Prohibitions on Reckless and Predatory Lending: Lessons from South Africa

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Prohibitions on Reckless and Predatory Lending: Lessons from South Africa

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This paper provides a statement and an analysis of South Africa's statutory provisions aimed at curbing reckless lending, and preventing predatory lending, to consumers.

I INTRODUCTION

South Africa is a developing country,[1] with a population of approximately 55 million[2] people, of which 40 million are regarded as economically-active, and fall between the ages of 15 and 64.[3] Of this approximately 25% are unemployed,[4] and in excess of 2.5 million adults are classified as illiterate.[5] This presents opportunities for unscrupulous financial service providers, and especially lenders, to

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[1] United Nations, *Statistical annex*, in 'World Economic Situation and Prospects 2015', United Nations, 2015, p 140.

[2] Statistics South Africa, *Mid-year population estimates*, in 'Statistical release',no. P0302, Statistics South Africa, 23 July, 2015, p 2. Up from 52 million according to the 2011 census. SouthAfrica.info, "South Africa's population", in *About*/*People*, published by SouthAfrica.info, October, 2015, accessed: 19 November, 2015.

[3] Jami Solli-Hubbard (ed.), *Responsible lending: An international landscape*, in 'News and Media, Resource Zone', Consumers International, November, 2013, p 71.

[4] United Nations, 2015, p 156.

[5] Stephanie Pretorius, "SA's real level of literacy", 'National', *The Citizen*, 29 August, 2013 06:00 am.

take advantage of the large number of unsophisticated financial consumers in South Africa.

> *The statistical returns obtained from credit providers and credit bureaus have revealed that the amount of credit granted to consumers has increased substantially from R1.1 trillion in 2007 to R1.5 trillion in 2014. There were 21.7 million credit active consumers and out of these, 9.6 million (44.2%) had impaired records. This increase has also led to an evolution of the problem of household over-indebtedness. Household debt to disposable income in South Africa is still high, even though the overall household indebtedness is actually down from its early peaks: Q4 2008 – 81.9% and this fell to 74.3% in Q4 2013. This is an indication that a large portion of household incomes still goes to servicing debt.*[6]

As a result,[7] South Africa's National Parliament enacted the National Credit Act[8] in 2005, the objects and purport of which are, *inter alia*, to combat reckless lending – that is to say lending which is reckless as regards a particular borrower's indebtedness - and prohibit predatory lending. The methods employed are at once farsighted and straightforward, and serve as a useful comparative model that other jurisdictions may wish to study in order, similarly, to discourage reckless and predatory lending practices.

This article will provide, by way of discussion, a background to the Act, an analysis of key provisions, and a discussion of enforcement mechanisms. Its focus on consumers is from the perspective of the particular dynamics encountered in the protection of individual consumers, and as such is predominantly based upon the

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[6] The National Credit Regulator, *Annual Report*, The National Credit Regulator, 2014, p 12.

[7] Megan Whittaker, "South Africa's National Credit Act: A Possible Model for the Proper Role of Interest Rate Ceilings for Microfinance", *Northwestern Journal of International Law & Business*, Vol. 28, no. 3 (Spring, 2007-2008), p 569ff.

[8] *National Credit Act*, No. 34 of 2005, (enacted: 15 March, 2006), (Republic of South Africa).

notion of the consumer as a natural person. Issues in the protection of sophisticated consumers are not within the ambit of this article.

II BACKGROUND TO THE ACT

The purpose of the National Credit Act is to:

> *... promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit ... and improved standards of consumer information; ... to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting ... to prohibit reckless credit granting; ... to establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework ... establish the National Credit Regulator and the National Consumer Tribunal...*[9]

In particular, the Act prohibits misleading and unfair marketing and selling practices[10] - an important provision in a society with a large number of financially unsophisticated consumers.[11] Moreover, the provisions aimed at prohibiting misleading and unfair conduct are worded sufficiently broadly that a Court or Tribunal can evaluate, on a case-by case basis, whether a particular practice is unfair or misleading, having regard to the circumstances of a particular debtor. This puts the onus squarely upon the lenders to conduct themselves appropriately.

The Act prohibits unilateral changes to a credit agreement, notwithstanding any provisions in the credit contract or at common

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[9] Preamble , ibid.

[10] S 76 (4)(c)(ii), ibid.

[11] See for example s 90 (2)(a)(i) and (ii), ibid, which makes void any credit contract that contains provisions which are deceptive or fraudulent.

law[12] to the contrary – in particular changes to the interest or fees payable,[13] or the period of repayment or the minimum amount payable;[14] nor may the credit provider unilaterally extend to the borrower increased credit facilities.[15] These provisions prevent consumers from being blind-sided by so-called loan interest 're-set'[16] provisions; prevent credit providers from being able to contract out of the provisions of the Act;[17] and prevent credit providers from continuing to extend credit to unsophisticated consumers until those consumers are over-indebted, and caught in a debt trap.

A further noteworthy aspect of the Act is the manner in which it seeks to shine a light onto debt practices in the Republic. In extreme cases we have seen examples of where industry representatives have sought to outlaw research into the harmful effects of the products their industry produces, the most obvious and possibly most extreme example of which is the prohibition on the conduct of research into deaths by gun violence in the United States.[18] In contradistinction to

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[12] Or where the agreement as a whole purports to deprive a common law right, s 90(2)(c), as prescribed by the Minister under ss (5), ibid.

[13] S 104 (1)(a) and (b), ibid.

[14] S 120 (1)(a) and (b), ibid.

[15] S 119 (1)-(4), ibid.

[16] The practice by which consumers are enticed into entering into loan contracts by virtue of low, fixed interest rates, which then later 'reset' to higher, floating rates, often at levels that are unaffordable. Assistant Governor of the Australian Reserve Bank, Guy Debelle, stated in 2008 that: 'There are at least four factors that can be identified [as causing the sub-prime disaster, two of which were]: reset shock, [and] poor assessment of the risks by the lending institution ...' Both reset shock and poor risk assessment are specifically addressed by the *National Credit Act*, and so should be viewed not just as forms of consumer protection, but also as potential bulwarks against systemic threats to the broader economy.

[17] s 90 (2)(a)(i), and s 90 (2)(b), *National Credit Act,* No. 34 of 2005.

[18] Todd C. Frankel, "Why the CDC still isn't researching gun violence, despite the ban being lifted two years ago", 'News/Storyline', *The Washington Post*, 14 January, 2015.

such an approach, the National Credit Act[19] specifically requires the National Credit Regulator to conduct research into socio-economic trends in consumer credit in the Republic, especially as regards over-indebtedness, and to make known its findings.[20]

The National Credit Act regulates the provision of consumer credit in South Africa, and covers every type of entity that extends credit: banks, micro-lenders, furniture and even clothing retailers. Entities that extend credit are captured by the provisions in the Act, and are required to register with the National Credit Regulator. Indeed, the only entities that extend credit but are not required to register with the National Credit Regulator are those with fewer than 100 loans in their portfolio,[21] or those whose portfolios are worth less than ZAR 500,000.[22] While such entities are not required to register

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[19] S 16 (1)(c).

[20] s 16 (1) and (2), *National Credit Act,* No. 34 of 2005.

[21] In South Africa, traditionally, black communities have assisted one another through the provision of so-called 'stokvel' finance. Stokvels operate as community savings clubs. Typically they have approximately twelve members or more, with each member contributing to a central fund on a weekly, fortnightly or monthly basis. Stokvels are virtually only utilized by low- or very low-income black South Africans – and then predominantly by older black South Africans. Members meet usually monthly at a party hosted by one of the members. In return for which the host may be expected to make a small profit. The central fund is then loaned to each member in turn for anything from funeral expenses to the purchase of groceries to home improvements. Anonymous, "Stokvel", *Oxford Dictionaries*, 2016. There are currently approximately 800,000 stokvels in South Africa, worth an estimated ZAR 45 billion, and with somewhere between 8,6 and 9 million members. Most are represented by the National Stokvel Association of SA. National Stokvel Association of South Africa (NASASA), "Homepage", in *Website*, published by National Stokvel Association of South Africa (NASASA), 2016, accessed: 2 January, 2016; Gillian Jones, "A stokvel by any other name is still empowering", 'Business / Financial Services', *Business Day*, 11 May, 2015 at 06:35. Clearly the legislator did not intend to cover stokvels, as registration for these community savings clubs would be unduly onerous.

[22] S 40 (1) (a), *National Credit Act,* No. 34 of 2005.

with the Regulator, they are nonetheless subject to the provisions of the Act in every particular. A credit provider required to register in terms of the Act, but which does not register, must not offer credit, and if it does so, any such credit agreements are void from the date upon which they were entered into.[23] In so doing the onus is placed squarely upon the providers of credit, such that if they fail to discharge their obligations, they would then be in a position of having no recourse against the debtor.

The Act prohibits heavy-handed debt enforcement processes, no doubt aimed at preventing debt collectors from frightening debtors into repayment. While this is not, it is suggested, aimed at achieving anything more than addressing the 'how' of the debt-collection process, as opposed to the 'when' or the 'if', it is nonetheless an important provision aimed at civilizing the process. Put differently, if a debtor can be forced to repay their debts, good and well, but they should not, in the process of being subjected to debt collection, be terrorised.[24]

The Act prevents credit providers from contractually escaping from any representations made prior to the commencement of the contract, but which may have induced the contract.[25] Moreover, the Act prevents excessively costly credit, over-indebtedness and reckless lending, inadequate consumer redress and dispute resolution, and even poor customer service.[26]

In terms of access to credit – an important feature in a developing economy where a sizeable portion of the population has historically not enjoyed equality of access to credit – an applicant is, by law, assured that they will be granted any credit they apply for,

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[23] S 40 (4), ibid.

[24] See for example s 133 'Prohibited collection and enforcement practices', ibid.

[25] S 90 (2)(h)(i), ibid.

[26] Jami Solli-Hubbard (ed.), November, 2013, p 72.

unless there are legitimate reasons for a refusal.[27] Where an application does result in a refusal, the applicant has a right to know the reasons.[28] This is an important provision, because credit providers will need to be accurate and circumspect in the reasons they provide. If the reasons are inadequate or unreasonable, then that would form the basis for a review of the provider's decision. Put differently, the credit provider cannot provide generic reasons by way of a form letter. The provider would need to demonstrate a reasonable measure of engagement with the applicant's circumstances. Furthermore, the provider will not be able to rely on reasons other than the reasons provided to the applicant, and so will be compelled to provide reasons which are, to the best of the ability of the provider, complete and comprehensive.

Credit granters are obligated to ensure that consumers can not only afford the credit, but that they also understand the costs and risks associated with that credit.[29]

III SPECIFIC PROVISIONS

This part provides an account and an analysis of specific provisions in the National Credit Act, which deserve particular attention. Only those sections which, in this writer's view, deserve attention, and which demonstrate consumer protection principles, are repeated here.

(a) Section 64, Right to information in plain and understandable language

Section 64 states as follows:

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[27] Ibid, p 72.

[28] Ibid.

[29] Ibid, p 72.

(1) The producer of a document that is required to be delivered to a consumer in terms of this Act must provide that document-

(a) ...

(b) in plain language, if no form has been prescribed for that document.

(2) For the purposes of this Act, a document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance, and import of the document without undue effort, having regard to-

(a) the context, comprehensiveness and consistency of the document;

(b) the organisation, form and style of the document;

(c) the vocabulary, usage and sentence structure of the text; and

(d) the use of any illustrations, examples, headings, or other aids to reading and understanding.

South Africa has developed an admirable focus[30] on plain language, concomitant with its progression to a democratic political dispensation in 1994. Examples include both South Africa's *Final Constitution*,[31] and the *Interim Constitution*[32] which preceded it, and the *Consumer Protection Act*.[33] In a country with a large proportion of the population ill-educated and in some instances illiterate, it serves to

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[30] See for example: Plain Language Institute, "Plain language legislation in SA", series edited by Plain Language Institute, in *Plain Language in SA*, published by Plain Language Institute, 2010, accessed: 8 November, 2015.

[31] *Constitution of the Republic of South Africa*, No. 108 of 1996, (enacted: 1996), (Republic of South Africa).

[32] *Interim Constitution of the Republic of South Africa*, No. 200 of 1993, (enacted: 1993), (Republic of South Africa).

[33] *Consumer Protection Act*, No. 68 of 2008, (enacted: 29 April, 2009), (Republic of South Africa).

strengthen the position of vulnerable consumers, by making legislation as accessible as possible. This is not only true for South Africa; it is true for any country where consumers, made vulnerable by, for example, their lack of language skills, are evident.

Again, as is a general feature of this Act, the onus is upon the producer of the document to ensure compliance, and again, as is also a feature of this Act, a Court or Tribunal is given philosophical direction in terms of reaching a conclusion as to compliance with the Act, but is specifically mandated to inquire into the particular circumstances of a consumer, upon whose behalf a complaint is brought. In so doing the Act references 'consumer of the class of persons for whom the document is intended'. Set against that must be the expected ability of a consumer with average literacy skills, but minimal credit experience, to understand that document without undue effort. In particular a Court or Tribunal must have regard to the vocabulary and sentence structure used in the document.[34]

It is not in dispute that this creates a large lee-way for Courts and Tribunals. But in the context of heavily skewed power relations between a credit provider, and a potentially vulnerable consumer, the Act clearly aims to favour the consumer. As a corollary, it is incumbent upon credit providers to know their customers (KYC), and to err on the side of caution in the formulation and provision of documentation.

(b) Section 66, Protection of consumer credit rights

Section 66 states as follows:

> *(1) A credit provider must not, in response to a consumer exercising, asserting or seeking to uphold any right set out in this Act or in a credit agreement-*

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[34] These issues were addressed by the High Court of South Africa in § 52, 53 and 64 in *Standard Bank of South Africa Ltd v Dlamini 2013 (1) SA 219 (KZD)*.

(a) discriminate directly or indirectly against the consumer, compared to the credit provider's treatment of any other consumer who has not exercised, asserted or sought to uphold such a right;

(b) penalise the consumer;

(c) alter, or propose to alter, the terms or conditions of a credit agreement with the consumer, to the detriment of the consumer; or

(d) take any action to accelerate, enforce, suspend or terminate a credit agreement with the consumer.

(2) If a credit agreement, or any provision of such an agreement is, in terms of this Act, declared to be unlawful or is severed from the agreement, the credit provider who is a party to that agreement must not, in response to that decision-

(a) directly or indirectly penalise another party to that agreement when taking any action contemplated in section 61(1);

(b) alter the terms or conditions of any other credit agreement with another party to the impugned agreement, except to the extent necessary to correct a similarly unlawful provision; or

(c) take any action to accelerate, enforce, suspend or terminate another credit agreement with another party to the impugned agreement.

This section serves to outlaw any attempts by a credit provider to punish a consumer for exercising their rights, or to punish another party to the agreement (such as a guarantor). It prevents a credit provider from installing into a contract any provisions which would allow some sort of sanction to be imposed upon a consumer who exercises their rights, or complains about their treatment. This is a valuable provision in that it prevents credit providers from bullying or coercing their customers.

(c) Section 76, Advertising practices

Section 76 states as follows:

(1) ...

(2) ...

(3) ...

(4) An advertisement of the availability of credit, or of goods or services to be purchased on credit-

(a)...

(b) ...

(c) must not-

(i) advertise a form of credit that is unlawful;

(ii) be misleading, fraudulent or deceptive; or

(iii) contain any statement prohibited by regulation; and

(d) may contain a statement of comparative credit costs to the extent permitted by any applicable law or industry code of conduct, but any such statement must-

(i) show costs for each alternative being compared;

(ii) show rates of interest and all other costs of credit for each alternative;

(iii) be set out in the prescribed manner and form; and

(iv) be accompanied by the prescribed cautions or warnings concerning the use of such comparative statements.

(5) In any advertisement concerning the granting of credit, a credit provider must state or set out the interest rate and other credit costs in the prescribed manner and form.

The effect of this section is, principally, to outlaw advertisements or promotional materials that are designed, or have the effect of, misleading or deceiving consumers, are fraudulent or illegal, and which fail to inform consumers of the costs of a particular form of credit.

(d) Section 80, Reckless credit

Section 80 states as follows:

(1) 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 preponderance of information 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.

(2) ...

(3) ...

This section places upon the credit provider an obligation to 'know the customer'. Moreover, the credit provider is to be judged according to what information was available at the time the decision to grant credit was made. This is potentially different from the information which the credit provider actually obtained. Thus a failure to make a reasonable investigation of the potential debtor's position, and a concomitant lack of adequacy of information obtained would not, it is suggested, constitute a defence. The incentive for the credit provider to make a thorough investigation is, therefore, maintained.

(e) Section 82, Assessment mechanisms and procedures

Section 82 states as follows:

(1) Subject to subsections(2)(a) and (3), a credit provider may determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations

under section 81, provided that any such mechanism, model or procedure results in a fair and objective assessment.

(2)The National Credit Regulator may-

(a) pre-approve the evaluative mechanisms, models and procedures to be used in terms of section 81 in respect of proposed developmental credit agreements; and

(b) publish guidelines proposing evaluative mechanisms, models and procedures to be used in terms of section 81, applicable to other credit agreements.

(3) Subject to subsections (2)(a) and (4), a guideline published by the National Credit Regulator is not binding on a credit provider.

(4) If the Tribunal finds that a credit provider has repeatedly failed to meet its obligations under section 81, or customarily uses evaluative mechanisms, models or procedures that do not result in a fair and objective assessment, the Tribunal, on application by the National Credit Regulator, may require that credit provider to-

(a) apply any guidelines published by the National Credit Regulator in terms of subsection (2)(b);or

(b) apply any alternative guidelines consistent with prevailing industry practice, as determined by the Tribunal.

This section allows the credit provider to develop its own evaluative mechanisms, models or procedures to enable it to conduct the creditworthiness and suitability assessment, as required above; provided the mechanisms that the credit provider develops are fair and objective. A credit provider may submit its mechanisms, models or procedures to the regulator for pre-approval.

The National Consumer Tribunal (NCT), on the recommendation of the National Credit Regulator, may impose mandatory guidelines on a credit provider who is consistently found to use evaluative mechanisms or procedures that are unfair and subjective. Put differently, this empowers a Tribunal to punish and impose conditions upon credit providers who have a track-record of acting contrary to the spirit or the letter of the Act. Given time and

sufficient opportunities for ventilation, this stricture may have a civilising effect on the industry as a whole, and may contribute to the development of a culture that favours prudent, ethical conduct towards consumers, by rendering contrary business practices unsustainable.

While the guidelines which the National Credit Regulator may publish subject to s 3 are not binding, the fact that a Tribunal may subsequently impose them as binding, by way of a court order, makes the guidelines highly persuasive. For one thing following the guidelines as published could later be used by a credit provider to convince a Tribunal that it has a clean track-record. This may prove useful, because a determination by a Tribunal that a credit provider does not have a clean track record opens up the possibility that the Tribunal may impose other processes as binding, in addition to the guidelines as promulgated by the National Credit Regulator.

(f) Section 83, Court may suspend reckless credit agreement

Section 83 states as follows:

> *(1) Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, the court may declare that the credit agreement is reckless, as determined in accordance with this Part.*
>
> *(2) If a court declares that a credit agreement is reckless in terms of section 80 (1)(a) or 80 (1)(b)(i), the court may make an order-*
>
> > *(a) setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or*
> >
> > *(b) ...*
>
> *(3) ...*
>
> *(4) ...*

This section effectively provides courts with unfettered discretion to apply the prohibitions on reckless lending. This includes the power to set aside a loan contract despite the *prima facie* validity thereof in terms of the common law or statute, or a contractual

provision. In making the determination the court need only have regard to what it determines to be just and reasonable grounds, and with reference to the manner prescribed by s 80 (1) (see above).

This section has the effect of making reckless lending a precarious business for the credit provider: while the credit provider may initially succeed in extending reckless loans, the credit provider is effectively denied of any certainty of title. If at a later stage either the borrower or the National Credit Regulator forms the view that the loan was reckless, it may then be challenged, and all of the borrower's obligations rendered void. This serves as a powerful disincentive to credit providers to 'chance their luck'.

Put differently, if the court finds the loan reckless, it can set aside all or part of the borrower's obligations. In effect, therefore, the court can punish a lender under this section, for making a reckless loan, by voiding all or part of the loan, leaving the lender with no further recourse. The flexibility given to the court, by which it can suspend 'all or part' of the obligations, according to whatever is 'just and reasonable', is particularly noteworthy.

(g) Section 85, Court may declare and relieve over-indebtedness

Section 85 states as follows:

> *Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may-*
>
> *(a) ...*
>
> *(b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.*

Similar to s 83, this section allows a Court to inquire into whether a debtor is over-indebted, notwithstanding a provision in the loan contract, or at common law or statute, that purports to deprive the

debtor of the right to be relieved of their debt, if they are found to be over-indebted. Clearly, therefore, the legislator has placed the onus for 'know your customer' on the credit provider, while at the same time firing a shot across credit providers' bows to the effect that if they engage in reckless lending, whereby a debtor is placed in an inescapable debt trap, then responsibility for those loans will rest with the credit provider, as indeed will the consequences.

In the event that a Court finds that credit has been extended in a manner that is reckless, it may re-arrange the debtor's obligations, including by recalculating the debtor's obligations,[35] which may include holding that the credit agreement is void *ab initio*,[36] requiring the credit provider to refund the debtor, with interest,[37] or it may cancel all of the creditor's rights to recover monies or goods,[38] or it may cause the creditor's rights to recover to be forfeited to the State.[39]

(h) Section 90, Unlawful provisions of credit agreement

Section 90 states as follows:

> *(1) A credit agreement must not contain an unlawful provision.*
> *(2) A provision of a credit agreement is unlawful if-*
> *(a) its general purpose or effect is to-*
> *(i) defeat the purposes or policies of this Act;*
> *(ii) deceive the consumer; or*
> *(iii) subject the consumer to fraudulent conduct;*
> *(b) it directly or indirectly purports to-*
> *(i) waive or deprive a consumer of a right set out in this Act;*

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[35] S 86 (7)(c)(ii)(dd), *National Credit Act*, No. 34 of 2005.

[36] S 89 (5)(a), ibid.

[37] S 89 (5)(b), ibid.

[38] S 89 (5)(c)(i), ibid.

[39] S 89 (5)(c)(ii), ibid.

(ii) avoid a credit provider's obligation or duty in terms of this Act;

(iii) set aside or override the effect of any provision of this Act;

(iv) authorise the credit provider to-

(aa) do anything that is unlawful in terms of this Act; or

(bb) fail to do anything that is required in terms of this Act;

(c) it purports to waive any common law rights that-

(i) may be applicable to the credit agreement; and

(ii) have been prescribed in terms of subsection (5);

(d) ...

(e) ...

(f) ...

(g) it purports to exempt the credit provider from liability, or limit such liability, for

(i) any act, omission or representation by a person acting on behalf of the credit provider; or

(ii) ...

(h) it expresses an acknowledgement by the consumer that-

(i) before the agreement was made, no representations or warranties were made in connection with the agreement by the credit provider or a person on behalf of the credit provider; or

(ii) ...

(i) ...

(j) ...

(k) it expresses, on behalf of the consumer-

(i) an authorisation for any person acting on behalf of the credit provider to enter any premises for the purposes of taking possession of goods to which the credit agreement relates; or

(ii) ...

(iii) ...

(iv) ...

(v) ...

(vi) a consent to the jurisdiction of-

(aa) the High Court, if the magistrates' court has concurrent jurisdiction; or

(bb) any court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept;

(l) ...

(m) it purports to direct or authorise any person engaged in processing payments to give priority to payments for the credit provider over any other credit provider;

(n) ...

(o) it states or implies that the rate of interest is variable, except to the extent permitted by section 103(4).

(3) In any credit agreement, a provision that is unlawful in terms of this section is void as from the date that the provision purported to take effect.

(4) In any matter before it respecting a credit agreement that contains a provision contemplated in subsection (2), the court must-

(a) sever that unlawful provision from the agreement, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the agreement as a whole; or

(b) declare the entire agreement unlawful as from the date that the agreement, or amended agreement, took effect, and make any further order that is just and reasonable in the circumstances to give effect to the principles of section 89(5) with respect to that unlawful provision, or entire agreement, as the case may be.

(5) ...

This section contains some of the most far-reaching consumer protection provisions, by declaring a variety of provisions unlawful. These include provisions which in the view of the Court attack the spirit of the Act, or subject the consumer to deceptive or fraudulent

provisions. The section extends to provisions in a contract that waive or exclude the consumer's rights or the provider's obligations.

Further, the section makes unlawful any provisions that exempt conduct on behalf of an agent of the provider, or exclude liability for any representations that may have induced the contract. It prevents a provider from contractually acquiring the right to repossess any goods by entering the debtor's premises without, it is assumed, a court order.

Significantly, it also prevents a provider from nominating as a forum a Division of the High Court of South Africa, when a Magistrate's Court will do. This, it is argued, is aimed at preventing a creditor from intimidating a debtor by selecting a court where the processes are more onerous, and the costs considerably higher. In addition, the creditor cannot select a jurisdiction which is remote from where the debtor resides, in order to make attendance at court more difficult and onerous for the debtor.

The section prevents the creditor forcing the debtor to agree to a garnishee order, that is to say, an order in which the debtor agrees to give the creditor access to the debtor's salary before it is paid to the debtor.[40] Finally, the section prohibits recourse by the creditor to punitive interest rates.

Where an agreement contains an unlawful provision, that provision will be void *ab initio*, and the Court is empowered to sever the provision from the agreement. If the provision cannot be severed, then the Court may declare the contract void from inception, and make any other orders that the Court deems fair and reasonable under the circumstances.

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[40] For more on this see: Angelique Arde, "Garnishee orders: are you exploited?", 'Business', *Independent Online*, 28 October, 2012 at 9:50pm; Frans Haupt, Hermie Coetzee, Dr Dawid de Villiers & Jeanne-Mari Fouché, *The incidence of and the undesirable practices relating to garnishee orders in South Africa*, University of Pretoria, October, 2008.

IV ENFORCEMENT

The Act establishes jurisdiction for both Courts and Tribunals; the latter partly to expedite judicial review without relying on over-burdened courts.[41]

Prohibited Conduct (Tribunal)	Offences and Contracts (Courts)
a) Confirming consent orders	a) Declaratory orders
b) Registrations	b) Suspension of reckless credit agreements
c) Compliance notices	c) Overcharging of interest rate and other fees
d) Unlawful advertising	d) Non-compliance with insurance charges
e) Unfair discrimination	e) Disputed accounts
f) Consumer rights	f) Surrender of goods
g) Failure to provide documents	g) Compensation awards for consumer or credit provider
h) Prohibited collection and enforcement practices	h) Restructuring of consumer's debt obligations
i) Payment processing practices	i) Enforcement of consent orders
	j) Debt enforcement

[42]

(a) Specific enforcement provisions and penalties

A Judicial Officer (Judge or Magistrate) may order that premises be searched[43] where the commission of a breach is suspected, and when searched, powers of search and seizure of both persons and evidence are comprehensive.[44] Juxtaposed with this power is a requirement[45] that persons being searched are entitled to their dignity (including that they not be physically searched by an officer of a different gender[46]), freedom, security and privacy;[47] that the search be conducted with

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[41] RP Goodwin-Groen, *The National Credit Act and its Regulations in the Context of Access to Finance in South Africa*, in 'Financial Policy and Regulation', FinMark Trust South Africa, November, 2006, p 61, § 5.6.1.

[42] Jami Solli-Hubbard (ed.), November, 2013, p 77.

[43] S 153, *National Credit Act*, No. 34 of 2005.

[44] S 154, ibid.

[4545] Under s 155, ibid.

[46] S 155(2), ibid.

[47] S 155(1), ibid.

regard to decency and order, and that persons present by advised of their right to legal representation,[48] which they may insist be present during the search.[49] Items over which the persons being searched assert privilege may not be searched,[50] but can be seized, pending a court determination as to whether they should be regarded as privileged.[51] Throughout this process inspectors may use reasonable force against persons or property.[52]

The Act includes the power to summon witnesses,[53] as well as the power to compel a witness to be sworn in,[54] or produce a book or document[55] when ordered to do so. Similarly, the Act[56] makes it an offence to refuse to answer a question fully or to the best of the witness's ability,[57] subject to the provisions of s 139(5) which state that a self-incriminating answer provided under s 159(a) cannot be used in criminal proceedings against the witness, except on a charge of perjury. In this writer's view this strikes a sensible balance: individuals who have, or who are connected with entities that have engaged in reckless or predatory lending cannot stymie a Court from uncovering the truth, but at the same time will not be forced to self-incriminate.

Section 160[58] makes it an offence to ignore an order of a Tribunal,[59] obstruct an investigation, engage in a personal attack on a

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[48] S 155(3)(a), ibid.

[49] S 155(3)(b), ibid.

[50] S 155(5), ibid.

[51] S 155(6), ibid.

[52] S 155(7), ibid.

[53] S 158(a), ibid.

[54] S 158(b)(i), ibid.

[55] S 158(b)(ii), ibid.

[56] S 159, ibid.

[57] ss (a), ibid.

[58] Ibid.

[59] Punishable by a fine or up to ten years imprisonment, or both: s 161(a), ibid.

member of a Tribunal, provide false information to a Tribunal, or ignore a search warrant.[60] Under s 151[61] a Tribunal may impose administrative penalties that amount to up to ten per cent of the respondent's turnover during the preceding year,[62] or 100,000 South African Rand (ZAR),[63] whichever is greater. In determining the administrative penalty the Tribunal is authorised to take account of a broad range of factors that relate to the gravity, extent and duration of the offence,[64] the loss or damage caused by the offence,[65] the behaviour of the respondent,[66] the market circumstances surrounding the contravention,[67] the profit earned through the contravention,[68] the level of co-operation which the respondent provided to the National Credit Regulator,[69] or whether the respondent has previous convictions for contravening the Act.[70]

Recently the National Credit Regulator has taken steps against a number of lenders for reckless lending.[71] In the aftermath of the fine levied against African Bank, and African Bank's subsequent collapse, other micro-lenders have, or are as at the time of writing, being taken to task.[72]

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[60] Punishable by a fine or up to twelve months imprisonment, or both: s 161(b), ibid.

[61] Ibid.

[62] S 151(2)(a), ibid.

[63] S 151(2)(b), ibid.

[64] S 151(3)(a), ibid.

[65] S 151(3)(b), ibid.

[66] S 151(3)(c), ibid.

[67] S 151(3)(d), ibid.

[68] S 151(3)(e), ibid.

[69] S 151(3)(f), ibid.

[70] S 151(3)(g), ibid.

[71] Renee Bonorchis, "African Bank's Ellerine Faces Closing as Buyers Stay Away", 'Business', *Bloomberg*, 4 November, 2014 at 10:38 pm AEST.

[72] These include Shoprite Holdings Ltd and Capitec Bank Holdings Ltd. Renee Bonorchis, "Shoprite Probed for Reckless Lending by S. African Regulator", 'Business', *Bloomberg Business*, 14 October, 2015 at 7:59 pm AEST.

V CONCLUSION

Reckless lending is antithetical to the concept of consumer protection, and in a worst case scenario can contribute to, or even precipitate financial contagion and crisis. Predatory lending is unconscionable and has no place in a modern economy. The South African legislation provides a robust legislative framework which if emulated and adequately enforced would, in this writer's view, provide for both consumer protection and the prevention of practices which are economically unsustainable.

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