A discussion of access to credit in South Africa with specific reference to reckless lending and over –indebted consumers.

by

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Declaration of Candidate

I, Louise Grace Botha, hereby declare that the contents of this dissertation represent my own unaided work (except as provided under the normal supervision process) and that the dissertation has not previously been submitted for academic examination towards any qualification. Furthermore, it represents my own opinions and not necessarily those of the University of Kwa-Zulu Natal, Howard College Campus and it does not contain any other person's writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted, then:

1. the words have been re-written but the general information attributed to them has been referenced; and

2. when exact words have been used, the writing has been placed inside quotation marks and referenced.

……..

Signed by Louise Botha

ABBREVIATIONS AND ACRONYMS

ANC	African National Congress
MFRC	Micro Finance Regulatory Council
NCA	National Credit Act
NCR	National Credit Regulator
NCT	National Consumer Tribunal

Abstract

Access to credit is very important as it allows consumers to buy goods that they cannot necessarily buy with one month's salary. Having access to credit also allows consumers to start small businesses. This not only benefits individual consumers, access to credit also helps the economy of a country to grow. However, due to the history of South Africa, many poor consumers were not able to access the formal credit sector as they did not have the necessary security to obtain credit. Many poor consumers had to use the informal credit sector or 'mashonisa' (informal money lenders) where they were open to abuse by credit providers who did not care about the law. At this point in time the credit industry was regulated by the Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968 which had certain requirements which made access to credit for poor consumers difficult. The South African government tried to make access to credit easier for poor consumers by introducing two Exemption Notices. However, an unintended consequence of this was that credit providers were able to offer many small loans to one consumer at very high interest rates. Levels of over-indebtedness then increased to the point where the government became very concerned about the situation both for consumers and for the economy as a whole. After an in depth study by the Department of Trade and Industry, the National Credit Act 34 of 2005 (NCA) was enacted. The NCA was specifically introduced to stop reckless lending by creditors and to prevent consumers from becoming over-indebted. When the Act came into operation it was very difficult for consumers to obtain loans. This was because of the onerous penalties provided for in the Act and because the Act established the National Credit Regulator (NCR) and the National Consumer Tribunal (NCT). These two bodies were established to ensure that credit providers, debt counsellors and credit bureaux were complying with the Act. The NCR investigates allegations of non-compliance with the Act and refers matters to the NCT for a hearing. If credit providers are found to be contravening the Act the Tribunal can impose heavy administrative fines or they can deregistered the credit provider. However, after a period of time, it seems that credit providers discovered that the Act was not being enforced properly and so it became easier for consumers to obtain loans. This has created a situation where over-indebtedness is still on the increase. It also shows that the mechanisms put in place by the NCA have not worked and more and more consumers are becoming over-indebted. This has caused the government to relook at the NCA and it has introduced amendments to the NCA. By introducing the new regulations the government believes that the regulations will close the loopholes and will bring down levels of over-

indebtedness. However, whether these amendments will achieve this will ultimately depend on how the NCR and the NCT are able to enforce them. If they cannot enforce the NCA properly then credit providers might just continue to offer loans to consumers who cannot pay them back.

CHAPTER 1

INTRODUCTION

1.1 Background

On 16 August 2014, the South African Police Service opened fire on a crowd of striking mineworkers at Marikana, about 100km northwest of Johannesburg in the North West Province.[1] This horrific event led to the death of 34 mineworkers. 78 mineworkers were wounded and 259 people were arrested.[2] The unrest at the Lonmin platinum mine began on 10 August 2012 when more than 3000 workers downed tools in what was called an illegal strike.[3] The protesting mineworkers were demanding a wage increase. The mineworkers were looking for a "living wage" of R12 500 per month.[4] It is believed that high levels of credit may have contributed to the factors that led to the tragic day in Lonmin.[5]

Newspaper reports dealing with this tragedy suggest that these mine workers were very dependent on short term loans from micro lenders. These short term loans appear to be the reason why so many mine workers were over-indebted and so were demanding a substantial increase in their earnings. The National Credit Act[6] (NCA) defines short-term credit transactions as those in which the deferred amount does not exceed R8000 and the whole amount is repayable within a period not exceeding six months.[7] Mineworkers could access loans of up to 50% of the value of their net pay.[8] It seems that all the miners needed to provide a credit grantor in order to obtain a loan was a payslip showing the previous month's salary and the unsecured credit was granted.[9] These short-term credit transactions are intended to be once off transactions and therefore they are a very expensive form of credit.[10] In accordance with the regulations to the NCA a maximum of R1257.50 in interest and fees

[1] "Marikana Massacre" www.sahistory.org.za/article/marikana-massacre-16-August-2012 (accessed 3 July 2014).
[2] ibid.
[3] ibid.
[4] ibid.
[5] Lisa Steyn, "Marikana miners in debt sinkhole" *Mail and Guardian Online* 7 Sept 2012 mg.co.za/article/2012-09-07-00-marikana-miners-in-debt-sinkhole *(*accessed 7 July 2014).
[6] 34 of 2005. Hereinafter referred to as the NCA. Unless otherwise indicated, all references to the NCA in this paper are references to the National Credit Act.
[7] Section 39(2)(a) of the NCA.
[8] Lisa Steyn (note 5 above).
[9] ibid.
[10] ibid.

can be charged on a short term loan of R1000.[11] This is big business for the micro lenders as well as the banks who actively market these unsecured loans.[12]

Many of the mineworkers who take these short-term loans will often repay their debt at the end of a particular month and then they will take out another loan immediately or they will repay their loan at the end of the month and then take another loan one or two weeks later.[13] Some of these mineworkers take out two to three loans every month.[14] The fact that they are taking out so many loans, and on such a regular basis, suggests that these mineworkers have become very dependent on these loans and therefore they are probably over indebted. It also seems that it is very easy for them to access these short term loans.

The tragedy of what happened at Marikana and the subsequent news reports which suggested that part of the problem was the over-indebtedness of the mine workers leads to the following question: how could it be that South Africans were so over-indebted that they were rioting six years after the introduction of the NCA which was specifically introduced to stop reckless lending by creditor providers and to prevent consumers from becoming over-indebted? What went wrong and what, if anything, is being done to rectify the situation or prevent such a situation from occurring again?

1.2 Problem Statement

Before the NCA was enacted, the credit industry was regulated by the Credit Agreements Act[15] and the Usury Act.[16] The only debt remedies available to over-indebted consumers were sequestration and being place under administration, which left a huge portion of over-indebted consumers without an adequate remedy.[17] These remedies were inadequate to assist the vast majority of consumers because over-indebted consumers either had to show that

[11] ibid
[12] Angelique Arde, "What to know before you borrow" IOL 29 July 2012 www.iol.co.za/business/personal-finance/what-to-know-before you borrow-1.1350997#.VDzMf7DlfKO (accessed 1 October 2014).
[13] Lisa Steyn (note 5 above).
[14] ibid.
[15] Act 75 of 1980.
[16] Act 73 of 1968.
[17] Mareesa Kreuser, "The application of section 85 of the National Credit Act in an application for summary judgement" (2012) *De Jure* www.saflii.org.za/journals/DEJURE/2012/2.pdf (accessed on 12 July 2014).

there was an advantage to their creditors in order to have their estate sequestrated or they had to have total debts of under R50 000 if they wanted to be placed under administration.

One of the reasons why the NCA was introduced was to assist over-indebted consumers. An important aim of the NCA is to prevent reckless lending in the first place so that consumers do not become over-indebted. However, situations can arise where consumers who were not over-indebted at the time they borrowed the money become over-indebted because something happens. For example, they lose their job, become ill and cannot work or they get divorced. They are then in the unfortunate position where they cannot repay their debts. The NCA provides a mechanism to assist consumers who become over-indebted by introducing a debt review process.[18]

Despite provisions to prevent reckless lending and over-indebtedness which were introduced by the NCA, the problem of over-indebted consumers appears to have actually become worse since the enactment of the NCA six years ago.[19] Anecdotal evidence suggests that more consumers are becoming over-indebted and many are defaulting on their credit agreements.[20] This suggests that the mechanisms which were introduced by the NCA have not worked.

It is suggested that one of the main reasons why the mechanisms introduced by the NCA have failed to adequately address the problems is because credit providers do not complete proper affordability assessments of the financial status of their clients before granting them credit. Up until now credit providers have been entitled to choose their own affordability criteria when assessing their clients. This is evidenced in a final report prepared for the National Credit Regulator (NCR) entitled "Research on the Increase of Unsecured Personal Loans in South Africa's Credit Market."[21] This report looked at the procedures followed by a number of credit providers. It was found that the affordability tests used by credit providers varied.

[18] Section 86 of the NCA.
[19] Stafford Thomas, "Cover Story 1 – Consumer Debt." *Financial Mail* 2 April 2012 http://www.financialmail.co.za/fm/2011/10/27/cover-story-1---consumer-debt (accessed 15 September 2014).
[20] NCR *Annual Report* 2012/13 http://www.ncr.org.za/Annual%20Report/ebook/12-13/book_image/NCR_ANNUAL_REPORT_PRINT.pdf (accessed 15 September 2014).
[21] "Research on the Increase of Unsecured Personal Loans in South Africa's Credit Market" 6 August 2012 http://www.ncr.org.za/press_release/UPL%20Report%2047%20Exec%20Sum.pdf (accessed 10 October 2014).

There has been no clear procedure that all credit providers had to adhere to and therefore consumers have been at risk of becoming over indebted.

This has now changed with the introduction of the new regulations.[22] The introduction of these amendments met with a great deal of opposition from credit providers.[23] The new regulations propose that before any credit provider can be registered in South Africa, they have to comply with a code of conduct or guidelines prescribed by the Minister of Trade and Industry or the NCR.[24] The Banking Association of South African was opposed to this idea and wanted the credit providers' code of conduct to be drawn up by credit providers and then approved by the Minister or the NCR.[25] Wonga, a micro lender which provides loans based on an assessment conducted over the internet, also opposed the provision for a prescribed affordability assessment arguing that it will have a negative impact on their business model.[26] Wonga explained that their online loan decisions are fully automated and do not rely on manual submissions.[27] The new affordability assessment would mean that Wonga would have to change the way in which they conduct their business and for this reason they were opposed to the introduction of more stringent measures.

Another issue which appears to have contributed to the problems of over-indebtedness in South Africa relates to the enforcement (or lack of enforcement) of the NCA by the NCR and the National Consumer Tribunal (NCT). A perusal of the judgments on the website of the NCT[28] reveals that there are very few judgments which deal with credit providers which have granted credit recklessly. Granting credit recklessly constitutes prohibited conduct under the

[22] GN 590 of GG37882, 01/08/2014; 3.
[23] Linda Ensor, "Changes to National Credit Act in Pipeline"4 February 2013 www.bdlive.co.za/business/retail/2013/02/04/changes-to-national-credit-act-in-pipeline (accessed 15 September 2014).
[24] Londiwe Buthelezi "Banks want credit data of former defaulters to stay." January 30 2104 www.iol.co.za/business/news/banks-want-credit-data-of-former-defaulters-to-stay-1.1639068#VDzl2rDlfKO (accessed 15 September 2014).
[25] ibid.
[26] Linda Ensor, "Wonga CEO says new credit laws will hit online lenders." 4 February 2014 www.bdlive.co.za/business/financial/2014/02/04/wonga-ceo-says-new-credit-law-will-hit-online-lenders (accessed 1 October 2104).
[27] ibid.
[28] www.thenct.org.za.

NCA[29] and such conduct can be referred to the NCT for a hearing. If a credit provider is found to be engaging in reckless credit granting the NCT can impose a penalty on that provider of up to 10% of the provider's annual turnover.[30] This could be a substantial penalty and therefore it must be assumed that this is a strong deterrent and credit providers would be extremely careful before granting credit. However, there appears to be only one matter against African Bank and more specifically it was against one particular branch of African Bank.[31] African Bank and the NCR reached a settlement in terms of which African Bank had to pay an administrative penalty of R20 million.[32] In view of the problems experienced by the miners at Marikana as well as the report published by the NCR which focuses specifically on the fact that unsecured lending in South Africa is on the increase, it seems reasonable to assume that the problems of reckless lending go far beyond one branch of African Bank. Therefore it also seems reasonable to assume that the lack of any reports relating to cases taken to the NCT by the NCR is a sign that the NCR is not enforcing the NCA to the extent that was envisaged by the legislature when the NCA was introduced.

1.3 Research Questions

This research involves a critical analysis of the NCA with particular reference to the issue of reckless credit lending and the over indebtedness of consumers. In this regard a number of questions are raised:

- Why was there a need for the legislature to introduce the NCA?
- How does the NCA define over-indebtedness?
- What new provisions did the NCA introduce to help consumers who were over-indebted?
- What new remedy did consumers have when dealing with debt?
- Have the new provisions helped the situation of over-indebtedness in South Africa?
- Why was there a need to amend the NCA?

[29] Section 1 of the NCA defines prohibited conduct as any act or omission in contravention of the NCA or that constitutes an offence under this NCA by an unregistered person who is required to be registered to engage in such act or a credit provider, credit bereau or debt counsellor.
[30] Section 161 of the NCA.
[31] Lisa Steyn, "African Bank to pay R20m after reaching NCR agreement." Mail and Gaurdian Online 04 October 2013 mg.co.za/article/2013-10-04-credit-regulator-agreement-african-bank-to-pay-over-r20m (accessed on 01 October 2014).
[32] Ibid.

- What new measures has the legislature introduced with the National Credit Amendment Act?
- Will these measures resolve the problems of reckless credit lending and over indebtedness?

1.4 Research Methodology

The research for this paper is desk based. It is based on an analysis of decided cases and legislation. This dissertation will also refer to articles which have documented the problems which over-indebted consumer are facing and the problem of reckless lending in South Africa. In addition, this dissertation will refer to published articles by leading South African academics which discuss the measures that have been put in place by the NCA and whether those measures have been successful in resolving the issues they were designed to deal with. Finally this dissertation will discuss the recent amendments to the NCA.

1.5 Overview of Chapters

This dissertation is divided into five chapters. Chapter 1 provides an introductory background to this dissertation. Chapter 2 deals with the history of credit in South Africa as well as the remedies that were available to consumers before the NCA was introduced. Chapter 3 deals with the NCA and the enforcement thereof as well as the new provisions which deal with over-indebtedness, reckless lending and debt review. Chapter 4 introduces the National Credit Amendment Act 19 of 2014 and will discuss those provisions which relate specifically to this dissertation. The final chapter looks at the conclusions reached in this dissertation.

CHAPTER 2

HISTORY OF CREDIT IN SOUTH AFRICA

2.1 The importance of access to credit.

In a cash economy or a society structured on barter only, there would be no need for credit.[33] Credit transactions are necessary when a person cannot or chooses not to pay cash for a product or service. Credit allows consumers to have access to and to use a product or a service before they have fully paid for the product or service.[34] However, in order to have access to credit, consumers will usually pay a fee which is usually in the form of interest. Credit allows consumers to purchase items that they cannot afford from a single month's salary because they are able to spread the payments over a number of months.[35] Not many consumers can afford to pay cash for expensive items such as houses or motor vehicles.[36] For the vast majority of South Africans the same is true when it comes to buying smaller items such as a fridge or a television or trading stock for a small business.[37] Some consumers even use credit to pay for their consumables such as clothing, food and travelling expenses.[38] The Department of Trade and Industry, when it considered the need to reform South African credit law identified the benefits of a working credit industry within an economy because access to credit helps consumers to accumulate assets, exploit economic opportunities and establish businesses.[39]

As pointed out above, having access to credit allows consumers to purchase products or services that they would not be able to purchase if they could only rely on a single month's income.[40] The credit industry, especially when it came to micro lenders, was rife with the

[33] "Making Credit Markets Work, A policy Framework for Consumer Credit" www.ncr.org.za/publications/Background_NCA_docs/Credit Law Review.pdf (accessed 17 August 2014).
[34] ibid.
[35] ibid.
[36] Kelly Louw *Consumer Credit Regulation in South Africa* (2012) 6.
[37] "Making Credit Markets Work, A policy Framework for Consumer Credit" www.ncr.org.za/publications/Background_NCA_docs/Credit Law Review.pdf (accessed 17 August 2014).
[38] Kelly Louw *Consumer Credit Regulation in South Africa* (2012) 6.
[39] "Making Credit Markets Work, A policy Framework for Consumer Credit" www.ncr.org.za/publications/Background_NCA_docs/Credit Law Review.pdf (accessed 17 August 2014).
[40] ibid.

exploitation of consumers, questionable lending and ruthless lending practises.[41] In the credit industry there is often a huge imbalance of power between consumers and credit providers.[42] Consumers are often poorly informed and uneducated about their rights or they are unable to enforce their rights through either negotiation or legal action.[43] Deceptive marketing practises and weak disclosure regarding the consequences of entering into a credit transactions (such as the cost of credit through the addition of interest and fees) could cause consumers to enter into credit transactions that they cannot afford.[44] This could lead to financial hardship which would see consumers taking on extra loans in order to pay back existing loans, causing a debt spiral which is difficult to escape.[45] This leads to many consumers becoming over-indebted. Over-indebtedness has a negative impact not only on families but also in the workplace as it can lead to de-motivation, absenteeism and even a propensity to commit theft.[46]

It is important to note that the problem of over-indebtedness is not only a problem for the individual consumer, it is also a problem for society at large. An example of this would be the tragic events that unfolded in Marikana. Anecdotal evidence suggests that a large number of mineworkers have ended up being over-indebted due to the many unsecured loans that have been made available to them.[47] This then led to dangerously high levels of anger, resentment and feelings of having been betrayed by the leadership in the African National Congress (ANC) and the formal trade unions. It was the high levels of debt and the need for increased wages to meet these debts which caused the miners to strike and ultimately ended in the massacre of 34 miners.[48]

[41] Kelly Louw *Consumer Credit Regulation in South Africa* (2012) 3.
[42] "Making Credit Markets Work, A policy Framework for Consumer Credit" www.ncr.org.za/publications/Background_NCA_docs/Credit Law Review.pdf (accessed 17 August 2014).
[43] Kelly Louw *Consumer Credit Regulation in South Africa* (2012) 6
[44] ibid.
[45] ibid.
[46] ibid.
[47] Milford Batemen, "The rise and fall of microcredit in post-apartheid South Africa" November 2012 mondediplo.com/blogs/the-rise-and-fall-of-microcredit-in-post (accessed 15 October 2104).
[48] ibid.

2.2 Credit Legislation prior to the National Credit Act

Before the NCA was introduced, consumer credit legislation consisted mainly of the Credit Agreements Act,[49] the Usury Act[50] and the Exemption Notices of 1992 and 1999. As these were important forerunners to the National Credit Act, they will each be discussed in turn.

2.2.1 The Credit Agreements Act 75 of 1980

The Credit Agreements Act was enacted to provide for the regulation of certain transactions in terms of which movable goods were purchased or leased on credit or certain services were rendered on credit.[51] This Act did not apply to money lending transactions.[52] This Act applied when a consumer bought or leased movable goods such as a motor vehicle or a fridge on credit. Section 6(5) of this Act required the consumer to pay an initial payment or deposit in order for the credit agreement to become binding on the parties. The underlying philosophy of the deposit requirement was that only consumers who were able to pay the prescribed deposits should be allowed to buy or lease the goods on credit.[53] For example, in order for a consumer to buy a fridge for R10 000 he would have to come up with the prescribed deposit of R1000. If he could not come up with the deposit then he would either have to buy a cheaper fridge or simply go without. The requirement of having to pay a deposit was thus clearly aimed at preventing a person from purchasing something he could not afford and therefore was aimed at preventing over-indebtedness.[54]

The Credit Agreement Act further tried to prevent over-indebtedness by not allowing a person to be party to a credit agreement in terms of which the period within which the full

[49] 75 of 1980.
[50] 73 of 1968.
[51] Preamble of the Credit Agreements Act 75 of 1980, hereinafter known as The Credit Agreements Act.
[52] Kelly-Louw "The prevention and alleviation of consumer over-indebtedness" (2008) 20 *SA Merc LJ* 200 at 203.
[53] Renke, S, Roestoff, M & Haupt, F "The National Credit Act: new parameters for the granting of credit in South Africa" (2007) *Obiter* 245 http://www.journals.co.za/ej/ejour_obiter.html (accessed 13 September 2014) .
[54] ibid.

price was payable, exceeded an appropriate prescribed period.[55] Using the above example of the consumer wanting a fridge for R10 000, he would need the deposit of R1000 and the consumer would have to pay the fridge off in twenty four months. The prescribed maximum periods of payment helped prevent consumers from being bound to debts for an extended period of indebtedness. From this discussion it can be seen that the purpose behind the Credit Agreements Act was to ensure that consumers only bought goods and services which they could reasonably afford and they were only bound to the debt for a reasonable period of time. So for example, they were not paying for the television or the fridge for years after the goods had stopped working or needed substantial repairs.

2.2.2 The Usury Act 73 of 1968

The Usury Act 73 of 1968 was enacted to provide for the limitation and disclosure of financial charges levied in respect of money lending transactions, credit transactions and leasing transactions.[56] It restricted the amount of interest which could be charged when a consumer borrowed money. The Usury Act covered money lending transactions of up to R500 000 and only capped the interest rates for these loans.[57] The Usury Act provided that no credit provider could demand or receive finance charges at an annual finance charge rate greater than the percentage determined by the Registrar in accordance with the directions of the Minister.[58] The Usury Act provided that basic disclosures had to be made. A credit provider was required to disclose to a consumer in writing the amount that the consumer was to receive, all other charges which formed part of the principal debt, the interest rate being charged as well as the finance charges that related to the interest rate and the date upon which the debt had to be repaid or the number of instalments in which the principal debt together with the finance charges must be paid.[59]

[55] Section 6(a) of the Credit Agreements Act.
[56] Preamble of the Usury Act 73 of 1968, hereinafter known as The Usury Act.
[57] Kelly-Louw "The prevention and alleviation of consumer over-indebtedness" (2008) 20 *SA Merc LJ* 200.
[58] S2(1)(a) of the Usury Act.
[59] S3 of the Usury Act. It must be noted however, not all the costs of the credit was disclosed and often it was only the interest rate that was disclosed.

One of the criticisms of the Usury Act was that it was a very complicated piece of legislation and there were no penalties for non-compliance.[60] Many credit providers used to contravene the Usury Act by not disclosing fees to consumers. This left many consumers in a situation where they did not fully understand the cost of the credit. Many consumers ended up paying back far more than just the amount of money that they had received.[61]

By limiting the interest rate, consumers were somewhat protected from credit providers imposing exhorbitant interest rates and so this was another measure which was designed to prevent consumers from becoming over-indebted. However, this all changed with the introduction of the Exemption Notices.

2.2.3 The Exemption Notice

As seen at the beginning of this chapter access to credit is very important to enable consumers to participate fully in the economy. If consumers cannot access credit they cannot buy cars, houses or start small businesses. Due to South Africa's history and prior to the first exemption notice, the majority of the South African population did not have access to the formal credit market.[62] Many consumers could not provide the necessary security and so found it extremely difficult to obtain loans in the formal sector.[63] This then meant that many consumers who needed credit had to use the unregulated credit market or "the mashonisa". Mashonisas are individuals or entities that provide credit to consumers who cannot get credit from the formal credit market. Because these credit providers and mashonisas were unregulated they conducted business as they pleased and many consumers suffered from their exploitative practices.[64] The government wanted to change this and therefore it introduced the first Exemption Notice in the hope that the formal credit market would be persuaded to grant credit to poor and disadvantaged people in South Africa.[65] This would enable these

[60] Kelly-Louw (2008) 20 *SA Merc LJ* 200.
[61] ibid.
[62] Marie Kirsten "Policy initiatives to expand financial outreach in South Africa." paper delivered at World Bank/Brookings Institute Conference 30 and 31 May 2006 www.dbsa.org/en/About-Us/Publications/Documents/Policy (accessed 10 October 2014).
[63] Tanya Woker "Access to redress for consumers: rights without redress are meaningless rights." paper presented at the International Consumer Law Conference, Pretoria, September 2014.
[64] Marie Kirsten "Policy initiatives to expand financial outreach in South Africa." paper delivered at World Bank/Brookings Institute Conference 30 and 31 May 2006 www.dbsa.org/en/About-Us/Publications/Documents/Policy (accessed 10 October 2014).
[65] Kelly-Louw (2008) 20 *SA Merc LJ* 200.

people to have access to credit in the formal credit sector and would enable them to set up small businesses.

In 1992 the first Exemption Notice was issued in terms of section 15A of the Usury Act. Section 15A of the Usury Act made it possible for categories of moneylenders to be exempted from its provisions. The Minister of Trade and Industry was empowered to determine the categories of moneylenders that could be exempt from the Act as well as the conditions which applied to an exemption.[66] The Exemption Notice was issued because it was seen that potential borrowers, who were poor and could not provide the necessary security for repayment found it difficult to get loans under the Usury Act.[67] It emerged that credit providers were reluctant to give loans to these consumers as they believed that the risk of non-payment was so high that lending money to them could not be justified.[68] Some credit providers suggested that it might become commercially viable for them to advance loans to these consumers if it were possible for them to charge higher interest rates.[69] It would then become economically viable to take the risk of lending to high risk borrowers.

In terms of this first notice, loans under R6000 were exempted from the provisions of the Usury Act. Interest rates that could be charged on these loans were uncapped.[70] This meant that lenders could ask for any interest rate that they wanted.[71] The micro finance industry had been made legitimate and it began to grow very quickly.[72] The up-side of this was that many poor consumers now had access to loans but these were subject to very high interest rates.[73]

Unfortunately, there were also some unintended consequences resulting from the introduction of the Exemption Notice. The government introduced the Exemption Notice to encourage credit providers to make small loans available to people so that they could do things like set up a small business. But in reality what happened is that many of the furniture and goods

[66] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343.
[67] ibid.
[68] ibid.
[69] ibid.
[70] Kelly-Louw (2008) 20 SA Merc LJ 200.
[71] Ibid.
[72] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council*.
[73] Kelly-Louw (2008) 20 SA Merc LJ 200

stores actually became credit providers or associated themselves with credit providers.[74] This meant that these credit providers could sell goods like expensive televisions without the consumer having to put down a deposit as required by the Credit Agreements Act. The credit provider would offer the consumer an expensive loan in order for the consumer to buy what he wanted.

Another unintended consequences resulting from the introduction of the Exemption Notice was that credit providers which were able to make exorbitant profits and were subject to very little control.[75] Because there was very little regulation in this industry, consumers were open to abuse at the hands of the credit providers. Credit providers would offer the same consumer several loans of R6 000 or less, so they advanced large amounts of money at very high rates of interest outside of the Usury Act.[76] This contributed to consumers becoming over-indebted which meant that there was a strong possibility that they would default on their repayments. [77] In order to combat the risk of default, credit providers often employed extreme money-collecting procedures.[78] Credit providers would obtain and hold consumers' bank cards and ID books. This would enable them to draw a monthly amount from the consumer's bank accounts in order to service their loans.[79] This also meant that consumers became very dependent on micro loans. When credit providers took their repayments this often left consumers with no money for their normal living expenses and so they had to return to the credit provider for further loans. Because a particular credit provider had their identity book and their cash card they were forced to return to the same money lender over and over again. This then led to a vicious never ending cycle of debt.[80]

This abuse led to the Minister of Trade and Industry consulting with role-players concerning the best way in which the micro-lending industry could be regulated in order to provide

[74] Tanya Woker "Access to redress for consumers: rights without redress are meaningless rights." paper presented at the International Consumer Law Conference, Pretoria, September 2014.
[75] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council.*
[76] ibid.
[77] Kelly Louw *Consumer Credit Regulation in South Africa*. Page reference
[78] Kelly-Louw (2008) 20 SA Merc LJ 200.
[79] ibid.
[80] Angelique Arde "Ministers'wish list to end debt abuse" 15 December 2013 http://www.iol.co.za/business/personal-finance/ministers-wish-list-to-end-debt-abuse-1.1622424#.VHWIcouUfUU (accessed 23 November 2014)

protection for poor consumers.[81] The result of this consultation was the introduction of the second Exemption Notice in June 1999.[82] The second Exemption Notice repealed and replaced the First Exemption Notice.[83] In terms of this notice, loans of up to R10 000 were now exempted from the provisions of the Usury Act.[84] The new notice introduced certain controls which were designed to protect consumers. The repayment period on these loans was not allowed to exceed 36 months and the loan amount was not paid in terms of a credit card or an overdraft.[85] Under the second Exemption Notice if a micro lender wanted to qualify for an exemption from the Usury Act, they had to register with the Micro Finance Regulatory Council (MFRC).[86] Under the second Exemption Notice registered micro lenders had to provide limited disclosures to consumers and were penalised in the event of non-compliance.[87] The second Exemption Notice further abolished the practise of micro lenders retaining consumers' bank cards and identity books as a means of ensuring that they had access to consumers' bank accounts and could thereby easily collect their money.[88] This also meant that consumers were obliged to return to the same micro lender in order to get further loans. In other words consumers could not 'shop around' to see whether they could get a better deal from other lenders.

The second Exemption Notice tried to regulate the micro-lending industry however, it was limited as the MFRC only had control over those lenders which had registered with it.[89] If a micro lender was not registered with the MFRC, they were supposed to abide by the Usury Act and could only charge interest rates as set out in that Act. However, it seems that this was not effectively enforced as many micro lenders continued to operate without being registered.

2.3 Debt Relief Measures prior to the NCA

[81] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council.*
[82] Ibid.
[83] Kelly-Louw (2008) 20 *SA Merc LJ* 200.
[84] The Exemption Notice found at www.ncr.org.za/the_act/Exemtionnoticedefinition.pdf.
[85] ibid.
[86] Kelly-Louw (2008) 20 *SA Merc LJ* 200 at 202.
[87] ibid.
[88] ibid.
[89] ibid.

Before the enactment of the NCA, there were very few debt relief measures which consumers could rely on. Over-indebted consumers could either have their estate sequestrated or they could apply to have their estates placed under administration.

2.3.1 Insolvency

Sequestration procedures are provided for in the Insolvency Act.[90] Sequestration applications can be brought by a debtor on an ex parte basis through voluntary surrender, or by way of compulsory sequestration in an application with prior notice by a creditor.[91] A sequestration application must be made in the High Court by way of a motion that must comply with the relevant requirements of the Insolvency Act.[92]

In terms of the Insolvency Act, the court has a discretion to accept the voluntary surrender of a debtor's estate and grant the sequestration order if it is satisfied that:[93]

- The provisions of section 4 have been complied with;[94]
- The estate of the debtor in question is insolvent;
- The debtor owns property of a sufficient value to cover the costs of the sequestration which will be payable from the free residue of his estate;
- And it will be to the advantage to the creditors of the debtor if his estate is sequestrated.

In the case of a compulsory sequestration the court has the discretion to grant the sequestration order if it is satisfied that:

[90] Act 24 of 1936.
[91] A Boraine and C Van Heerden "The Application of the National Credit Act on Sequestration Applications." https://web.up.ac.za/sitefiles/file/47/327/Law Clinic Draft Papers from Conference/Andre Boraine en Corlia Van Heerden Draft.pdf (accessed on 15 July 2104) at 4.
[92] ibid.
[93] S6 of the Insolvency Act.
[94] S4 of the Insolvency Act deals with the Notice of surrender and the lodging of the statement of the debtor's affairs at the Master's office and steps the debtor needs to take to ensure the notice is lodged correctly.

- The applicant is a creditor who has a liquidated claim against the debtor for not less than R100 or two or more creditors who have a liquidated claims against the debtor amounting to not less than R200;[95]
- The debtor has committed an act of insolvency;[96]
- There is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated;[97] and
- The formalities of section 9 of the Insolvency Act have been complied with.

In the case of a voluntary sequestration the onus of proving that the requirements have been met rests with the debtor.[98] But in the case of a compulsory sequestration the onus of satisfying the court that the requirements have been met rests on the sequestrating creditor and there is no onus on the debtor to disprove any element.[99] It must be noted that even if a court is satisfied that the abovementioned requirements have been established, it does not have to grant an order of voluntary sequestration or compulsory sequestration.[100] Each case must be decided on its own facts and in each case the court has an overriding discretion that must be exercised judicially and upon a consideration of all the relevant circumstances.[101] The court usually uses its discretion when it looks at the advantages to creditors requirement.[102]

From the above discussion it can be seen that that the requirement of "advantage to creditors" plays an important role in whether the court will decide to grant or decline an order for voluntary or compulsory sequestration even where all the other requirements have been satisfied.[103] When determining such an advantage the courts need to look at the whether a

[95] S9(1) of the Insolvency Act.
[96] S8 of the Insolvency Act.
[97] S12(1) of the Insolvency .Act
[98] A Boraine and C Van Heerden "To sequestrate or not to sequestrate in view of the National Credit Act34 of 2005: a tale of two judgements." 2010 (3) *PER/PELJ* 3.
[99] ibid.
[100] ibid.
[101] *Julie Whyte Dresses (Pty) Ltd v Whitehead* 1970 (3) SA 218 (D).
[102] A Boraine and C Van Heerden "The Application of the National Credit Act on Sequestration Applications." https://web.up.ac.za/sitefiles/file/47/327/Law Clinic Draft Papers from Conference/Andre Boraine en Corlia Van Heerden Draft.pdf (accessed on 15 July 2104) at 4.
[103] ibid.

substantial portion of the creditors will derive an advantage from sequestration.[104] If, after all the costs of sequestration have been met and there is little or no funds available to pay creditors, there will be no advantage to creditors for the debtor to be declared insolvent.[105] The courts will then refuse to grant the sequestration order.

Should the court grant the sequestration order the consumer may obtain much needed debt relief. The consumer's goods are sold and creditors are paid what they are owed from the proceeds. According to the Insolvency Act creditors are entitled to 20-25 cents for each rand that they are owed.[106] One of the main advantages of being declared insolvent is that after 4 years insolvent consumers can apply for rehabilitation. The effect of rehabilitation is that the sequestration is terminated and all the pre-sequestration debts are discharged, giving consumers a fresh start.[107] Consumers would no longer be indebted to their creditors and can now become functioning members of society again.

Because the courts have a discretion to grant or decline a sequestration order, over-indebted consumers have very limited options when it came to debt relief remedies. If consumers cannot show that there is an advantage to creditors courts will probably not grant a sequestration order. In the case of *London Estates (Pty) Ltd v Nair*[108] it was stated that sequestration is only to the advantage of creditors if it will result in creditors as a body being paid and there will be no advantage to creditors if no dividend or only a negligible dividend is available after the costs of sequestration have been paid. This means that for an over-indebted consumer to take advantage of being sequestrated he is going to have to have some assets that can be sold and the proceeds used to pay the creditors. However, most poor consumers have become over indebted because they have been borrowing money to pay for their normal living expenses such as food, clothing and simple household appliances (which are still being paid off). Many of these consumers do not have sufficient assets to ensure that

[104] ibid.
[105] ibid.
[106] "Voluntary Sequestration – Advantages and Disadvantages." www.insovencycare.co.za, (accessed 1 October 2014).
[107] Ndatega Victoria Asheela "The Advantage Requirement in Sequestration Applications: A Call for Relaxation." www.upetd.up.ac.za, (accessed 02 October 2014).
[108] 1957 3 SA 591 (D).

when the assets are sold there will be a significant dividend for the creditors.[109] This means that sequestration is not an option for most consumers. The problem then is that over-indebted consumers will not be able to enjoy the benefits of being rehabilitated and must continue to live under their mountain of debt for an indefinite period of time. In some instances the situation is so bad that consumers will spend the rest of their lives in debt.[110]

This left over-indebted consumers with the option of having their estate placed under administration. However, because of the requirements of administration most consumers were left without this option and were at the mercy of credit providers.

2.3.2 Administration

A second form of debt relief for over-indebted consumers was for their estate to be placed under administration. Administration orders are governed by Section 74 and 74A to 74W of the Magistrate's Court Act.[111]

A debtor may apply to court on a prescribed form for his estate to be placed under administration if the debtor has a total amount of debt that does not exceed R50 000 and that debtor is unable to pay all his debt.[112] An administration order makes provision for the payment of debts in instalments or otherwise and the administration of the debtor's estate.[113] When an administration order is granted, the court appoints an administrator who must lodge security unless the court appoints a person who is an advocate, attorney, articled clerk or a law agent.[114] At the hearing the debtor may be interrogated by the court or any creditor

[109] Ndatega Victoria Asheela "The Advantage Requirement in Sequestration Applications: A Call for Relaxation." www.upetd.up.ac.za, (accessed 02 October 2014).
[110] Antoinette Slabbert "Five million South Africans drowning in debt." 05 November 2014 http://www.moneyweb.co.za/moneyweb-economic-trends/five-million-south-africans-drowning-in-debt (accessed 23 November 2014).
[111] Act 32 of 1944.
[112] S74(1) of the Magistrate's Court Act.
[113] S74(1) of the Magistrate's Court Act.
[114] S74E of the Magistrate's Court Act.

whose debt has been proved about his financial position.[115] The debtor will be interrogated with regards to:

- His assets and liabilities;
- His present and future income and that of his wife leaving him;
- His standard of living and the possibility of economising; and
- Any other matter that the court may deem relevant.[116]

The court then decides how much the debtor should pay the administrator and an order is made for this amount to be deducted from the salary of the debtor and to be paid to the administrator.[117] The administrator must collect the payments made in terms of the Administration Order and keep a list of all payments and other funds received on behalf of the debtor.[118] The administrator may, before making a distribution, deduct necessary expenses and a remuneration determined in accordance with the prescribed tariff.[119] The administrator may also deduct a prescribed amount to provide for future costs.[120] The administrator must distribute the balance after deductions pro rata among the creditors at least once every three months, unless all the creditors otherwise agree or the court orders otherwise.[121] The distribution account must be lodged with the court where it is open for inspection by the debtor and creditors.[122] As long as the administration order is in place, creditors cannot enforce their claims against the debtor.[123] However, the granting of an administration order is no bar to the sequestration of the debtor's estate.[124] A debtor who is the subject of an administration order commits an offence if he incurs any debts without disclosing the administration order.[125] As soon as the costs of the administration and the listed creditors have been paid in full the administrator must lodge a certificate to that effect

[115] S74B(e) of the Magistrate's Court Act.
[116] S74B(e)(i)-(iv) of the Magistrate's Court Act.
[117] South African Law Reform Commission media statement concerning its review of administration orders (Project 127) : Questionaire on abolition of administration orders http://www.justice.gov.za/salrc/media/2008%2003%2007%20Media%20statement%20Questionnaire%20Administration%20Orders.pdf (accessed on 17 August 2014).
[118] S74J(1) of the Magistrate's Court Act.
[119] S74L(1)(a) of the Magistrates' Court Act.
[120] S74L(1)(b) of the Magistrates' Court Act.
[121] S74J(1) of the Magistrates' Court Act.
[122] S74J(5) of the Magistrates' Court Act.
[123] S74P of the Magistrate's Court Act.
[124] S74R of the Magistrate's Court Act.
[125] S74S of the Magistrates' Court Act.

with the clerk of the court and send the copies of the certificate to all the creditors.[126] When this has been done the administration order comes to an end.

On paper this appears to be a satisfactory system for resolving debt problems provided the amount of debt is less than R50 000. However, history has demonstrated that the system is open to abuse, especially by administrators. The Magistrate's Court Act provides for administrators to take a maximum fee of 12.5 percent of the amounts collected. However, copies of distribution accounts reveal that administrators are charging fees of about 23 to 50 percent of the amounts they collect.[127] In 2002 the Banking Council commissioned Deloitte, Ernst and Young and KPMG to audit 20 large debt administration companies. This audit revealed that the costs, fees and recoveries made by administrators exceeded the maximum prescribed limits and allowed administrators to be the major beneficiaries of the process at the expense of the debtors and the creditors.[128] It was clear that the administration of poor peoples' estates had become big business for some administrators. This was a system which was designed to assist poor people to deal with their debt problems but instead it had become a system for certain people to make a lot of money.

Another problem with Administration Orders is that the court hearing the application for administration has the discretion to appoint any person as the administrator.[129] This means that unsuitable people could be appointed as administrators.[130] There is no regulatory body regulating administrators and administrators do not need to have any type of qualification.[131]

A further criticism of this system of debt relief is that if a debtor's total debt exceeds R50 000 then that debtor cannot apply to have his estate put under administration. Such debtors are

[126] S 74U of the Magistrates' Court Act 32 of 1944.
[127] Laura du Preez "Debtors pay Millions in Illegal Fees." www.debtbusters.co.za/article/debtors-pay-millions-in-illlegal-fee/ (accessed on 17 August 2014).
[128] ibid
[129] S74E of the Magistrate's Court Act.
[130] South African Law Reform Commission media statement concerning its review of administration orders (Project 127) : Questionaire on abolition of administration orders http://www.justice.gov.za/salrc/media/2008%2003%2007%20Media%20statement%20Questionnaire%20Administration%20Orders.pdf (accessed 10 August 2014).
[131] ibid.

then left without an adequate form of debt relief.[132] But, on the other hand, those debtors that do have their estates placed under administration, could be caught up in administration indefinitely because payments do not cover the costs of administration and the interest which must be paid on outstanding debts.[133]

2.3.3 Emolument Attachment Orders

An emoluments attachment order, which is often referred to (incorrectly) as a garnishee order, is not really a debt relief measure. However it is a measure by which creditors can ensure that they get paid. The fact that creditors can rely on emoluments attachment orders in order to ensure that they get paid might be an incentive for creditors to lend money. This is exacerbated by the fact that creditors seem to be able to access payrolls quite easily.

An emoluments attachment order is made in terms of section 65J of the Magistrate's Court Act.[134] It allows the creditor to receive weekly or monthly instalments from the debtor through a process of monthly deductions made from the debtor's salary by the debtor's employer before the debtor receives his salary.[135] These deductions are paid directly to the creditor or a party representing the creditor.[136] An emoluments attachment order is used by creditors where judgment for a debt has been granted in their favour and the debtor has failed to pay that judgment.[137] Creditors use this method of collection as it is both time and cost effective.[138]

The process for obtaining an emoluments attachment order is set out in section 65J. Creditors can ask for an emoluments attachment order to be issued from the court where the employer

[132] ibid.
[133] ibid.
[134] University of Pretoria Law Clinic "The incidence of and undesirable practises relating to "garnishee orders- a follow up report." September 2013 http://web.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf, (accessed 20 August 2013).
[135] ibid.
[136] ibid.
[137] ibid.
[138] ibid.

of the debtor resides, carries on business or is employed.[139] However, research has established that emolument attachment orders are often granted in courts established in areas in which the debtor neither works nor resides.[140] This creates a problem for debtors as they are unable to oppose or rescind such orders.[141] This is especially true for poor consumers who will not have the funds to travel to other areas to oppose such applications.

An emolument attachment order can be granted in three instances. The first is in terms of Section 65J (2)(a) of the Magistrates' Court Act which states:

"An emoluments attachment order shall not be issued –

(a) Unless the judgment debtor has consented thereto in writing or the court has so authorised, whether on application to the court or otherwise, and such authorisation has not been suspended."

In terms of this section an emoluments attachment order can be issued where the debtor has consented to the order in writing.[142] This section is open to abuse as there have been some instances where the consents have been forged.[143] Further, where the debtor has consented to the emolument attachment order it is often found that the debtor does not understand the full costs and obligations of this agreement.[144] In some cases debtors sometimes propose unrealistic instalments that they cannot keep up with.[145] In some instances creditors will ensure that consumers sign such consents at the time that they apply for the loan. Such consents are signed in blank and are used the moment that the consumer defaults. In a recent case before the NCT involving an application for deregistration of a micro lender it was found that the micro lender had concluded supplementary agreements with consumers where

[139] S65J (1)(a) of the Magistrate's Court Act.
[140] Brett Bentley "Separating the baby and the bath water – garnishee and emoluments attachment orders" March 2014 (2013) *De Rebus* 41 www.saflii.org/za/journals/DEREBUS/2013/41.html (accessed 24 July 2014).
[141] ibid.
[142] University of Pretoria Law Clinic "The incidence of and undesirable practises relating to "garnishee orders- a follow up report." September 2013 http://web.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf, (accessed 20 August 2013).
[143] Brett Bentley "Separating the baby and the bath water – garnishee and emoluments attachment orders" March 2014 (2013) *De Rebus* 41 www.saflii.org/za/journals/DEREBUS/2013/41.html (accessed 24 July 2014).
[144] University of Pretoria Law Clinic "The incidence of and undesirable practises relating to "garnishee orders- a follow up report." September 2013 http://web.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf, (accessed 20 August 2013).
[145] ibid.

consumers were made to sign blank acknowledgement of debt forms which allowed the micro lender to enforce the credit agreement at its own discretion.[146] This is a clear violation of the NCA and the credit provider was deregistered.

The second instance where an emolument attachment order can be issued is where the debtor is notified in terms of section 65(A)(1) to appear in court in order for an enquiry into their financial position can take place.[147] The court can make an order for the debtor to make payments and issue an emoluments attachment order.[148]

The third instance when an emoluments attachment order can be granted is where a request is made directly to the clerk of the court. Section 65(J)(2)(b) states that an emoluments attachment order shall not be issued -

(b) Unless the judgment creditor or his or her attorney has first –
   (i) Sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emolument attachment order will be issued if the said amount is not paid within ten days of the date on which that registered letter was posted; and
   (ii) Filed with the clerk of the court an affidavit or affirmation by the judgment creditor or a certificate by his or her attorneys setting forth the amount of the judgment debt at the date of the order laying down the specific instalments, the costs, if any, which have accumulated since that date, the payments received since that date and the balance owing and declaring that the provisions of subparagraph (i) have been complied with on the date specified therein."

This section is used by the judgment creditor where the debtor has not consented to the granting of the judgment or the court has not authorised the emolument attachment order.[149] A letter must be sent by registered mail to the debtor from the creditor advising him of the

[146] *National Credit Regulator vs Comprehensive Financial Services* Witbank 20 August 2014
[147] Ibid.
[148] ibid.
[149] University of Pretoria Law Clinic "The incidence of and undesirable practises relating to "garnishee orders- a follow up report." September 2013 http://web.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf, (accessed 20 August 2103).

judgment amount and warning him that an emolument attachment order will be issued if he fails to pay his debt.[150] Then the creditor must file an affidavit confirming that he has sent the registered letter to the debtor as well as setting out the other requirements of this section.[151]

An emolument attachment order is prepared by the creditor or his attorney and it must be signed by the judgment creditor or his attorney and the clerk of the court, and served on the garnishee by the messenger of the court.[152] The emolument attachment order does not need to be served on the debtor.[153] Sometimes a debtor does not even know about the emolument attachment order until they receive their payslip and see the deduction for the first time.

In the third instance there is no enquiry into the financial affairs of the debtor and the creditor then decides on the instalment amount.[154] Further, the creditor and the clerk of the court granting the emolument attachment order do not know if the debtor has other existing emolument attachment orders.[155] This could result in a debtor taking home very little salary at the end of every month. Newspaper reports regarding the Marikana tragedy indicated that in some instances consumers were taking home as little as R2000 to R3000 per month.[156]

In South Africa it is common for one debtor to have multiple emolument attachment orders.[157] This means that debtors who are probably over-indebted and were defaulting on existing debt were given unsecured credit when they really could not afford it. This could be

[150] ibid.
[151] ibid.
[152] S65J(3) of the Magistrates Court Act.
[153] University of Pretoria Law Clinic "The incidence of and undesirable practises relating to "garnishee orders- a follow up report." September 2013 http://web.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf (accessed 20 August 2103).
[154] ibid.
[155] ibid.
[156] Rebecca Davis "Marikana: The debt-hole that fuelled the fire."12 October 2012 Daily Maverick http://www.dailymaverick.co.za/article/2012-10-12-marikana-the-debt-hole-that-fuelled-the-fire#.VHWS74uUfUU (accessed on 23 November 2014).
[157] University of Pretoria Law Clinic "The incidence of and undesirable practises relating to "garnishee orders- a follow up report." September 2013 http://web.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf (accessed 20 August 2103).

an indication of reckless credit lending on the part of credit grantors.[158] From this information it can also be deduced that emolument attachment orders are being used as a form of security in the unsecured lending industry.[159]

Conclusion

The Usury Act and the Credit Agreements Act tried to protect consumers from over-indebtedness. The government found, however, that some consumers, especially poorer consumers, were being excluded from the formal credit market. This was because credit providers were not willing to grant credit due to the restrictions placed on them by the Usury Act and the Credit Agreements Act. This then led to the introduction of the Exemption Notices, exempting smaller loans from the Usury Act in the hopes that the formal banking sector would be encouraged to make small loans available to poor consumers. This meant that the protection that was in place to prevent over-indebtedness was now removed. The end result of this was that the level of over-indebtedness in South Africa reached alarming proportions.

It also became clear that the debt relief remedies available to consumers were not adequate to assist consumers. The government further realised that helping consumers to overcome their debt problem is important because once they have paid off their debt or been relieved of their debt problems, they are able to become functioning members of society again.

The increase in over-indebtedness and the inadequate debt relief measure which were available to assist consumers led to the enactment of the National Credit Act.

[158] ibid.
[159] ibid.

CHAPTER 3

THE NATIONAL CREDIT ACT

3.1 Rationale Behind the introduction of the National Credit Act

As seen in chapter 2, the credit industry was regulated by two rather complicated pieces of legislation with very inadequate remedies to assist over-indebted consumers. The legislation was also very outdated as the consumer credit market in South Africa was changing rapidly and there was an increase in over indebted consumers.[160] These factors led to the Department of Trade and Industry's decision to review the legislation and evaluate the problems facing consumers in the credit market.[161] During the review process, extensive research was conducted by the Micro Finance Regulatory Council which focussed on the consumer-credit market.

Many weaknesses in the consumer credit market were identified. The weaknesses which are particularly relevant to this discussion were as follows:

- Inappropriate debt-collection and personal insolvency legislation that created an incentive for reckless lending and prevented rehabilitation of over-indebted consumers.[162]
- Predatory behaviour of credit providers which lead to high levels of debt for consumers.[163]

This extensive review by the Department of Trade and Industry resulted in the promulgation of the NCA and the repeal of the Usury Act and the Credit Agreements Act.[164]

[160] Kelly-Louw (2008) 20 *SA Merc LJ* 200.
[161] ibid.
[162] Kelly Louw *Consumer Credit Regulation in South Africa* (2012).
[163] ibid
[164] Ibid.

3.2 The Purpose of the National Credit Act

The NCA was promulgated to create a single system of credit regulation in South Africa and to establish the NCR whose responsibility it is to administer the credit industry.[165] The purposes of the NCA are set out in Section 3 of the Act. These include promoting and advancing the social and economic welfare of South Africans, promoting a fair, transparent, competitive, sustainable, responsible, efficient and accessible credit market and industry and protecting consumers. The Act does this by:

- Promoting the development of a credit market that is accessible to all South Africans, with regard to those who have historically been unable to access credit under sustainable market conditions.[166]
- Ensuring consistent treatment of different credit products and different credit providers.[167]
- Promoting responsibility in the credit market by encouraging responsible borrowing, the avoidance of over-indebtedness and the fulfilment of financial obligations by consumers and discouraging reckless credit granting by credit providers and contractual default by consumers.[168]
- Promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers.[169]
- Addressing and correcting imbalances in the negotiating power between consumers and credit providers.[170]
- Improving consumer credit information and reporting and the regulation of the credit bureaux.[171]
- Addressing and preventing over-indebtedness of consumers and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations.[172]

[165] Kelly Louw *Consumer Credit Regulation in South Africa* (2012).
[166] Section 3(a).
[167] Section 3(b).
[168] Section 3(c)(i)-(ii).
[169] Section 3(d).
[170] Section 3(e).
[171] Section 3(f).
[172] Section 3(g).

- Providing for a consistent and accessible system of resolutions of disputes arising from credit agreements.[173]
- Providing for a consistent and harmonised system of debt restructuring, enforcement and judgement.[174]

From this it can be seen that the purpose of the Act is to ensure that all South Africans, including previously disadvantaged persons have access to credit but that it is also important that the market functions effectively and that those who borrow money are in a position to repay their debts. There have been numerous cases where the courts have discussed the purposes of the Act.[175] The courts have said that the main purposes of the Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers.[176] In the case of *Kubyana v Standard Bank of South Africa Ltd,* a decision of the Constitutional Court, the court went further to say that the Act also seeks to promote a competitive, sustainable, efficient and effective credit industry by promoting responsibility in the credit market, encouraging responsible borrowing, discouraging contractual default and adhering to a debt-enforcement system that prioritises the eventual satisfaction of all responsible consumer's obligations under credit agreements.[177] Thus, there needs to be a balance between protecting the consumer's rights with the rights of the creditors.

3.2 Important Sections of the National Credit Act.

One of the main aims of the Act is to ensure that consumers do not become over-indebted. One way to ensure this was to introduce the reckless lending provisions. This now means that creditors must ensure that consumers can afford to repay their loans before they can grant them credit. If credit providers fail to take steps to ensure that consumers were not over-indebted they are engaging in reckless lending which, in terms of the Act, has certain serious negative consequences for credit providers. This is designed to stop credit providers from granting credit to those who cannot afford it. The Act further introduced new debt relief

[173] Section 3(h).
[174] Section 3(i).
[175] See for example *Firstrand Bank v Seyffeerts* 2010 (6) SA 429; *Balkind v ABSA Bank* 2013 (2) SA 481 (ECG); SA Taxi *Securitization v Mbatha* 2011 (1) SA 310 (GSJ).
[176] *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) at 11.
[177] ibid.

measures for consumers who due to circumstances, sometimes beyond their control, cannot honour their present credit obligations.

3.2.1 Over-indebtedness

A consumer is over-indebted in terms of the Act if he or she is or will not be able to satisfy in a timely manner all the obligations under all the credit agreements to which he or she is a party.[178] The determination whether the consumer is over-indebted or not, is done on the preponderance of information available at the time of the determination.[179] The person making this determination must take into consideration the financial means, prospects and obligations of the consumer[180] and probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as shown by the consumer's history of debt repayment.[181]

It must be noted that at the time of taking out a particular debt such as buying a motor vehicle or a house or even certain household goods, the consumer may well be able to afford the debt. However a life event may occur which changes this position. For example, the consumer may be retrenched or otherwise lose his job,[182] or he may get divorced or the breadwinner or one of the breadwinners in the family may die. The result may be the loss of income and a consumer who could previously meet his debts quite comfortably, is now in a position where he cannot repay those debts.

3.3.2 Reckless Lending Provisions

The National Credit Act introduced the concept of reckless credit lending and provides certain serious consequences for credit grantors who engage in reckless lending. Section

[178] Section 79(1).
[179] Stefan Renke "The National Credit Act: New Parameters for the Granting of credit in South Africa." reference.sabinet.co.za.ezproxy.ukzn.ac.za:2048/webx/access/electronic_journals/obiter/obiter_v28_n2_a3.pdf (accessed 3 October 2014).
[180] Section 79(1)(a).
[181] Section 79(1)(b).
[182] Denise Mhlanga, 'Jobless consumers over-indebted', 19 February 2013, www.property24.com/articlas/jobless-consumers-over-indebted (accessed 02 November 2014).

80(3) of the NCA provides that a credit provider must not enter into a reckless credit agreement with a prospective consumer.

The NCA provides that a credit agreement is reckless if, at the time that the agreement was made the credit provider failed to conduct an assessment as required by the National Credit Act.[183] It is important to note that regardless of whether the credit provider believes a consumer can repay the debt, they are obliged to conduct the assessment. Failure to conduct the assessment on its own constitutes reckless lending even if, had the assessment been done, the credit provider would have granted the credit. An agreement can also be declared reckless if the credit provider, having conducted an assessment, entered into the agreement with the consumer despite the fact that on the information available to the credit provider indicated that the consumer did not understand or appreciate the risks, costs or obligations under the proposed credit agreement[184] or entering into that credit agreement would make the consumer over-indebted.[185]

When a consumer applies for credit and while the credit application is being considered by the credit provider, the consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by the National Credit Act.[186] A credit provider must not enter into a credit agreement without first taking reasonable steps to assess the consumer's:[187]

- General understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;[188]
- Debt repayment history as a consumer under credit agreements;[189]
- Existing financial means, prospects and obligations.[190]

[183] Section 80(1)(a).
[184] Section 80(1)(b)(i).
[185] Section 80(1)(b)(ii).
[186] Section 81(1).
[187] Section 81(2)(a).
[188] Section 80(2)(i).
[189] Section 80(2)(ii).
[190] Section 80(2)(iii).

If a consumer alleges that a credit agreement is reckless there is a complete defence open to the creditor. It is a complete defence to the allegation that a credit agreement is reckless if the credit provider can show that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the required assessment[191] and a court or the Tribunal decides that the consumers failure to do so materially affected the ability of the credit provider to make a proper assessment.[192]

When the Act was first introduced, it provided that a credit provider could determine for themselves their own criteria for meeting their assessment obligations, provided that such criteria resulted in a fair and objective assessment.[193] This meant that the test for whether a credit provider had taken the required reasonable steps should have been determined objectively looking at the facts and circumstances of each case.[194] The Act also provided that the NCR could pre-approve the criteria that creditor providers could use when conducting the assessments as required by the NCA. [195] However, these guidelines were not binding on credit providers.[196] It is important to note that the NCR did not pre-approve any criteria set by any credit provider even though the Act permitted this. So up until this point in time each creditor has been able to set their own standards and questions. This then leads to the question of how it would be possible to find that there has been reckless lending because, provided there has been even relatively superficial compliance with the Act, creditors would have been able to argue that they did comply, therefore, they could argue there has been no reckless lending.

A recent case which demonstrates the problem is illustrated by what has come to be known as the R699 matter. This matter involved a company called Satinsky which is a motor dealership.[197] Satinsky offered to sell motor vehicles to consumers who could obtain finance

[191] Section 80(4)(a).
[192] Section 80(4)(b).
[193] Section 82(1) .
[194] Kelly Louw, "A Credit Provider's complete defence against a consumer's allegation of reckless lending" reference.sabinet.co.za.ezproxy.ukzn.ac.za:2048/webx/access/electronic_journals/ju_samlj_v26_n1_a2.pdf (accessed 1 September 2014).
[195] Section 82(2)(a).
[196] Section 82(3).
[197] Quinton Bronkhorst "The inside story of the R699 car scheme." 9 July 2014 www.businesstech.co.za/new/general/62203/the-inside-story-of-the-r699-car-scheme (accessed 30 October 2014).

from major South African banks. Their monthly repayments would be subsidised through advertising contracts with a Hong Kong based company known as Blue Lakes Trading and Promotions.[198] The vehicles would essentially be turned into driving advertisements for the scheme. In terms of these arrangements, consumers could effectively drive new cars from as little as R699 per month, depending on the contract signed.[199] Basically consumers had two contracts. The first contract was with the bank which financed the vehicle. In terms of this contract, consumers were liable for the full instalment of the vehicle. Consumer then had a second contract with Blue Lakes in terms of which they would receive payment for advertising. The advertising deal with Blue Lakes collapsed and consumers no longer received the advertising fee. This now meant that the consumers now had to pay the full instalment to the bank without the subsidy from Blue Lakes. This put many consumers into financial difficulty as many could not afford the full vehicle instalment without the advertising fee.

The three major banks involved in this matter are Absa Bank Limited, Nedbank Limited and Standard Bank Limited. Wesbank was the only bank which refused to finance these vehicles from Satinsky saying that the deal was unsustainable and too risky.[200] In this matter the banks involved all confirmed that the affordability assessments were done according to the lending framework of the NCA.[201] Absa has stated that they provided credit in line with their processes and criteria and was never party to the contract between the consumer and Blue Lakes.[202] So the question that needs to be asked is: if these consumers cannot afford the vehicle instalment without the advertising fee and the banks insist that they did not take this fee into account when assessing the affordability then how did all those consumers qualify for a loan they clearly cannot afford to service?[203] This seems to be a clear example of superficial compliance with the Act but certainly there appears to be no compliance with what the Act was hoping to achieve.

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[198] ibid.
[199] ibid.
[200] Wendy Knowler "The R699 car story keeps accelerating…"10 July 2014 www.ecr.co.za/post/the-r699-car-story-keeps-accelerating (accessed 10 November 2014).
[201] Lameez Omarjee "R699 car drivers moving forward." 13 July 2014 www.fin24.com/Companies/Advertising/R699-car-drivers-moving-forward-20140713 (accessed 18 October 2014).
[202] Wendy Knowler "The R699 car story keeps accelerating…"10 July 2014 www.ecr.co.za/post/the-r699-car-story-keeps-accelerating (accessed 10 November 2014).
[203] Ibid.

A finding that a credit agreement constitutes reckless lending has many adverse consequences for the credit provider.[204] The NCA empowers the courts to suspend credit agreements. In any court proceedings in which a credit agreement is being considered, a court may declare that the credit agreement is reckless.[205] If a court declares that a credit agreement is reckless then the court may make an order setting aside all or part of the consumer's rights and obligations under that agreement[206] or the court may make an order suspending the force and effect of that credit agreement.[207] If a court declares that a credit agreement is reckless then it must consider whether the consumer is over-indebted at the time of those court proceedings[208] and if the court concludes that the consumer is over-indebted the court may make an order[209] suspending the force and effect of that credit agreement until a date determined by the court when making the order of suspension[210] and restructure the consumer's under any other agreements in accordance with section 87.[211] Before making an order in terms of section 3, the court must consider the consumer's current means and ability to pay the consumer's current financial obligations that existed at the time the agreement was made[212] and the expected date when such obligation under a credit agreement will be satisfied, assuming the consumer makes all required payments in accordance with any proposed order.[213]

During the period that the force and effect of a credit agreement is suspended the consumer is not required to make any payment under the agreement.[214] The creditor is not allowed to charge interest or any other fee to the consumer.[215] The creditor's right under the agreement are unenforceable.[216] After the suspension of the force and effect of a credit agreement ends

[204] Kelly Louw "A Credit Provider's Complete defence against a consumer's allegation of reckless lending." reference.sabinet.co.za.ezproxy.ukzn.ac.za:2048/webx/access/electronic_journals/ju_samlj_v26_n1_a2.pdf (1 September 2014).
[205] Section 83(1).
[206] Section 83(2)(a).
[207] Section 83(2)(b).
[208] Section 83(3)(a).
[209] Section 83(3)(b).
[210] Section 83(b)(i).
[211] Section 83(b)(ii).
[212] Section 83(4)(a).
[213] Section 83(4)(b).
[214] Section 84(1)(a).
[215] Section 84(1)(b).
[216] Section 84(1)(c).

all the respective rights and obligations of the credit provider and the consumer under that agreement are revived[217] and fully enforceable to the extent that a court may order.[218]

Despite the powers given to the courts in cases of reckless lending, reckless lending cases are rare. In April 2010, a Port Elizabeth Magistrate found Absa Bank guilty of reckless lending after the bank granted a pensioner a loan in circumstances where the monthly instalments he was expected to pay were in excess of his monthly income.[219] The consumer approached a debt counsellor, who in turn referred the application to an attorney with the end result that the court found in favour of the consumer.[220] In another matter, a Johannesburg magistrate found that African Bank was guilty of reckless lending because African Bank failed to adequately assess the information presented by the consumer prior to entering into the agreements.[221]

In order for a court to make a finding of reckless lending consumers need to go to debt counsellors who will then be able to determine if there was reckless lending and take the matter to court. These applications are time consuming and costly and some debt counsellors do not have the funds to go to court. In most instances consumers will not have the funds to approach courts either. The costs involved may mean that from a practical perspective consumers are without an effective remedy to have a credit agreement declared reckless.

Reckless lending is regarded as prohibited conduct in terms of the Act and so credit providers who engage in such lending could face an investigation by the NCR and the matter could be referred to the NCT for a hearing. A finding of reckless credit lending could lead to the imposition of an administrative penalty[222] which could be as high as 10% of the provider's annual turnover. This should be a major deterrent for credit providers. However, as pointed out in Chapter 1 there appears to be only one case involving one branch of African Bank where such as case has been dealt with by the Tribunal.

[217] Section 84(2)(a)(i).
[218] Section 84(2)(a)(ii).
[219] Trishika Veeragudu "Scrapping your credit agreement" 19 July 2010 http://www.lucidliving.co.za/legal/354/ (accessed 20 October 2014).
[220] ibid.
[221] Ibid.
[222] Section 151.

3.3.3 Debt Review

Debt review is a new remedy available to debtors who are over-indebted. This is the primary relief for over-indebted consumers.[223] Debt review can be initiated either under section 85 or section 86 of the NCA.[224]

Section 85 of the National Credit Act states that in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under the credit agreement is over-indebted, then the court may refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make recommendations[225] or the court may declare that the consumer is over-indebted.[226]

The second way for debt review to be initiated is where a consumer applies to a debt counsellor to have himself declared over-indebted.[227] However, debt review will not apply to a particular credit agreement if, at the time of the application, the credit provider under the credit agreement has proceeded to take steps as set out in section 129 of this Act.[228] A debt counsellor must then determine, after looking at the finances of the consumer, whether a consumer appears to be over-indebted[229] and if the consumer is seeking a declaration of reckless credit, whether and of the consumer's agreements appear to be reckless.[230]

Once an assessment on the consumer is conducted the debt counsellor may conclude that:

[223] Lerien Bester "Lifeline for over-indebtedness" 17 May 2013 http://www.fin24.com/Debt/News/Lifeline-for-over-indebtedness-20130515 (accessed 05 November 2014).
[224] Philip N Stoop "South African Consumer Credit Policy: Measures Indirectly Aimed at Preventing Consumer Over-indebtedness." (2009) 21 *SA Merc LJ* 365-386.
[225] Section 85(a).
[226] Section 85(b).
[227] Section 86(1).
[228] Section 86(1).
[229] Section 86(6).
[230] Section 86(6)(b).

- The consumer is not over-indebted and must therefore reject the application, even if the debt counsellor concluded that a particular credit agreement was reckless.[231]
- The consumer is not over-indebted but is likely to experience difficulty satisfying all the consumer's obligations under the credit agreements. The debt counsellor may recommend that the consumer and credit providers voluntarily consider a plan of debt re-arrangement.[232]
- The consumer is over-indebted and then the debt counsellor may issue a proposal recommending that the court make and order in line with the NCA[233]

The court may order that one or more of the consumer's credit agreements be declared to be reckless[234] or that one or more of the consumer's obligations be re-arranged by the debt counsellor.[235] However, as already been discussed above, not all debt counsellors have the means to take an application alleging that there has been reckless lending to court.

In terms of section 88 of the NCA a consumer who has filed for an application in terms of section 86 or who alleges in court that they are over indebted must not enter into any further credit agreements or incur any further charges with a credit facility until

- The debt counsellor rejects the application and the consumer fails to apply to the court.[236]
- The court has determined that the consumer is not over-indebted or the court rejects a debt counsellor's proposal.[237]
- The court makes an order on the consumer and credit providers where an agreement re-arranging the consumer's obligations have been made.[238]

[231] Section 86(7)(a).
[232] Section 86(7)(b).
[233] Section 86(7)(c).
[234] Section 86(7)(c)(i).
[235] Section 86(7)(c)(ii).
[236] Section 88(1)(a).
[237] Section 88(1)(b).
[238] Section 88(1)(c).

When a consumer is placed under debt review the debt counsellor will help draft a budget for the consumer that will help the consumer to manage his monthly finances better. The debt counsellor will also negotiate a suitable payment arrangement with the credit providers. By reducing the monthly instalment amount the consumer will, it is hoped, be able to get through the month on his salary. While under debt review the consumer will only have to make one payment to a Payment Distribution Agency and it in turn will pay the creditors. Once the debt has been repaid, the consumer's credit record will be wiped clean which will allow the consumer to apply for credit again. This process is supposed to be simple and to help over-indebted consumers escape from their crushing debts. However, an independent study has found that consumers shy away from debt review.[239]

While under debt review, consumers are not allowed to enter into any credit agreements. This is an attempt by the legislature to protect over-indebted consumers from incurring more debt. If a credit provider enters into a credit agreement with a consumer who has applied for debt review then all or part of the new credit agreement may be declared reckless in terms of the NCA.[240] However, it seems that it may well be that many consumers do not apply for debt review because of the fact they will no longer be allowed to apply for credit.[241]

If a consumer goes under debt review, they may end up paying more interest on a debt because the period of time for repayment is extended. Credit providers are under no obligation to reduce the interest rate on the debt. This means that when consumers are under debt review for a long time, the interest might be more than the payment made each month. It must be noted however that the consumer will not be paying interest for an indefinite time because the interest is capped due to the in duplum rule. The common law in duplum rule is where the interest on a debt will no longer continue to run where the total amount of arrear interest has accrued to an amount equal to the outstanding principal debt.[242] The NCA incorporates a statutory version of the in duplum rule which is similar to the common law

[239] Unknown "Consumers struggle out of the debt trap." 6 August 2012 www.bdlive.co.za/articles/2009/10/23/consumers-struggle-out-of-debt-trap (accessed 3 November 2014).
[240] Section 88(4).
[241] Unknown "Consumers struggle out of the debt trap." 6 August 2012 www.bdlive.co.za/articles/2009/10/23/consumers-struggle-out-of-debt-trap (accessed 3 November 2014).
[242] KPMG "Correctly applying the induplum rule." https://www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/Financial-Services/Documents/In%20duplum%20factsheet.pdf (accessed 16 November 2014).

rule however, the statutory rule includes a number of costs such as collection costs, service fees, etc in addition to interest which in aggregate may not exceed the unpaid principal debt at any point while the consumer is in default under the credit agreement whereas the common law rule only applies to unpaid interest.[243]

3.4 Enforcement of the National Credit Act 34 of 2005

The National Credit Act established the National Credit Regulator and the National Consumer Tribunal in order for the National Credit Act to be enforced and monitored.

3.4.1 National Credit Regulator

The National Credit Regulator (NCR) was established as the regulator in terms of section 12 of the NCA and is responsible for the regulation of the South African Credit industry. The NCR:

- Has jurisdiction throughout the Republic;[244]
- Is a juristic person;[245]
- Is independent and subject only to the Constitution and the law;[246]
- Must exercise its function in accordance with the NCA;[247]
- Must be impartial ;[248] and
- Must perform its functions in as transparent a manner as is appropriate having regards to the nature of the specific function;[249] and
- Must perform its functions without fear, favour or prejudice.[250]

[243] Ibid. The in duplum rule is a rather complicated area of law that has been further complicated by the introduction of s103 of the NCA which is commonly referred to (maybe incorrectly) as the statutory in duplum rule. A full discussion of the rule is beyond the scope of this dissertation. It is suggested that the intention of the legislature was certainly to ensure that the amount of interest and costs which a consumer has to pay will be limited once a consumer falls into arrears. However how this section is to be interpreted is controversial. Readers are referred to *Nedbank v The National Credit Regulator* [2001} ZASCA 35 and to Kelly Louw "Consumer Credit Regulation" 255.
[244] Section 12(1)(a).
[245] Section 12(1)(b).
[246] Section 12(1)(c).
[247] Section 12(1)(d).
[248] Section 12(1)(e).
[249] Section 12(1)(f)(i).
[250] Section 12(1)(f)(ii).

Each organ of state must assist the NCR to maintain its independence and impartiality, and to perform its function effectively.[251] The responsibilities of the NCR are set out in sections 12 to 18 of the NCA.

The NCR is responsible to promote and support the development of a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry to serve the needs of historically disadvantaged persons; low income persons and communities; and remote, isolated or low density populations and communities with the purposes of the NCR.[252] The NCR needs to monitor and report the following to the Minister on an annual basis:

- Credit availability, price and market conditions, conduct and trends;[253]
- Market share, market conduct and competition within the consumer credit industry, the credit industry structure, including the extent of ownership, control and participation within industry by historically disadvantaged persons;[254]
- Access to consumer credit by small business or persons;[255]
- Levels of consumer indebtedness and the incidence and social effects of over-indebtedness;[256]
- And any other matter relating to the credit industry.[257]

The NCR regulates the consumer credit industry by registering credit providers, credit bureaux and debt counsellors.[258] Credit providers, credit bureaux and debt counsellors may not conduct their business without registering with the NCR.[259] The NCR can also suspend or cancel any registration in terms of the NCA.[260]

[251] Section 12(2).
[252] Section 13(a)(i)-(iii).
[253] Section 13(c)(i).
[254] Section 13(c)(ii).
[255] Section 13(c)(iii).
[256] Section 13(c)(iv).
[257] Section 13(c)(v).
[258] Section 14(a).
[259] ML Vessio "What Does the National Credit Regulator Regulate?" (2008) 20 *SA Merc LJ* 227-242.
[260] Section 14(b).

One of the most important responsibilities of the NCR is the enforcement of the NCA. The NCR must enforce the NCA by:

- Promoting informal resolution of disputes arising in terms of the NCA between consumers on the one hand and a credit provider on the other;[261]
- Receiving complaints concerning alleged contraventions of the NCA but not intervening in or adjudication any such dispute;[262]
- Monitoring the consumer credit market and industry to ensure that prohibited conduct is prevented, detected and prosecuted;[263]
- Investigating and ensuring the national and provincial registrants comply with the NCA and their respective registrations;[264]
- Issuing and enforcing compliance notices;[265]
- Investigating and evaluating alleged contraventions of the NCA;[266]
- Negotiating and concluding undertakings and consent orders in terms of the NCA;[267]
- Referring to the Competition Commission any concerns regarding market share, anti-competitive behaviour or conduct that may be prohibited in terms of the Competition Act 89 of 1998.[268]
- Referring matters to the NCT and appearing before the NCT;[269] and
- Dealing with any other matter referred to it by the NCT.[270]

The NCR is also responsible for increasing knowledge about how the consumer credit market operates in South Africa and for promoting public awareness of consumer credit matters.[271] The NCR is expected to do this by implementing education and information measures to develop public awareness.[272] The NCR is also expected to provide guidance to the credit

[261] Section 15(a).
[262] Section 15(b).
[263] Section 15(c).
[264] Section 15(d).
[265] Section 15 (e).
[266] Section 15(f).
[267] Section 15(g).
[268] Section 15(h).
[269] Section 15(i).
[270] Section 15(j).
[271] Section 16(1).
[272] Section 16(1)(a).

market by issuing explanatory notices outlining its procedures, or its non-binding opinion on the interpretation of any provision of the NCA or applying to court for a declaratory order on the interpretation or application of any provision of the NCA.[273] The NCR is required to monitor the socio-economic patterns of consumer credit activity and to identify factors concerning over-indebtedness and the patterns, causes and consequences[274] of over-indebtedness.[275] These are fairly onerous but important duties which have been placed on the NCR and it is hoped that it will be properly resourced to implement them. There is little evidence at this stage that the NCR is meeting all these obligations but it is perhaps too early in the life of the NCR to make a proper judgment on this issue. However the NCR has been criticised for failing to regulate credit providers which engage in reckless credit lending.

3.4.2 National Consumer Tribunal

The National Consumer Tribunal (NCT) was established in terms of section 26 of the NCA. The NCT is a juristic person which has jurisdiction throughout the Republic of South Africa and is a tribunal of record that must exercise its function in accordance with this Act or and other applicable legislation.[276] The NCT or a member of the NCT acting in accordance with the NCA may adjudicate in relation to any:[277]

- Application that may be made to it in terms of the NCA and may make any order provided for in the NCA in respect of such application;[278]
- Allegation of prohibited conduct by determining whether prohibited conduct has occurred and if so, by imposing a remedy provided for in this Act.[279]

The Tribunal may grant an order for costs in terms of section 147 and exercise any power conferred on it by law.[280] A decision by the Tribunal has the same status as one made by the High Court of South Africa.[281]

[273] Section 16(b)(ii).
[274] Section 16(c)(i).
[275] Section 16(c)(ii).
[276] Section 26(1)(a)-(d).
[277] Section 27(a).
[278] Section 27(a)(i).
[279] Section 27(a)(ii).
[280] Section 27(b) –(c).

The primary responsibility of the NCT is to deal with credit providers who engage in conduct that is prohibited by the NCA. The NCR investigates the conduct of the credit providers and then refers the matter to the NCT for a hearing into the possible prohibited conduct. If the NCT finds that a credit provider has been engaging in prohibited conduct it has a number of penalties which it can impose. The NCT can suspend or cancel a credit provider's registration[282] or have the credit provider repay the consumer any excess amount charged as well as excess interest set out in the credit agreement.[283] The NCT can impose an administration penalty as a form of punishment for the credit provider who is seen to be contravening the NCA.[284] In terms of section 151 of the NCA the NCT may not exceed the greater of 10 percent of the credit provider's annual turnover or R 1 000 000. These are very severe penalties that credit providers can face if they are found contravening the NCA. Government hoped that this would deter credit providers from engaging in prohibited conduct. However, it seems that the NCR and the NCT have failed in enforcing the NCA properly as credit providers continue to freely offer credit and consumers are becoming more over-indebted.

3.5 Conclusion

One of the reasons why the NCA was introduced was because of the high level of over-indebtedness which existed in South Africa and the inadequate debt relief measures that were available for consumers. The NCA defined over-indebtedness and introduced important provisions to prevent the granting of credit recklessly. If creditor providers are found to have engaged in reckless lending then there are heavy consequences for those credit providers. Credit agreements could be set aside by the courts and credit providers could be penalised by the NCT. However, after six years there have not been many cases brought before the courts of reckless lending and even fewer cases of prohibited conduct involving reckless lending before the Tribunal. There has been no empirical study as to why this is the case and

[281] "Mandate and Functional Purpose of the National Consumer Tribunal" http://www.thenct.org.za/mandate (accessed 10 July 2104).
[282] Section 150,
[283] Section 150(h).
[284] Kelly Louw *Consumer Credit Regulation in South Africa* (2012).

therefore it is only possible to make certain assumptions. The lack of cases before the court could be due to the fact that these cases are time consuming and costly for consumers to bring to court.

Another reason could be that credit providers have been superficially complying with the NCA. Credit providers have been allowed to set their own criteria for affordability assessments. It is suggested that this has enabled credit providers to conduct very superficial assessments and so they have continued to grant credit to already over-indebted consumers. Should consumers raise the issue of reckless lending at a later stage credit providers are able to show that an affordability assessment was done in terms of the NCA. There has been no uniformity amongst the credit providers when it comes to the affordability assessments. This in itself creates uncertainty and consumers do not know what is required of them.

The NCA introduced a further debt relief measure in the form of debt review. This was now an option for consumers who in the past were unable to have their estate sequestrated or to apply for administration. By going under debt review consumers are unable to get further credit. This was a way to protect over-indebted consumers and prevent further over-indebtedness.

The NCA was enacted six years ago and yet there are still very high levels of over-indebtedness in South Africa. In fact anecdotal evidence suggests that indebtedness in South Africa is increasing, not decreasing as was expected after the introduction of the Act. Credit providers still seem to be engaging in reckless lending. It seems that credit providers have not been deterred from engaging in reckless credit lending. This has now led to the government conducting a further investigation into debt problems in South Africa and has led to the introduction of the National Credit Amendment Act.[285] It is hoped that these amendments will close the loopholes which have been found to exist in the NCA.

[285] 19 of 2014.

Chapter 4

The National Credit Amendment Act

4.1 Rationale for the Amendments

Government recognises that access to credit is critical for household consumption expenditure and economic growth, however government continues to be concerned about the very high levels of household debt in South Africa and the over-indebtedness of consumers.[286] In June 2013 the level of household indebtedness had risen to 76 percent of disposable income and many households had fallen into arrears or defaulted in terms of their credit agreements..[287] It was believed that reckless lending and the abuses in payday loans had aggravated this problem and that such abusive practices were driving many over-indebted consumers into a vicious cycle of debt.[288]

In June 2012 the Department of Trade and Industry embarked on a comprehensive review of the policy framework regarding consumer credit with the purpose of analysing and amending the current policy.[289] Loopholes were identified in the NCA and the National Credit Amendment Act has now been introduced in an attempt to close some of those loopholes.[290] Some of the policy challenges identified were that the NCR's powers had to be strengthened; reckless lending practises had to stop and each credit provider had to do a proper affordability assessment before granting credit.[291] The Amendment Act has been signed by the President but will only come into operation on a date to be announced. At present, the regulations are in the process of being finalised. Further the President must state the date for the commencement of this Act.

[286] Department of Trade and Industry "Government Moves to Protect Consumers and assist over-indebted households." 12 December 2013 www.dti.gov.za/editmedia.jsp?id=2964 (accessed 23 September 2014).
[287] ibid.
[288] ibid.
[289]" National Credit Amendment Bill [B47B-2013: briefing by Department of Trade and Industry" http://www.pmg.org.za/report/20140228-national-credit-amendment-bill-b47b-2013-briefing-department-trade-and-industry (accessed 4 October 2014).
[290] ibid.
[291] ibid.

The National Amendment Act changes the governance structures within the NCR, it provides for the registration of payment distributions agents and tightens measures relating to debt counsellors and the conduct of their practises.[292] The National Amendment Act will also provide a standardised affordability assessment for creditors which will aid in the prevention of reckless lending.

4.2 Important Provisions of the National Credit Amendment Act.

There have been many amendments to the NCA but for the purposes of this dissertation only the provisions relating to the affordability assessments and the functions of the NCR will be discussed.

4.2.1 Registration of credit providers

Section 42, which deals with those entities which are required to be registered with the NCR, has been amended. Until the amendments, the NCA only required credit providers with at least 100 credit agreements or a total principal debt of R500 000 to be registered credit providers.[293] This amendment removed both requirements and now the Minister will determine the threshold amount for the purposes of determining whether a credit provider is required to be registered.[294] This amendment is to ensure that all creditor providers are registered with the NCR. This means that the NCR will now be responsible for ensuring that all credit providers are acting within the NCA and the NCR will now be able to investigate all credit providers when there is an allegation of that credit provider contravening the NCA. This amendment will substantially increase the workload of the NCR. Government is going to have to review the NCR in order to ensure that it can handle this increase in the workload. Government needs to be cautious as it seems that the NCR had a substantial workload before the amendments and it seems that it struggled to ensure proper enforcement of the NCA. The Regulator has struggled to regulate credit providers that have fallen under its jurisdiction up

[292] "Amendments to National Credit Act will help many South Africans settle their debt" https://www.saica.co.za/News/NewsArticlesandPressmediareleases/tabid/695/itemid/4674/language/en-US/Default.aspx (accessed on 05 October 2014).
[293] "The National Credit Amendment Act" https://www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/Financial-Services/Documents/NCAA%20August%202014.pdf (accessed on 05 October 2014).
[294] ibid.

until now – how is it going to cope with these increased regulatory functions? A lack of enforcement will enable credit providers to continue to get away with prohibited conduct because the NCR does not have the resources to enforce the NCA. This amendment further opens questions about businesses that provide incidental credit.[295] Will they now need to register with the NCR? This will need to be clarified when the Minister publishes the new threshold levels.

4.2.2 Affordability assessments

As has been discussed above, currently, creditors are allowed to develop their own affordability assessment criteria. It seems that this has been a major contributor to the continued problems of over-indebtedness and reckless lending and has allowed credit providers to argue that they are complying with the Act even when this is superficial compliance. The Act has now been amended and with this amendment the Minister is empowered to prescribe affordability assessment regulations which creditors will have to use when conducting their affordability tests. Failure to adhere to these regulations could see creditors being held for reckless lending.

On 1 August 2014, the Minister published draft National Credit Regulations. Chapter 3 of the Regulations deal with the criteria to conduct affordability assessments. These regulations apply to consumers, all credit providers and all credit agreements that fall under the NCA.[296] A credit provider must take practicable steps to assess the consumer's allocatable income as well as their discretionary income to determine whether the consumer has the financial means to pay the proposed credit instalments.[297] A credit provider is required to take practicable steps to validate the consumers income by referring to the consumers recent three months'

[295] The National Credit Act defines an "Incidental credit agreement" as:"An agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions (a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or (b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date."

[296] GN 590 of GG37882, 01/08/2014.
[297] ibid.

payslips, the consumers three month bank statements or any other similar credible information.[298] This means that credit providers would need to see a consumers' payslip and bank statement before granting credit. Online credit providers such as Wonga are concerned that this will negatively affect business as it will require consumers to have equipment such as scanners to send through the required documentation resulting in a longer turnaround time and reducing their access to short term credit.[299] The argument is that this will force desperate consumers to again turn to the informal credit markets or mashonisas. However, given the problems which have been experienced in South Africa and the failure to have a more standardised system of information gathering, these requirements should be welcomed.

The Regulations also contains a comprehensive list of questions that credit providers will be required to ask consumers before an affordability assessment is regarded as having been conducted properly. When conducting the affordability assessment, a credit provider must calculate the consumer's allocatable and discretionary income, take into account all of the consumer's debts as well as any maintenance obligations arising from statutory deductions or necessary expense.[300] Allocatable income is defined as gross income less statutory deductions such as income tax, unemployment insurance and maintenance payments, less necessary expenses.[301] Necessary expenses means the consumer's minimum living expenses as determined in accordance with the regulations together with any other necessary living expenses excluding debt repayments.[302] Discretionary income is defined as gross income less statutory deductions such as income tax, unemployment find, maintenance payments and less necessary expenses; less all other committed payment obligations including such as appear from the credit applicant's credit records as held by any Credit Bereau which income is the amount available to fund the proposed credit instalment.[303]

By standardising the affordability assessment criteria the Legislature hopes that this will prevent credit providers from providing credit to the maximum of the consumer's income,

[298] ibid.
[299] Linda Ensor "Wonga CEO says new credit laws will hit online lenders" 4 February 2014 http://www.bdlive.co.za/business/financial/2014/02/04/wonga-ceo-says-new-credit-laws-will-hit-online-lenders (accessed 7 October 2014).
[300] GN 590 of GG37882, 01/08/2014
[301] GN 590 of GG37882, 01/08/2014
[302] ibid
[303] Ibid.

leaving the consumer with little income for other things.[304] Having standard assessment criteria also provides credit providers and consumers with clarity as to what is needed before credit can be granted. However, again there is the problem that these requirements will be too burdensome and it could lead to consumers being refused credit and create a situation where consumers will again resort to using the informal credit market. This amendment needs to be closely monitored by the Department of Trade and Industry. There is a strong possibility that some consumers might not qualify for credit in the formal credit market due to the affordability test and they will then seek credit in the informal sector where the credit providers do not care about the law. This might lead to higher levels of over-indebtedness and hardship for consumers. Achieving the correct balance between access to credit and preventing over-indebtedness will remain a ongoing challenge and is, it is submitted a task which the NCR is called upon to monitor.

4.2.3 The Tribunal to deal with reckless credit lending

As was discussed above, the Act sets out certain consequences for credit providers that are found to have granted credit recklessly. However, in terms of the NCA only a court can make a finding that a provider had granted credit recklessly. As was pointed out, this could have severe financial implications for already over-indebted consumers.[305] However the NCA has now been amended and the amendment will allows the NCT as well as a court to declare a credit agreement reckless in accordance with the NCA.[306] The NCT is now provided with all the powers that a court may have in declaring credit agreements to have been granted recklessly.

This amendment will assist debt counsellors to bring applications of reckless credit lending to the attention of the NCT. Not all debt counselling firms are large enough to dedicate resources to reckless lending investigations and smaller firms have stated that it is impossible

[304] "National Credit Act – Recent Amendments are about much more than just a credit information Amnesty" http://www.stbb.co.za/uploads/stbb_lu4-2014_s2.pdf (accessed 11 October 2014).
[305] "National Credit Act, no 34 of 2005 – Submission: National Credit Act Amendment Bill" Microfinance South Africa 02 December 2013 http://www.mfsa.net/new/sites/default/files/MFSA%20Submission_National%20Credit%20Act%20Amendment%20Bill%202%20Dec%202013.pdf (accessed on 04 October 2014).
[306] GN 590 of GG37882, 01/08/2014.

for them to bring applications of reckless lending due to time constraints and lack of funds.[307] This amendment could be a cheaper alternative to assist over-indebted consumer to have their agreements declared reckless. Further, it might deter credit providers from granting credit without conducting proper affordability assessments well knowing that it is now the NCT that has the power to declare credit agreements to be reckless. This may be an amendment that will help over-indebted consumers.

4.2.4 Amendment of Section 136 of the NCA

This section has been amended by allowing any person to submit a complaint concerning an alleged contravention of the NCA or a complaint concerning an allegation of reckless credit lending to the NCR in the prescribed manner and form.[308] Current practise at the NCR is that credit providers that wish to report unregistered credit providers for illegal practises are not being heard and the NCR requires consumers to lay complaints.[309] Consumers may not complain about illegal or reckless lenders as they see them as their last resort to credit.[310] I believe this amendment could be viewed as a way for creditor providers to bring unregistered credit providers and illegal practises to the NCR.

4.3 Concluding Remarks

By amending the NCA, the government has tried to close the loopholes and provide the necessary relief to over-indebted consumers. Government has also increased the powers of the NCT. All credit providers will now have to be registered with the NCR. This means that the NCR can monitor and take action against all credit providers that are in contravention of the NCA. Further the NCT now has the power to declare credit agreements to have been granted recklessly. This may act as a deterrent to credit providers and this is a cheaper alternative where a consumer can lodge the allegation of reckless lending.

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[307] Mata Fischer-French "Reckless lending charges are no deterrent" 18 March 2013 http://mayaonmoney.co.za/2013/03/reckless-lending-charges-are-no-deterrent-2/ (accessed 17 October 2104).

[308] 19 of 2004.

[309] "National Credit Act, no 34 of 2005 – Submission: National Credit Act Amendment Bill" Microfinance South Africa 02 December 2013 http://www.mfsa.net/new/sites/default/files/MFSA%20Submission_National%20Credit%20Act%20Amendment%20Bill%202%20Dec%202013.pdf (accessed on 04 October 2014).

[310] ibid.

Credit providers will have to do a proper affordability assessment in order to see in the consumer qualifies for credit. However, it must be stressed that the NCR needs to exercise caution around affordability assessments. It will defeat one of the important purposes of the Act which is to ensure that all South Africans have access to credit and there cannot be a situation where credit providers refuse to grant consumers credit and then those consumers resort to the informal credit market – mashonisas- who do not follow the law. This could lead to further over-indebtedness for consumers who, because they are acting outside the protections of the NCA, will be unable to obtain assistance.

Chapter 5

5.1 Conclusion

From this discussion it can be seen that it was necessary to introduce the previously mentioned amendments in order to curb over-indebtedness. Having government set the criteria for affordability assessments will mean that both credit providers and consumers now know what they are expected to do. The advantage of this regulation is that now people know what to do and this can be monitored and enforced better.

With that being said, at the end of the day, whether or not the NCA achieves the lofty aims set out in section 3 is going to boil down to proper enforcement of the NCA by the NCR and the NCT. A major problem with the NCA has been the lack of enforcement. If there had been more cases of reckless lending taken to the NCT and if the NCR had set up proper criteria for assessments as provided for in the NCA then these amendments might not have been necessary. As stated above, when the NCA was first introduced it became very difficult for consumers to obtain credit. However, over a period of time credit providers discovered that the NCA was not being enforced and so credit providers soon went back to their old ways. The NCA has now been amended so that credit providers and consumers understand the issues clearer. However, the NCA needs to be enforced properly or, it is suggested that, credit providers will have no incentive to change their behaviour. Government needs to ensure that the NCR and the NCT have enough resources so that they can enforce the NCA properly. As stated above there is a huge problem in South Africa with informal money lenders (known in some communities as mashonisa) who lend money at huge interest rates and use very unsavoury methods to ensure that they are repaid. It seems that they have no fear of the law. This needs to change.

In conclusion, therefore it can be argued that the government needs to find a balance between the rights of credit providers and the rights of consumers to have access to credit. Government further needs to make sure that the NCR and NCT have the necessary resources to enforce the NCA properly. If the law is too strict when it comes to lending money then credit providers will not want to lend money at all. Or, if there is no proper enforcement of

the Act then the level of over-indebtedness could get worse. We will then end up with a situation which no amendments in law can rectify.