁷⁷ Kelly-Louw & Stoop (note 57 above; 231).

¹⁷⁸ National Credit Regulator (note 27 above; 61).

¹⁷⁹ Ellyne & Jourdan (note 3 above; 21).

¹⁸⁰ Goodwin-Groen & Kelly-Louw (note 6 above; 48).

¹⁸¹ Ellyne & Jourdan (note 3 above; 23).

¹⁸² Ibid

¹⁸³ For example, the maximum rate of interest for mortgage agreements is RR+12% per year, compared to unsecured credit where the maximum rate of interest is RR+21% per year.

¹⁸⁴ Compliance & Risk Resources (Pty) Ltd (note 100 above; 18).

¹⁸⁵ Ibid 42.

¹⁸⁶ In other words, loan sharks.

¹⁸⁷ Compliance & Risk Resources (Pty) Ltd (note 100 above; 18).

In the case of *Micro Finance South Africa v Minister of Trade and Industry and Another*,¹⁸⁸ which dealt with an application for an order staying the implementation of the regulations prescribing maximum rates of interest and other fees, the Minister conceded that there were submissions received after the publishing of the draft regulations. These submissions expressed concerns that the lowering of the maximum interest rate would result in a situation whereby credit providers would not consider it 'economically viable' to lend to lower-income, higher risk consumers and that this would especially affect those consumers who relied on unsecured and short-term loans.¹⁸⁹ Evidence to attest to this submission was provided by an expert witness and economist, who stated that the proposed regulations would reduce access to credit for low-income and rural consumers and would further urge credit providers to focus on high earners with secure employment.¹⁹⁰

Many of these commendations and criticisms hold true. In 2009, after the NCA and its regulations were implemented, overall access to credit was shown to have improved.¹⁹¹ Furthermore, research showed that although the maximum fees were being treated as prescribed fees, the limits were being observed by credit providers.¹⁹² However, concerns were raised about lower-income consumers having reduced access to credit (having access to only about 1.4 per cent of the total credit distributed) and that these consumers were left with credit options such as unsecured credit and short-term loans.¹⁹³ The year 2015 witnessed a 'ballooning' of nearly 30 per cent of the issuing of unsecured loans by lenders which occurred after the government proposed the amended caps contained in the current regulations. It was clear that lenders had attempted to maximise their profits under the then-current higher interest rate.¹⁹⁴

Today, although the total number of credit applications being rejected has decreased, the share of unsecured credit agreements that have been granted to lower-income consumers by credit providers has also decreased. Statistics show that this decrease pertains mainly to consumers who earn less than R10 000 per month; whilst credit providers have favoured

¹⁸⁸ *Micro Finance South Africa v Minister of Trade and Industry and Another* (16746/2016) [2016] ZAGPPHC 1155 (22 November 2016)

¹⁸⁹ (16746/2016) [2016] ZAGPPHC 1155 (22 November 2016) para 8.

¹⁹⁰ *Ibid* para 16.

¹⁹¹ Feasibility (Pty) Ltd (Research Report Summary) *Pricing of and Access to Consumer Credit: a review of the impact of the National Credit Act one year after its implementation* (2009) available at <https://www.ncr.org.za/documents/pages/research-reports/jun09/Pricing%20and%20Access%20Summary%20Cover%20June%202009.pdf>, accessed on 16 March 2018 at 2, which showed 32 million active accounts, as opposed to 19.8 million in 2002.

¹⁹² *Ibid* 4.

¹⁹³ *Ibid* 6.

¹⁹⁴ 'Unsecured lending jumps 30% ahead of interest rate caps' *Daly Group* 4 October 2014, available at <https://www.itweb.co.za/content/APero3MZGr5qQb6m>, accessed on 18 August 2018.

granting unsecured credit to consumers who earn more than R15 000 per month.¹⁹⁵ The latter statistics which illustrate credit providers turning lower-income consumers away in favour of higher-income earners who pose little to no risk, echo the concerns voiced by critics of the caps and the views expressed in the *Micro Finance*¹⁹⁶ case.

3.3.3.3 Correspondence to the aims of the NCA

The need for price controls on loans is not without merit as they aid in the prevention of reckless lending,¹⁹⁷ and safeguard consumers against taking out loans they cannot afford and becoming overindebted.¹⁹⁸ The Minister's decision to increase the caps on various categories of credit costs such as the interest rate, ensure that credit providers can continue lending at a profit, whilst maintaining consumer protection.¹⁹⁹

It is clear, however, that the pricing of loans has a direct impact on access to credit. If access to formal credit is limited, those who earn less are considered higher risk will have to satisfy their credit needs through alternative (and possibly unregulated) sources, such as usurers.²⁰⁰ By forcing consumers to turn to unregulated, high-cost sources of credit, the NCA facilitates over-indebtedness rather than preventing it, contrary to the aims stated in section 3.

3.4. DISCLOSURE

3.4.1 Introduction

Otto and Grove, in examining the Usury Act, distinguished between three phases of disclosure concerning credit agreements, namely, pre-agreement disclosure, contractual disclosure and post-contractual disclosure.²⁰¹ Similarly, the NCA makes provision for these stages of

¹⁹⁵ National Credit Regulator (Executive Summary) *Consumer Credit Market Report (2018)* available at <https://www.consumerprofilebureau.com/wp-content/uploads/2018/07/CPB-CCMR-2018Q1.pdf>, accessed on 20 March 2018 at 15. Note that these statistics reflect the end of the first quarter of the year 2018, namely from 1 January to 31 March 2018. It was shown that there was a decrease from 38.68% to 35.19% in the number of unsecured credit agreements granted to those with a gross monthly income of up to R10 000. In the same period, there was an increase in unsecured credit granted to those with a gross monthly income of more than R15 000, from 63.37% to 65.85%.

¹⁹⁶ (16746/2016) [2016] ZAGPPHC 1155 (22 November 2016)

¹⁹⁷ Whittaker (note 171 above; 565).

¹⁹⁸ See *National Credit Regulator v Murphy & Sons Cash Loans CC NCT-82548-2017-57(1)*, in which the respondent, a credit provider, was alleged, amongst other things, to have charged interest on the principal debt in excess of the stipulated amount. The NCT, in casu, found that the respondent had contravened the NCA and its Regulations and ordered that the credit provider refund the consumers who had been charged excess amounts. This case serves as evidence that the NCA is effective in deterring non-abiding credit providers.

¹⁹⁹ National Credit Regulator (note 27 above; 61).

²⁰⁰ Compliance & Risk Resources (Pty) Ltd (note 100 above; 18). Also note that another word for 'usurer' is 'loan shark'.

²⁰¹ Grove & Otto (note 48 above: 84-89).

disclosure through certain provisions, which will subsequently be discussed.²⁰² These so called ‘truth-in-lending’ laws aim to facilitate transparency in negotiations between consumers and credit providers are significant to consumers who are in unequal bargaining positions.²⁰³ For the purposes of this research paper, only selected provisions of the NCA will be dealt with.

3.4.2 Relevant provisions

3.4.2.1 Pre-agreement Disclosure

Section 92 of the NCA assists pre-agreement disclosure by obliging credit providers to give consumers a pre-agreement and a quotation which sets out the proposed costs of the agreement such as the principal debt, the proposed distribution of that principal debt, the interest rate and other costs, and the total cost of the agreement.²⁰⁴ The NCA further provides that the quotation will be binding on the credit provider for at least five business days before the agreement is entered into.²⁰⁵

Fundamental provisions contained in the NCA are sections 80-82 which deal with the prevention of reckless credit by credit providers²⁰⁶.

Prior to a consumer obtaining credit, a credit provider is obliged to take reasonable steps to assess that consumer’s understanding of the risks, costs, obligations and rights involved; their debt repayment history as a credit consumer; and their existing financial means, prospects and obligations.²⁰⁷ In determining a consumer’s capacity to afford the loan, a credit provider is entitled to implement its own evaluative assessment method, provided it is capable of reaching a fair and objective outcome.²⁰⁸ Alternatively, the Minister may publish guidelines on the

²⁰² P N Stoop ‘Disclosure as an Indirect Measure Aimed at Preventing Over-indebtedness’ (2013) available at <https://www.up.ac.za/media/shared/Legacy/sitefiles/file/47/327/lawclinicdraftpapersfromconference/phillipstooptdraft.pdf>, accessed on 24 July 2018 at 4.

²⁰³ Whittaker (note 171 above; 572).

²⁰⁴ Section 92(2)(b) of Act 34 of 2005.

²⁰⁵ Section 92(3)(a) and (b) of Act 34 of 2005.

²⁰⁶ Section 80 provides that a credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119 (4): a) the credit provider failed to conduct an assessment as required by section 81 (2), irrespective of what the outcome of such an assessment might have concluded at the time; or (b) the credit provider, having conducted an assessment as required by section 81 (2), entered into the credit agreement with the consumer despite the fact that the information made available to the credit provider indicated that— (i) the consumer did not generally understand or appreciate the consumer’s risks, costs or obligations under the proposed credit agreement; or (ii) entering into that credit agreement would make the consumer over-indebted.

²⁰⁷ Section 81(2)(i)-(iii) of Act 34 of 2005. Note that section 81(1) also requires the consumer to answer any questions posed by the credit provider in conducting the affordability assessment, fully and truthfully.

²⁰⁸ Section 82(1) of Act 34 of 2005.

mechanisms or procedures which can be applied to determine a consumer's affordability.²⁰⁹ Regulation 23A sets out the criteria that must be applied by credit providers when conducting an affordability assessment.²¹⁰ According to this regulation, credit providers are required to take practical steps to ascertain the consumer's gross income and thus foresee whether he or she will be able to afford the proposed credit instalments.²¹¹

3.4.2.2 Contractual Disclosure

Contractual disclosure is fulfilled through section 93 which compels the credit provider to deliver a copy of the credit agreement, at no charge, either in paper form or electronically,²¹² and which must be in a prescribed form.²¹³ Regulation 31 prescribes the requirements for an intermediate or large credit agreement,²¹⁴ and includes the condition that the agreement must be 'clear, comprehensive, concise and in plain language.'²¹⁵ In addition, the credit provider is obliged to disclose all the information from the quotation in a tabular format, labelled 'Cost of Credit' on the front page of the credit agreement (if the quotation does not form part of the agreement).²¹⁶ The 'Cost of Credit' contained in the agreement must reflect the fees contained in the quotation, which include the principal amount, the initiation and service fee, the rate of interest to be levied, the nature and cost of the insurance provided, default administration charges, collection costs etc.²¹⁷ Furthermore, the credit provider is obliged to disclose the sum of the aforementioned amounts, and where this is not ascertainable, then the method for calculating the amount must be disclosed.²¹⁸ Notably, the credit provider is also obliged to state the number and frequency of repayments on the loan as well as the duration of the agreement and the total amount of repayments required.²¹⁹

²⁰⁹ Section 82(2)(b) of Act 34 of 2005. It should also be noted that, according to section 82(4), if the National Consumer Tribunal finds that a credit provider has not met its obligations in terms of section 81 or has not utilised evaluation mechanisms which result in a fair and objective assessment, the Tribunal may require the credit provider to apply the guidelines published by the Minister, or apply alternative guidelines within the practices of the industry.

²¹⁰ GN 1080 of GG 39379 (note 4 above; 29-33).

²¹¹ Further, this regulation requires credit providers to validate a consumer's gross income by considering factors such as his or her payslips, proof of income, bank statements and financial statements. Some examples of affordability assessment questions can include the consumer's total monthly expenditure (including any mortgage instalments/rent, car instalments, and living expenses); their basic salary; and their average monthly income as per their payslip.

²¹² Section 93(1) of Act 34 of 2005.

²¹³ Section 93(2) and (3) of Act 34 of 2005.

²¹⁴ GN 1080 of GG 39379 (note 4 above; 40-46).

²¹⁵ Ibid 40.

²¹⁶ Ibid 41 Regulation 31(1)(e).

²¹⁷ Ibid 41-43 Regulation 31(2)(c)(i) - (xxii). These requirements refer only to intermediate or large credit agreements.

²¹⁸ Ibid 43 Regulation 31(1)(g) and (h).

²¹⁹ Ibid 43-44 Regulation 31(1)(k).

It can be submitted that the amount of information and the prescribed manner in which it is to be disclosed may render such information difficult to read or understand, and further, may conceal important information behind a collection of words.

3.4.2.3 Post-contractual Disclosure

Post-contractual disclosure is facilitated through various provisions. Importantly, section 108 provides for the issuing of periodic statements of account.²²⁰ Regulation 35 prescribes the information to be included in such statements, including, but not limited to, the details of the credit provider and consumer; the details of the credit agreement; a summary of the transactions occurring up to the period of the statement as well as details of each transaction including the amount of each transaction; and any fees or charges levied, or interest incurred.²²¹

Consumers are also entitled, as per section 110,²²² to request statements of account which the credit provider must accommodate, and which include information such as any amounts owing or currently payable, and the current balance on the consumer's account. This provision coincides with section 113,²²³ which allows the consumer to request a statement of the amount needing to be paid to settle an account.

The aforementioned provisions have the positive consequence of ensuring that consumers are aware of their existing debts, and in addition encourage awareness and education concerning credit.

3.4.3 Analysis

One of the fundamental aims of the NCA is to provide for improved standards of information to allow consumers to make informed choices, and to correct the imbalance of bargaining power between the credit provider and the consumer.

The provisions relating to pre-disclosure, such as the establishment of a quotation, enables the consumer to 'shop around'²²⁴ and compare prices provided by various credit providers in order to obtain the best price for a credit agreement. Further, it allows consumers, when examining the costs of credit disclosed, to make an informed choice when deciding whether to enter into the agreement.²²⁵ Consumers of credit are likewise, in theory, able to obtain credit

²²⁰ 34 of 2005

²²¹ Regulation 35(a)-(g) of GN 1080 of GG 39379 (note 4 above; 47-49).

²²² 34 of 2005

²²³ 34 of 2005

²²⁴ Otto (note 35 above; 50).

²²⁵ Compliance & Risk Resources (Pty) Ltd (note 100 above; 55).

at a competitive rate.²²⁶ Pre-agreement disclosure can be viewed as an 'indirect measure' in preventing over-indebtedness of consumers, by dissuading them from entering into more credit agreements for which they are not able to financially endure.²²⁷

However, although these provisions aim to promote transparency and consumer understanding, these aims are frustrated when financially illiterate consumers who apply for credit, have trouble comprehending the context and impact of the various costs disclosed.²²⁸ As a result, vulnerable consumers may choose loans which have a lower repayment amount every month, but which attract higher accumulated costs and have a longer term of repayment.

Importantly, even if a credit agreement is concluded orally, it must be reduced to writing.²²⁹ Disclosure of the contract itself, such as allowing the consumer to obtain a copy of the agreement, enables said consumer to have proof of the agreement. This creates an enforceable right for consumers and a corresponding obligation for credit providers.²³⁰ The pre-agreement quotation and the copy of the agreement thereby enables the consumer to determine the total cost of the loan, what it is comprised of, and the amount of payments he or she will be expected to make over the stipulated period to satisfy the debt. This assists the consumer in planning his or her financial administration.²³¹

However, merely providing the consumer with a copy of the agreement and disclosing costs and terms, does not benefit consumers who are not able to read or comprehend lengthy, formal contracts that contain complicated information which is difficult to understand.²³² In this respect, the reckless lending provisions are a welcome relief and act as a 'red line'²³³ for consumers who risk being exploited due to lack of understanding.²³⁴ The affordability assessments thus ensure that more consumers are afforded protection under the NCA, especially those who have a lower-income.²³⁵

Despite the praise surrounding the affordability assessments, there have been contentions that it might not serve low-income, higher risk consumers. These concerns were reflected in

²²⁶ Compliance & Risk Resources (Pty) Ltd (note 100 above; 55).

²²⁷ Stoop (note 202 above; 7).

²²⁸ National Credit Regulator (note 27 above; 86).

²²⁹ S Renke, M Roestsoff & F Haupt 'The National Credit Act: New Parameters for the Granting of Credit in South Africa' (2007) *Obiter* 254.

²³⁰ Otto (note 35 above; 51).

²³¹ Stoop (note 202 above; 11).

²³² *Ibid* 8.

²³³ Adewale (note 26 above; 370).

²³⁴ The NCA also contains other provisions (that fall outside the ambit of this paper) which prevent the exploitation of consumers, such as section 89 which states when a credit agreement will be considered unlawful; and section 90 which states when a provision in a credit agreement will be deemed unlawful.

²³⁵ Renke, Roestsoff & Haupt (note 229 above; 270).

the case of *Truworths Limited and Others v Minister of Trade and Industry and Others*,²³⁶ which dealt with an application by several large retailers who stated that one of the sub regulations of regulation 23A,²³⁷ namely sub regulation 4(c) did not adequately cater for this portion of society, labelling the sub regulation as ‘discriminatory’ and ‘unreasonable’²³⁸ Sub-regulation 4(c) provides that when credit providers are conducting an affordability assessment on consumers who are self-employed, informally employed, or are employed in a manner by which they do not receive payslips or proof of income, they will be obliged to request from these consumers, their latest three months bank statements or their latest financial statements.²³⁹ The applicants contended that as a result of these conditions, the poorer and less privileged members of the community who do not have access to bank statements, would need to provide a form of validation which is ‘inappropriate’ and ‘impossible’ for them to comply with before taking out a loan.²⁴⁰ Engers AJ concurred with the attack of the regulation stating it ‘well-founded’,²⁴¹ and supplemented his submission by using the example of a flower seller who does not have a bank account and is therefore unlikely to have bank statements.²⁴² The judge further conceded that lacking bank statements creates an ‘insurmountable obstacle’ for those who are denied loans of small amount even though they may earn a reasonable monthly income.²⁴³

He further reasoned that although the regulations in their entirety promote the prevention of reckless credit, they ‘frustrate’ other aims of the NCA, such as the promotion of an accessible credit market, particularly to those who historically were unable to access credit, and went on to remark that the regulations could have the unintended consequence of eliminating any credit being granted to vulnerable consumers, which is in opposition to the aims of the NCA.²⁴⁴ The regulation was reviewed and ultimately set aside, however, the remaining sub-regulations have been left unchanged and credit providers are still required to ask for bank statements or pay slips of formally employed consumers when assessing affordability.²⁴⁵

²³⁶ *Truworths Limited and Others v Minister of Trade and Industry and Others* 2018 (3) SA 558 (WCC)

²³⁷ GN 1080 of GG 39379 (note 4 above; 29-33).

²³⁸ 2018 (3) SA 558 (WCC) at pg 16 para 44.

²³⁹ GN 1080 of GG 39379 (note 4 above; 30).

²⁴⁰ 2018 (3) SA 558 (WCC) at pg 16 para 45.

²⁴¹ *Ibid* para 46.

²⁴² *Ibid*

²⁴³ *Ibid*. In addition to this submission, the judge used the example of a parent who needs to buy a school uniform for their child and who, although cannot afford to pay the entire amount at once, can afford monthly repayments if their loan is approved.

²⁴⁴ *Ibid* at pg 22 para 64.

²⁴⁵ L Ensor ‘Credit regulator pushes for proof’ (2018) *Pressreader* available at <https://www.pressreader.com/south-africa/business-day/20180507/281526521685100>, accessed on 20 August 2018. The article further highlights concerns expressed by the NCR company secretary, who contends that the judgement invalidated sections of the regulations dealing with discretionary income, rendering them ‘impractical’ Furthermore, he argues that the purpose of the affordability

After concluding a credit agreement, continued protection of the consumer is a priority in terms of the NCA. The provisions allowing consumers to acquire statements of their accounts, together with details of their loan transactions, play an important role in ensuring that consumers are informed about their current financial situation, and that they are dissuaded from entering into further credit agreements, overburdening themselves and becoming over-indebted.²⁴⁶ Again, these provisions are of no benefit to consumers who are financially illiterate.

3.4.4 Correspondence to the aims of the NCA

The NCA has an array of consumer protective measures which ensure that consumers are adequately informed about their credit agreement before, during and after entering into said agreement. These provisions not only aim to ensure 'transparency' in the credit market, but also ensure that consumers are placed in an equal bargaining position to lenders when it comes to borrowing money. Further, provisions relating to disclosing the cost of the loan and the reckless lending provisions promote the NCA's objectives in the prevention of over-indebtedness.²⁴⁷

However, as predominantly argued by Stoop, the disclosure provisions, whilst making substantial information available to the consumer, do not provide for *full* disclosure.²⁴⁸ This is due to the fact that many consumers who obtain information from credit providers, are not able to read, comprehend and thus properly utilise such information to their advantage. There are

regulations is to ensure that credit be extended to those persons whose income has been verified, thus curbing reckless lending.

²⁴⁶ Renke, Roestsoff & Haupt (note 229 above: 256).

See also National Credit Regulator *Annual Report* (2017/18) available at <http://www.ncr.org.za/documents/pages/Annual%20Reports/NCR%20Annual%20Report%202017-18.pdf>, accessed on 20 November 2018 at 49, which shows that at 31 December 2017, 15,62 million consumers (out of 25, 31 million credit active consumers) were in 'good standing'. This illustrates the benefits of consumers being aware of their current financial situations. 'Good standing' is defined in National Credit Regulator *Credit Bureau Monitor* (2018) available at <http://www.ncr.org.za/documents/CBM/CBM%20June%202018.pdf>, accessed on 20 November 2018 at 8, as 'An account or consumer showing as current or on which the client has not missed more than one or two instalments, which has no adverse listings and has no judgment.'

²⁴⁷ See *National Credit Regulator v Mrs Yilwe NCT-39821-2016-140(1)* where the NCT held that the credit provider had repeatedly contravened various sections of the NCA by failing to provide consumers with pre-agreement statements and quotations in the manner prescribed by the Act, and further ordered the lender to pay an administrative fine. The judgement highlights the importance of consumers' rights and their continued protection to ensure reckless credit lending is prohibited. Similarly, in *National Credit Regulator v Mobimoola Financial Services (Pty) Ltd NCT-18256-2014-140(1)*, the NCT found that the respondent, a credit provider, contravened the NCA as it had failed to register as a credit provider, conduct affordability assessments when granting loans, and provide consumers with pre-agreement statements and quotations as well as copies of the credit agreement. The respondent was ordered to pay an administration fine of R250 000. This judgement therefore ensures that consumers are aware of the necessity of affordability assessments, and furthermore, illustrates to credit providers the consequences of failing to adhere to the requirements of the NCA.

²⁴⁸ Stoop (note 202 above: 11).

therefore arguments that in order for these provisions to be fully effective and achieve the aims of the NCA, the lack of education amongst consumers needs to be adequately addressed.²⁴⁹

3.5 CONCLUSION

There will never exist a piece of legislation that covers every aspect to which it relates. The NCA is no different in this regard, and no matter how many safeguards it provides, creditors will find ways to exploit recognized loopholes. Provisions relating to the cost of credit, whilst practical, appear to have the unintended consequence of reducing access to credit. In addition, the NCA's various 'gatekeeping' provisions relating to disclosure and affordability, whilst helpful in assessing creditworthiness and avoiding over-indebtedness, prevent consumers from accessing credit 'at the door' if they fail to meet certain requirements or produce certain documentation.

²⁴⁹ Ibid

CHAPTER 4

4.1 INTRODUCTION

To facilitate an improved perspective of South Africa's credit legislation and to determine whether lessons can be learned from other countries, it is necessary to compare the NCA to the credit legislation that currently exist in other developing and developed countries. Due to the limited nature of this research, this chapter will only examine the strengths and weaknesses of credit legislation in the United Kingdom and India. The research emphasis is placed on provisions relating to the cost of credit and disclosure of those costs, as highlighted in this dissertation.

4.2 UNITED KINGDOM

4.2.1 Introduction

The United Kingdom has a variety of consumer protection acts and regulations and is considered to have one of the most advanced and sophisticated credit markets in the world.²⁵⁰

4.2.2 Current credit regulatory regime

Credit in the United Kingdom is regulated by the Consumer Credit Act 39 of 1974 (hereinafter the 'CC Act') as amended by the Consumer Credit Act 14 of 2006, as well as a number of secondary laws.²⁵¹ The main objectives of the CC Act include, but are not limited to, enabling consumers to address unfair lending practices and loan agreements and ensuring improved disclosure of information by lenders.²⁵²

In respect of the costs of credit, the United Kingdom has no definitive interest rate cap and instead the cost of credit is determined using an annual percentage rate ('APR'). The APR is the complete cost of borrowing for a year and includes loan fees and the interest the consumer must pay.²⁵³ Although the United Kingdom government had contemplated interest rate caps,

²⁵⁰ S Sharifi & G.M Flores 'Options for Short-Term Credit in the United Kingdom' (31 March 2013) available at http://www.bretton-woods.com/assets/Short-term_Credit_Needs_Options_and_Costs_in_the_United_Kingdom_-33652.pdf, accessed on 16 September 2018 at 3.

²⁵¹ These include but are not limited to: The Consumer Credit (Disclosure of Information) Regulations No. 1013 of 2010; The Consumer Credit (Total Charge for Credit) Regulations No. 1011 of 2010; and The Consumer Credit (Agreements) Regulations 1024 of 2010.

²⁵² H Pieterse *The National Credit Act of South Africa and the Motor Finance Sector* (unpublished MBL thesis, University of South Africa, 2009) 35. See, for example, section 19 of the CC Act 2006 which inserts section 140A into the CC Act 1974, and which gives the courts the power to declare an agreement unfair if the creditor fails to do anything before or after concluding the agreement. Section 55 of the CC Act 1974 also mandates disclosure of information by the creditor.

²⁵³ See Barclays Bank website 'Understanding loan rates: What's an APR?' available at <https://www.barclays.co.uk/loans/what-does-apr-mean/>, accessed on 25 September 2018. Prior to the CC Act, the Moneylenders Act 1927 provided that an interest rate on loans in excess of 48% were considered prima facie excessive, but it was found that in practice, this form of protection was

its implementation was considered difficult due to the United Kingdom's diverse credit market. Additionally, it was contended that if lenders were forced to comply with interest rate ceilings, it would result in them gravitating towards these ceilings, thus limiting competitive prices for consumers, and alternatively, resulting in a loss of profits for lenders and urging them to turn away from riskier borrowers.²⁵⁴

Section 20 of the CC Act provides for the total charge of credit and is arguably one of the most important provisions.²⁵⁵ It states that the Secretary of State may make regulations to determine the true cost of credit for borrowers and that such regulations will prescribe the items to be included in such a cost breakdown as well as how the respective cost amounts are to be determined.²⁵⁶

The regulation also stipulates that the cost breakdown must include the method for calculating the rate of the total charge for credit.²⁵⁷ Regulation 4 of the Consumer Credit (Total Charge for Credit) Regulations 2010 prescribes how the total cost of credit is to be determined and includes account maintenance costs and utilisation costs.²⁵⁸ Regulation 5 provides that the APR will be calculated in accordance with a mathematical formula set out in the Schedule, and regulation 6 contains a list of assumptions for calculating the APR and the total charge for credit.²⁵⁹

Barclays Bank,²⁶⁰ in England, provides a good example of how the cost of a loan is calculated according to this system: if a consumer takes out a loan for a car of €10 000 to pay off over 3 years, at an APR of 5.5 per cent, this would amount to 36 monthly repayments of approximately €301, totalling €10 848.60 (thus amounting to €848.60 in interest and fees).

The United Kingdom places value on the principle of disclosure, especially in respect of credit agreements. Section 55(1) of the CC Act states that regulations may be implemented detailing the information to be disclosed and the way it is to be disclosed by a creditor to a borrower before he enters into a credit agreement. Regulation 3(2) of the Consumer Credit (Disclosure

insufficient (See United Kingdom Department of Trade and Industry *White Paper The Consumer Credit Market in the 21st Century* (2003), available at <http://webarchive.nationalarchives.gov.uk/20090609014342/http://www.berr.gov.uk/files/file23663.pdf>, accessed on 20 October 2018 at 62).

²⁵⁴ United Kingdom Department of Trade and Industry (note 253 above: 62).

²⁵⁵ A G Guest & M G Lloyd *The Consumer credit act 1974* (1975) 20.

²⁵⁶ Section 20(1)(a) of the CC Act 39 of 1974.

²⁵⁷ *Ibid*, section 20(1)(b).

²⁵⁸ The Consumer Credit (Total Charge for Credit) Regulations 2010, SI 2010/1011 regs 4(1)-4(2), available at http://www.legislation.gov.uk/ukxi/2010/1011/pdfs/ukxi_20101011_en.pdf, accessed on 20 September 2018.

²⁵⁹ *Ibid* reg 6(a)-(q)).

²⁶⁰ See Barclays Bank website 'Personal loan: Want to know your loan rate?' available at <https://www.barclays.co.uk/loans/personal/>, accessed on 25 September 2018.

of Information) Regulations 2010 (the 'Disclosure Regulations') provides for pre-contractual disclosure and requires the creditor to disclose certain information before the agreement is entered into, including but not limited to: the type of credit, the total amount of credit to be provided, the duration of the agreement, the interest rate charged, the APR and the total amount payable under the agreement, and the amount, number and frequency of repayments.²⁶¹

In addition, section 60(1)²⁶² allows the Treasury to make regulations regarding the form and content of credit agreements to ensure that the borrower is aware of his rights and duties, the total charge of credit and the remedies available to him.²⁶³ Regulation 8 of the Disclosure Regulations specifies the manner of disclosure in credit agreements and states that pre-credit information must be disclosed in accordance with the form contained in Schedule 1 which contains information such as the features of the credit product and the cost of credit.²⁶⁴

The Consumer Credit (EU Directive) Regulations 2010 (the 'EU Regulations') amend the CC Act by inserting various provisions. Regulation 3, for example, inserts section 55A into the CC Act which instructs the creditor to explain various matters to the consumer before agreeing to the terms of the loan, to ensure the loan is consistent with his financial ability or needs.²⁶⁵ In addition, regulation 5 inserts section 55B into the CC Act which requires the creditor to undertake a credit worthiness assessment before extending credit to the consumer.

In facilitating contractual disclosure, section 63(2) of the CC Act enables the borrower to receive a copy of the signed credit agreement within seven days of executing the agreement. Further, regulation 3 of The Consumer Credit (Agreements) Regulations 2010 (the 'Credit Agreements Regulations')²⁶⁶ details the form and content of credit agreements and coincides with section 60(1) of the CC Act. It provides that agreements need to include the information

²⁶¹ The Consumer Credit (Disclosure of Information) Regulations 2010, SI 2010/1013 reg 4(a)-(v), available at https://www.legislation.gov.uk/uksi/2010/1013/pdfs/ukxi_20101013_en.pdf, accessed on 20 September 2018.

²⁶² As amended by the Financial Services Act 2012 (Consumer Credit Order) 2013.

²⁶³ Section 60(1) of the CC Act 39 of 1974.

²⁶⁴ The Consumer Credit (Disclosure of Information) Regulations 2010 (note 261 above; Schedule 1 pgs. 10-14).

²⁶⁵ Such matters include the features of the credit agreement to be included; the periodic payments to be paid by the debtor and how the amounts are calculated; any features of the agreement which are likely to adversely affect the debtor and which are not likely to be foreseen; the consequences of default of payment; and details regarding the right to withdraw from the agreement and the exercise of such right.

²⁶⁶ The Consumer Credit (Agreements) Regulations 2010, SI 2010/1014 available at https://www.legislation.gov.uk/uksi/2010/1014/pdfs/ukxi_20101014_en.pdf, accessed on 20 September 2018.

specified in Schedule 1 of the Credit Agreements Regulations,²⁶⁷ and states that such information must be presented in a 'clear and concise manner'.²⁶⁸

Section 97 of the CC Act enables post-contractual disclosure by requiring the creditor, upon request by the borrower, to furnish him with a statement indicating the amount payable that is necessary to discharge the borrower's indebtedness, together with particulars indicating how that amount is arrived at. Regulation 26 of the EU Regulations inserts section 77B into the CC Act which states that upon request by the debtor, the creditor must give him a statement in writing which must include a table illustrating the details of the instalments owed under the credit agreement.²⁶⁹

In addition to legislation, financial institutions also have the option of registering with the Lending Standards Board and adopting the Standards of Lending Practice,²⁷⁰ which set out standards in terms of which credit products, including unsecured loans and overdrafts, are to be marketed and sold. This 'code' allows firms to govern their relationships with customers in a flexible way rather than adhering to rigid rules, and at the same time ensures consumer protection and fair lending.²⁷¹ For instance, one of the aspects of the Standards deals with consumer vulnerability, and advises firms to develop loan products and services which are inclusive and take into account diverse range of consumers, such as those who are in a vulnerable position, and to ensure that such products or services are sufficiently flexible to meet the needs of such consumers.²⁷²

4.2.3 Analysis and comparison

The United Kingdom possesses various comprehensive credit consumer protection provisions, and in this way, identifies with the NCA. In respect of the cost of credit, both the CC Act and the Total Charge for Credit Regulations, like the NCA, seek to ensure that the consumer is not subject to predatory or unfair lending practices. However, although the legislature opted for the APR methodology as opposed to interest rate caps such as the NCA, it has been argued by Harding that the objective of protecting consumers in this way has not been achieved, as many consumers are still ignorant as to the meaning and importance of the

²⁶⁷ Ibid, Schedule 1 pgs. 7-13. Such information includes but is not limited to: the nature of the agreement; duration of the agreement; the amount of credit; the rate of interest; the APR; and the time and amount of repayments.

²⁶⁸ Ibid, regulation 3(2).

²⁶⁹ These details include the date on which the instalment is due; the amount of the instalment; conditions relating to payment of the instalment; and a breakdown of the instalment.

²⁷⁰ Lending Standards Board 'The Standards of Lending Practice: Personal Customers' (2018) available at <https://www.lendingstandardsboard.org.uk/wp-content/uploads/2017/12/Standards-of-Lending-Practice-Personal-7-Dec.pdf>, accessed on 18 September 2018 at 2.

²⁷¹ Ibid

²⁷² Ibid 11.

APR system.²⁷³ Further, it has been contended that creditors have been able to manipulate the APR system by extending the term over which the loan is taken.²⁷⁴ Therefore, although the APR is reduced, the total interest repayable may have increased.²⁷⁵

In respect of disclosure, the CC Act and the various regulations discussed above seek to ensure that consumers are informed about the different aspects of the credit agreement, at all stages of the credit process, to enable them to make informed decisions and to shop around for the best prices.²⁷⁶ In this regard, the credit regime is like that of South Africa's. Whilst these efforts are commendable, financial illiteracy still exists in the United Kingdom and many consumers are still unaware of various financial charges, rendering it difficult for them to compare credit products.²⁷⁷

Furthermore, it can be contended that after the financial crisis in 2008, and due to more stringent credit regulations being introduced, many consumers have been prevented from accessing mainstream sources of credit. Statistics emphasise this point by showing that the availability of unsecured credit has decreased to consumers due to the tightening of credit lending criteria.²⁷⁸

4.2.4 Conclusion

The reasoning behind the APR system is relevant to South Africa's current credit regime. It has been argued that the interest rate caps introduced by the NCA and its regulations have had the effect of excluding competition, as creditors charge the maximum rate, and has resulted in many high-risk consumers being denied access to formal finance. The United Kingdom deviated from this approach by introducing the APR system to suit its diverse market.²⁷⁹ Despite its practical rationale, their consumers still face difficulties in determining the true cost of loans due to financial illiteracy.

Both the APR system utilised in the United Kingdom, and the capping mechanism applied in South Africa, address the need for the protection of consumers from exploitive lending

²⁷³ G Harding *Consumer credit and consumer hire: a practical guide* (1996) 64. See also United Kingdom Department of Trade and Industry (note 253 above; 62) which highlights the difficulties consumers face in understanding this method of calculation and subsequently find it trying to compare prices for different loan products.

²⁷⁴ United Kingdom Department of Trade and Industry (note 253 above; 62).

²⁷⁵ *Ibid*

²⁷⁶ Harding (note 273 above; 61).

²⁷⁷ United Kingdom Department of Trade and Industry (note 253 above; 62).

²⁷⁸ Bank of England *Credit Conditions Survey-2018 Q1* (2018) available at <https://www.bankofengland.co.uk/credit-conditions-survey/2018/2018-q1>, accessed on 10 September 2018 at 1.

²⁷⁹ United Kingdom Department of Trade and Industry (note 253 above: 62).

practices. However, despite the sound reasoning behind their implementation, both systems have similar effects in that consumers find it difficult to understand the total cost of a loan.

Further, although the United Kingdom has introduced extensive disclosure provisions which aim to ensure transparent lending, financial illiteracy bars consumers from the full extent of protection that the legislature aimed at promoting. South African consumers likewise experience difficulties in understanding the information disclosed to them, despite the NCA's wide-ranging disclosure requirements. In addition, while the United Kingdom's credit regime is comprehensive, it can be submitted that its rigorous regulations have excluded many consumers from accessing mainstream credit. This same contention can be made in respect of South Africa's stringent credit legislation.

The Standards of Lending Practice can, perhaps, be argued to be one of the most effective solutions aimed at eradicating unfair lending practices, as it acts as a 'voluntary code' providing guidelines which lenders can follow, without having to strictly adhere to. In this way, consumers are protected without necessarily being financially excluded due to their non-conformity with risk-standards. Lenders who adopt this code can use a 'flexible discretion' without necessarily being bound to certain 'gatekeeping provisions' when extending credit to those consumers who are considered high risk by other lenders.

4.3 INDIA

4.3.1 Introduction

India, like South Africa, is still a developing country. This statement is also true in respect of India's credit regime. Traditionally, Indian consumers were 'debt averse' and reluctant to borrow money except for when it came from family or friends.²⁸⁰ Today, however, credit is no longer seen as taboo and can be obtained with relative ease from banks, non-banking financial

²⁸⁰ 'Despite a booming economy, is India's credit market slowing down?' *Knowledge @ Wharton* 6 September 2007 available at knowledge.wharton.upenn.edu/article/despite-a-booming-economy-is-indias-consumer-credit-market-slowing-down/#, accessed on 20 September 2018.

institutions or peer-to-peer lending platforms online.²⁸¹ India's credit legislation is however, anything but simple.²⁸²

4.3.2 Current credit regulatory regime

Credit in India is regulated by a variety of laws and regulations but lacks a single, comprehensive piece of credit legislation. Instead, different aspects of credit are governed by several different laws.

With regards to the cost of credit, it is necessary to note that over the years, interest rates on loans have been largely deregulated,²⁸³ and banks were free to determine lending rates for different products, subject to approval of the Managing Committee and the requirement of transparency.²⁸⁴ Although interest rates have been deregulated, rates beyond a certain level can be deemed excessive,²⁸⁵ and the boards of banks are required to adopt and adhere to principles according to guidelines published by the Reserve Bank of India ('RBI'). These guidelines include the requirement that interest rates charged by banks must be considered reasonable and justified, considering the prospective risk of the borrower and the presence or absence of collateral. Further, banks need to consider the total cost of credit to the borrower, including interest rates and charges, which must be justifiable. In addition, the guidelines provide that an appropriate ceiling on the interest rate may be publicised.²⁸⁶ The RBI has also sought to limit predatory lending practices by warning banks to desist from 'pernicious

²⁸¹ 'Waiting for a crisis?' *Business Today* 11 September 2016, available at <https://www.businesstoday.in/magazine/features/unsecured-credit-has-made-a-comeback-but-with-risks/story/236367.html>, accessed on 20 September 2018.

See also Reserve Bank of India Consultation Paper *Peer to Peer Lending* (2016) available at <https://rbidocs.rbi.org.in/rdocs/content/pdfs/cper280416.pdf>, accessed on 20 November 2018 at 4: Peer-to-peer lending (P2P Lending) can be defined as the use of an online platform which seeks to match lenders, who provide unsecured loans, with borrowers. The interest rate on such loans is either agreed upon by the parties or is a flat rate set by the platform. See page 7 for various advantages of P2P lending for borrowers, such as lower rates offered by lenders as opposed to other moneylenders from unorganised financial sectors.

²⁸² For a history of India's credit market, see: M Shah, R Rao & P.S.V Shankar 'Rural Credit in 20th Century India: Overview of History and Perspectives' (2007) 42(15) *JSTOR* available at https://www.jstor.org/stable/4419471?seq=1#page_scan_tab_contents, accessed on 15 September 2018 at 1351-1360.

²⁸³ P Basu 'A Financial System for India's Poor' (2005) 40(37) *JSTOR* available at https://www.jstor.org/stable/4417132?seq=1#page_scan_tab_contents, accessed on 15 September 2018 at 4008.

²⁸⁴ *Complaints about excessive interest charged by banks*, RBI Notification No. RBI /2006-2007/377 (07/05/2007), available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/77163.PDF>, accessed on 14 September 2018 at para 2.

²⁸⁵ *Ibid* para 3.

²⁸⁶ *Ibid* para 4.

practices,' which include camouflaging the interest element in the form of a processing fee, with the RBI stating that such practices violate the principle of fair and transparent lending.²⁸⁷

The lending rate for credit is now determined under a relatively new methodology implemented by the RBI, known as the Marginal Cost of Funds based Lending Rate ('MCLR').²⁸⁸ According to the RBI, commercial banks are required to prepare MCLR which acts as the 'internal benchmark' for lending rates and which requires that interest rates for different customers differ depending on the level of risk of the borrower.

This means that the cost of loans will differ from bank to bank. For example, a personal loan (such an unsecured loan) under Rs.10 lakhs²⁸⁹ from Punjab National Bank will accrue an interest rate of MCLR (currently 8.45%) +3.55%.²⁹⁰ This rate can be contrasted to a loan for a car which is MCLR+0.95%.²⁹¹ The interest rate for a personal loan is higher due to the fact that the loan is unsecured, whereas the loan for the car attracts a lower interest rate because there is security.

It should be noted that P2P lending (where an online platform is utilised to provide unsecured loans)²⁹² is gaining momentum in India and is attractive to borrowers as lenders offer lower interest rates and other charges, when compared to banks.²⁹³ Usually, the online platform is provided by a technology company registered under the Companies Act,²⁹⁴ and allows lenders to participate in the lending process once they are registered on the website.²⁹⁵ Once the borrower registers on the site, the online platform regulates the transaction and enables the

²⁸⁷ *Pernicious practices of select banks deterring customer protection and accounting integrity*, RBI Notification No. RBI/2013-14/292 (17/09/2013), available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/CS172509113FS.pdf>, accessed on 14 September 2018 at para 3.

²⁸⁸ Previously, banks had to determine their lending rate based on the Base Rate which was the minimum rate at which a bank could lend. If the Base Rate was, for example, 10%-10.25%, banks could select a rate between these 2 figures and then add a percentage point to that.

²⁸⁹ The currency of India is the Indian Rupee (Rs). A Lakh Rupee is 100 000 rupees. As of 28 September 2018, according to the exchange rate, Rs. 10 lack would equate to approximately R19 951.00 (See the 'Currency Converter' available at https://coinmill.com/INR_ZAR.html)

²⁹⁰ See Punjab National Bank website 'Interest Rates on Advances-Linked with MCLR' available at <https://www.pnbindia.in/interst-rate-on-advances-linked-to-mclr.html>, accessed on 19 September 2018.

²⁹¹ Ibid. See also Axis Bank website 'Personal loan interest rate' available at <https://www.axisbank.com/retail/loans/personal-loan/interest-rates-charges>, accessed on 19 September 2018 which shows Axis Bank providing a different rate for a personal loan, being

²⁹² Reserve Bank of India Consultation Paper (note 281 above; 4): Peer-to-peer lending (P2P lending) can be defined as the use of an online platform which seeks to match lenders, who provide unsecured loans, with borrower (see note 280 above which provides a comprehensive definition of P2P lending). The interest rate on such loans is either agreed upon by the parties or is a flat rate set by the platform.

²⁹³ Ibid 7.

²⁹⁴ Act No. 18 of 2013

²⁹⁵ Reserve Bank of India Consultation Paper (note 280 above; 7).

lender to transfer the loan from his bank account to the borrower's account.²⁹⁶ P2P lending therefore allows for relatively simple and speedy access to unsecured credit.

Disclosure plays an equally important role in the credit context within India. Previously, India had no 'truth-in-lending laws' which required lenders to make truthful disclosures of interest rates and to refrain from misleading borrowers.²⁹⁷ Today, however, there exist a variety of laws designed to promote consumer access to information. The Consumer Protection Act 68 of 1986 ('the Consumer Protection Act') was implemented to provide better protection for consumer interests,²⁹⁸ and to establish consumer councils. The Consumer Protection Act makes provision for a Central Consumer Protection Council,²⁹⁹ whose objects include promoting the rights of interests of consumers³⁰⁰ such as the right to be informed about the 'quality', 'quantity' and 'price' of goods or services.³⁰¹

In 2007, the RBI issued guidelines to be considered by banks which included the requirement of a 'prior-approval process' for loan applicants with reference to factors such as the cash flows of the prospective borrower.³⁰² This guideline facilitates pre-contractual disclosure by both the bank and the borrower in order to prevent the consumer from borrowing more than he can afford. In 2008, the RBI added to this by instructing banks to ensure that all loan application forms contained cost information that was comprehensive and included all terms relating to fees and charges.³⁰³ Further, banks were instructed to provide the consumer with an 'all in cost' of the loan to aid him in comparing the prices of different financial products,³⁰⁴

²⁹⁶ Ibid.

²⁹⁷ U Varottil 'Truth in lending: Regulatory Measures in India' *India Corp Law*, 10 February 2015 available at <https://indiacorplaw.in/2015/02/truth-in-lending-regulatory-measures-in.html>, accessed on 20 September 2018. In the past, lenders merely had to disclose a 'flat rate of interest' which usually only amounted to half the actual interest rate.

²⁹⁸ It should be noted that in terms of Section 2(d)(i) of the Consumer Protection Act, 'consumer' includes a person who '*buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person.*' This section therefore makes provision for a consumer of credit.

²⁹⁹ Section 4 of the Consumer Protection Act 68 of 1986.

³⁰⁰ Section 6 of the Consumer Protection Act 68 of 1986.

³⁰¹ It should be noted that 'service' in terms of Section 2(o) of the Consumer Protection Act includes a service relating to banking or financing, thus making the Consumer Protection Act applicable to the practice of obtaining loans.

³⁰² RBI Notification No. RBI /2006-2007/377 (07/05/2007) (note 284 above: 4).

³⁰³ *Disclosing all information relating to processing fees/charges*, RBI Notification No. RBI/2008-09/328 (25/11/2008), available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/89293.PDF>, accessed on 14 September 2018 at para 3.

³⁰⁴ Ibid

and in this way ensured that all fees were disclosed to consumers to avoid banks getting away with 'unfair trade practices'.³⁰⁵

To emphasise this point, the RBI issued another notification in 2010 which instructed banks to transparently disclose all information about fees, charges, their respective amounts, penalty fees and the existence of an interest clause,³⁰⁶ and further, that such information had to be displayed on the bank's website.³⁰⁷ This was reiterated in a further notification in 2015 which requested banks to adhere to various instructions relating to information to be displayed on their websites, including the interest rate for different loans; the fees and charges relating to each; and the APR to represent the total cost of credit, thereby allowing consumers to compare the prices of different loans and to facilitate transparency when concluding the loan agreement.³⁰⁸

The RBI aims to ensure consumers are adequately protected at both the processing stage of the loan and thereafter, by instructing banks to provide borrowers with a 'key fact statement' which includes, amongst other things, the name of the loan product, its amount, the interest and fees payable and the number of instalments payable.³⁰⁹ In addition, the Guidelines on Fair Practices Code for Lenders, which was issued by the RBI in 2003,³¹⁰ has been adopted by the majority of financial institutions in India and contains rules relating to loan applications. For example, lenders are required to ensure a proper assessment of the loan application is undertaken before the loan is granted,³¹¹ and further, are to confirm that the terms and conditions of the agreement have been accepted by the borrower and reduced to writing and signed.³¹²

³⁰⁵ An 'unfair trade practice' is defined in Section 2(r) of the Consumer Protection Act and means a deceptive method or practice in the sale or supply of any goods or provision of any services, and includes but is not limited to: a false representation relating to the standard or quality of a good or service; a misrepresentation regarding the need for or usefulness of a particular good or service; or materially misleading the public as to the price of the good or service. Such unfair practices can therefore also be attributed to misrepresenting the true cost or terms of a loan agreement.

³⁰⁶ RBI Notification No. RBI/2010-11/285 (19/11/2010) (note 303 above; para 2).

³⁰⁷ Ibid

³⁰⁸ *Display of information by banks*, RBI Notification No. RBI/2014-15/422 (22/01/2015) available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/C64DIB22012015.PDF>, accessed on 14 September 2018 at para 2(a)(i)-(iii).

³⁰⁹ Ibid at para 2(b). For an example of such a 'summary box', see the Annexure attached to this Circular.

³¹⁰ *Guidelines on Fair Practices Code for Lenders*, RBI Notification No. 104/09.07.007/2002-03 (05/05/2003) available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/36102.PDF>, accessed on 14 September 2018.

³¹¹ Ibid at para 2(ii)(a).

³¹² Ibid at para 2(ii)(c).

The RBI provides an example regarding the cost of a loan which banks are required to include in their websites:³¹³

Example of EMI Calculation (pure fixed loan)³¹⁴

	Amount of Loan	1,000,000.00	
	Annual Interest Rate	15.00%	
	Number of Payments	120	
	Monthly Payment	16,133.50	

In this way, India's credit regime ensures consumers are aware of their obligations which are not hidden beneath a mass of words or terminology.

Post-contractual disclosure is ensured by requiring lenders to provide a copy of the loan agreement to the borrower once the agreement is concluded, and to provide notice of any alterations to the terms, conditions and interest rate of the agreement.³¹⁵

4.3.3 Analysis and comparison

Although India, like the United Kingdom, has removed their caps on charges such as interest rates, there still exist various protective mechanisms in place to prevent consumers from being charged exorbitant fees on their loans. The MCLR system ensures that there is still a structured device upon which banks can set their lending rates. Further, the various notifications implemented by the RBI have sought to protect consumers from excessive rates on their loans, thus preventing reckless lending and over-indebtedness.

The RBI has also introduced various guidelines and instructions to ensure transparency in loan agreements, and like both the United Kingdom and South Africa, makes provision for pre-contractual disclosure, contractual disclosure, and post-contractual disclosure. To prevent over-indebtedness, banks are also instructed to undertake credit-worthiness assessments, similar to the affordability assessment provided for by the NCA.

4.3.4 Conclusion

India possesses a variety of consumer protective devices which place significant emphasis on the cost of loans and disclosure to consumers. There is, however, a lack of a single, comprehensive piece of credit legislation that can aid consumers in understanding their rights,

³¹³ Reserve Bank of India *Frequently Asked Questions Annex*, available at <https://m.rbi.org.in/Scripts/FAQView.aspx?Id=77>, accessed on 21 November 2018

³¹⁴ EMI stands for 'Equated Monthly Instalments' which includes repayment of both the principal amount and the interest.

³¹⁵ RBI Notification No. 104/09.07.007/2002-03 (05/05/2003) (note 310 above; at para 2(iii)).

remedies and duties. Interestingly, despite this lack of stringent legislative authority, the availability of unsecured loans has risen by approximately 27 per cent from 2015 to 2018,³¹⁶ suggesting that consumers have improved access to credit.

Furthermore, peer-to-peer lending creates a safe and regulated alternative for consumers who cannot access formal finance or who are denied loans by formal credit providers, allowing them to obtain loans without resorting to unregulated sources. This 'middle ground' promotes access to credit and may address any limitations faced by lenders and borrowers.³¹⁷ In addition, the use of an online platform and registration of users simplifies the distribution of information between parties to the loan agreement, thereby facilitating proper disclosure.³¹⁸

4.4 CONCLUDING REMARKS AND RECOMMENDATIONS

Based on the above information, different countries have difference mechanisms in place regarding the cost of credit and the disclosure of information relating to credit.

The United Kingdom can be compared to South Africa in its structured approach to credit legislation and consumer protection, however, unlike South Africa, it is able to afford effective enforcement of these regulations.

Furthermore, the United Kingdom, despite having a comprehensive piece of legislation which deals with credit as well as various other regulations and codes which aim at protecting consumers, still experiences many difficulties which undermine these objectives. For example, while the United Kingdom has a clear and concise mechanism for calculating interest, many consumers are continuously perplexed as to the total cost of credit. Similarly, the positive impact of the various disclosure provisions is limited due to the financial illiteracy of consumers.

It can be concluded, based on the analysis of the United Kingdom's regulatory framework and the statistics outlined above, that even though consumer protection in relation to credit is extensive, it may be hampering access to credit as lenders are denying those consumers who they consider higher risk.

India's history and consumer culture can be compared to that of South Africa's. However, despite having an array of consumer protection mechanisms in place relating to cost and

³¹⁶ CRISIL (Press Release) *Unsecured loans grow 4x bank credit, ride to continue* (2018) available at <https://www.crisil.com/en/home/newsroom/press-releases/2018/07/unsecured-loans-grow-4x-bank-credit-ride-to-continue.html>, accessed on 22 September 2018.

³¹⁷ S.S. Lavanga-Slater *Investigating Peer-to-Peer Lending as a Solution to Unsecured Lending in an Unbalanced Credit Market* (unpublished PhD study, University of Pretoria, 2017) available at https://repository.up.ac.za/bitstream/handle/2263/60502/Lavagna_Investigating_2017.pdf?sequence=1, accessed on 1 December 2018 at 52.

³¹⁸ *Ibid* 100.

disclosure of credit, India seems to lack a single and comprehensive piece of legislation dealing with consumer credit and protection. Its credit system, as opposed to the United Kingdom and South Africa, is complicated and consists of several Acts, Regulations, Notifications and Circulars. Interestingly however, statistics show that the availability of and access to unsecured credit in India has increased. Yet the United Kingdom, due to stringent lending criteria has seen a decrease in access to this form of credit.

This suggests that when it comes to credit legislation and credit access there is no one size fits all approach. There are pros and cons to each form of legislative regime. It can be contended that one regime is not necessarily best suited to a country but could be better suited to another country.

South Africa can be described as the 'middle ground' between the United Kingdom and India as, despite having credit legislation similar to that of the United Kingdom, it still faces difficulties when it comes to consumers' access to credit. This lack of access is, however, somewhat negated by the extensive consumer protection mechanisms contained in the NCA, such as those provided for in India's legislation, which ensure that consumers do not fall victim to reckless lending and over-indebtedness. A balance therefore needs to be found between improving access to credit and simultaneously ensuring consumers are shielded from exploitation by lenders.

It can be suggested that voluntary codes, such as those implemented in both the United Kingdom and India, be adopted by lenders in South Africa. These codes provide standards to which lenders can voluntarily adhere to (thus improving their public image) and which do not hamper their productivity and profits. This, in turn, can facilitate improved access to credit whilst ensuring consumers are protected.

In addition, P2P lending can be contended to be a feasible alternative to formal sources of unsecured credit for South African consumers.³¹⁹

³¹⁹ Ibid 25 in which it is submitted that research indicates P2P lending to be a 'sustainable alternative' for accessing unsecured credit to other formal forms of finance.

CHAPTER 5

5.1. INTRODUCTION

This research paper has demonstrated instances where, despite the sound reasoning and practicality behind the provisions of the NCA and its regulations, the NCA's objectives relating to access to credit and improved consumer information are not being met.

To determine the precise impact of the regulation of unsecured credit on consumers, this chapter seeks to answer the various sub-questions raised in the beginning of this paper.

5.2. DOES THE REGULATION PERTAINING TO UNSECURED CREDIT IMPROVE FINANCIAL ACCESSIBILITY IN THE MARKET IN ACCORDANCE WITH THE AIMS PROVIDED FOR IN THE NCA?

One of the aims of the NCA, as referenced in its preamble and section 3, is to improve accessibility of credit, especially to those who were previously denied access to credit. The NCA has achieved this objective in part by removing the exemption that had restricted the unsecured credit market,³²⁰ and introduced measures to safeguard consumers, such as maximum rates of interest and cost caps.³²¹ However, following the reckless and predatory lending allegations surrounding the Marikana Massacre, the lending criteria of unsecured credit was made more prescriptive and stringent and in so doing had the effect of unsecured loans only being granted to higher-income consumers.³²²

This was echoed in the case of *Truworths Limited and Others v Minister of Trade and Industry and Others*,³²³ where it was argued that measures such as the affordability assessment introduced by the NCA had the unintended consequence of reducing access to credit. The case of *Micro Finance South Africa v Minister of Trade and Industry and Another*³²⁴ also illustrated concerns that the stringent criteria contained in the NCA meant that lenders were reluctant to lend to lower-income, higher risk consumers.

The measures introduced by the NCA pertaining to the cost of credit on unsecured loans have had the unintended consequence of reducing access to credit. The initiation fee (alleged by Campbell to be an unnecessary cost),³²⁵ promotes consumer over-indebtedness, as consumers who cannot afford the initiation fee upfront, are lured into taking another loan to

³²⁰ Leriba Consulting Limited (note 68 above; 4).

³²¹ Ibid 5.

³²² Ellyne & Jourdan (note 3 above; 24).

³²³ 2018 (3) SA 558 (WCC)

³²⁴ (16746/2016) [2016] ZAGPPHC 1155 (22 November 2016)

³²⁵ Campbell (note 130 above; 262).

cover the cost.³²⁶ Furthermore, the 'flat-rate' attached to the service fee (which fails to distinguish between financially active consumers and consumers who do not use their accounts often),³²⁷ results in smaller loans attracting inflated rates.³²⁸

In addition, the interest rate on loans, including unsecured loans, are considered 'prescribed' rates rather than maximum rates as intended by the legislature,³²⁹ and result in consumers being denied access to credit at competitive prices.³³⁰ Further, these caps mean that lenders, who are seeking to attain high profits, would prefer to lend to higher income consumers who pose little to no risk.³³¹

Upon examination of these charges, it can be submitted that smaller, unsecured loans which are required by many lower-income consumers, are simply not affordable to lower-income consumers, consequently excluding many consumers from accessing credit. These contentions have merit. Statistics provided by the CCMR, as illustrated earlier in this paper, show that lenders favour granting unsecured loans to consumers who earn more than R15 000 per month, and tend to reject applicants who earn less than R10 000 per month.³³²

Therefore, although the regulations introduced pertaining to unsecured credit were aimed at minimising exploitation and improving access to credit, these objectives are not being met and lower-income consumers (whose welfare the NCA directly aims to improve) are being financially excluded from the unsecured credit market, and alternatively, the formal credit market.

5.3 WHAT ADVANTAGES DO THE NCA AND ITS REGULATIONS POSSESS FOR CONSUMERS?

The NCA has been described as a 'huge improvement' to its predecessors due its increased breadth of application and its ability to regulate various forms of credit.³³³ One of these forms of credit is unsecured credit which acts as a staple for many consumers in South Africa, particularly those who rely on it to accommodate their living expenses from day to day.

³²⁶ Ellyne & Jourdan (note 3 above; 80).

³²⁷ Otto (note 35 above; 100).

³²⁸ Campbell (note 130 above; 262). Refer to the example used by Campbell in Chapter 3: If the loan amount is R200 and the service fee is R60, the monthly cost of the service fee relative to the loan amount is 30% per month, whilst the annual cost of the service fee relative to the loan amount is 360% per year. In contrast, if the loan amount is R10 000, the monthly cost of the service fee relative to the loan amount is only 0,6% per month, whilst the annual cost of the service fee relative to the loan amount is 7.2% per year.

³²⁹ Ellyne & Jourdan (note 3 above; 23).

³³⁰ Ibid

³³¹ Compliance & Risk Resources (Pty) Ltd (note 100 above; 18).

³³² National Credit Regulator (note 5 above; 15).

³³³ Otto (note 54 above; 261).

Despite its pitfalls pertaining to the costs of unsecured loans, the rationale behind the caps on costs for loans is sound in that they aim to prevent the exploitation of consumers whilst enabling lenders to profit.³³⁴ Further, mechanisms such as the 'in duplum' rule ensure that the costs on defaulting loans are capped, preventing consumers from falling into debt spirals.³³⁵ The NCA also instructs both the NCR and the Minister to consult with each other and with industry experts and participants (such as credit providers and debt counsellors) when reviewing these limits before implementing them. During these consultations, various factors are considered, such as access to credit and the potential impact of the regulations.³³⁶ In this way, the NCA seeks to ensure the lived-reality of society and the needs of consumers are considered.

The disclosure provisions contained in the NCA and its regulations (such as the delivery of quotations) enable consumers to get the most economically viable credit and ensure they are aware of terms and conditions before entering into a loan agreement.³³⁷

Further, safeguards in the NCA such as the reckless lending provisions aim to prevent consumers from being exploited even if they are unable to understand these terms.³³⁸ For example, section 89 of the NCA which details circumstances whereby a credit agreement will be considered unlawful,³³⁹ and section 90 which provides for unlawful provisions of a credit agreement.³⁴⁰

Overall, the disclosure provisions, as detailed previously in this paper, act as an inherent defence for consumers by dissuading them from taking out loans which they cannot afford.³⁴¹

Therefore, the NCA, through these structural and systematic mechanisms, does achieve its objectives in creating a transparent and responsible credit market, whilst ensuring responsible borrowing and informed decision-making by consumers. In this way, consumers are advantaged by the NCA and its regulations.

5.4 TO WHAT EXTENT ARE CONSUMERS OVER-BURDENED BY THE CURRENT LEGISLATION?

³³⁴ National Credit Regulator (note 27 above; 61).

³³⁵ Otto (note 35 above; 95).

³³⁶ Whittaker (note 171 above; 574).

³³⁷ Stoop (note 202 above; 7).

³³⁸ Adewale (note 26 above; 370).

³³⁹ 34 of 2005. See for example, section 89(2)(d) which states that a credit agreement will be unlawful if, at the time the agreement was entered into, the credit provider was not registered.

³⁴⁰ 34 of 2005. See for example, section 90(2)(a) which states that a provision in a credit agreement will be unlawful if it deceives the consumer.

³⁴¹ Stoop (note 202 above; 7).

One of the fundamental issues pertaining to the NCA and consumers is that due to the stringent criteria imposed, lower-income consumers who are considered high risk by lenders, are denied access to secure forms of finance. This means that lower-income consumers are forced to utilise unsecured loans which, as illustrated in this paper, are more expensive compared to secure loans.³⁴²

Alternatively, these consumers are altogether excluded from the formal credit market and are compelled to source unregulated sources of finance, such as loans through usurers,³⁴³ which subjects them to exploitation.³⁴⁴ These issues are illustrated through the CCMR statistics highlighted above, which show a gradual exclusion of lower-income consumers from the formal credit market.³⁴⁵

Further, the price structure relating to unsecured loans, such as the initiation fee, service fee and interest, make smaller loans (on which many lower-income consumers rely) more expensive. Despite not appearing so, consumers are charged beyond the actual cost of the loan itself.³⁴⁶ In addition, due to the maximum rates of interest being treated as prescribed rates by lenders, consumers are denied loans at competitive prices,³⁴⁷ preventing them from achieving economic advancement.

Another important issue is that of financial illiteracy of consumers. Despite the regulations pertaining to disclosure of information and transparency, many consumers are still unable to fully comprehend and utilise the information that is provided, rendering these provisions futile.³⁴⁸ Accordingly, even with mandatory disclosure of terms and costs, consumers still tend to choose those loans which are more expensive due to the way information is presented by lenders, therefore facilitating exploitation by lenders.³⁴⁹

5.5 IS THERE A SATISFACTORY BALANCE BETWEEN CONSUMER PROTECTION AND ACCESS TO CREDIT IMPOSED BY THE NCA AND ITS REGULATIONS?

The NCA was implemented due to a history of abuse by credit lenders,³⁵⁰ in a market which was characterised by inequality, an absence of transparency and inadequate consumer protections.³⁵¹ In response, the legislature introduced various measures to shield consumers

³⁴² Rom (note 15 above; 47).

³⁴³ Or 'loan sharks.'

³⁴⁴ Compliance & Risk Resources (Pty) Ltd (note 100 above; 18).

³⁴⁵ National Credit Regulator (note 5 above; 4).

³⁴⁶ Leriba Consulting Limited (note 68 above; 5).

³⁴⁷ Ellyne & Jourdan (note 3 above; 23).

³⁴⁸ Stoop (note 202 above; 11).

³⁴⁹ National Credit Regulator (note 27 above: 87).

³⁵⁰ Jordaan (note 23 above; 2).

³⁵¹ Kelly-Louw (note 39 above; 205).

from exploitive practices including the establishment of the NCR which seeks to provide consumers with a system of redress.³⁵² In addition, the reckless lending provisions contained in the NCA serve as a 'red line'³⁵³ for lenders' conduct and ensure consumers are not severely disadvantaged through hindrances such as illiteracy. The introduction of caps on the cost of loans similarly seek to curb reckless lending.

However, it is submitted that the NCA's efforts to safeguard consumers may have resulted in stringent provisions which force consumers, who are considered high-risk, towards alternative and costlier sources of credit.³⁵⁴ This submission is illustrated by statistics published by the NCR which show that, in an attempt to facilitate access to credit, the NCA has unintentionally contributed towards financial exclusion,³⁵⁵ and in so doing, has favoured credit expansion over consumer protection.³⁵⁶

Therefore, although the NCA has tried to simultaneously ensure a transparent and responsible credit market whilst improving access to credit, it can be argued that its intensive efforts to protect consumers has, in fact, resulted in many consumers being forced to take out unsecured loans which are more expensive than secured loans, or alternatively being excluded from the formal credit market altogether. Consequently, consumers are exploited by unregulated lenders such as usurers,³⁵⁷ or forced to pay more for small loans, and in this way, are not fully protected as the NCA intended.

5.6 IS MORE, OR LESS REGULATION NEEDED TO IMPROVE THE CURRENT STATE OF AFFAIRS?

Based on South Africa's history of consumer abuse, the complexity of the credit market,³⁵⁸ and the need for transparent lending and enforcement mechanisms, credit needs to be regulated.³⁵⁹ However, there exists a risk, in any regulated market, that too much regulation could result in costs being passed to the consumer,³⁶⁰ and access to credit being hampered.

³⁶¹

The United Kingdom's credit legislation identifies with the NCA on several aspects, but particularly because it consists of a single, comprehensive statute which deals with consumer

³⁵² South African Human Rights Commission (note 28 above; 31).

³⁵³ Adewale (note 26 above; 370).

³⁵⁴ Compliance & Risk Resources (Pty) Ltd (note 100 above; 18).

³⁵⁵ de Wet, Botha & Booyens (note 40 above; 99). See also National Credit Regulator (note 5 above;4).

³⁵⁶ Ellyne & Jourdan (Note 3 above; 20).

³⁵⁷ Or 'loan sharks.'

³⁵⁸ Renke, Roestsoff & Haupt (note 229 above; 230).

³⁵⁹ Kelly-Louw & Stoop (note 57 above; 8).

³⁶⁰ The Free Market Foundation of Southern Africa (note 32 above; 6).

³⁶¹ Kelly-Louw (note 39 above; 226).

credit and has extensive consumer protection mechanisms. To negate the effects of stringent legislation on access to credit, the United Kingdom introduced the APR method to determine the cost of credit, as opposed to cost caps. However, it has been contended that this method is still being manipulated by creditors and that consumers do not fully comprehend its calculation, thus making it difficult to compare prices of loans.³⁶² Furthermore, despite its comprehensive credit provisions, statistics show that many consumers are being denied access to mainstream finance and the availability of unsecured loans has decreased.³⁶³

India, in contrast to the United Kingdom and South Africa, has a variety of legislative devices dealing with consumer credit as opposed to a single, stringent statute. In addition, the cost of credit is not capped but structured lending mechanisms are in place to ensure transparency and affordability. Despite the complex, more lenient legislative framework, statistics show that the availability of unsecured loans has increased by 27 per cent.³⁶⁴

Consequently, it can be contended that both legislative approaches have their flaws and strengths. A less rigid legislative framework such as India's will have the drawback of weaker consumer protection but will have an increased access to credit. Alternatively, a stringent legislative framework such as the United Kingdom's will have the shortfall of reduced access to credit but will have increased consumer protection.

To conclude, each country is varied in respect of its consumers, resources and capital, therefore, the selected credit legislation should best suit that country's needs. In other words, one size cannot fit all.

5.7 RECOMMENDATIONS

There are advantages and disadvantages to both lenient and rigorous criteria, therefore a balance needs to be found between consumer protection and access to credit. It is submitted that the NCA can learn some valuable lessons from the contrasting credit frameworks of the United Kingdom and India. For example, both the United Kingdom and India have voluntary codes with flexible criteria,³⁶⁵ allowing lenders to escape the rigidity of formal credit legislation whilst simultaneously ensuring consumer protection and access to credit. In addition, these voluntary codes enable lenders to accommodate the needs and circumstances of individual

³⁶² United Kingdom Department of Trade and Industry (note 253 above; 62).

³⁶³ Bank of England (note 278 above; 1).

³⁶⁴ CRISIL (note 316 above).

³⁶⁵ In India, this is the Guidelines on Fair Practices Code for Lenders, and in the United Kingdom, it takes the form of The Standards of Lending Practice.

consumers and situations.³⁶⁶ Consequently, borrowers are not instantly refused credit should they need meet certain gatekeeping criteria.

Furthermore, P2P lending can act as a 'middle ground' by allowing consumers to access unsecured credit without necessarily facing the same gatekeeping provisions implemented by the NCA and its regulations. Additionally, consumers, upon rejection by formal lenders, will have another viable alternative to attaining unsecured credit without resorting to unregulated sources of finance.

5.8 CONCLUSION

After an analysis of the various provisions relating to unsecured credit, it can be contended that the NCA and its regulations have both a positive and negative impact on consumers. The NCA has facilitated consumer protection by curbing exploitive lending practices and promoting a transparent credit market which ensures consumers are able to make informed choices.

In addition, the NCA and its regulations have introduced provisions relating to the cost of credit which seek to safeguard consumers from becoming over-indebted by taking out loans which they cannot afford, and further, seek to ensure the costs of credit are not excessive.

On the surface, the NCA is practical, its reasoning is sound, and its objectives are well-intentioned. However, strict lending criteria pertaining to unsecured credit has had the unintended consequence of reducing access to credit, especially to lower-income consumers, whom the NCA aims to support. In this way, Kelly-Louw's portrayal of regulation being portrayed as a 'toothless tiger' appears correct.³⁶⁷

Regulation of credit, including unsecured credit, is needed in South Africa based on its history. Furthermore, regulation of credit is essential for credit providers to alleviate the risks they undertake when providing loans to consumers. However, the negative impact of such regulation on consumers' needs to be considered. Once we have appreciated the practical impact that such legislation has, methods of alleviating the harsh unintended consequences on consumers need to be considered.

³⁶⁶ Lending Standards Board (note 270 above; 2).

³⁶⁷ Kelly-Louw (note 33 above; 92).

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