

# **THE IMPACT OF THE CREDIT LEGISLATION ON CONSUMERS**

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## **Abstract**

The purpose of this paper is to examine two South Africa legislations dealing with over indebtedness of a consumer. It is clear that in terms of the South African law, section 129 (1) and 130 (3) of the National Credit Act provide that a creditor provider who wishes to enforce a debt under a credit agreement must first issue a section 129 (1) (a) notice to the consumer (the purpose of the notice is to notify the consumer of his/her arrears). On the other hand, the South African National Credit Act encourages the consumers to fulfil the financial obligations for which they are responsible. The second legislation to be examined which serve or appear to serve same purpose as the National Credit Act is the Insolvency Act. It therefore, postulated that the compulsory sequestration of a consumer in terms of the Insolvency Act would stand as an alternative remedy for a credit provider before she/he can have recourse mechanisms, such as debt review that are focused on satisfaction of the consumer's financial obligation, in terms of the provisions of the National Credit Act. The paper determines to what extent these measures comply with the constitutional consumer protection demands. The legislature had been pertinently cognizant of the Insolvency Act when it lately enacted the National Credit Act. This is much apparent from the express amendment of section 84 of the Insolvency Act to the extent set out in schedule 2 of the National Credit Act.

**Keywords:** National Credit Act, Consumer, Credit Agreement, Credit Provider, Credit Legislation and Insolvency Act

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## **1. INTRODUCTION**

The South African National Credit Act 34 of 2005 introduced fundamental rights to protect the consumers from over-indebtedness and some measures in an attempt to prevent overspending by consumers. And, more importantly measures to prevent credit providers from lending money to consumers who cannot afford either to pay the loan/principle amount or the interest on the loan amount. A debtor who becomes over-indebted may apply for debt review. The National Credit Act also provides for the re-organization of debt of a person who is over-indebted. It also affords such person/consumer the opportunity to survive the immediate consequences of his/her financial distress. Its purpose is to inter alia, prevent reckless credit approval and granting, it addresses the problem of over-indebted and in particular to protect the consumer.

The sequestration process in terms of the South African Insolvency Act 24 of 1936 may provide debt relief to individual debtors, if the sequestration order is properly followed, the debtor may be rehabilitated. Rehabilitation has the effect of discharging all pre-sequestration debt and further relieving the debtor of every disability resulting from sequestration. The debtor can apply for

sequestration by way of voluntary surrender. It is also possible for a creditor to sequester a debtor estate by way of compulsory sequestration. The process of compulsory sequestration is often used as a debt relief measure, in the form of a so-called friendly sequestration. In a friendly sequestration the debtor will arrange with a friend or a family member to whom he/she owes a debt that he/she will commit an act of insolvency in terms of section 8 (g). In this circumstance, the debtor will give a written notice to a creditor that he/she is unable to pay all or any of his debts.

The courts in the below mentioned cases had to decide whether or not a sequestration proceeding qualifies as a legal proceeding to enforce an agreement", in particular that a notice pursuant to section 129 (1) and 130 (3) of the National Credit Act was not issued. The question is whether or not the legislature enacting the National Credit Act intended that the Insolvency Act, particularly section 4 of the Act to be used to protect over-indebted consumer by allowing the consumer/applicant to apply for voluntary sequestration. The provisions of section 4 of the Act require an applicant/consumer to make full disclosure of his/her assets and liabilities before embarking into voluntary sequestration. The court must be fully informed of consumer/applicant's proprietary situation. The courts had to decide

whether consumers/applicants should embark into voluntary sequestration or use the machinery of National Credit Act which appears to be the most appropriate to protect the consumer against over-indebtedness.

When enacting the National Credit Act, the legislature did not specifically make any mention of the Insolvency Act. The question is whether or not the National Credit Act has an impact on the Insolvency Act. However the court in *Ex Parte Ford and Two Similar Cases*<sup>11</sup> held that section 85 of the National Credit Act is applicable to proceedings under voluntary surrender. The Court further held that an application for voluntary surrender should not be granted where the machinery of the National Credit Act is the appropriate mechanism to be used. In *Investec Bank v Mutemeri*<sup>12</sup> the Court held that section 130(1) does not apply to sequestration because an application for sequestration is not application for enforcement of sequestrating creditor's claim. It is therefore, not subject to the requirement of section 130(1) of the National Credit Act. The Court also held that an application by a credit provider for the sequestration of a consumer does not constitute litigation or a judicial process in terms of section 88(3). On Appeal, in the case of *Naidoo v Absa*<sup>13</sup> the Supreme Court of Appeal confirmed the decision of Mutemeri. The Appeal Court held that a credit provider need not be required to comply with section 129(1) (a) before instituting sequestration proceedings against a debtor. In terms of section 130(3) the court may only determine the matter if it is satisfied that:

- the provisions of section 129 or 131 as the case may be, have been complied with,
- further that the matter is not pending before the Tribunal, and
- that the credit provider has not approached the court under the circumstances specified.

A credit provider may not commence with legal proceedings against a debtor in terms of section 29 (1) (b) before the notice in terms of section 129 (1) (a) has been provided to the debtor and any further requirements have been met in terms of section 130. In *Investec Bank Limited and Investec Bank Private Bank v Mavhungu David Ramurunzi*, the Court held that:

"In the circumstances, the bank did not prove that it delivered the notice. As pointed out earlier, section 129 (1) (b) (i) and section 130 (1) (b) make this a peremptory prerequisite for commencing legal proceedings under a credit agreement, and a credit cognizant in the plaintiff's cause of action. Failure to comply, must of necessity, preclude a plaintiff from enforcing its claim, this is despite the fact that in this matter, it was not disputed that the appellants were in arrears and thus breached their contractual obligations. The bank therefore, failed to make out a case for summary judgement and the application ought to have been refused"

## 2. THE PURPOSE OF THE RESEARCH

The question is whether or not a sequestration proceeding qualifies as a "legal proceeding to enforce an agreement". And further that, do the proceedings under debt review pursuant to National Credit Act automatically bar sequestration proceedings in the form of an application for compulsory sequestration of a consumer's estate. The research paper investigates, whether the provisions of National Credit Act and the provision of the Insolvency Act, are both seen to be concurrently aimed at the protection of consumers who are over-indebted. Some of the main obstacles in applying the National Credit Act in practice are the gaps left in the statute by the legislature. The paper illustrates some of the gaps. The paper is based on critical analysis of the decided cases. There are contributions by various scholars who equally reflect wide coverage of the interpretation of these two legislations, however the paper adds to the existing literature.

## 3. RESEARCH METHODOLOGY

The research adopted doctrinal legal research approach as a data collection method. The method is also known as the "black letter law". It is best defined as research method which intends to provide a systematic explanation of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarified issues and gaps in the existing law.<sup>14</sup> Pearce, Campbell and Harding also define doctrinal legal research approach as a research which provides a systematic exposition of the rules governing a particular legal category, analysis of the relationship between rules and explains areas of difficult and perhaps predicts future developments.<sup>15</sup> The research approach adopted is aimed at giving a detailed exposition of the impact of the credit legislation on Consumers. The research adopted the doctrinal legal approach to analyze and give meaning to the data collected. This research adopts the form of desk based or library based research approach, since it is based on internet, journal articles, case law, statutes, government gazette and the library text books.

## 4. DISCUSSION OF CASE LAW REGARDING NATIONAL CREDIT ACT AND INSOLENCY ACT

### 4.1. Facts and decision in Naidoo

The case was an appeal to the Supreme Court of Appeal by the appellant who was sequestrated at the respondent's instance at the Durban High Court on

11 2009 3 SA 376 (WCC)

12 2010 1 SA 265 (GSJ)

13 (391/2009)[2010] ZASCA 72 (27 May 2010)

14 JM Smits 'What is legal doctrine? On the aims and methods of Legal-dogmatic Research (2015)3.

15 D Pearce, E Campbell and P Harding 'Australian Law School. A discipline Assessment for the Common Wealth Tertiary Education Commission (1999)33.

the 25<sup>th</sup> May 2009. The appellant had failed to meet his payments obligation to the respondent under a car note agreements relating to six vehicles and two home loans agreements.

Seemingly, the appellant conceded that compulsory sequestration proceedings are not "legal proceedings to enforce agreement" as contemplated in section 129 (1) (b) of the National Credit Act. The appellant, however, argued that the respondent erred in instituting compulsory sequestration proceedings against him before issuing him with a notice as contemplated in section 129 (1) (a) of the National Credit Act. The appellant contended that the procedure before debt enforcement provided for in section 129 (1) (a), when read with section 130 (3), should be interpreted to cover circumstances relating not only to the enforcement of a credit agreement but also to sequestration proceedings. This is because the unpaid claims that are the subject matter of the sequestration application arose from credit act agreement to which the National Credit Act applies. The Supreme Court of Appeals concurred with the concession of the appellant that sequestration proceedings are not in and of themselves "legal proceedings to enforce the agreement" within the meaning of section 129 (1).

#### 4.2. Facts and decision of Investec Bank Ltd and Another v Mutemeri and Another

The respondent-debtors, namely the consumers, opposed an application for compulsory sequestration. The basis of their opposition was that the application for debt review in terms of the National Credit Act barred the applicant from proceeding with the application for a compulsory sequestration. They argued that such an application for debt review amounts to debt enforcement.

The discussion therefore, considers the impact of the debt relief remedies and certain special provisions that apply to the debt enforcement in the National Credit Act on sequestration procedures provided in the Insolvency Act in view of the above judgments. It is trite knowledge that sequestration applications may either be brought by the debtor on an ex parte basis through voluntary surrender, or by way of compulsory sequestration in an application with prior notice by the creditor. In both instances, the applicable civil procedure involved is a high court application.

In the case of voluntary sequestration the court has the discretion to accept voluntary surrender of the debtor's estate and grant a sequestration order if it is satisfied that:

- The debtor is insolvent
- There is a sufficient free residue to defray the costs of sequestration
- It will be to the advantage of the creditors, and
- The formalities of section 4 of the Insolvency Act have been complied with.
- The onus of proof rests upon the debtor to convince the court that he/she has complied with the above requirements. Similarly, in the case of compulsory sequestration, the court also has a discretion to grant an application for

the sequestration of a debtor's estate if it is satisfied that:

- The applicant is a creditor or agent who has a liquidated claim against the debtor
- The debtor committed an act of insolvency or is insolvent
- It is believed that it will be in the advantage of the creditors of the debtor if his/her estate is sequestrated, and
- The formalities in section 9 of the Insolvency Act have been complied with.

The court has inherent jurisdiction to prevent abuse of its process. Thus, even where the requirements for granting a sequestration are met, the court may refuse to grant the order if it amounts to abuse in one way or another. The question remains as to whether or not an application for compulsory sequestration constitutes "debt enforcement" pursuant to the National Credit Act. The answer to this question is of extreme significance as it can have severe implications for the credit provider. If the answer is in the affirmative it inter alia would have the effect that:

- Where the debt enforcement by compulsory sequestration is sought by a credit provider, such credit provider will have to comply with the requirements of section 129 (1) (a) as a mandatory step prior to debt enforcement as well as any other provision of the National Credit Act regulating the debt enforcement, or
- Where the debt enforcement by compulsory sequestration is sought against a consumer who is, like one in casu under debt review will as a result of the provisions of section 88 (3) of the National Credit Act constitute a bar against compulsory sequestration.

Credit plays a vital role in the economy of most countries in the world. When a consumer applies for credit and the credit is granted, a contract usually has to be concluded. The credit provider (grantor) occupies a position of contractual power in which he/she dictates the contractual terms. The consumer on the other hand, because of his/her need for the credit, does not have as much bargaining power as the credit grantor.<sup>16</sup>

A consumer is over-indebted when he/she is unable to pay his/her financial obligations timeously, as agreed in a credit agreement. This could be either because his/her financial commitments have changed or because the individual has borrowed and spent more money than she/he earns. In such instances, the debt becomes a major burden for the borrower, which contribute to the consumer's social and financial exclusion and poverty.

These contracts resulted in unequal bargaining position between the consumer and the credit grantor. Therefore, a contract may be easily abused in order to exploit the consumer (particularly the uneducated consumer). It occurs where the consumer has assets which could be attached in order to pay the debt. An examples of a situation in which the contract may be abused in order to exploit the consumer, will be where there is lack of proper

<sup>16</sup> Collier-Reed and Lehmann Basic Principles of Business Law (2006) 156.

disclosure. In particular, in the contract where there is an abuse of the consumer's obligation, exorbitantly high finance charges and misuse of remedies by the credit grantor.<sup>17</sup> The National Credit Act simplifies and standardizes the manner in which information is disclosed in credit agreements. The Act specifies the manner in which credit providers have to provide information on credit agreements. The Act also requires that credit providers provide this information in simple language that the consumer should be able to understand. The reason for this is that consumers should be able to read and understand the information so that they can compare the information on credit agreements from different credit providers in order to make informed choices.

The National Credit Act assists over-indebted consumers to restructure their debts. The Act provides for consumers, who are unable to service their monthly repayments on their credit agreement, to be assisted by Debt Counsellors to re-arrange their monthly repayments with their credit providers. The Act also aims to prevent over-indebtedness of consumers and encourage responsible lending by credit providers. The National Credit Act states that before a credit provider can enforce a credit agreement, it must first issue a consumer with a section 129 notice that warns the consumer that legal action may be taken against the consumer unless she/he takes action to reach an agreement with the creditor about repayment of the outstanding debt. Such notice would be for the consumer to approach a debt counsellor. The National Credit Act argued that the notice to a consumer is only a notification and not a step to enforce the credit agreement, while on the other hand the banks argued that a creditor starts to enforce a credit agreement once it issues a section 129 notice, and therefore the relevant credit agreement is excluded from the debt review process. The Supreme Court of Appeal agreed with the views held by the banks' with regard to the interpretation of the National Credit Act. It held that as soon as one receives a section 129 notice in respect of a credit agreement, that agreement is excluded from the debt review process. However, one can still apply for debt review in respect of other credit agreements.

Prior enactment of the existing National Credit Act, the consumer credit was governed by the Credit Agreement Act<sup>18</sup> and the Usury Act.<sup>19</sup> The exploitation of consumer's by credit grantors or micro lenders, often infamously referred to as "loan sharks". It raises serious concerns about over-indebtedness and over-spending by consumers. This led the Department of Trade and Industry to establish a task team to review the legislation that impacts on consumer credit. This task team was

established in 2002.<sup>20</sup> In August 2004, the Department of Trade and Industry published a policy framework for consumer credit.<sup>21</sup> In June 2005, it was tabled (as the National Credit Bill) in Parliament.<sup>22</sup> The National Credit Bill was assented to by the President on 10 March 2006. The President signed a proclamation in order to put the Act into operation at different stages. The National Credit Act came into operation in a piece-meal fashion on 1 June 2006, 1 September 2006 and 1 June 2007. The part dealing with credit-marketing practices, over-indebtedness, reckless credit and rearrangement of debts came into operation on 1 June 2007.

The National Credit Act introduced measures in an attempt to prevent over-spending by consumer and, more importantly, to prevent money lenders from lending money to consumers who cannot afford either to pay the loan amount, or to pay the interest on the loan amount. In particular it introduced the concepts of "over-indebtedness" and "reckless credit". In terms of the National Credit Act a consumer is over-indebted when he/she is unable to satisfy all his/her obligations under all his/her credit agreements in a timely manner, having regard to his/her financial means, obligations and history of debt repayment.<sup>23</sup> A credit agreement is reckless if the credit provider failed to conduct an assessment as required, irrespective of what the outcome of such an agreement might have been.<sup>24</sup> The second instance of reckless credit is where the credit provider, conducted an assessment but concludes a credit agreement with the consumer despite the fact that the preponderance of information available to him/her, indicated that;

- The consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement<sup>25</sup>;
- Entering into that credit agreement would make the consumer over-indebted.<sup>26</sup>

The purpose of the National Credit Act, as set out in section 3 of the Act, is to inter alia prevent reckless credit granting and address the problem of over-indebtedness and, in particular to protect the consumer. In *First Rand Bank Ltd v Olivier*<sup>27</sup> the Court stated that "the purpose of the National Credit Act is inter alia, to provide for the debt re-organization of a person who is over-indebted, thereby affording that person the opportunity to survive the immediate consequences of his/her financial distress and to achieve a manageable financial position". In addition to this a debtor who

17 Nagel et al Business Law (2007) 150.

18 Act No 75 of 1980.

19 Act No 73 of 1968.

20 See Roestoff and Renke "Debt relief for consumers. The interaction between insolvency and consumer protection legislation" (part 1) 2005 *Obiter* 561 562-564.

21 The Department of Trade and Industry South Africa consumer credit law reform. Policy framework for consumer credit (2004)

22 *Ibid.*

23 National Credit Act 34 of 2005, sec 79.

24 National Credit Act 34 of 2005, sec 80(1) (a).

25 National Credit Act 34 of 2005, sec 80(1) (b)(i).

26 National Credit Act 34 of 2005, sec 80(1) (b)(ii).

27 2009 3 SA 353 (SECLD) 357

becomes over-indebted may apply for debt review<sup>28</sup> in order for his/her debts to eventually be rescheduled and to enable him/her to pay the creditors over an extended period of time.

The sequestration process in terms of the Insolvency Act<sup>29</sup> may provide debt relief to individual debtors. The purpose of the sequestration process in terms of the Act is to provide for a collective debt collecting process that will ensure an orderly and fair distribution of the debtor's assets in circumstances where these assets are insufficient to satisfy all the creditors' claims.<sup>30</sup> The debtor can apply for sequestration by way of voluntary surrender<sup>31</sup> while it is possible for a creditor to sequester a debtor's estate by way of compulsory sequestration.<sup>32</sup> The process of compulsory sequestration is often used as a debt relief measure in the form of a so-called friendly sequestration. In a friendly sequestration the debtor will arrange with a friend or a family member to whom he/she owes a debt that he/she will commit an act of insolvency in terms of section 8 (g), that is, where the debtor gives written notice to a creditor that he/she is unable to pay all or any of his/her debts.<sup>33</sup> The reason why some debtors rely on the sequestration process to force a discharge of their debts on their creditors<sup>34</sup> is that sequestration allows the debtor to eventually be rehabilitated.<sup>35</sup> Rehabilitation has the effect of discharging all pre-sequestration debts and further relieving the debtor of every disability resulting from sequestration.<sup>36</sup>

Some debtors prefer to use the process of voluntary surrender rather than to have their credit agreements dealt with under section 86 of the National Credit Act<sup>37</sup> in spite of the fact that their credit agreements fall within the National Credit Act. This is evident from the decision of *Ex Parte Ford and Two Similar Cases*.<sup>38</sup> The Court however held that an application for voluntary surrender should not be granted where the machinery of the National Credit Act was the appropriate mechanism to be used. In *Investec Bank v Mutemeri*<sup>39</sup> the credit provider applied for compulsory sequestration. The respondent argued that the credit provider is precluded by section 130 (1) of the National Credit Act, from seeking the application for compulsory sequestration.<sup>40</sup> The respondent also invoked section

88 (3) of the National Credit Act.<sup>41</sup> The Court held that an application for sequestration is not application for enforcement of the sequestrating creditor's claim. It is therefore not subject to the requirement of section 130 (1) of the National Credit Act. The Court also held that an application by a credit provider for the sequestration of a consumer does not constitute litigation or a judicial process in terms of section 88 (3). On Appeal in the case of *Naidoo v Absa*<sup>42</sup> the Supreme Court of Appeal confirmed the decision of Mutemeri. The appeal Court held that a credit provider need not comply with section 129 (1) (a) before instituting sequestration proceedings against a debtor.<sup>43</sup> The Court held further that such proceedings are not proceedings to enforce a credit agreement and the credit provider need not comply with requirements of section 130(3)(a).<sup>44</sup>

In *Naidoo v ABSA Bank* the Court had to deal with the issue of whether or not a sequestration proceedings qualifies as a "legal proceeding to enforce an agreement" under section 29 read with section 130 of the National Credit Act. The relevant parts of these sections provide as follows:

- Section 29 (1) if the consumer is in default under a credit agreement, the credit provider,
- May draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with relevant jurisdiction, with intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payment under agreement up to date;
  - Subject to section 130 (2), may not commence any legal proceedings to enforce agreement before;

approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default under that credit agreement for at least 20 business days and (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer (b) in case of a notice contemplated in s 129(1), the consumer has not responded to that notice or responded to the notice by rejecting the credit receiver's proposal (c) in case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider.

41 National Credit Act 34 of 2005, sec 88(3) applies only to credit providers who want to enforce any rights or security under a credit agreement by means of litigation or other judicial process. It provides for various instances when credit provider may proceed to enforce a credit agreement.

42 (391/2009)[2010] ZASCA 72 (27 May 2010).

43 National Credit Act 34 of 2005, sec 129(1)(a) provides that, if a consumer is in default under a credit agreement, the credit provider may draw the default to the attention of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction with the intent that the parties resolve any dispute under the agreement or develop and agree on plan to bring the payments under the agreement up to date.

44 National Credit Act 34 of 2005, sec 130(3)(a) states that in case of credit agreement the court may determine the matter only if is satisfied that in case of proceedings to which section 127, section 129 or section 131 apply, the procedure required by those section have been complied with.

28 National Credit Act 34 of 2005, sec 86.

29 Act No 24 of 1936

30 Bertelsmann et al *Mars The Law of insolvency in South Africa* (2008) 2.

31 Insolvency Act No 24 of 1936, sec 3&7.

32 Insolvency Act No 24 of 1936, sec 9&12.

33 See in general Smith "Friendly and not so friendly sequestrations" 1981 MB 58. See also Evans and Haskins "Friendly sequestrations and the advantage of creditors" SA Merc LJ 1990 246.

34 See Boraine and Roestoff "Fresh start procedures for consumer debtors in South African bankruptcy law" 2005 Int. Insolv. Rev 1 6.

35 Insolvency Act No 24 of 1936, sec 129.

36 Ibid.

37 National Credit Act No 34 of 2005, sec 86.

38 2009 3 SA 376 (WCC).

39 2010 1 SA 265 (GSJ).

40 National Credit Act 34 of 2005, sec 130 (1) deals with the debt enforcement procedure in court. It provide that a credit provider may

c. First providing notice to the consumer, as contemplated in paragraph (a).

Some of the main obstacles in applying the National Consumer Act in practice are the gaps left in the statute by legislature. The purpose of the National Consumer Act as indicated above may conflict with the provisions of Insolvency Act, in particular the compulsory sequestration of a consumer. It was mentioned earlier that there is no substantive mentioned of the Insolvency Act or its provision in the National Consumer Act. Schedule 1 of National Consumer Act or its provisions sets the rules regarding conflicting legislation but did not mention the Insolvency Act. It must be further noted that in *Investec Bank v Mutemeri* the High Court held that an application for sequestration is not a process whereby the creditor enforces a debt and hence does not amount to a legal proceeding to enforce an agreement under the National Consumer Act. In *Naidoo* case the Appellate Division confirmed *Mutemeri* judgment and held that a credit provider need not comply with the procedure provided for in section I of the National Credit Act before instituting sequestration proceedings against a debtor, such proceedings are not proceedings to enforce a credit agreement.

## 5. CONCLUSION

It is clear in terms of section 129 (1) and 130 (3) of the National Credit Act that a creditor who wishes to enforce a debt under a credit agreement must first issue a section 129 (1) (a) notice to the consumer. In *Naidoo v ABSA Bank* the Court had to decide whether or not a sequestration proceeding qualifies as a "legal proceeding to enforce an agreement", in particular that a notice pursuant to section 129 (1) and 130 (3) of the National Credit Act was not issued. In view of the decision in *Mutemeri* case, similarly it stands to reason that the compulsory sequestration of a consumer in terms of Insolvency Act, the debtor ought to be issued with section 129 (1).

The purpose of the National Credit Act is to combat over-indebtedness and to promote and advance the social and economic welfare of South Africans, to promote fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market, industry and to protect consumers. The Act does not mention the Insolvency Act or its provisions in the National Credit Act. The question therefore arises, as to whether sequestration proceedings instituted by a credit provider qualifies as a "legal proceeding to enforce an agreement" under section 129 of the National Credit Act. Section 85 of the National Credit Act is in any event not applicable in proceedings for voluntary surrender under Insolvency Act. The operation of section 85 of the National Credit Act is dependent on the satisfaction of the following requirements:

- The context of the court proceedings
- Allegations in those proceedings of over-indebtedness by a consumer under a credit agreement, and

- Consideration by a court in those proceedings of a credit agreement.

In *Ex Parte Ford* and two similar cases, the Court conceded that the first two requirements had been satisfied, however, it was submitted that there were no credit agreement before the Court, and that the provisions of section 4 of the Insolvency Act require an applicant to make full disclosure of his/her assets and liabilities. The court must be fully informed of the applicant's proprietary situation. The applicant for voluntary surrender must also satisfy the court that acceptance of the surrender estate in question will be to the advantage of the creditors. The fact that the National Credit Act leaves the provisions of section 4 to section 6 of the Insolvency Act generally unaffected acknowledges that insolvency can arise in a great variety of circumstances, many of them are quite unrelated to over-indebtedness, may arise out of credit agreement as defined in the National Credit Act. The Court in *casu* concluded that the machinery of the National Credit Act is more appropriate to be used.

It is evident from the courts arguments that the National Credit Act accommodates all the people, both rich and poor. It is notable that the National Credit Act contains provisions that are aimed at the protection of consumers who are over-indebted and further contains measures that are aimed at preventing reckless credit granting. This is an improvement from the repealed Usury Act and Credit Agreements Act. Consumers are protected against unscrupulous credit grantors who abuses their power to the detriment of consumers. Credit providers who allowed the consumers to enter into the credit agreement regardless of the credit worthiness of the consumer are now obliged to comply with mandatory financial assessment to determine whether the consumer affords the credit. Consumers on the other hand feel the practical effect of the National Credit Act should they not afford the credit after the assessment. Failure to comply with the financial assessment prior to entering into credit agreement can result in the credit agreement constituting reckless agreement. As indicated above, the credit provider has the recourse in the event of non-payment of credit agreement against the consumer. It is also evident that a credit provider who has not delivered the necessary section 129(1) notice is precluded from proceeding with any legal action. Therefore compliance with the necessary requirements of section 129 (1) notice is vital.

An over-indebted consumer may have the financial potential to overcome his/her debt if assisted by restructuring a ruling of reckless credit, or simple negotiations between himself/herself and the credit provider. By fulfilling her/his financial obligations the consumer also avoids becoming insolvent and a less useful member of the economy. Furthermore, a debtor should not be forced to lose his/her assets and be subjected to the social stigma of being insolvent without at the minimum being given relief measure, through National Credit Act.

## 6. RECOMMENDATIONS

Section 9 (4) (A) of the Insolvency Act 24 of 1936, under application for compulsory sequestration ought to be amended to include a provision to the effect that the debtor must receive a notice in writing regarding the envisaged sequestration.

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