

Curbing Reckless and Predatory Lending: A Statutory Analysis of South Africa's National Credit Act

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Abstract

This paper provides a statement and an analysis of South Africa's statutory provisions aimed at curbing reckless lending, and preventing predatory lending, to financial consumers. The focus of the paper is on the statutory mechanisms for combatting reckless and predatory lending, including a critique of the success or otherwise of the implementation of the relevant legislation. The paper aims to provide a comparative analysis of what is, overall, an innovative and effective regime, the aim of which is to protect vulnerable financial consumers from reckless and predatory lending practices. As such, it is hoped, that the paper will provide useful techniques for the protection of borrowers in other common law jurisdictions, such as Canada and the United States, or indeed wherever vulnerable consumers of finance are liable to be exploited.

Introduction

South Africa is a developing country (United Nations, 2015, p 140), with a population of approximately 55 million people (Statistics South Africa, 2015, p 2), up from 52 million according to the 2011 census (SouthAfrica.info, October, 2015), of which 40 million are regarded as economically-active, and fall between the ages of 15 and 64 (Solli-Hubbard (ed.), 2013, p 71). Of this, approximately 25 per cent are unemployed, (United Nations, 2015, p 156), and in excess of two and a half million adults are classified as illiterate (Pretorius, 2013). This presents opportunities for unscrupulous financial service providers, and especially lenders, to take advantage of the large number of unsophisticated financial consumers in South Africa. It is within this context that the South African legislation is noteworthy.

... 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. (The National Credit Regulator, 2014, p 12).

As an expression of an over-arching policy for the protection of financial consumers, South Africa's National Parliament enacted the *National Credit Act (National Credit Act, 2005)* in 2005, in order to address the inadequacies of the previous legislative regime, (Whittaker, 2007-2008, p 569ff; Renke, Roestoff, & Haupt, 2007, p 230ff), which included an outdated and ineffective regulatory framework, (The Department of Trade and Industry, 2004, p 13) and comprised inadequate mechanisms to promote the rehabilitation of consumers, or to assist already over-indebted consumers to deal with their debt (The Department of Trade and Industry, 2004, p 13, § 2.9). The objects and purport of this Act are, *inter alia*, to combat reckless lending (see definition below, Section 80, Reckless credit. See also: CM Van Heerden & Boraine, 2011), (that is to say lending which is reckless as regards a particular consumer's existing indebtedness), combat the problem of over-indebtedness generally (S 3(g), *National Credit Act, 2005*. See also Chapter 4, Part D 'Over-indebtedness and reckless credit', ss 78-88, *National Credit Act, 2005*. See also The Department of Trade and Industry, 2004, pp 30-32), and prohibit predatory lending.

There are many who criticize this legislation, arguing that this will overburden the economy and will lead to significant costs for business. ... despite the increased costs for business, the legislation is necessary in order to prevent the exploitation of consumers ... many acknowledge that the introduction of the National Credit Act shielded South Africa from some of the worst excesses of the global recession of 2008/2009. (Woker, 2010 b, p 217).

This is the first time in the history of South Africa's consumer-credit legislation that such provisions have been enacted (Renke et al., 2007, p 244). The legislative mechanisms 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.

Predatory lending creates overly indebted consumers, threatens livelihoods, and can trap people in a cycle of poverty. (South Africa's Finance Minister, Pravin Gordhan, quoted in: Bateman, 2012, p 3).

The Act provides, chiefly, twelve innovations. These are as follows:

- i. Credit agreements must be in plain language (S 64 (1)(b), *National Credit Act*, 2005).
- ii. All credit agreements must contain a quote as to costs, and the issuer is bound by the quote for five days (S 92 (3), *National Credit Act*, 2005).
- iii. The Act prescribes information that must be included regarding the costs of credit, to be contained in all advertising and marketing materials (S 76 (4)(d); s 76 (5); s 92, *National Credit Act*, 2005).
- iv. Credit sales at a person's private dwelling or place of employment are strictly limited (S 75, *National Credit Act*, 2005).
- v. Reasons must be provided if a credit application is declined (S 62, *National Credit Act*, 2005).
- vi. Automatic increases in credit limits are prohibited, (S 74 (2), *National Credit Act*, 2005), save for where the consumer has agreed in writing to such increases, (S 119 (4), *National Credit Act*, 2005), subject to strict conditions.
- vii. Reckless lending is prohibited (S 80, *National Credit Act*, 2005).
- viii. Interest, fees and charges are regulated on all agreements, including micro-loans (S 102/103, *National Credit Act*, 2005. Cf the position in the United States, see: Andriotis, 2016).
- ix. Credit Bureau are regulated (S 43, *National Credit Act*, 2005) and consumers have the right to a free credit bureau record (S 70, *National Credit Act*, 2005).
- x. Debt counselling is introduced, to enable restructuring of debts for over-indebted consumers (S 14 (a); s 44; s 46; s 47 (1); s 48 (2); s 61 (2)(c); s 71; s 83 (3)(b)(ii); s 85 (a) and (b); s 86-88; s 129; s 130; s 139 (1)(b)(i); s 152 (1)(e), *National Credit Act*, 2005).
- xi. The Act promotes the development of a 'fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry' (S 13 (a), *National Credit Act*, 2005) by, *inter alia*, monitoring the 'levels of consumer indebtedness and the incidence and social effects of over-indebtedness' (S 13 (c)(iv); s 70 (5), *National Credit Act*, 2005), by conducting research and developing policies and proposing legislative amendments (S 13 (d), *National Credit Act*, 2005).
- xii. The Act establishes a National Credit Tribunal (S 26; s 27, *National Credit Act*, 2005).

First this article will provide a definition of reckless and predatory lending, followed by an analysis of how consumer protection policy is expressed by the *National Credit Act*. Next follows an analysis of key provisions of the Act, and then a discussion of enforcement mechanisms. Finally, concluding observations are provided.

Throughout this article consumers will be taken to mean individual consumers who are natural persons. Issues in the protection of sophisticated consumers, or corporations as consumers, are not canvassed.

Reckless and Predatory Lending Defined

Reckless lending

Reckless lending is a category of malpractice undoubtedly more egregious than irresponsible lending (Wilson, 2013, p 84). Where irresponsible lending refers to credit extended despite being unsuitable to a consumer's needs, reckless lending is understood in English common-law as more akin to gross negligence or a reckless disregard for serious harm (Wilson, 2013, p 84).

Wilson (Wilson, 2013, p 84) is of the view that the South African approach is, as a result, more restrictive than an approach which prohibits irresponsible lending. She cites as evidence the consumer's obligation to answer truthfully all questions put to them by the lender, where a failure to do so will afford the lender a complete defense (S 81 (4), *National Credit Act*, 2005) against a claim of reckless lending.

She states therefore, that the 'consumer is therefore responsible for 'reckless' borrowing' (Wilson, 2013, p 84).

Based upon a comprehensive review of the Act, however, this analysis does not take into account the Act's emphasis on the responsibility of the lender to ask whatever questions are pertinent and to take reasonable steps to ensure that the consumer understands and appreciates the risks and the costs of the loan (S 81 (2)(a)(i), *National Credit Act*, 2005); to assess the consumer's debt-repayment history (S 81 (2)(a)(ii), *National Credit Act*, 2005); and to assess the consumer's existing financial means and obligations (S 81 (2)(a)(iii), *National Credit Act*, 2005). If after all of those enquiries have been made, and a consumer fails to answer fully and truthfully, that will nonetheless not be a complete defense, as Wilson asserts. It will only become a complete defense if the lender can demonstrate that the consumer's failure to answer fully and truthfully had a material affect on the lender's ability to make a proper assessment (S 81 (4)(b), *National Credit Act*, 2005).

Consequently, a better understanding of the choice of the word 'reckless' in the Act may be one of semantics, and may in fact in the case of the South African legislation be more akin to 'irresponsible'. To this end, Raff states as follows:

... falling somewhere between "negligence" and "intentional misconduct," recklessness has evaded precise judicial interpretation for two hundred years. (Rapp, 2008, p 111).

In South Africa, reckless lending is defined by the Act (S 80, *National Credit Act*, 2005) by reference to processes and outcomes, specifically: as a failure to take reasonable steps to assess whether the consumer understands their rights and obligations under a credit agreement, along with a failure to assess the consumer's credit history, coupled with a failure to assess the consumer's capacity to repay, taking account of their current obligations. If the consumer is applying for a loan for a commercial purpose, the lender must take reasonable steps to assess the feasibility and the potential success of the venture. If the outcomes of such assessments were against lending the consumer money, and in addition, lending to the consumer would leave them over-indebted, but the lender extended the loan nonetheless, then that loan would be regarded as 'reckless'.

Predatory lending

Predatory lending is more difficult to define. Engle and McCoy (Engel & McCoy, 2002) define predatory lending to include at least two of the following: loans which result in serious harm to consumers; harmful rent seeking; loans involving fraud and deception; other instances of a lack of transparency which are not actionable as fraud; and requiring consumers to surrender their rights to legal redress (Engel & McCoy, 2002, p 1260. See also Engel & McCoy, 2007, p 2043).

Goldstein (Goldstein, 2004, p 40) defines predatory lending as containing three sets of essential characteristics, namely those relating to the terms and consequences of the loan; the manner in which the consumer obtained the loan; and finally, the power imbalance between the lender and the consumer, with particular reference to the consumer's experience and access to information.

Reckless as compared to predatory lending

Effectively, these are matters of degree. Put simply, reckless lending ignores a consumer's circumstances. Predatory lending actively preys upon a consumer's circumstances. The Act specifically addresses 'reckless lending' (see 'Section 80, Reckless credit', below) but, because predatory lending cannot be precisely defined, by addressing other malpractices that would typically enable predatory lending (see 'Section 90, Unlawful provisions of credit agreement', below), the Act seeks to address that phenomenon too. It must be acknowledged, however, that in South Africa this has met with mixed results.

One, typical example of predatory lending often takes the form of so-called 'payday' loans (see: Johnson, 2002, p 2-4), and there are examples of these in South Africa. While payday loans are not in and of themselves predatory, they often have predatory characteristics. Despite the legislative attempts to curb predatory lending in South Africa, there is evidence of predatory practices, and often these have been concealed within payday loans. Indeed, there is evidence not only of predatory payday lending practices in South Africa under the Act but, furthermore, that these practices were so egregious that they triggered civil unrest, which precipitated the 'Marikana massacre' (See further: '(f) The 'Marikana' connection', below).

The National Credit Act As Consumer Policy

Aims

The purpose of the *National Credit Act* is to:

... promote a fair and non-discriminatory marketplace for access to consumer credit [For a definition of what constitutes a credit agreement under the Act, see: Renke et al., 2007, p 235.] 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... (Preamble, *National Credit Act*, 2005).

The Act therefore seeks to do a number of things. These range from prohibiting reckless credit extension to creating a fairer industry, serving, henceforth, better-informed consumers. The Act tackles predatory lending practices by prohibiting misleading and unfair marketing and selling practices (S 76 (4)(c)(ii), *National Credit Act*, 2005) - an important provision in a society with a large number of financially unsophisticated consumers (see for example s 90 (2)(a)(i) and (ii), *National Credit Act*, 2005, which makes void any credit contract that contains provisions which are deceptive or fraudulent), and includes outlawing negative option marketing - that is to say an agreement whereby silence will be regarded as consent to the creation of the agreement (S 74 (1), *National Credit Act*, 2005).

This is a reflection of the concerns of the legislator: that in a country where many consumers are semi- or illiterate, opportunities for unscrupulous lenders to prey upon the weakest and most vulnerable consumers are almost limitless.

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 consumer.

This is a feature that occurs throughout the Act: the onus is placed squarely upon lenders to both conduct themselves appropriately, and to know their customers, while Courts and Tribunals are enabled to take account of the consumers they have before them: consumers who are illiterate or semi-literate and who represent the easiest prey to unscrupulous lenders would be entitled, under the Act, to protection from Courts or Tribunals commensurate with their vulnerability. This acknowledgement in the Act of the different strata of consumers, and the different levels of protection afforded by way of leeway granted to Courts and Tribunals, places consumer protection at the core of this Act, and is, it is argued, from the standpoint of consumer policy, one of the most outstanding features of the South African legislation.

The Act prohibits unilateral changes to a credit agreement, notwithstanding any provision in the credit contract or at common law to the contrary (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), *National Credit Act*, 2005) – in particular changes to the interest or fees payable (S 104 (1)(a) and (b), *National Credit Act*, 2005), or the period of repayment or the minimum amount payable (S 120 (1)(a) and (b), *National Credit Act*, 2005); nor may the credit provider unilaterally extend to the consumer increased credit facilities (S 119 (1)-(4), *National Credit Act*, 2005).

These provisions are aimed at curbing both reckless and predatory lending, by preventing consumers from being blind-sided by so-called loan interest 're-set' provisions (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); prevent credit providers from being able to contract out of the provisions of the Act (S 90 (2)(a)(i), and s 90 (2)(b), *National Credit Act*, 2005); and prevent credit providers from continuing to extend credit to unsophisticated consumers until those consumers are over-indebted, and caught in a debt trap.

Both reset shock and poor risk assessment are specifically addressed by the *National Credit Act*, and so should be viewed not just as a form of consumer protection, but also as a potential bulwark against systemic threats to the broader economy (See also: Stevis, 2014, which describes the unsecured debt market as a 'subprime-loan crisis for the country').

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 ... (Debelle, 2008, p 8).

Moreover, these provisions – namely prohibitions on unilateral changes to credit agreements - act as a break on a lender's ability to force upon consumers standard-form contracts that may contain provisions which would enable the lender to gain virtually unfettered power to change, vary or amend provisions in the contract, as they see fit. Compare this with the position in, for example, Australia, where standard-form contracts for financial services are typical, and where the only fetter upon the unscrupulous use of this power resides in the prohibitions on unfair contract terms contained in the *ASIC Act* (Subdivision BA--Unfair contract terms, s 12BF 'Unfair terms of consumer contracts', *Australian Securities and Investments Commission Act* (Cth), 2001), and then only to contracts for the provision of financial services (*Australian Securities and Investments Commission Act* (Cth), 2001), where those contracts meet the definition of 'standard-form' (see: Access Canberra Australian Capital Territory et al., 2016, p 21). Consequently the emphasis in the South African legislation is quite different from that of, for example, Australia: in South Africa changes cannot be made unilaterally. In Australia changes can be made unilaterally unless they can be proven to be unfair, and only if they form part of a standard-form contract. Consequently consumer policy is once again front and center in the *National Credit Act*, with a clear emphasis on placing the onus on the credit provider to prove they are in compliance, not on the consumer to prove the credit provider is in breach.

Research

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, industries have sought to outlaw research into the harmful effects of the products their industry produces. One such example is the prohibition on the conduct of research into deaths by gun violence in the United States (Frankel, 2015). In contradistinction to such an approach, the *National Credit Act* (S 16 (1)(c)) specifically requires the National Credit Regulator (National Credit Regulator, 2016 c) to conduct research into socio-economic trends in consumer credit in the Republic, especially as regards over-indebtedness, and to make known its findings (S 16 (1) and (2), *National Credit Act*, 2005).

These findings are contained in the NCR's Annual Reports, and in research commissioned by the NCR. They provide insights into educational initiatives (The National Credit Regulator, 2011/2012, p 13/34-37; The National Credit Regulator, 2012/2013, p 33-36; The National Credit Regulator, 2014, p 20-23; The National Credit Regulator, 2014/2015, p 19-20/33; Motshegare, 2010, p 14); trends in the credit market, such as increases in the use of unsecured credit (The National Credit Regulator, 2011/2012, p 14/24; The National Credit Regulator, 2012/2013, p 27; The National Credit Regulator, 2014/2015, p 27; Motshegare, 2010, p 7); trends in the number of consumers with impaired credit records (The National Credit Regulator, 2011/2012, p 19/20; The National Credit Regulator, 2012/2013, p 30; The National Credit Regulator, 2014, p 36-37; The National Credit Regulator, 2014/2015, p 25; Motshegare, 2010, p 6); trends in the costs of credit (The National Credit Regulator, 2011/2012, p 22; The National Credit Regulator, 2014, p 38; Motshegare, 2010, p 4); trends in the accessibility of credit (The National Credit Regulator, 2011/2012, p 22; The National Credit Regulator, 2012/2013, p 32); trends in alternative dispute resolution (The National Credit Regulator, 2011/2012, p 22; The National Credit Regulator, 2012/2013, p 23); trends in overall levels of debt (The National Credit Regulator, 2011/2012, p 24; The National Credit Regulator, 2014, p 32-34); levels of household debt (The National Credit Regulator, 2011/2012, p 23); distribution of debt by province (The National Credit Regulator, 2011/2012, p 25; The National Credit Regulator, 2012/2013, p 28; The National Credit Regulator, 2014, p 35); breakdowns of indebtedness by income bracket (The National Credit Regulator, 2011/2012, p 25; The National Credit Regulator, 2012/2013, p 29; Motshegare, 2010, p 4); compliance trends (The National Credit Regulator, 2011/2012, p 27/28; The National Credit Regulator, 2014, p 19; The National Credit Regulator, 2014/2015, p 18/30-31); trends in respect of debt counseling (The National Credit Regulator, 2011/2012, p 29-31; The National Credit Regulator, 2012/2013, p 15; The National Credit Regulator, 2014, p 29-31; The National Credit Regulator, 2014/2015, p 23-24; Motshegare, 2010, p 4; Masilo & Rankhumise, 2014, p 338); trends in respect of complaints, investigations and enforcement, including significant Court decisions (The National Credit Regulator, 2011/2012, p 13/31-34; The National Credit Regulator, 2012/2013, p 16-22; The National Credit Regulator, 2014, p 24-28/40; The National Credit Regulator,

2014/2015, p 21-22); and a statistical report on the consumer credit market, tracking trends in consumer finance, and issued quarterly (National Credit Regulator, 2016 a).

Overall, research commissioned by the NCR has indicated various trends since the enactment of the Act. For example, while there has been evidence of improvements in access to credit (Hawkins, 2009, p 2), overall, access to credit remains persistently inadequate (Developmentnomics (Pty) Ltd, 2012, p 52); anecdotal evidence suggesting that by capping interest rates and fees, loans to smaller and higher-risk consumers may have been discouraged, inhibiting access to credit by those consumers (Mphahlele, 15 July, 2015); more expensive credit-granting processes due to the provisions of the Act, potentially off-set against lower levels of bad debts (Developmentnomics (Pty) Ltd, 2012, p 34); a decline in the cost of credit across certain categories (Hawkins, 2009, p 1), particularly furniture finance (Hawkins, 2009, p 4); serious inefficiencies and backlogs in debt counseling services (National Credit Regulator, 2010, p 3-4; Roestoff, Haupt, & Coetzee, 2009, p 247; Developmentnomics (Pty) Ltd, 2012, p 45); regulatory and legislative shortcomings leading to, for example, a low number of those consumers in need of debt review enjoying adjudication by the Courts (Roestoff et al., 2009, p 247; Developmentnomics (Pty) Ltd, 2012, p 13); reductions in average household debt, (Developmentnomics (Pty) Ltd, 2012, p 62); but persistent problems of financial vulnerability among consumers (Developmentnomics (Pty) Ltd, 2012, p 19); trends in the granting of unsecured credit (Developmentnomics (Pty) Ltd, 2012, p 58); trends in respect of developmental credit; (Developmentnomics (Pty) Ltd, 2012, p 106); obstacles in practice surrounding proof of recklessness; (Developmentnomics (Pty) Ltd, 2012, p 106); and a lack of transparency and price comparability for consumers wishing to compare loans (Developmentnomics (Pty) Ltd, 2012, p 107).

There is evidence that, as at the time of the compilation of the report, (Developmentnomics (Pty) Ltd, 2012); the increase in the number of consumers with impaired credit records had increased by 426,000 year on year (Developmentnomics (Pty) Ltd, 2012, p 108). Set against a total of 18,51 million consumers of finance in the Republic, of which 8,61 million had impaired credit records (47 per cent of total), an increase of almost half a million consumers with impaired records, year on year, might be regarded by some as evidence that there is already too much access to credit. It may be argued, therefore, that greater access to credit, especially in high-risk micro-loans, facilitated by lower regulatory costs, would be to the overwhelming benefit of the lenders, not the consumers (see also: Mphahlele, 15 July, 2015). It seems intuitive that increased loans to higher-risk micro-lenders would return a higher percentage of impaired records than the overall level of impaired records for the entire consumer market. In light of the fact that the overall level of impaired consumers is approaching 50 per cent, it would appear that the argument could be made that current regulatory costs are not high enough, much less too low.

Finally, there is evidence that some consumers are using the protection of the Act to game the system, although evidence of the need to protect illiterate and financially illiterate consumers remains strong (Developmentnomics (Pty) Ltd, 2012, p 109).

The most recent figures quarter-on-quarter, as at March 2016, indicate that the value of mortgages granted decreased by 16,45 per cent; secured credit granted decreased by 18,22 per cent; unsecured credit agreements decreased by 15,97 per cent; credit facilities (consisting mainly of credit cards, store cards and bank overdrafts) decreased by 4,72 per cent; short-term credit decreased by 28,46 per cent; while developmental credit increased by 212,25 per cent (National Credit Regulator, 2016 b, p 1-2).

Ambit

The *National Credit Act* previously regulated every type of entity that extended credit: banks, micro-lenders, pawn brokers (S 1, *National Credit Act*, 2005; Renke et al., 2007, p 232), furniture and clothing retailers, entities both foreign and domestic, and organs of state (Renke et al., 2007, p 236). The only exception was agreements not at arms length, such as between family members (for an account of types of agreement not at arms length, see: Renke et al., 2007, p 237). Entities that extend credit and which were captured by the provisions of the Act were required to register with the National Credit Regulator (National Credit Regulator, 2016 d). Indeed, the only entities that extended credit but were not required to register with the National Credit Regulator were those with fewer than 100 loans in their portfolio – such as 'stokvels' - or those whose portfolios were worth less than ZAR 500,000 (S 40 (1)(a), *National Credit Act*, 2005).

In South Africa, traditionally, black communities have assisted one another through the provision of so-called 'stokvel' finance. Stokvels operate as community savings clubs and are exempted from registration under the Act (S 8 (2)(c), *National Credit Act*, 2005). 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 usually meet monthly at a party hosted by one of the members, and 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 (Stokvel, 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), 2016; Jones, 2015). Clearly the legislator did not intend to cover stokvels, as registration for these community savings clubs would be unduly onerous.

While entities other than stokvels, but which were below the threshold of 100 loans or ZAR 500,000, were previously not required to register with the Regulator, they were nonetheless subject to the provisions of the Act in every particular.

This led to conduct problems with small, unregistered moneylenders, who argued that they were not subject to the provisions of the Act. As a result the Act was amended (S 10, *National Credit Amendment Act*, 2014) so that henceforth anyone who extends credit in an amount in excess of the amount set by the Minister would have to register as a credit provider. The Minister set this amount at nil ZAR (*Government Notices*, 2016, s 2, p 5), thereby capturing anyone who extends credit to another person, where the credit includes the repayment of any fees or interest (S 8 (3)(b), *National Credit Act*, 2005). The only exception being loans made not at arm's length (S 4 (1) & (2), *National Credit Act*, 2005) such as between family members.

... every person or entity that trades as a credit provider, even the smallest, illegal and informal credit providers are encouraged to register ... regulate and monitor all credit providers ... in order to promote responsible credit lending, to curb reckless credit lending and reduce the over indebtedness of consumers. ... registered credit providers are prohibited from engaging in unconscionable and unscrupulous conduct, such as the outright criminal practices often used by illegal and informal credit providers ... This new threshold is an innovation in the industry that will largely contribute to an equal playing field in the credit market. The threshold will increase legal and responsible credit lending, which will in turn lead to broader financial inclusion ... (Medupe, 2016).

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 (S 40 (4), *National Credit Act*, 2005. See also: Thomson, 21 June, 2016). In so doing, the responsibility is placed squarely upon the providers of credit, which if they fail to discharge, will leave them in a position of having no recourse against the consumer.

Enforcement of debts and contractual liability

The Act prohibits heavy-handed debt enforcement processes, no doubt aimed at preventing debt collectors from frightening consumers into repayment. It is suggested that while this is not 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 and protecting consumers from intimidation. Put differently, if a consumer can be forced to repay their debts, good and well, but they should not, in the process of being subjected to debt collection, be terrorized (see for example s 133 'Prohibited collection and enforcement practices', *National Credit Act*, 2005). Compare the position in the United States where, in 2015, the Consumer Financial Protection Bureau 'received more than 85,200 complaints about debt collection, making it by far the largest source of consumer grievances among the sectors it watches over.' (Hayashi, 2016).

The Act ousts the *parol evidence rule* in favor of the consumer, by preventing credit providers from contractually escaping from any representations made prior to the commencement of the contract, which may have induced the contract (S 90 (2)(h)(i), *National Credit Act*, 2005). Moreover, the Act seeks to address inadequate consumer redress and dispute resolution, and even poor customer service (Solli-Hubbard (ed.), 2013, p 72).

Access to credit

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, unless there are legitimate reasons for a refusal (Solli-Hubbard (ed.), 2013, p 72). The Act does this by granting every person the right to apply for credit (S 60 (1), *National Credit Act*, 2005), and that credit may only be refused on reasonable commercial grounds (S 60 (2), *National Credit Act*, 2005). The Act does not establish a right to require a credit provider to enter into a credit agreement, but merely that no discrimination takes place in the provision of credit (S 60 (3), *National Credit Act*, 2005). This prohibition on discrimination must, according to the Act, be read with the objects and purport of the Constitution (S 9 (3) of *Constitution of the Republic of South Africa*, 1996, which prohibits discrimination based upon ‘race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’), and with the provisions of the *Promotion of Equality and Prevention of Unfair Discrimination Act*. The relevant provisions are contained in Chapter 2 of the Act (Chapter 2, *Promotion of Equality and Prevention of Unfair Discrimination Act*, 2000, which deal with the ‘Prevention, Prohibition and Elimination of Unfair Discrimination, Hate Speech and Harassment’, and within Chapter 2, by s 6, which is a ‘Prevention and general prohibition of unfair discrimination’; s 7, which is a ‘Prohibition of unfair discrimination on ground of race’; s 8, which is a ‘Prohibition of unfair discrimination on ground of gender’; s 9, which is a ‘Prohibition of unfair discrimination on ground of disability’; s 11, which is a ‘Prohibition of harassment’; and s 12, which is a ‘Prohibition of dissemination and publication of unfair discriminatory information that unfairly discriminates’).

These prohibitions against unfair and discriminatory treatment under s 61 (1) (*National Credit Act*, 2005) extend to and include: assessing the consumer’s credit worthiness S (1)(a); acceding to an application for credit S (1)(b); any aspect of the costs involved S (1)(c); any of the terms or conditions S (1)(d); assessing or requiring compliance with any aspect of a credit agreement S (1)(e); exercising any of the credit provider’s rights S (1)(f); ‘determining whether to continue, enforce, seek judgment in respect of, or terminate a credit agreement’ S (1)(g); or reporting any consumer’s record, S (1)(h). Where an application does result in a refusal, the applicant has a right to know the reasons (Solli-Hubbard (ed.), 2013). 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, not only that consumers can afford the credit, but also that they understand the costs and risks associated with that credit (Solli-Hubbard (ed.), 2013, p 72).

The ‘Marikana’ connection

Despite these provisions, however, the Act has failed to completely remove the scourge of unsecured, predatory loans. Indeed, unsecured loans in South Africa have become the biggest growth market for the four major South African banks (Theobald, 2013, p 7. For more on the dangers of sub-prime (or microcredit as it is also known), and the devastation caused by the extension of sub-prime loans to the poorest of the poor in ‘Bolivia, Bosnia, Pakistan, Nicaragua, Morocco and most catastrophically, in Andhra Pradesh State in India, site of 250 000 suicides by indebted farmers’, see: Bateman, 2012, p 2). In at least one instance, the reckless provision of loans, in a manner that many have argued was predatory, resulted in social conditions that ultimately gave rise to a massacre, at the hands of the South African Police. As Bateman states:

... we have perhaps just witnessed one of the most appalling microcredit-related disasters of all in South Africa. Extreme over-indebtedness by workers apparently helped precipitate the Marikana massacre on August 16 [2012]. Miners employed at Lonmin’s mine were gradually seduced by local lending institutions into accessing far too much microcredit (Bateman, 2012).

With far too many miners apparently forced into spending more on interest payments each week ... no matter how hard they tried, they simply could not prise themselves away from

taking out a microcredit in advance of payday. ... The miners' desperation and anger was palpable, Lonmin refused to back down, and a massacre ensued [when South African Police Services members shot striking miners]. (Bateman, 2012, p 3).

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.

Section 64, Right to information in plain and understandable language

South Africa has developed an admirable focus (see for example: Plain Language Institute, 2010) on plain language, concomitant with its progression to a democratic political dispensation in 1994. Examples include both South Africa's *Final Constitution, (Constitution of the Republic of South Africa, 1996)* and the *Interim Constitution (Interim Constitution of the Republic of South Africa, 1993)* which preceded it, and the *Consumer Protection Act (Consumer Protection Act, 2008)*. In a country with a large proportion of the population ill-educated and in some instances illiterate, it serves to strengthen the position of vulnerable consumers, by making legislation as accessible as possible. This is not only true for South Africa; it would be 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 or contract to ensure that it is in plain language, 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' (S 64 (2), *National Credit Act, 2005*). 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 contract (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)*).

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 credit providers, and a potentially vulnerable consumer, the Act clearly aims to favor the latter. 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.

Section 66, Protection of consumer credit rights

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 consumers. It is also useful, as part of a wider effort, to combat predatory lending.

Section 76, Advertising practices

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

Such a provision is clearly aimed at curbing predatory lending. Where it can be shown that a credit provider breached this section, the consumer may seek to have their indebtedness made void. This not only places the onus squarely on the shoulders of the lender, but also the risk: if a lender can be shown to have extended credit to a class of persons in breach of this or other sections, they may face a ruling from a Court or Tribunal which would render void the indebtedness of a whole class of consumers. That in turn may cause the collapse of the lender.

Section 80, Reckless credit

This section defines credit to be reckless where the granting of such credit would leave the

consumer over-indebted.

It placed upon the credit provider an obligation to ‘know their customer’. Moreover, the credit provider was to be judged according to what information was available at the time the decision to grant credit was made. This was potentially different from the information which the credit provider actually obtained. Thus a failure to make a reasonable investigation of the potential consumer’s position, and a concomitant lack of adequacy of information obtained would not, it is suggested, have constituted a defense. The Act attempted therefore to provide an incentive for the credit provider to make a thorough investigation.

Nonetheless, credit providers were attempting to evade responsibility for granting credit recklessly, by blaming the consumer for the inadequate provision of information. The information that a credit provider is required to ascertain has, therefore, now been specified in later regulatory amendments (*Government Notices*, 2015), and is compulsory (Medupe, 2014). These ‘Affordability Assessments’ require a credit provider to ascertain, at a minimum, and subject to certain exceptions (such as pawn transactions, school or student loans, developmental credit, public interest credit agreements, emergency loans, temporary increases under existing credit agreements, incidental credit and the like (Chapter 3, s 2, *Government Notices*, 2015)), the consumer’s existing financial means and prospects and existing financial obligations (Arde, 2014). It must do so by requiring from the consumer:

- i. three payslips or bank statements indicating three salary deposits (S 4 (a), *Government Notices*, 2015); or
- ii. for consumers who do not receive a salary, three instances of documentary proof of income or three months of bank statements (S 4 (b), *Government Notices*, 2015); or
- iii. for consumers who are not formally employed, three months of bank statements or their latest financial statement (S 4 (c), *Government Notices*, 2015);
- iv. where there is a material variance in pay, the provider must average out the gross income over the preceding three pay periods (S 5, *Government Notices*, 2015);
- v. the consumer must accurately disclose all of their obligations (S 6, *Government Notices*, 2015);
- vi. the consumer must submit ‘authentic’ documentation (S 7, *Government Notices*, 2015);
- vii. the provider must take into account other sources of income and, where appropriate, joint household income, (S 78 (3), *National Credit Act*, 2005), as well as ‘existing financial means, prospects and obligations’ (S 81 (2)(a)(iii), *National Credit Act*, 2005);
- viii. the credit provider must utilise the expense norms table, contained in the regulations, (S 9, *Government Notices*, 2015) which provide as follows (*Government Notices*, 2015, p 19):

Minimum	Maximum	Minimum Monthly Fixed Factor	Monthly Fixed Factor = % of Income Above Band Minimum
R0.00	R800.00	R0.00	100%
R800.01	R6,250.00	R800.00	6.75%
R6,250.01	R25,000.00	R1,167.88	9.00%
R25,000.01	R50,000.00	R2,855.38	8.20%
R50,000.01	Unlimited	R4,905.38	6.75%

- ix. the credit provider must utilise the following methodology: ascertain gross income; include statutory deductions and minimum living expenses to arrive at net income, to be set against payment of debt instalments; and calculate discretionary income to satisfy repayments of new debts after existing debts are taken into account (S 10, *Government Notices*, 2015);
- x. the credit provider must take into account the consumer's debt repayment history (S 13, *Government Notices*, 2015).

Where what constitutes the reckless granting of credit has been the subject of litigation, Courts and Tribunals have asserted that there is no hard and fast rule as to the provision of information to prove recklessness (*SA Taxi Securitisation (Pty) Ltd v Mbatha*; *SA Taxi Securitisation (Pty) Ltd v Molete*; *SA Taxi Securitisation (Pty) Ltd v Makhoba*, [2010], § 56. See also: *Liphoko v ABSA Bank Ltd and Others*, [2010], § 4.2).

Once again, in setting out a list of information that should have been provided, I do not wish to be prescriptive or to lay down a law of the Medes and the Persians. It may be that a Defendant does not have to go as far as I have suggested in the previous paragraph. (SA Taxi Securitisation (Pty) Ltd v Mbatha; SA Taxi Securitisation (Pty) Ltd v Molete; SA Taxi Securitisation (Pty) Ltd v Makhoba, [2010], § 69).

Instead, Courts have stated that a party seeking a Court to exercise its discretion – and it is a discretion – in terms of s 80, must place as much information before the Court as possible, in order to persuade the Court to exercise that discretion (*Standard Bank of South Africa Limited v Hales and Another*, [2009], § [12]. See also: Kreuser, 2012, p 15).

The mere submission or even proof of over-indebtedness does not place a mandatory duty on the court to make an order in favour of the consumer and merely opens the door for the court to use its discretion. (Kreuser, 2012, p 15, paraphrasing Standard Bank of South Africa Limited v Hales and Another, [2009], § [13]).

Wisely, however, a loan from a pawn broker is an exception. For example, these agreements are not subject to the prohibitions on reckless lending (S 78 (2), *National Credit Act*, 2005). This provision is particularly insightful, because a loan from a pawn broker is set-off against movable property, which the creditor 'pawns', on the understanding that if the loan is not repaid, the property will be forfeited. Thus, collateral is provided, and if the consumer cannot repay, then the collateral is lost to the consumer, but nothing more. Put differently, loans from a pawn broker, where the consumer provides collateral, will not lead to a spiral of indebtedness. Moreover, individuals who pawn property are often in such a perilous financial position that loans to them would often, if not almost always, be categorized as 'reckless'. The combination of financial desperation and fixed collateral is thus rightly, in this writer's view, regarded as more important than the prohibition on reckless lending, which if enforced would prevent the consumer from being able to pawn their property.

Section 82, Assessment mechanisms and procedures

This section allowed the credit provider to develop its own evaluative mechanisms, models or procedures to enable it to conduct the creditworthiness and suitability assessment, as was 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 (NCR), 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 civilizing effect on the industry as a whole, and may contribute to the development of a culture that favors prudent, ethical conduct towards consumers, by rendering contrary business practices unsustainable.

Subject to ss 82 (3), the NCR may publish guidelines for assessment mechanisms and procedures by credit companies. While the guidelines which the NCR may publish are not binding, the

fact that a Tribunal may subsequently impose them as binding, by way of a 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 NCR.

Section 83, (Subsequently amended by s 25, National Credit Amendment Act, 2014, in which jurisdiction is extended to include Tribunals). Court may suspend reckless credit agreement

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 provisions 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 consumer or the National Credit Regulator forms the view that the loan was reckless, it may then be challenged, and all of the consumer'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 consumer'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.

Section 85, Court may declare and relieve over-indebtedness, read with s 127, Surrender of goods and s 128, Compensation for consumer

Similar to s 83, this section allows a Court to inquire into whether a consumer is over-indebted, notwithstanding a provision in the loan contract, or at common law or statute, that purports to deprive the consumer of the right to be relieved of their debt if they are found to be over-indebted (for more, see: J. Otto, May 2012, p 2, and the decision in *Andrews v Nedbank Ltd*, 2012, § 19). Clearly, therefore, the legislator has placed the onus to '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 consumer is placed in an inescapable debt trap, then responsibility will rest with the credit provider, as indeed will the consequences. In order for a consumer to convince a Court that they are over-indebted, the following requirements would have to be met, in terms of evidence of the consumer's financial position:

an outline of each Defendant's assets and liabilities, income and expenditure sufficient to enable the Court to ascertain whether the allegation of over-indebtedness is bona fide... (SA Taxi Securitisation (Pty) Ltd v Mbatha; SA Taxi Securitisation (Pty) Ltd v Molete; SA Taxi Securitisation (Pty) Ltd v Makhoba, [2010], § 68, (1)).

In the event that a Court finds that credit has been extended in a manner that is reckless, it may re-arrange the consumer's obligations, including by recalculating those obligations (S 86 (7)(c)(ii)(dd), *National Credit Act*, 2005), which may include holding that the credit agreement is void *ab initio* (S 89 (5)(a), *National Credit Act*, 2005); requiring the credit provider to refund the consumer, with interest (S 89 (5)(b), *National Credit Act*, 2005); or it may cancel all of the creditor's rights to recover monies or goods (S 89 (5)(c)(i), *National Credit Act*, 2005); or it may cause the creditor's rights to recover to be forfeited to the State (S 89 (5)(c)(ii), *National Credit Act*, 2005).

If the consumer has a valid complaint that, but for the recklessness of the credit provider, the consumer would never have become involved in the credit transaction, it might be "just and reasonable" to "set aside" the agreement. In that event, the agreement would be null and void and as if it had never been. As a consequence, the credit provider, who remains the owner of the vehicle, would be entitled to restoration of the vehicle. On the other hand, the consumer,

who no longer has any obligations under the agreement that has been set aside would be relieved of any further indebtedness or deficiency claim under the agreement. In certain circumstances, this would be a fair and symmetrical resolution. (SA Taxi Securitisation (Pty) Ltd v Mbatha; SA Taxi Securitisation (Pty) Ltd v Molete; SA Taxi Securitisation (Pty) Ltd v Makhoba, [2010], § 46).

In determining an outcome under s 85, Courts will examine whether the consumer has surrendered the goods under 127 (*National Credit Act, 2005*) for sale, subject to the fair price provisions of s 128 (*National Credit Act, 2005*). A consumer is not required to surrender the goods according to s 127, but where a consumer has retained the goods, it is less likely they will come under the protection of s 85 (*National Credit Act, 2005*). See further the provisions of s 130 (1), *National Credit Act, 2005*; *SA Taxi Securitisation (Pty) Ltd v Mbatha*; *SA Taxi Securitisation (Pty) Ltd v Molete*; *SA Taxi Securitisation (Pty) Ltd v Makhoba*, [2010], § 49). Furthermore, Courts will take a dim view of an application under s 85, where the consumer has failed to take steps to resolve the dispute, after receiving notice under s 129 (1)(a) (*National Credit Act, 2005*; *FirstRand Bank Ltd v Olivier*, [2008], § 14-15. See also: Kreuser, 2012, p 13).

In any event my view is that the NCA does not envisage that a consumer may claim to be over-indebted whilst at the same time retaining possession of the goods which form the subject matter of the agreement. Such goods should be sold to reduce the defendant's indebtedness. (Masipa, J, Standard Bank of SA Ltd v Panayiotts, [2009], § 77, and cited with approval in SA Taxi Securitisation (Pty) Ltd v Mbatha; SA Taxi Securitisation (Pty) Ltd v Molete; SA Taxi Securitisation (Pty) Ltd v Makhoba, [2010], § 48. See also: Corlia van Heerden, 2013, p 985).

It seems unlikely that the legislature ever intended that the consumer could keep the "money and the box". (SA Taxi Securitisation (Pty) Ltd v Mbatha; SA Taxi Securitisation (Pty) Ltd v Molete; SA Taxi Securitisation (Pty) Ltd v Makhoba, [2010], § 45).

One further consequence of s 127 (*National Credit Act, 2005*) is that it gives the consumer an 'extraordinary right' to escape from a credit agreement whenever there are goods involved, by unilaterally deciding to return the goods to the credit provider, so that they can be sold (Coetzee, 2010, p 572; Bentley Credit Control (Pty) Ltd and Bentley Attorneys, 11 September, 2009). The consumer will, however, run the risk that the sale of the goods will not cover the debt, and where that is so, the consumer will still be liable to the lender for the balance. S 128 (*National Credit Act, 2005*) provides a range of protections to the consumer, to ensure that the goods are sold at 'the best price reasonably attainable' (S 128 (2), *National Credit Act, 2005*). If the credit provider fails in this regard, a Tribunal may order that it pay an additional amount, exceeding the sale proceeds, to the consumer (S 128 (2), *National Credit Act, 2005*. See judgment in: *Dumas v Motor Finance Corporation*, [2008]. See also: Woker, 2010 a, p 9). The better view is that 'goods' here refer to movable property (Coetzee, 2010, p 572).

Because a creditor must demonstrate that it complied with the Act in terms of 'know your customer' at the time when credit was extended, any credit extended after the point where the consumer would henceforth become over-indebted, whether by one or multiple creditors, would be liable to be deemed reckless. Put differently, where a consumer has been left over-indebted by multiple creditors, it would be open to the consumer to attack all or any of the creditors who extended credit to the consumer in a manner that was reckless.

Section 90, Unlawful provisions of credit agreement

This section contains some of the most far-reaching consumer protection provisions of the Act aimed at curbing predatory lending, by declaring a variety of potential contractual terms 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 contracts 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 excludes 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 consumer'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 consumer, 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 consumer resides, in order to make attendance at court more difficult or onerous for the consumer.

The section also prevents the creditor from forcing the consumer to agree to a garnishee order (for more on the abuse and corruption of these orders, see: Theobald, 2013, p 7) that is to say, an order in which the consumer agrees to give the creditor access to the consumer's salary before it is paid (for more on this see: Arde, 2012; Haupt, Coetzee, de Villiers, & Fouché, 2008). 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 that 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.

Enforcement

Statutory enforcement bodies

Section 12 (*National Credit Act, 2005*) establishes the National Credit Regulator (NCR). Section 13 (*National Credit Act, 2005*) invests the NCR with responsibility to create a 'fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry', specifically to serve the needs of those consumers who were historically disadvantaged by racial discrimination under Apartheid; low income consumers and low income communities; and consumers who reside in remote, isolated or low population density regions.

Under s 15 of the Act (*National Credit Act, 2005*), the NCR is given responsibility for enforcement by, *inter alia*, receiving complaints of alleged contraventions (S 15 (b), *National Credit Act, 2005*); monitoring the consumer credit market with a view to preventing contraventions, or detecting and prosecuting same (S 15 (c), *National Credit Act, 2005*); issuing and enforcing compliance notices (S 15 (e), *National Credit Act, 2005*); conducting investigations (S 15 (f), *National Credit Act, 2005*); referring anti-competitive behavior to the Competition Commission (S 15 (h), *National Credit Act, 2005*); referring matters to the Tribunal (S 15 (i), *National Credit Act, 2005*); or accepting referrals from the Tribunal (S 15 (h), *National Credit Act, 2005*).

Section 26 (*National Credit Act, 2005*) establishes the National Consumer Tribunal, which may adjudicate any application in terms of the Act, or make any order provided for in the Act. It may also adjudicate in relation to any allegations of prohibited conduct, and impose a remedy provided for in the Act (S 27, *National Credit Act, 2005*. See also ss 142-148, dealing with Tribunal consideration of complaints, applications and referrals and ss 149-152, dealing with Tribunal orders).

The Act establishes jurisdiction for both Courts and Tribunals; the latter partly to expedite judicial review without relying on over-burdened courts (Goodwin-Groen, 2006, p 61, § 5.6.1). Tribunals are tasked with tackling prohibited conduct (Solli-Hubbard (ed.), 2013, p 77), as defined by the Act, whereas Courts are tasked with punishing offences (Solli-Hubbard (ed.), 2013, p 77). Generally speaking, offences are more serious in nature (see: *National Credit Regulator v Season Star Trading 333 CC t/a De Noon's Cash Loans*, [2013], § 32, citing with approval *The Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Federal Mogul Friction Products (Pty) Ltd T & N Holdings Ltd T & N Friction products (Pty) Ltd*, [2003], § 99), and involve intention (*mens rea*), whereas prohibited conduct, or a failure to comply with required conduct, is covered by a penalty regime involving administrative fines (S 151, *National Credit Act, 2005*), and does not require the element of intention (*National Credit Regulator v Season Star Trading 333 CC t/a De Noon's Cash Loans*, [2013], § 39/40). These fines are capped at 10 per cent of the respondent's annual turnover during the previous financial year, or ZAR 100,000.00, whichever is greater (S 151 (2), *National Credit Act, 2005*).

In the event that an offence is committed, the Act sets out potential punishments (S 161, *National Credit Act, 2005*). Where the offence involves a failure to comply with an order from a Tribunal to remedy a form of prohibited conduct, the punishment may involve a fine, or imprisonment of up to ten years, or both (S 161 (a) *National Credit Act, 2005*). For any other contravention that constitutes an offence, the punishment may be a fine, or imprisonment not exceeding 12 months, or both (S 161 (b) *National Credit Act, 2005*).

The South African penalty regime under the Act derives its concept of civil penalties for prohibited

conduct from the Australian model (*National Credit Regulator v Season Star Trading 333 CC t/a De Noon's Cash Loans*, [2013], § 33), and reserves criminal prosecutions only for the most serious contraventions (*National Credit Regulator v Season Star Trading 333 CC t/a De Noon's Cash Loans*, [2013], § 33. See also: Comino, 2009, p 804, fn 8).

Specific enforcement provisions and penalties

A Judicial Officer (Judge or Magistrate) may order that premises be searched (S 153, *National Credit Act*, 2005) where the commission of a breach is suspected, and when searched, powers of search and seizure of both persons and evidence are comprehensive (S 154, *National Credit Act*, 2005). Juxtaposed with this power is a requirement (under s 155, *National Credit Act*, 2005) that persons being searched are entitled to their dignity (including that they not be physically searched by an officer of a different gender (S 155 (2), *National Credit Act*, 2005)), freedom, security and privacy (S 155 (1), *National Credit Act*, 2005) that the search be conducted with regard to decency and order, and that persons present be advised of their right to legal representation (S 155 (3)(a), *National Credit Act*, 2005), which they may insist be present during the search (S 155 (3)(b), *National Credit Act*, 2005). Items over which the persons being searched assert privilege may not be searched (S 155 (5), *National Credit Act*, 2005), but can be seized, pending a court determination as to whether they should be regarded as privileged (S 155 (6), *National Credit Act*, 2005). Throughout this process inspectors may use reasonable force against persons or property (S 155 (7), *National Credit Act*, 2005).

The Act includes the power to summon witnesses (S 158 (a), *National Credit Act*, 2005), as well as the power to compel a witness to be sworn in (S 158 (b)(i), *National Credit Act*, 2005), or produce a book or document (S 158 (b)(ii), *National Credit Act*, 2005) when ordered to do so. Similarly, the Act (S 159, *National Credit Act*, 2005) makes it an offence to refuse to answer a question fully or to the best of the witness' ability (Subsection (a), *National Credit Act*, 2005), subject to the provisions of s 139(5), which states 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 (*National Credit Act*, 2005) makes it an offence to ignore an order of a Tribunal (punishable by a fine or up to ten years imprisonment, or both, S 161 (a), *National Credit Act*, 2005), obstruct an investigation, engage in a personal attack on a member of a Tribunal, provide false information to a Tribunal, or ignore a search warrant (punishable by a fine or up to twelve months imprisonment, or both (S 161 (b), *National Credit Act*, 2005)). Under s 151 (*National Credit Act*, 2005) a Tribunal may impose administrative penalties that amount to up to 10 per cent of the respondent's turnover during the preceding year (S 151 (2)(a), *National Credit Act*, 2005), or 100,000 South African Rand (ZAR) (S 151 (2)(b), *National Credit Act*, 2005), whichever is greater. In determining the administrative penalty, the Tribunal is authorized to take account of a broad range of factors that relate to the gravity, extent and duration of the offence (S 151 (3)(a), *National Credit Act*, 2005), the loss or damage caused by the offence (S 151 (3)(b), *National Credit Act*, 2005), the behavior of the respondent (S 151 (3)(c), *National Credit Act*, 2005), the market circumstances surrounding the contravention (S 151 (3)(d), *National Credit Act*, 2005), the profit earned through the contravention (S 151 (3)(e), *National Credit Act*, 2005), the level of co-operation which the respondent provided to the NCR (S 151 (3)(f), *National Credit Act*, 2005), or whether the respondent has previous convictions for contravening the Act (S 151 (3)(g), *National Credit Act*, 2005). This allows Courts to identify recidivist lenders, and to increase penalties where a pattern of misconduct can be identified. Bad apples can potentially, therefore, be removed from the industry. However, as identified below, this has met with mixed results.

Recently the NCR has taken steps against a number of lenders for reckless lending (Bonorchis, 2014). 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. These include Shoprite Holdings Ltd and Capitec Bank Holdings Ltd (Bonorchis, 2015). This is commendable, but at least in the case of African Bank, is a case of closing the stable door after the horse had bolted.

But there's a nasty taste to this rescue. Bloomberg reports that African Bank charged borrowers rates as high as 5% PER MONTH. So not only was ABIL [African Bank Investment Ltd, which was the parent company to African Bank] able to keep its retailer alive by providing

loans to the poor so they could buy furniture they couldn't afford, it also fleeced them on interest rates. You would think that such a bank should be allowed to fail, wouldn't you? Not a bit of it. According to Bloomberg, the central bank's reason for rescuing it was to ensure that the poor could continue to borrow. The South African central bank and government between them have bailed out a predatory lender. (Coppola, 2014, p 4).

The lesson to be learned from this failure, by observers in other jurisdictions is that, while the South African legislation is far-reaching, insightful, and consumer-centric, without being draconian, the legislation is merely the framework, and framework alone is not enough. Implementation must be concerted and enforcement must be rigorous. Indeed, on the available evidence, it appears that the NCR is late to a party in which microcredit institutions have operated virtually unfettered; where consumer debt, especially among the most vulnerable is growing steeply, the NCR has, traditionally, been over-cautious.

There is no evidence of government bodies specifically regulating microcredit institutions so as to restrict their lending activities to appropriate levels. The growing crisis of unsecured credit non-repayment is reflected in worsening ratings for the most risky of local financial institutions. Consumer debt is reaching record levels, encouraged until recently as a short-term economic stimulant. (Bateman, 2012, p 3).

One of the most serious obstacles for the protection of consumers in South Africa, and one of the most serious practical failings of the *National Credit Act (National Credit Act, 2005)*, has been the use of garnishee orders – sometimes multiple garnishee orders – against the poorest and most vulnerable, and while this issue is beyond the purview of this paper, this aspect deserves concerted and urgent further attention (see further: Haupt et al., 2008; Arde, 2012; Hogg, 2014; M. Roestoff & S. Renke, 2005; The Department of Trade and Industry, 2004). If the allegations about wide-spread corruption of, and collusion with, court officials in the creation of such orders is founded, (Theobald, 2013, p 7) then one potential solution may be the creation of statutory provisions for both disgorgement and punitive damages.

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 (for more on the role played by the *National Credit Act, 2005* in insulating South Africa from the Global Financial Crisis, see: Woker, 2010 b, pp 217/218, 231, fn 6. See also: Wilson, 2013, p 79). Predatory lending is unconscionable and has no place in a modern economy. In South Africa there is a credible argument to be made that unrestricted predatory lending precipitated a massacre of citizens by armed agents of the State (see: Bateman, 2012; and Bateman 2013; Fakir, 20 August 2014 b; Fakir, 20 August 2014 a).

What this paper has been concerned with, however, is not solely the implementation of the *National Credit Act*, but rather also its legislative mechanics, combined with an analysis of its philosophical underpinnings, its objects and its purport. To that end the South African legislation provides a robust legislative framework (for an empirical analysis of the effects of the *National Credit Act, 2005*, on credit extension in South Africa, see: Chipeta & Mbululu, 2012), which, if emulated and adequately enforced would, in this writer's view, provide for both consumer protection and the prevention of practices which are ethically indefensible and economically unsustainable.

If the *National Credit Act* were emulated elsewhere, the devil would surely reside in the details, and specifically the successful protection of consumers would depend upon the details of implementation and enforcement. Put differently, this car is well-made and thoughtfully designed. From here, passenger safety and comfort will depend upon the skill and prudence of the driver.

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