

# The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005

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**CM Van Heerden**

*BProc LLB LLM LLD*

*Associate Professor, Department of Mercantile Law, University of Pretoria.*

**A Boraine**

*Bluris LLB LLM LLD*

*Dean and Professor, Faculty of Law, University of Pretoria*

## OPSOMMING

### **Die geld of die boks: Perspektiewe op roekelose krediet ingevolge die Nasionale Kredietwet 34 van 2005**

Die Nasionale Kredietwet 34 van 2005 (hierna die NKW) lei die konsep van roekelose krediet vir die eerste keer in Suid-Afrikaanse kredietwetgewing in. Die NKW poog om roekelose kredietverlening te voorkom deur voorooreenkoms-assessering ingevolge artikel 81 daarvan verpligtend te maak en maak verder voorsiening vir verskeie remedies ten opsigte van roekelose krediet. Daar word aan die hof verskeie magte verleen afhange van die soort roekelose krediet wat toegestaan is. Aansienlike onduidelikheid bestaan egter oor die basis waarop die magte van die hof om te beveel dat 'n totale of gedeeltelike tersydestelling van die regte en verpligtinge van die verbruiker, aan wie roekelose krediet soos beoog in artikel 80(1)(a) en 80(1)(b)(ii) toegestaan is, uitgeoefen moet word. Dit is voorts ook nie duidelik op watter basis 'n hof ten aansien van voormelde soorte roekelose krediet moet besluit tussen tersydestelling van die verbruiker se regte en verpligtinge of opskorting van die krag en effek van die ooreenkoms nie. Hierdie bespreking stel praktiese ondersoek in na die aard van roekelose krediet en die wyse waarop 'n voorooreenkoms-assessering gedoen moet word. Die remedies ten opsigte van roekelose krediet word ontleed in 'n poging om die praktiese effek van die magte van die hof vas te stel ten opsigte van die verskillende gevalle van roekelose krediet waarvoor die NKW voorsiening maak. Die prosedurele implikasies verbonde aan roekelose krediet word ook ondersoek.

## **1 Introduction**

In the preamble to the National Credit Act 34 of 2005 (hereinafter “the NCA”) it is *inter alia* stated that this comprehensive piece of consumer credit legislation, of which the debt relief provisions effectively came into operation on 1 June 2007, aims to promote responsible credit granting and use and for that purpose prohibits reckless credit granting. Section 3(c) further elaborates on this objective by indicating that one of the purposes of the NCA is promoting responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and discouraging reckless credit granting by credit providers and contractual default by

consumers.<sup>1</sup>

The concepts of reckless credit granting and over-indebtedness as set out in part D of chapter 4 of the NCA are new concepts introducing novel debt relief remedies into South African consumer credit law.<sup>2</sup> Over-indebtedness refers to the situation where the preponderance of available information at the time that a determination is made, indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party. For this purpose regard must be had to the consumer's financial means, prospects and obligations<sup>3</sup> 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 indicated by the consumer's history of debt repayment.<sup>4</sup> The debt relief remedies offered in respect of over-indebtedness, namely voluntary debt review in accordance with section 86 of the NCA or court-ordered debt review as envisaged by section 85 of the NCA, aim to achieve debt restructuring which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.<sup>5</sup>

Reckless credit, on the other hand, which in essence penalises the disregard by the credit provider for the consequences of granting credit in certain circumstances, may encompass a situation where the consumer becomes over-indebted as a result of reckless credit granting but it also extends to other situations. Regard should be had to section 80 of the NCA to determine whether credit has been granted recklessly.<sup>6</sup> As such it is provided that a credit agreement is reckless if, at the time that the agreement was made, or at the time when the credit limit is increased<sup>7</sup>

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- 1 S 3(c)(i) & (ii) National Credit Act (NCA). See also Renke "Measures in South African consumer credit legislation aimed at the prevention of reckless lending and over-indebtedness: An overview against the background of recent developments in the European Union" 2011 *THRHR* 208 209.
  - 2 See further Otto & Otto *The National Credit Act Explained* (2010) 58-63, 77-79; Scholtz *et al Guide to the National Credit Act* (2009) ch 11. See also Vessio "Beware the provider of reckless credit" 2009 *TSAR* 274.
  - 3 S 79(1)(a) NCA.
  - 4 S 79(1)(b) NCA.
  - 5 S 3(i) read with s 85, 86, 87 and 88 NCA. See the discussion of over-indebtedness and its accompanying debt relief remedies in Scholtz *et al* par 11.3.
  - 6 *Desert Star Trading 145 (Pty) Ltd v No 11 Flamboyant Edleen CC* 2011 2 SA 266 (SCA).
  - 7 The provisions regarding reckless credit as set out in s 80(1) NCA do not apply to an increase in terms of s 119(4) NCA. S 119(4) NCA provides that if a consumer, at the time of applying for the credit facility or at any later time, in writing has specifically requested the option of having the credit limit automatically increased from time to time, the credit provider may unilaterally increase the credit limit once a year and by an amount as indicated in the subsection. Thus, in such instance a pre-agreement assessment as prescribed by s 81, as discussed hereinafter, will not be necessary.

(a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time;<sup>8</sup> or

(b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that

(i) the consumer did not *generally*<sup>9</sup> understand or appreciate the consumer's risks, cost or obligations under the proposed credit agreement;<sup>10</sup> or

(ii) entering into that credit agreement would make the consumer over-indebted (own emphases added).<sup>11</sup>

There may thus be some overlap between reckless credit and over-indebtedness but this will not necessarily be the case in all instances of reckless credit and conversely, there may be many instances where a consumer may have become over-indebted after he or she entered into a credit agreement but not as a result of credit having been extended recklessly, for instance where a consumer is retrenched after having entered into a credit agreement that he or she could well have afforded while still employed.<sup>12</sup> Reckless credit entitles the consumer to a number of debt relief remedies, including debt rearrangement in the instance where the extension of reckless credit resulted in the over-indebtedness of the consumer.

The purpose of this discussion is to investigate the concept of reckless credit, the remedies it affords and its procedural implications.

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8 S 80(1)(a) NCA. This type of reckless credit appears to be reckless *per se* and will also be referred to as type one reckless credit for purposes of this discussion. See also Vessio 2009 *TSAR* 274 281.

9 It is to be noted that this subsection is broadly worded and does not require that the consumer should "specifically" not have understood the risks, costs and obligations under the agreement but merely requires a "general" lack of such understanding.

10 S 80(1)(b)(i) NCA. This will also be referred to as type 2 reckless credit for purposes of this discussion.

11 S 80(1)(b)(ii) NCA. See also Scholtz *et al* par 11.1. In this instance there is thus an overlap between over-indebtedness and reckless credit. This will also be referred to as type three reckless credit for purposes of this discussion. See further Vessio 2009 *TSAR* 274 275 where she indicates that The Oxford English Dictionary defines "reckless" as "disregarding the consequences or danger etc; rash" and concludes that reckless lending includes not only the act of disregarding the consequences but also the act of not analysing at all, or analysing incorrectly, one's client or potential client in the carrying out of certain prescribed assessments or investigations.

12 Scholtz *et al* par 11.1.

## 2 Reckless Credit

### 2 1 Scope of Application

Reckless credit and its accompanying debt relief remedies, as provided for in part D of chapter 4 of the NCA, apply only to natural person consumers<sup>13</sup> who entered into credit agreements governed by the NCA on or after 1 June 2007.<sup>14</sup> Thus it is not available to juristic person consumers and further it does not operate retroactively,<sup>15</sup> meaning that a natural person consumer will not be able to rely on reckless credit in respect of a credit agreement entered into before 1 June 2007. In this context though, regard must be had to the extended definition of juristic person in the NCA, namely that it includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if there are three or more individual trustees or the trustee itself is a juristic person, but does not include a *stokvel*. The effect of this definition is that a trust may thus qualify as either a natural person or as a juristic person depending on the number or identity of its trustees and where it qualifies as a natural person it will be entitled to rely on reckless credit but not where it is regarded as a juristic person.

As indicated, the concept of reckless credit can only apply if the agreement is a credit agreement to which the NCA applies.<sup>16</sup> Thus it can only apply in respect of a credit facility,<sup>17</sup> credit transaction<sup>18</sup> or credit guarantee<sup>19</sup> as set out in the NCA. In this context regard should be had to section 4(2)(c) of the NCA which provides that the NCA applies to a credit guarantee only to the extent that it applies to a credit facility or credit transaction in respect of which the credit guarantee is granted. This means that where a natural person consumer for instance stood surety for a juristic person with an asset value or annual turnover of more than one million rand, in respect of a credit transaction entered into on or after 1 June 2007, the NCA will not apply to the credit transaction being an exempt transaction<sup>20</sup> and will consequently also not apply to the credit guarantee (suretyship), with the effect that the surety, despite being a natural person, will not be able to raise the issue of reckless credit.<sup>21</sup> If for instance a small or intermediate<sup>22</sup> credit transaction is entered into by a small juristic person with an asset value or annual

13 S 78(1) NCA.

14 Otto & Otto 9.

15 Scholtz *et al* par 11.1. Obviously this is so because compulsory credit assessment as set out in s 81 NCA was not a requirement before entering into credit agreements until the coming into operation of the reckless credit provisions of the NCA.

16 S 4(1) NCA. Regarding credit guarantees, see Stoop & Kelly-Louw "The National Credit Act regarding suretyships and reckless lending" 2011 2 *Potchefstroom Electronic Law Journal* 66.

17 S 8(3) NCA.

18 S 8(4) NCA.

19 S 8(5) NCA.

20 S 4(1)(a) to (d) NCA.

21 *Nedbank Ltd v Wizard Holdings* 2010 5 SA 523 (GSJ).

22 S 9 NCA.

turnover of less than R1 million, then the NCA will apply to that credit transaction. However, given that section 4(2)(c) uses the words “ to the extent “ it is submitted that a natural person who stood surety for a juristic person consumer with regard to a credit agreement to which the NCA has limited application as set out in section 6 of the NCA will not be able to raise the issue of reckless credit as section 6 provides that part D of chapter 4 does not apply to juristic persons and thus a juristic person cannot rely on reckless credit granting.

It is further to be noted that sections 81 to 84 of the NCA, and any other provisions in part D of chapter 4, to the extent that they relate to reckless credit, do not apply to<sup>23</sup>

- (a) a school loan or a student loan;
- (b) an emergency loan;
- (c) a public interest credit agreement;
- (d) a pawn transaction;
- (e) an incidental credit agreement; or
- (f) a temporary increase in the credit limit under a credit facility,<sup>24</sup>

provided that any credit extended in terms of paragraph (a) to (c) above is reported to the National Credit Register in the prescribed manner and form, and further provided that in respect of any credit extended in terms of paragraph (b), reasonable proof of the existence of the emergency as defined in section 1 of the NCA is obtained and retained by the credit provider.

## 2 2 Prevention of Reckless Credit by Assessment and Truthful Answering

The NCA contains specific measures aimed at prevention of reckless credit which places obligations on credit providers as well as consumers.<sup>25</sup> As such, a credit provider is prohibited from entering into a reckless credit agreement<sup>26</sup> and further from entering into a credit agreement without first taking reasonable steps to assess:<sup>27</sup>

- (a) the proposed consumer’s
  - (i) 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;
  - (ii) debt repayment history as a consumer under credit agreements;
  - (iii) existing financial means, prospects and obligations; and

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23 S 78(1) NCA.

24 See also s 80 read with s 119(4) NCA.

25 See in general Otto & Otto 77 -79; Scholtz *et al* par 11.4; Stoop & Kelly-Louw 2011 2 *PER* 67 86; Renke 2011 *THRHR* 208.

26 Renke 2011 *THRHR* 208 223 where he points out that this is a general prohibition.

27 S 81(2) NCA.

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.

The consumer is also enjoined to prevent reckless credit granting by the requirement in the NCA that when applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the required assessment.<sup>28</sup> It is thus submitted that where, for instance, a consumer applies to enter into a specific credit agreement with a specific credit provider, such consumer may not during the time that the credit provider is considering the aforementioned application, enter into any further credit agreements with other credit providers without disclosing full details thereof to the first mentioned credit provider in order to enable such credit provider to include such information in the section 82-assessment.

It should be noted that the assessment required by section 81 is more comprehensive than a mere affordability assessment as the consumer's general understanding of the risks, costs and obligations should also be assessed and it should be evident from the assessment that regard was also had to the consumer's debt repayment history. It is submitted that in this regard credit providers may be well advised to comply with the plain language requirement as set out in section 64 of the NCA. Although the NCA requires that the credit provider takes reasonable steps to assess the aspects as listed in section 81(2)(a) and (b), it does not set out what these reasonable steps are. Section 82 of the NCA provides that a credit provider may determine for itself the evaluative mechanisms and models or procedures to be used in meeting its assessment obligations under section 81, provided that any such mechanisms, model or procedure results in a fair and objective assessment. Vessio aptly remarks that the wording of section 82 is interesting in that the positive responsibility appears to be on the credit provider to ask the correct information gathering questions.<sup>29</sup> Notice should however be taken of section 61(5) of the NCA which provides that a credit provider may determine for itself any scoring or other evaluative mechanism or model to be used in managing, underwriting and pricing credit risk, provided that any such mechanism or model is not founded or structured upon a statistical or other analysis in which the basis of risk categorisation, differentiation or assessment is a ground of unfair discrimination prohibited in section 9(3) of the Constitution.<sup>30</sup>

This right of the credit provider to determine its own evaluative mechanism is subject to the right of the National Credit Regulator to pre-approve the evaluative mechanisms, models and procedures to be used for assessment purposes in respect of developmental credit agreements

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28 S 81(1) NCA.

29 Vessio 2009 *TSAR* 274 279.

30 The Constitution of the Republic of South Africa, 1996.

and to publish guidelines proposing evaluative mechanisms, models and procedures to be used in respect of other credit agreements.<sup>31</sup> A guideline published by the National Credit Regulator is not binding on a credit provider, except with regard to developmental credit or if so ordered by the National Consumer Tribunal.<sup>32</sup>

If the Tribunal finds that a credit provider has repeatedly failed to meet its obligations under section 81, or customarily uses evaluative mechanisms, models or procedures that do not result in a fair and objective assessment, the Tribunal, on application by the National Credit Regulator may require that credit provider to apply any guidelines published by the National Credit Regulator or apply any alternative guidelines consistent with prevalent industry practice, as determined by the Tribunal.<sup>33</sup>

To date the National Credit Regulator has not yet published any general guidelines for the assessment purposes set out in section 81.

It is further submitted that, given the fact that the reckless credit remedy is not to the avail of juristic persons, a section 81 pre-agreement assessment appears to be a compulsory prerequisite only where a credit agreement is entered into with a natural person consumer. However, although not compulsory in the case of juristic persons, it is good business practice to also conduct a pre-agreement assessment along the lines mentioned hereunder where the consumer is a juristic person, obviously with the necessary changes required by the context.

For purposes of the comprehensive compulsory pre-agreement assessment as required by section 81, it is thus submitted that the credit provider must implement non-discriminatory evaluative measures, cast plainly<sup>34</sup> in an official language that the consumer reads and understands,<sup>35</sup> which should *inter alia* address the following aspects:

- (a) Whether the consumer understands and appreciates the risks and costs of the credit and his or her rights and obligations as a consumer under the credit agreement. It is submitted that this can objectively be achieved by inserting a clause into the credit application indicating that the risks and costs of the credit and the consumer's rights and obligations as a consumer under a credit agreement have been explained to him or her by the credit provider and that the consumer expressly acknowledges that he or she understands and appreciates his or her rights and obligations as a consumer.<sup>36</sup>
- (b) The consumer's debt repayment history as a consumer under credit agreements. It is submitted that for this purpose, unless the consumer is an existing client of the credit provider and the credit provider has access to the

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31 S 82(2) NCA.

32 S 82(3) NCA.

33 S 82(2)(a) & (b) NCA.

34 S 64 NCA.

35 S 63 NCA.

36 Scholtz *et al*/par 11.6. See also Vessio 2009 *TSAR* 274 280 fn 42.

consumer's debt repayment history, the credit provider should do a credit bureau check as that will give an indication as to whether the consumer has a good or bad debt repayment history. A bad debt repayment history, eg judgments due to non-payment of debt might serve to expose the consumer as a possible reckless credit risk in the sense that entering into a credit agreement with him or her might lead to the consumer's over-indebtedness. It is submitted that it is prudent that the assessment contain a reference to the fact that the credit provider did have due regard to the consumer's debt repayment history as required by section 81(2)(a)(ii).

(c) The consumer's existing financial means, prospects and obligations. It should be borne in mind that "financial means, prospects and obligations" has an extended meaning in terms of the NCA which will enable the credit provider to also take into account the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the prospective consumer and that other person customarily share their respective financial means and mutually bear their respective financial obligations.<sup>37</sup>

(d) Where the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the credit provider may for purposes of assessing the consumer's financial means, prospects and obligations also have regard to the reasonably estimated future revenue flow from that business purpose.<sup>38</sup> It is submitted that in this regard the credit provider should thus require projected profit margins of the business venture from the consumer. The assessment in the case where the consumer has such commercial purpose for applying to enter into a credit agreement must indicate that there is a reasonable basis to conclude that such commercial purpose may prove to be successful.

(e) Assessment should be done not only of the means prospects and obligations of a consumer under a credit facility or a credit transaction to which the NCA applies, but also of the surety in respect of such credit facility or credit transaction.<sup>39</sup>

### 2 3 Time for Determination of Reckless Credit

In terms of section 80(2) of the NCA the question whether reckless credit was granted is determined with regard to the time the agreement was made. No regard should be had to the ability of the consumer to meet the obligations under that credit agreement or understand or appreciate the risks, costs and obligations under the proposed credit agreement at the time that the determination is being made. A determination of reckless credit will thus always entail an *ex post facto* enquiry. It is clear that the moment of entering into the agreement is the definitive moment for determining whether credit was granted recklessly and consequently the mere fact that a consumer in respect of whom no credit assessment was done can actually afford the credit or that a consumer who has been assessed but did not understand the risks, costs and obligations under

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37 S 78(3) NCA.

38 S 78(3)(c) NCA.

39 See Stoop & Kelly-Louw 2011 2 *Potchefstroom Electronic Law Journal* 67 for a detailed discussion regarding the obligation to do a s 81-assessment in respect of a surety.



the credit agreement has in the meantime grasped such risks, costs and obligations, will not provide the credit provider with a defence against an allegation of reckless credit.

## **2 4 Complete Defence Against Reckless Credit**

For the purposes of the NCA, it is a complete defence to an allegation that a credit agreement is reckless if the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by section 81 *and* a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment.<sup>40</sup>

This complete defence is only available to a credit provider who can prove that both requirements of section 81(4) of the NCA are met.<sup>41</sup> The NCA however does not mention specific aspects that would indicate "materiality" as referred to in section 81(4).<sup>42</sup> It is submitted that in each specific instance the facts of the particular matter and the extent of the untruthfulness of the consumer will have to be considered in order to determine whether it can be said that the credit provider's ability to make a proper assessment was materially influenced.

## **2 5 Debt Relief Powers of Court in Respect of Reckless Credit**

### ***2 5 1 Court may Suo Motu Look into Issue of Reckless Credit***

Section 83(1) of the NCA provides that despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, the court may declare that the credit agreement is reckless, as determined in accordance with part D of chapter 4 of the NCA. Unlike section 85 of the NCA, which requires an allegation of over-indebtedness before a court can exercise its powers relating to over-indebtedness, section 83 does not require an allegation of reckless credit before a court can exercise its powers with regard to reckless credit. It thus appears that a court can *suo motu* look into the issue of reckless credit during court proceedings in which a credit agreement is being considered.<sup>43</sup> Given that the words "court proceedings" is used, it is clear that a court can make use of these powers

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40 S 81(4)(a) & (b) NCA.

41 Scholtz *et al* par 11.4.1.

42 *Horwood v Firstrand Bank Ltd* unreported South Gauteng High Court case nr 36853/2010. The court indicated (par 6) that not every failure by a consumer to fully and truthfully answer the credit provider's request for information as part of the prescribed assessment will entitle the credit provider to the complete defence mentioned in s 81(4) NCA. The question as to what would constitute such materiality was however left open by the court (par 15).

43 *Scholtz et al* par 11.4.5. See also *African Bank Ltd v Myambo* 2010 3 SA (GNP) 298.

in action and application proceedings.<sup>44</sup> Although a debt counsellor may during a debt review in terms of section 86 determine that a specific credit agreement is reckless, it is only a court which can actually declare that specific agreement reckless.<sup>45</sup> Furthermore it should be noted that it is not a requirement of the NCA that the consumer is obliged to approach a debt counsellor for purposes of a determination of reckless credit before such issue may be raised and it is submitted that either the consumer or the court (*suo motu*) may raise the issue of reckless credit without the assistance of a debt counsellor.

In respect of the approach to be taken by a court when determining whether reckless credit was granted, the court in *SA Taxi Securitisation (Pty) Ltd v Mbatha*<sup>46</sup> remarked:<sup>47</sup>

While one of the purposes of the NCA is to discourage reckless credit, the Act is also designed to facilitate access to credit by borrowers who were previously denied such access. An over-critical armchair approach by the court towards credit providers when evaluating reckless credit, or the imposition of excessive penalties upon lenders who have recklessly allowed credit, would significantly chill the availability of credit especially to the less affluent members of our society.

### ***2 5 2 Court may not Deviate from Section 83 Powers***

Section 130(4)(a) of the NCA provides that if in any debt procedures in a court, the court determines that the credit agreement was reckless as described in section 80 it *must* make an order contemplated in section 83. The court thus has no discretion in such an instance to deviate from the powers given to it by section 83 and can make no other orders than those provided for in the said section. It is important to note that the NCA does not regard a reckless credit agreement as an unlawful agreement and thus it is clear that the debt relief afforded in respect of a reckless credit agreement is limited to the relief set out in section 83 and does not extend to the relief provided in section 89(5) of the NCA in respect of unlawful credit agreements.<sup>48</sup>

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44 S 86(6) NCA provides that if a consumer seeks a declaration of reckless credit during a debt review in terms of s 86 NCA, the debt counsellor must determine whether any of the consumer's credit agreements appear to be reckless.

45 A debt counsellor is defined in reg 1 as "a natural person who is registered in terms of s 44 of the NCA offering a service of debt counseling. Debt counselling is also defined in reg 1 as "performing the services contemplated in s 86 of the NCA".

46 2011 1 SA 310 (GSJ).

47 Par 37. See also *SA Taxi Securitisation Pty) Ltd v Nako* unreported case Eastern Cape High Court no 19/2010.

48 Boraine & Van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" 2010 *THRHR* 1.

### **2 5 3 Powers Where No Credit Assessment was Done or the Consumer did not Understand the Risks, Costs and Obligations Under Credit Agreement**

The NCA endows a court with the same powers where no credit assessment as required by section 81 was done prior to entering into a credit agreement with the consumer as in the instance where the credit provider, having conducted an assessment entered into the credit agreement with the consumer despite the preponderance of information available to the credit provider indicating that the consumer did not *generally* understand or appreciate his or her risks, costs or obligations under the proposed credit agreement. If a court declares that a credit agreement is reckless in terms of section 80(1)(a) (no prior credit assessment) or 80(1)(b)(i) (consumer did not *generally* understand risks, costs or obligations under the credit agreement), the court *may* make an order setting aside all or part of the consumer's rights and obligations under *that* credit agreement, as the court determines just and reasonable in the circumstances *or* suspending the force and effect of *that* credit agreement in accordance with section 83(3)(b)(i).<sup>49</sup>

Thus, in respect of the first two types of reckless credit as envisaged by section 80(1)(a) and 80(1)(b)(ii) of the NCA, the court has a discretion to order either partial or complete setting aside of the consumer's rights and obligations under the agreement or suspending the force and effect of the specific agreement. The NCA is however silent on how a court should decide which one of the aforementioned orders it should make.<sup>50</sup> It treats both the situation where no credit assessment was done as well as the situation where a credit assessment was actually done but the consumer did not understand the relevant risks, costs and obligations in the same manner without differentiating between the two. It also does not differentiate between the situation where performance in terms of the agreement has not yet occurred and the situation where the parties have already performed. For example: The credit provider has advanced money or goods and the consumer has or has not made certain payments. The section is further silent on the rights and obligations of the credit provider in the instance where the consumer's rights and obligations under the credit agreement are set aside partially or completely. It is further notable that these consequences may follow even if the consumer is not over-indebted.<sup>51</sup>

It may thus be asked, given the absence of any express indication, how a court must decide whether to set aside the rights and obligations of a consumer under a credit agreement or to merely suspend the force and effect of such credit agreement?<sup>52</sup> If the court does decide to opt for setting aside the consumer's rights and obligations, one may ask on what

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49 *Ibid.*

50 *Idem* 3.

51 *Ibid.*

52 *Ibid.*

basis it will for instance regard it as “just and reasonable in the circumstances” to only partially set the consumer’s rights and obligations under the agreement aside as opposed to completely? It is submitted that the absence of clear guidelines regarding the setting aside of the consumer’s rights and obligations, and the absence of an indicator as to when setting aside will be more appropriate than suspension, may lead to a fragmented approach by the courts and requires clarification.

### 2 5 3 1 *Setting Aside of a Reckless Credit Agreement*

It is submitted that where performance in terms of the reckless credit agreement has not yet occurred it might appear “just and reasonable in the circumstances” that the court may rule that the consumer has no further rights and obligations.<sup>53</sup> It will thus for all practical purposes effectively amount to cancellation of the contract and both parties will be absolved from reciprocal performance.<sup>54</sup>

Where however performance has already occurred, for example, the credit provider advanced a loan amount or delivered a vehicle to the consumer and the consumer has or has not made certain agreed payments and the agreement is set aside, the next question to be asked relates to restoration.<sup>55</sup> As reckless credit agreements do not constitute unlawful credit agreements<sup>56</sup> for purposes of the NCA with the grave consequence of forfeiture of the credit provider’s rights as provided for by section 89(5) of the NCA, it is submitted that the credit provider will be able to claim restoration of any performance based on for example, unjustified enrichment of the consumer.<sup>57</sup>

In *SA Taxi Securitisation (Pty) Ltd v Mbatha*<sup>58</sup> the court indicated that if the consumer has a valid complaint that, but for the recklessness of the credit provider, the consumer would never have become involved in the credit transaction, it might be “just and reasonable “to set aside the agreement.<sup>59</sup> In that event, according to the court, the agreement would be null and void as if it had never been.<sup>60</sup> As a consequence, the credit provider, who remains owner of the vehicle which was financed in this specific instance, would become entitled to restoration thereof.<sup>61</sup> On the other hand the consumer, who no longer has any obligations under the

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53 *Idem* 4.

54 *Ibid.*

55 *Idem* 7.

56 S 89 NCA, which sets out the various instances of unlawful agreements, does not contain a reference to a reckless credit agreement.

57 Boraine & Van Heerden 2010 *THRHR* 1.

58 2011 1 SA 310 (GSJ)-

59 Par 47.

60 *Ibid.*

61 *Ibid.* See also *SA Taxi Securitisation (Pty) Ltd v Chesane* 2010 6 SA 557 (GSJ) par 28 and *SA Taxi Securitisation (Pty) Ltd v Booï* unreported case Eastern Cape High Court no 40771/2009.

agreement that has been set aside, would be relieved of any further indebtedness or deficiency claim under the agreement.<sup>62</sup>

### 2 5 3 2 *Suspension of a Reckless Credit Agreement*

It is submitted that the choice by a court to order a suspension of the force and effect of a reckless credit agreement rather than the complete or partial setting aside thereof, should be guided by the question whether the lack of assessment or the lack of comprehension by the consumer of the risks, costs and obligations under the credit agreement subsequently (some time after the conclusion of the agreement) lead the consumer to become over-indebted, thus creating a situation in which the consumer requires a “debt-breather” in the form of a suspension in order to recover financially to a situation where he or she is again able to resume payments in respect of the reckless agreement. This situation which envisages the occurrence of over-indebtedness at some stage later than the moment that the agreement was entered into, should be distinguished from the situation mentioned in section 80(1)(b)(ii) of the NCA where the specific agreement caused the consumer to become over-indebted at the very moment he or she entered into the said credit agreement. The essence of this submission in respect of a court’s suspensive powers regarding reckless credit is that suspension as provided for in section 84 of the NCA and discussed hereinafter, envisages that the agreement will resume again after the suspension is lifted. As such it appears to be a remedy designed to provide temporary debt relief aimed at alleviating over-indebtedness and not merely an arbitrary punishment to a credit provider who extended reckless credit. It is further submitted that where the facts of a particular matter clearly indicate that a consumer will not recover financially despite a suspension in accordance with section 84, it will be futile for the court to order such suspension.

Other than is the case with setting aside of the consumer’s rights and obligations as discussed above, the NCA contains a more detailed, although not altogether clearer, indication in section 84 of what a suspension of the force and effect of a credit agreement entails. During a period that the force and effect of a credit agreement is suspended in terms of the NCA:<sup>63</sup>

- (a) the consumer is not required to make any payment required under the agreement;
- (b) no interest, fee or other charge under the agreement may be charged to the consumer;
- (c) the credit provider’s rights under the agreement, or under any law in respect of that agreement, are unenforceable, despite any law to the contrary.

Once a suspension of the force and effect of a credit agreement ends, all the respective rights of the credit provider and consumer under that

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62 *Ibid.*

63 S 84(1) NCA.

agreement are revived<sup>64</sup> and are fully enforceable except to the extent that a court may order otherwise.<sup>65</sup> However, no amount may be charged to the consumer by the credit provider with respect to any interest, fee or other charge that were unable to be charged during the suspension.<sup>66</sup>

Thus it appears that where a suspension is appropriate, the penalty for the credit provider in having extended reckless credit lies in the fact that the credit grantor will not receive any payment in respect of the agreement for the period of suspension, will forfeit the interest and other charges that would have accrued during that period and will not be able to enforce the agreement by for instance cancelling the agreement and repossessing the financed item, if any.

It may however be asked how a suspension in terms of section 84 affects the credit provider's security, eg a motor vehicle financed in terms of an instalment agreement? Is the consumer entitled to retain the depreciating security whilst not making any payments? The NCA does not specify or limit the period of suspension and it may well be that the court orders a suspension which may run over a considerable period of time. Neither does section 84 expressly state that the consumer is obliged to return the financed item to the credit provider for the period of suspension or that the consumer is entitled to retain possession of such item whilst the suspension is in force.

Two different points of view may be taken in this regard. On the one hand it may be argued that the bar against enforcement of the agreement read together with the right of the consumer to stop making payments for the period of suspension whilst not being placed under an express obligation to return the financed item to the credit provider for the period of suspension, viewed against the backdrop that the agreement is not cancelled or set aside but merely suspended, indicates that the legislature intended that the consumer cannot be deprived of possession of the financed item during the period of suspension.

On the other hand, the NCA strives to balance the competing rights of consumers and credit providers.<sup>67</sup> When one takes this view, it seems manifestly unfair to allow the consumer, during a period of suspension of a reckless credit agreement to retain the credit provider's depreciating security whilst not making any payments and to also penalise the credit provider further by non-receipt of payments and the forfeiture of interest and other charges for the period of suspension. From this perspective,

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64 It is submitted that this is an unfortunate choice of word, as the suspension does not end or terminate the relevant rights and obligations. "Resume" instead of "revive" may have been a more appropriate choice.

65 S 84(2)(a)(i) & (ii) NCA.

66 S 84(2)(b) NCA.

67 S 3(d) NCA provides that one of the purposes of the NCA is promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers.

the mere fact that a section 81- assessment was not done or that the consumer, despite the assessment did not understand the risks, costs and obligations under the agreement, does not entitle the consumer to free possession and use of the financed item as consolation.

The court in *SA Taxi Securitisation (Pty) Ltd v Mbatha*<sup>68</sup> took the view that if the effect of the agreement is suspended, *all* elements of the agreement would have to be suspended.<sup>69</sup> It indicated that although section 81(4)(c) contemplates that the credit provider will not be entitled to enforce its rights during a period of suspension, that subsection must be read with subsection 81(4)(a) and (b) of the NCA.<sup>70</sup> It consequently held that there is no basis for reading into the language of the NCA a provision that when suspension is appropriate, the court also has the power to permit the consumer to utilise the security in a manner which will permit it to deteriorate during the period of suspension. According to the court “It seems unlikely that the legislature ever intended that the consumer could keep the ‘money *and* the box’”.<sup>71</sup>

It is submitted that although section 84 bars enforcement during a suspension and absolves the consumer from payment during the suspension it does not necessarily imply that the consumer may possess and use the credit provider’s depreciating security to the credit provider’s detriment during such suspension. What if the suspension ends and the consumer is still not in a financial position to resume payments under the credit agreement? Possibly the provision that is made in section 84(2) for a “revival” of the respective *rights* and obligations of both the parties once the suspension ends, may shed more light upon the matter. In this regard it may be asked why it would be necessary to state in section 84(2) that the consumer’s rights are revived if section 84(1) does not make any specific mention of the consumer’s rights. It is submitted that the only reasonable inference to be drawn from this is in fact that section 84(1), although not in express terms, by implication envisages that the consumer’s right to possession and use of the financed item be suspended for as long as the suspension is in force.

On a practical level thus: Although the credit provider will not be entitled to cancel the agreement and repossess the financed item in terms of enforcement proceedings, it would appear that the consumer is also not entitled to remain in possession of that item and to use it during the period of suspension, unless the consumer can provide adequate security that the credit provider will not suffer any harm due to

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68 2011 1 SA 310 (GSJ)-

69 Par 48.

70 Par 45.

71 Par 46. The court indicated (par 48) that if the effect of the agreement is merely suspended, all elements of the agreement would have to be suspended and that this would mean that the consumer would not be entitled to retain possession of the vehicle during the period of suspension but that at the same time the consumer would not have to make any payments under the agreement during the suspension period.

depreciation and use of the financed item during a suspension. It is submitted that should it transpire during a suspension that the credit provider will suffer irreparable harm due to depreciation of his security whilst in possession of the consumer, which will inevitably be the case in many instances,<sup>72</sup> at least with regard to most movable property, if the consumer uses it without paying for it, the credit provider may, if the facts permit, approach the court for an interim attachment order to secure the safekeeping of the movable financed item pending the expiry of the suspension.<sup>73</sup> Such an interim safekeeping attachment order does not amount to enforcement proceedings and will thus not fall under the bar against enforcement contained in section 84 of the NCA.<sup>74</sup> One may even venture as far as suggesting that this is an order that the court can make *suo motu* when it declares the credit agreement reckless and orders suspension, as it may be argued that it appears to be implied in section 84(1) read with section 84(2) that the consumer's rights to the financed item is also suspended. However in view thereof that the position regarding possession of the credit provider's security during a suspension is somewhat uncertain, and there is no guarantee that a court may take such a liberal view as to make an order *suo motu*, it is submitted that it would be prudent for a credit provider who faces a possible suspension of a reckless credit agreement to approach the court for an interim attachment order to be made simultaneously with any order declaring the credit agreement reckless and suspending the force and effect thereof.

An issue which complicates the above explanation and needs further consideration is the question as to what should be done in the instance where the financed item that is subject to a suspension, is immovable property? The inconvenience and cost of requiring the consumer to vacate the immovable property for the period of suspension would be immense. Should it be held that a consumer whose credit agreement is suspended may continue to occupy the immovable property that is subject to the credit agreement but the consumer whose credit agreement in respect of a movable item, such as a motor vehicle is suspended, may not stay in possession of the vehicle during the suspension might probably give rise to a claim that it infringes on the latter consumer's right to equality. Should one try to take the dim view that suspension in terms of section 84 is only appropriate within the context of movable property, it would lead to a reverse accusation where the consumer in respect of immovable property can then complain about being treated unequally.

It is doubtful whether the legislature even contemplated all of the above scenarios when section 84 was drafted but it is submitted that

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72 It is submitted that a consumer who cannot afford to repay his debt in terms of a credit agreement, is also usually not in a position to pay the security premiums applicable to the item financed in terms of that agreement.

73 See *SA Taxi Securitisation v Chesane* 2010 6 SA 557(GSJ).

74 *Ibid.* See also Otto & Otto 113.



section 84 might eventually be more complicated to interpret and apply than would initially appear. Probably this confusion could have been avoided to some extent if the legislature clearly provided in section 84 that where the instalment agreement relates to a movable item, such item should be returned to the credit provider during the period of suspension. However, the position relating to immovable property would then still be problematic within the context of equal treatment of consumers.

It also does not appear as if this problem can be cured by providing for partial rescission of the rights and obligations of the consumer where immovable property is at stake and to take the view that suspension is only appropriate where movable items are concerned. Rescission even if only partial, implies that certain of the consumer's rights and obligations come to an end, whereas suspension contemplates that the rights and obligations in terms of the agreement resume once the suspension ends.

It is further submitted that it would also have contributed to legal certainty if section 83 indicated in which instances and on what grounds a complete or partial setting aside of the consumer's rights and obligations would have been more appropriate and in which instances a suspension of the force and effect of the credit would have been more suitable. In respect of setting aside one can at least deduce that the court will have regard to facts which makes such complete or partial setting aside "just and appropriate in the circumstances" but insofar as determining that a suspension is the more appropriate order, section 83(2)(b) contains no clear guidelines for making such order. As submitted above, a suspension may be held to be more appropriate where the consumer has performed in terms of the reckless credit agreement but has subsequently become over-indebted and is in need of temporary debt relief. In the end however, it appears that the choice between a setting aside and a suspension will essentially be a common sense decision guided by the facts of a particular case.

#### *2 5 4 Powers of Court where Entering into Specific Credit Agreement Caused Over-Indebtedness*

In respect of the third type of reckless credit as described in section 80(1)(b)(ii) of the NCA, namely where a section 81-assessment was done, but the credit provider disregarded the preponderance of available information and still entered into a credit agreement with the consumer which agreement toppled the consumer into the abyss of over-indebtedness at the moment of conclusion into the agreement, once the court has declared the agreement reckless it:<sup>75</sup>

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75 S 83(3) NCA. See s 87 NCA which provides: "(1)(a) If a debt counsellor makes a proposal to the Magistrate's court in terms of section 86(8)(b) or a consumer applies to the magistrates court in terms of section 86(9), the Magistrate's court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means,

*continued on next page*

- (a) must further consider whether the consumer is over-indebted at the time of those court proceedings; and
- (b) if the court concludes that the consumer is over-indebted the court *may* make an order:
  - (i) (i) suspending the force and effect of that credit agreement until a date determined by the court when making the order of suspension; and
  - (ii) (ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.

Before making the order as set out in section 83(3) the court is obliged<sup>76</sup> to consider the consumer's current means and ability to pay his or her current financial obligations that existed at the time the agreement was made.<sup>77</sup> In addition the court has to consider the expected date when any such obligation under a credit agreement will be fully satisfied, assuming the consumer makes all the required payments in accordance with any proposed order.<sup>78</sup>

Where the court thus grants the debt relief as set out in section 83(3) it will effectively mean that the court will make an order suspending the credit agreement which was entered into recklessly and caused the consumer to become over-indebted and that all the consumer's other credit agreements, excluding the aforementioned agreement, in respect of which the consumer has subsequently also become over-indebted as a result of the reckless credit granting, will be restructured.

It thus appears that the legislature intended to penalise the credit provider in respect of this third type of reckless credit by suspending the credit provider's right to payment and enforcement and forfeiture of interest, fees and charges which would otherwise have been charged during that period and by giving preference to restructuring of other credit agreements in respect of which the consumer may subsequently have become over-indebted as a result of having entered into the suspended reckless credit agreement.

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prospects and obligations may -  
reject the recommendation or application as the case may be; or  
make an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) or (3), if the Magistrate's court concludes that the agreement is reckless;  
an order rearranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii); or  
both orders contemplated in subparagraph (i) and (ii)."  
It is further provided by s 87(2) NCA that the National Credit Regulator may not intervene before the Magistrate's court in a matter referred to it in terms of s 87.

76 S 83(4) NCA uses the word "must".

77 S 83(4)(a) NCA.

78 S 83(4)(b) NCA.

Insofar as the other credit agreements that will be restructured are concerned, such restructuring will have to occur in terms of section 86(7)(c) and will entail

- (a) extending the period of the agreement and reducing the amount of each payment accordingly;
- (b) postponing during a specified period the dates on which payments are due under the agreement;
- (c) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
- (d) recalculating the consumer's obligations because of contraventions of part A or B of Chapter 5, or Part A of Chapter 6.<sup>79</sup>

It is submitted that the court's power to postpone dates of payments in terms of section 86(7)(c) should not be confused and equated with the court's power to suspend a reckless credit agreement in terms of section 84. Further, it is clear from section 86(7)(c) that unlike in terms of a section 84-suspension, the court is not empowered to "write off" interest when ordering a debt restructuring.<sup>80</sup> Once these debts have been restructured, the provisions of section 88(3) will apply to such restructured debt, thus effectively preventing enforcement by the credit provider whilst the consumer duly makes payments in terms of the debt restructuring order.<sup>81</sup>

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79 Part A of ch 5 NCA deals with unlawful credit agreements and provisions, part B deals with disclosure, form and effect of credit agreements. Part A of ch 6 NCA deals with collection and repayment practices.

80 Scholtz *et al* par 11.3.3.2.

81 S 88(3) NCA provides that: "Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i) may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until -  
the consumer is in default under the credit agreement; and  
one of the following has occurred:  
an event contemplated in subsection (1)(a) through (c); or  
the consumer defaults on any obligation in terms of a rearrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.

S 88(1) NCA provides that a consumer who has filed an application for debt review in terms of s 86(1), or who has alleged in court that he or she is over-indebted must not incur any further charges under a credit facility or enter into any further credit agreement, other than a consolidation agreement, with any credit provider until one of the following events has occurred:

- (a) the debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) have expired without the consumer having so applied;
- (b) the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application;

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## 2 6 Procedural Perspectives

It is submitted that reckless credit may constitute both a cause of action in those instances where the consumer takes the initiative to have the agreement declared reckless as well as a defence on the merits in those instances where the credit provider has instituted legal proceedings based on the credit agreement against the consumer. In practice however, it appears that reckless credit is usually raised as a defence by a consumer in response to a credit provider's enforcement attempts.

Given that section 81, requiring the pre-agreement assessment, is cast in peremptory terms<sup>82</sup> and in view thereof that courts may *suo motu* enquire into the aspect of reckless credit, it is submitted that a credit provider, when instituting legal proceedings to enforce a credit agreement, should allege in its particulars of claim that an assessment as required by section 81 was done prior to entering into the agreement. It is thus submitted that compliance with the provisions of section 81 can be regarded as a statutory requirement and that failure to allege such compliance might render the credit provider's particulars of claim excipiable for lack of a complete cause of action. Where a matter is undefended, failure to make such allegation may also jeopardise the granting of default judgment as it can be expected that a court will *suo motu* enquire into the aspect of reckless credit.

Where a credit provider fails to allege in its particulars of claim that a pre-agreement assessment was conducted, the consumer may thus except against the particulars of claim. In the event that such assessment was indeed conducted but merely not alleged in the particulars of claim, the court should uphold the exception and the credit provider can then cure its defective particulars of claim by an appropriate amendment. Should it transpire that such an assessment was never conducted an amendment will not cure the defect. In view thereof that failure to conduct a pre-agreement assessment constitutes reckless credit *per se* it would appear that the appropriate order for the court to make in such instance would be to set the particulars aside on the basis of an incurable excipiability and to make an order in terms of section 83, as expressly obliged by section 130(4)(a).

Where the credit provider alleges in its particulars of claim that a section 81-assessment was conducted prior to entering into the credit agreement, the defendant can of course raise a number of defences, namely:

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(c) or a court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreements as rearranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.

See *Firstrand Bank Ltd v Fillis* 2010 6 SA 565 (ECP).

82 As indicated, s 81 provides that the credit provider "must" not enter a credit assessment without first doing the necessary assessment.

- (a) that although an assessment was conducted, it did not amount to a proper assessment as envisaged by the NCA;
- (b) that despite the assessment and the indication by the preponderance of available information that the consumer did not generally understand the risks, costs and obligations under the credit agreement, the credit provider disregarded it and still entered into the credit agreement with the consumer (which essentially also implies the assessment was not conducted properly);
- (c) that despite the assessment, the credit provider still elected to enter into the credit agreement with the consumer and disregarded the indication by the preponderance of available information that entering into that specific agreement would make the consumer over-indebted.

Where the consumer alleges, at summary judgment stage, that in respect of a specific credit agreement the credit has been extended recklessly, it is submitted that a bald allegation of reckless credit will not qualify for purposes of warding off summary judgment. In this regard the consumer should state the nature and grounds pertaining to the specific type of reckless credit that is relied upon.<sup>83</sup> Essentially the same principle applies to the drafting of the consumer's plea: a defendant must clearly and concisely state the nature of his defence and all the material facts on which it is based, in such a manner that the plaintiff knows exactly which case it has to meet.<sup>84</sup>

In *SA Taxi Securitisation (Pty) Ltd v Mbatha* the court, in considering an application for summary judgment, indicated that the consumer-defendants failed to set out their defence of reckless credit with sufficient particularity. The court then gave the following non-exhaustive guidelines in respect of the information which would need to be disclosed regarding the consumer's defence:<sup>85</sup>

In respect of reckless credit as provided for in section 80(1)(a) of the NCA, the court indicated that details should have been given of the negotiations leading up to the conclusion of the agreement and the parties to the negotiations should have been identified.<sup>86</sup> The consumer-defendant should also have disclosed details concerning any credit application that the defendant signed and the circumstances in which he or she signed those credit applications as this information would have enabled the court to evaluate whether there is a basis for the allegation that no assessment was conducted under the NCA.<sup>87</sup> It is respectfully submitted that by imposing these obligations upon the defendant, the court is in fact to some extent burdening the consumer with an onus which should rightfully be that of the credit provider. It is submitted that where the credit provider seeks summary judgment against the consumer, the credit provider is the party who is obliged to make the

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83 *Breitenbach v Fiat SA (Edms) Bpk* 1976 2 SA 226 (T).

84 *Neugebauer & Co Ltd v Bodiker & Co (SA) Ltd* 1925 AD 316 AT 319; *FPS Ltd v Trident Construction (Pty) Ltd* 1989 3 SA 537 (A) 542.

85 Par 55ff.

86 Par 56.1.

87 *Ibid.*

necessary allegations in its particulars of claim regarding an assessment having been conducted prior to entering into the agreement. If such allegation is made and the consumer-defendant wishes to contest it, then the consumer-defendant should provide detail indicating that such an assessment was in fact never conducted or was not conducted properly in the manner envisaged by section 81 of the NCA.

In respect of reckless credit as described in section 80(1)(b)(i), the court indicated that the consumer – defendant should provide information demonstrating his or her level of education and experience at the time relating to the risk of incurring credit.<sup>88</sup> According to the court this would have involved a disclosure by the consumer-defendant of prior credit transactions entered into.<sup>89</sup>

As regards reckless credit as described in section 80(1)(b)(ii), the court indicated that the consumer-defendant should provide details of his or her indebtedness at the time the agreement was concluded as well as information concerning the defendant's income and expenditure.<sup>90</sup> Information should also be provided concerning the consumer-defendant's current levels of indebtedness.<sup>91</sup> It is submitted that the consumer-defendant should also indicate that proper disclosure of his or her complete state of indebtedness was made to the credit provider at the time of the assessment.

Insofar as the credit provider is concerned, it is thus clear that the credit provider bears the onus to prove that a pre-agreement assessment was conducted. Consequently where the credit provider failed to conduct a pre-agreement assessment the credit provider will not be able to escape a declaration of reckless credit. Where however the consumer in his or her plea admits that a credit assessment was done but alleges lack of *generally* understanding the risks, costs and obligations under the credit agreement, it is submitted that the credit provider should file a reply to the consumer's plea alleging facts which, if proven, would show that such risks, costs and obligations were duly explained to the consumer or demonstrating that the consumer has been party to various previous credit agreements thus justifying the inference that the consumer was sufficiently educated regarding such risks, cost and obligations. Also, where the consumer in his or her plea admits to an assessment having been conducted but pleads that entering into the specific credit agreement made him or her over-indebted, the credit provider could file a reply alleging either that the defendant was not catapulted into over-indebtedness by that specific agreement or that the consumer failed to answer the credit provider's request for information fully and truthfully

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88 Par 56.2.

89 *Ibid.*

90 Par 56.3. In this case the court indicated that the consumer should also have indicated income derived from using the vehicle as a taxi.

91 Par 56.4.

thus materially influencing the credit provider's ability to make a proper assessment.

That having been said, it may be remarked that insofar as summary judgment proceedings are concerned, the credit provider being the plaintiff-applicant, unfortunately does not have the luxury of filing a replying affidavit to the consumer-respondent's opposing affidavit. The grave reality thereof would then be that in the event where the credit provider alleges in its particulars of claim that an assessment was conducted, the consumer defendant could for instance in an opposing affidavit allege that despite the assessment the credit provider entered into a credit agreement with the consumer which made the latter over-indebted or that the preponderance of available information indicated that the consumer did not understand the risks, costs and obligations under the agreement. Due thereto that the summary judgment procedure does not allow for a replying affidavit, the credit provider will not be able to set the matter straight by providing evidence to the effect that the consumer did not become over-indebted as a result of that specific agreement or did not answer fully and truthfully to the credit provider's requests for information, which failure materially influenced the credit provider's ability to do the necessary assessment or was sufficiently educated regarding the risks, costs and obligations under the agreement. It might thus be time to rethink the introduction of a replying affidavit by the credit provider in summary judgment proceedings, at least insofar as credit agreements governed by the NCA are concerned.<sup>92</sup> Otherwise the only option might be for the plaintiff to draft a "novel-like" particulars of claim containing every conceivable allegation necessary to pre-empt possible defences based on reckless credit that a consumer may have.

## 6 Conclusion

The legislature has through the NCA introduced the concept of reckless credit and its accompanying debt relief remedies into South African consumer credit law with the aim of preventing reckless credit granting and affording appropriate relief in instances where credit has been extended recklessly despite the prohibition against entering into a reckless credit agreement contained in section 81. It appears that the compulsory assessment required by section 81, if done comprehensively, might serve to curb reckless credit granting in many instances. Insofar as the debt relief afforded in respect of type one and two reckless credit as set out in section 80(1)(a) and 80(1)(b)(ii) is concerned, it is submitted that sections 83(2)(a) and (b) do not contain sufficient indication to as how the court should determine whether to order a complete or partial setting aside of the rights and obligations of

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<sup>92</sup> See in this regard the remark by Wallis J in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* unreported KZN case no 7089/09 par 26.

the consumer under a credit agreement or whether to order a suspension of the force and effect of the specific credit agreement in respect of which credit was extended recklessly. It is further submitted that although the aforesaid section makes no mention of the rights and obligations of the credit provider once a complete or partial setting aside is ordered, there may be instances where the credit provider will be entitled to restoration of its performance. With regard to suspension of a credit agreement in terms of section 84 it appears that suspension is a suitable remedy where the consumer to whom credit has been granted, is over-indebted and needs temporary debt relief, and that it is appropriate in instances in which the reckless credit granting immediately caused the consumer to become over-indebted as well as where it subsequently had the effect that the consumer, some time after entering into the agreement, became over-indebted. It also appears that section 84(1) by implication, would have the effect that the consumer's right to possession of the financed item is also suspended for the duration of the suspension order made by the court, although the practical effect of such order in the instance where the financed item is immovable property, may be problematic.

Finally, it may be remarked that the remedies in respect of reckless credit is not a large gift bag being handed over to the consumer which entitles him or her to "keep the money and the box" whilst the credit provider is sent to the corner without anything. The objectives of the prohibition against reckless credit granting have a very specific aim, namely to prevent and alleviate reckless credit granting and over-indebtedness and it is this objective towards which the remedies in respect of reckless credit should be applied. It should however also be borne in mind that these remedies can only be effective if they are effective on a procedural level as well and as such legislative intervention to clarify the various problematic procedural aspects relating to reckless credit as discussed above, is necessary.