The National Credit Act's Remedies for Reckless Credit in the Mortgage Context

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Abstract

The *National Credit Act* 34 of 2005 prohibits the granting of reckless credit and also provides for certain remedies that courts can grant to consumers who have fallen victim to reckless lending practices. Depending on the circumstances, these remedies are the partial or full setting aside of the consumer's rights and obligations under the agreement; the temporary suspension of the effect of the agreement; and the restructuring of the consumer's obligations. This article investigates these remedies with a focus on the effect that they would have on a credit provider under a mortgage agreement. The argument is made that the contractual and security rights of credit providers amount to "property" for the purposes of section 25(1) of the *Constitution of the Republic of |South Africa,* 1996 (the property clause) and that, to some degree or another, each of these remedies involves a "deprivation" (limitation or modification) of the creditor provider's rights (property). The consequence is that, when one of these remedies is granted to a consumer, the court must tailor the remedy in such a way that the effect on the credit provider is not "arbitrary" as meant in the property clause. Therefore, the proposal is that there must be a sufficient relationship between the purpose of the remedy (to discourage reckless lending and to rectify the damage caused) and the effects thereof on the credit provider. In general, the remedy should not go further than is necessary to rectify the prejudice suffered by the consumer due to the credit provider's conduct. The formulation of the remedy should accommodate considerations such as whether and to what extent either or both parties have already performed under the agreement, and it should accordingly ensure that the consumer will not be unjustifiably enriched. The remedy should also account for the effect that it would have if the consumer is permitted to keep the property that was subject to the reckless credit agreement. The article furthermore raises doubts regarding the recent high court judgment in *ABSA v De Beer* 2016 3 SA 432 (GP), where all the consumer's rights and obligations under a mortgage agreement were set aside due to the credit provider's reckless conduct. Remedies like this have serious consequences and therefore it is imperative that courts carefully investigate all the effects that the order would have, so that a just and reasonable outcome is achieved. This article accordingly aims to provide some guidance with reference to the principles of constitutional property law.

Keywords

National Credit Act; reckless credit; remedies; mortgage; constitutional property law.

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1 Introduction

One of the aims of the *National Credit Act*[1] is to promote responsibility in the credit market by encouraging responsible borrowing and discouraging reckless lending.[2] When seeking to resolve consumer over-indebtedness through debt enforcement or debt restructuring, for instance, the Act also places a premium on the satisfaction of all responsible – as opposed to irresponsible – financial obligations.[3] Therefore, one of the ways in which Parliament intended to address the problems surrounding consumer over-indebtedness in South Africa was by providing ways to prevent people from incurring unaffordable debt but also to relieve or "rescue"[4] consumers who have fallen victim to reckless lending.

The focus of this article is on the latter, namely the remedies that the NCA provides for consumers who have been exposed to what the Act calls "reckless credit".[5] My focus is also narrowed to mortgage agreements in the light of the fact that the high court in *ABSA v De Beer*[6] recently declared a mortgage agreement reckless and remedied the situation by setting aside all of the consumer's obligations under the agreement.[7] Setting aside all the obligations under a mortgagee agreement, which is

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1 *National Credit Act* 34 of 2005 (hereafter NCA).

2 Section 3(c) of the NCA.

3 Section 3(g) and (i) of the NCA.

4 Vessio 2006 *THRHR* 657.

5 Sections 80-84 of the NCA. For situations in which these provisions do not apply, see ss 78(1)-(2). In general, see Van Heerden "Over-indebtedness and Reckless Credit" para 11.5; Otto and Otto *National Credit Act Explained* 4th ed 89-92; Kelly-Louw "Consumer Credit" paras 135-137; Kelly-Louw *Consumer Credit Regulation* 293-313. Also see Coetzee *Comparative Reappraisal* 270-282; Kelly-Louw 2014 *SA Merc LJ* 26-45; Brits *Mortgage Foreclosure* para 4.3.3; Stoop and Kelly-Louw 2011 *PELJ* 85-88; Renke 2011 *THRHR* 223-227; Van Heerden and Boraine 2011 *De Jure* 392-415; Boraine and Van Heerden 2010 *THRHR* 650-656; Stoop 2009 *SA Merc LJ* 367-368; Vessio 2009 *TSAR* 274-289; Kelly-Louw 2008 *SA Merc LJ* 218-222; Renke, Roestoff and Haupt 2007 *Obiter* 245-247; Vessio 2006 *THRHR* 649-657.

6 *ABSA Bank Ltd v De Beer* 2016 3 SA 432 (GP) (hereafter *De Beer*). See Van Heerden "Over-indebtedness and Reckless Credit" para 11.5.7.1; Koekemoer 2016 *JQR* para 2.1.

7 Similar situations have been reported in the media. See eg SAPA 2010 http://www.fin24.com/PersonalFinance/Money-Clinic/Absa-guilty-of-reckless-lending-20100430; and also Kelly-Louw *Consumer Credit Regulation* 312-313; Kelly-Louw 2010 *JQR* para 2.1; Boraine and Van Heerden 2010 *THRHR* 651.

one of the available orders that a court may grant, seems rather drastic,[8] and thus it is vital to closely analyse the law in this respect. The logical effects of such an order include that the property is set free of the mortgage (as a real security right)[9] while the consumer (the owner/mortgagor) is no longer required to pay anything towards the loan. One may ask whether this kind of windfall for the victim of reckless lending is truly defendable. In reaction to the order that was granted in *De Beer*, authors like Sonnekus[10] and Otto[11] have expressed their concerns as to the extent of the court's powers in this regard. Other authors have also pointed to the serious uncertainties that surround these remedies in general.[12]

During the years that the NCA has been in operation, it has become quite common for consumers to make the allegation of reckless lending as one of their defences in proceedings instituted by the credit provider to enforce the credit agreement. Except for *De Beer*,[13] such defences have rarely been successful in both the mortgage[14] and non-mortgage[15] contexts,

8 See eg Vessio 2006 *THRHR* 657; Vessio 2009 *TSAR* 288.

9 This is a consequence of the principle that the mortgage is accessory to the principal obligation – meaning that the security right cannot exist if there is no principal obligation. See eg *Kilburn v Estate Kilburn* 1931 AD 501 505-506; *Thienhaus v Metje & Ziegler* 1965 3 SA 25 (A) 32; and further Brits *Real Security* 20-25.

10 Sonnekus 2016 *TSAR* 351-361.

11 Otto 2017 *TSAR* 168-170.

12 See especially Van Heerden "Over-indebtedness and Reckless Credit" para 11.5.7; Van Heerden and Boraine 2011 *De Jure* 392-415; Boraine and Van Heerden 2010 *THRHR* 650-656.

13 And some matters reported in the media, as indicated in fn 7 above.

14 See eg *Standard Bank of South Africa Ltd v Kelly* 2011 ZAWCHC 1 (25 January 2011) (hereafter *Kelly*); *Mercantile Bank Ltd v Hajat* 2013 ZAGPJHC 134 (9 May 2013); *ABSA Bank Ltd v Malherbe* 2013 ZAFSHC 78 (16 May 2013); *Land & Agricultural Development Bank of South Africa Ltd v Bosch* 2014 ZAGPJHC 130 (30 May 2014); *ABSA Bank Limited v Pereira* 2015 JDR 1208 (GJ); *Standard Bank of South Africa Limited v Dlamini* 2016 ZAGPPHC 26 (22 January 2016); *ABSA Bank Limited v Kganakga* 2016 ZAGPJHC 59 (18 March 2016); *Nedbank Limited v Schoeman* 2016 ZAGPJHC 142 (2 June 2016); *Maria v Nedbank Limited; In re: Nedbank Limited v Foley* 2016 ZAGPPHC 669 (4 August 2016); *ABSA Bank Limited v Potgieter* 2017 ZAECPEHC 8 (31 January 2017); *Wiese v ABSA Bank Limited* 2017 ZAWCHC 12 (24 February 2017); *FirstRand Bank Limited v Van Coller* 2017 ZAGPPHC 85 (8 March 2017).

15 See eg *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011 1 SA 310 (GSJ) (hereafter *Mbatha*); *SA Taxi Securitisation (Pty) Ltd v Nako* 2010 ZAECBHC 4 (8 June 2010) (hereafter *Nako*); *SA Taxi Securitisation (Pty) Ltd v Xolile* 2012 JOL 29510 (ECM); *SA Taxi Securitisation (Pty) Ltd v Campher* 2012 ZAECGHC 9 (24 February 2012) (hereafter *Campher*); *SA Taxi Development Finance (Pty) Ltd v Mokolobe* 2013 ZAGPJHC 198 (11 June 2013); *Mofuta v SA Taxi Securitisation (Pty) Ltd, In re: SA Taxi Securitisation (Pty) Ltd v Mofuta* 2013 ZAFSHC 95 (20 June 2013); *SA Taxi Securitisation (Pty) Ltd v Melaphi* 2014

although there have been some instances in which an application for summary judgment was denied due to the prospect that a reckless credit defence might succeed on trial.[16] The lack of success in relying on reckless lending as a defence is mostly because consumers struggle to prove that the credit provider did not do a pre-agreement affordability assessment. Often the reckless credit defence is also raised as a last desperate attempt to thwart the credit provider's enforcement action, but the courts have little sympathy for vague and bold allegations of reckless lending without sufficient substantiation.[17]

Therefore, the aim of this article is to investigate the effect of the NCA's reckless credit remedies, with an emphasis on the mortgage context. It is imperative to establish clearer guidelines on how to approach these remedies, so that they can be applied in a consistent and principled manner. It is also necessary to comply with the overall purpose of the Act, which is to strike an equitable balance between the interests of consumers and credit providers.[18] In this regard, the main proposal of this article is that section 25(1) of the *Constitution of the Republic of South Africa*, which prohibits the arbitrary deprivation of property, can be a useful tool to help evaluate the nature, effects and limits of the reckless credit remedies. I will show that the creditor's contractual right to receive payment in accordance with the terms of the contract, qualifies as "property" for constitutional purposes, and that the various remedies in the reckless credit context have the effect of "depriving" the credit provider of such property. Ultimately I will therefore argue that the arbitrariness test laid down in section 25(1) provides valuable insights into the application of these remedies. A general hypothesis is that any remedy given in the reckless credit context should be tailored in a way that it does not go further than what is necessary to rectify the prejudice caused to the consumer by the credit provider's reckless lending practice. Any interference with the credit provider's rights beyond this point is constitutionally suspect and should hence be avoided.

ZAWCHC 47 (2 April 2014); *Africa Bank Limited v Greyling* 2014 ZAGPJHC 315 (7 November 2014); *Toyota Financial Services South Africa v Mohlabi* 2015 ZAFSHC 178 (10 September 2015) (hereafter *Mohlabi*).

16 See eg *ABSA Bank v Coe Family Trust* 2012 3 SA 184 (WCC); *Benade v ABSA Bank Limited* 2014 ZAWCHC 84 (16 May 2014); *ABSA Bank Ltd v Schneider* 2015 ZAGPPHC 855 (3 December 2015).

17 See eg *Mbatha* para 26; *Mohlabi* paras 13, 20.

18 Section 3 of the NCA.

2 Statutory framework for reckless credit

2.1 General

The NCA prohibits a credit provider from entering into a reckless credit agreement with a prospective consumer.[19] Therefore, before concluding a credit agreement, the credit provider must take reasonable steps to assess the proposed consumer's "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"; the consumer's "debt re-payment history as a consumer under credit agreements"; and his "existing financial means, prospects and obligations".[20] The credit provider must furthermore assess "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".[21] The Act allows a credit provider to determine its own evaluative mechanisms or models and procedures when fulfilling its assessment obligations, as long as these are fair, objective and not in conflict with any affordability assessment regulations.[22]

However, the burden is not on the credit provider alone, since the Act expects the consumer, when applying for credit and while such an application is being considered, to "fully and truthfully answer any requests for information made by the credit provider as part of the assessment".[23] Moreover, in the event that an allegation of reckless credit is made, it is as a complete defence for the credit provider if it can show that the consumer failed to fully and truthfully answer the relevant requests for information, and if such failure materially affected the credit provider's ability to make a proper assessment.[24]

Section 130(4)(a) of the Act determines that if, during any proceedings involving debt, a court determines that the credit agreement was

19 Section 81(3) of the NCA.
20 Section 81(2)(a)(i)-(iii) of the NCA.
21 Section 81(2)(b) of the NCA.
22 Section 82(1) of the NCA. On the affordability assessment regulations, see Renke 2015 *LitNet* 432-454. Also see Van Heerden "Over-indebtedness and Reckless Credit" para 11.5.6; Van Heerden and Renke 2015 *Int Insolv Rev* 67-95; Kelly-Louw "Consumer Credit" para 135.
23 S 81(1).
24 S 81(4)(a)-(b). See Kelly-Louw 2014 *SA Merc LJ* 47-54; Kelly-Louw *Consumer Credit Regulation* 300-304; Kelly-Louw "Consumer Credit" para 136; Van Heerden "Over-indebtedness and Reckless Credit" para 11.5.5.

reckless,[25] the court "must" make one of the orders in section 83 pertaining to the reckless credit remedies.[26] This appears to suggest that the court has no discretion to deviate from the powers granted in section 83 and that it can make no order other than those provided for in that section.[27] Yet section 83 itself appears to incorporate a discretion by stating that the court or Tribunal[28] "may" declare the agreement reckless.[29] In my view this implies that, even if all the conditions are met, the court is not obliged to declare the agreement reckless.[30] As seen below, the possible orders are also discretionary, so even if it declares the agreement reckless, it seems that the court may – depending on the circumstances – decide not to grant a remedy.

Regarding the legal status of a reckless credit agreement, the Act does not classify it as unlawful and thus *ab initio* null and void.[31] This is confirmed by the fact that reckless credit agreements are not included in the Act's general list in section 89 of credit agreements that are unlawful.[32] Consequently, it seems clear that the intention is that such agreements remain valid, but that the courts are granted special powers to decide on the effects of such agreements.[33] It should also be noted that a reckless credit agreement is not voidable and accordingly none of the remedies involve the setting aside of the agreement as such.[34]

2.2 The reckless credit remedies

25 When a court must determine whether credit was granted recklessly, it must consider the situation at the time when the agreement was made and not the situation when the determination is being made. See section 80(2) of the NCA.

26 Sections 130(4)(a) read with ss 80 and 83 of the NCA.

27 Van Heerden and Boraine 2011 *De Jure* 401; Kelly-Louw "Consumer Credit" para 137 fn 3.

28 Originally only a court had these powers, but s 25 of the *National Credit Amendment Act* 19 of 2014 has extended these powers to the Tribunal.

29 Section 83(1) of the NCA. The court may exercise this power of its own accord (*mero motu*): see Van Heerden "Over-indebtedness and Reckless Credit" para 11.5.7; Otto and Otto *National Credit Act Explained* 4th ed 90; Boraine and Van Heerden 2010 *THRHR* 651; Van Heerden and Boraine 2011 *De Jure* 400-401.

30 See *Kelly* para 8. However, also see *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2016 6 SA 596 (CC) para 49, where – in arguably an *obiter dictum* – the Constitutional Court did not regard there to be such a discretion.

31 Boraine and Van Heerden 2010 *THRHR* 650-651, 655. Also see Van Heerden "Over-indebtedness and Reckless Credit" para 11.5.7.1.

32 Boraine and Van Heerden 2010 *THRHR* 650, 651; Van Heerden and Boraine 2011 *De Jure* 401.

33 Boraine and Van Heerden 2010 *THRHR* 651.

34 Boraine and Van Heerden 2010 *THRHR* 652.

The NCA essentially provides for three categories of reckless credit, each having its own consequences, namely the specific orders or remedies that can be granted – although there is some overlap.[35]

2.2.1 Categories one and two

In the first category of reckless credit, the agreement will be reckless if the credit provider failed to conduct the assessment referred to above, irrespective of what the outcome of such an assessment might have been at the time.[36] The second category is if the credit provider did make the required assessment but "entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement".[37]

Under both categories the court or Tribunal has a discretion to make either of the following two orders:[38]

(1) an order "setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances" (henceforth referred to as the "setting-aside remedy"; or

(2) an order "suspending the force and effect of that credit agreement" until a date determined by the court when the order of suspension is made (henceforth referred to as the "suspension remedy").

A preliminary question is whether the court can grant both remedies by, for instance, setting aside a portion of the debt as well as suspending the repayment of the remaining portion? The NCA seems to insist on a choice between the two and does not appear to allow a combination. This is unfortunate, since it is conceivable that a combination of the remedies could be a feasible solution under certain circumstances.

The Act does not say anything more on the details of the setting-aside remedy, but it does provide more information on the suspension remedy. It stipulates that, during the period of suspension, "the consumer is not

35 See generally Boraine and Van Heerden 2010 *THRHR* 651-652; Van Heerden and Boraine 2011 *De Jure* 393-394. Also see Kelly-Louw "Consumer Credit" para 137.
36 Section 80(1)(a) read with s 81(2) of the NCA.
37 Section 80(1)(b)(i) read with s 81(2) of the NCA.
38 Section 83(2)(a)-(b) read with s 83(3)(b)(i) of the NCA.

required to make any payment required under the agreement"; "no interest, fee or other charge under the agreement may be charged to the consumer"; and "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".[39] Therefore, the credit provider's penalty lies therein that, during this period, it will not receive any payment in respect of the agreement, that it will forfeit interest and other charges that would have accrued, and that it will not be able to enforce the agreement and repossess any property.[40] In effect, a payment moratorium is created during the suspension period, but the consumer remains indebted to the credit provider.[41] The apparent purpose of the suspension is to assist the consumer to eventually repay the debt.[42]

The Act also provides that, when the suspension ends, all the rights and obligations of the credit provider and consumer are "revived" and "fully enforceable except to the extent that a court may order otherwise".[43] However, the Act stresses that, after the suspension ends, the credit provider may not retrospectively charge the consumer for any interest, fee or other charge that it could not charge during the suspension period.[44] It can be mentioned in passing that there appears to be somewhat of a contradiction here.[45] Although the Act states that *all* the rights and obligations will revive and will thus be *fully* enforceable after the suspension ends, this notion of a full revival of all rights and obligations of the parties is a misnomer and should not be taken literally, since it is not true that *all* rights become *fully* enforceable once more. Indeed, this principle – stated in seemingly absolute terms ("all" and "fully") – is significantly curtailed by the rule that no liability accrues on the consumer's part for interest *et cetera* during the suspension period. Fortunately, this contradiction is relatively minor and hopefully will have little practical implication. The legislature probably merely meant to convey the intention that, after suspension, the contractual relationship between the parties will go ahead as normal but that, when it comes to calculating the consumer's

39 Section 84(1)(a)-(b) of the NCA. See *Mbatha* para 48.
40 Van Heerden and Boraine 2011 *De Jure* 405.
41 Boraine and Van Heerden 2010 *THRHR* 654.
42 Boraine and Van Heerden 2010 *THRHR* 654.
43 Section 84(2)(a)(i)-(ii) of the NCA. The fact that the court may order otherwise seems to suggest that a further suspension is possible after the first one ends, but this is unclear: see Boraine and Van Heerden 2010 *THRHR* 654, 656.
44 Section 84(2)(b) of the NCA.
45 My gratitude to one of the anonymous reviewers who pointed this contradiction out to me and suggested that I briefly address it.

liability, the suspension period (and the costs that would have accrued during this time) are, as it were, erased from memory.

Regarding the setting-aside remedy, the NCA says nothing more than that it can be done in part or in full and, importantly, that the order must be just and reasonable in the circumstances. In *Standard Bank v Kelly*[46] the court advised that the decision "will in general be informed by the statute's policy of promoting equity in the credit market and by the consideration of assisting the consumer to fully repay responsibly undertaken debt at the expense, if necessary and appropriate, of subordinating the rights of reckless creditors".

In *SA Taxi Securitisation v Mbatha*[47] the court suggested that the setting-aside remedy involves the setting aside of the agreement itself and thus that "the agreement would be null and void, and as if it had never been".[48] However, a careful reading of the Act does not reveal this consequence, since nothing in the Act suggests that the agreement is void. Moreover, the NCA does not empower the court to set aside the agreement in the sense of its being voidable, but instead the court may merely set aside all or part of the rights and obligations of the consumer.[49] The Act does not mention the rights and obligations of the credit provider, but the reciprocal nature of the contract implies that, if the rights and obligations of the consumer are set aside, the countervailing rights and obligations of the credit provider must logically also fall away.[50]

It is worth highlighting that a suspension or setting aside may follow for the first two categories of reckless credit even if the consumer is not over-indebted at the time the matter is adjudicated.[51] However, it is arguable that over-indebtedness should nevertheless always be a factor when deciding on which remedy to grant, since the remedy should generally be focussed on rectifying any negative consequences of the reckless loan and should not lead to an unjustified windfall for the consumer.

2.2.2 Category three

46 *Kelly* para 8.
47 *Mbatha* para 47.
48 Also see *Mohlabi* para 10.
49 Boraine and Van Heerden 2010 *THRHR* 652.
50 Boraine and Van Heerden 2010 *THRHR* 653.
51 Boraine and Van Heerden 2010 *THRHR* 652; Van Heerden and Boraine 2011 *De Jure* 402.

The third category of reckless credit is if the credit provider did make the required assessment, but "entered into the credit agreement with the consumer despite the fact that entering into that credit agreement would make the consumer over-indebted".[52] In this situation, the court or Tribunal "must further consider whether the consumer is over-indebted at the time of those proceedings" and if it is concluded that the consumer is indeed over-indebted, the court or Tribunal has the discretion to make an order:[53]

(1) "suspending the force and effect of that credit agreement until a date determined by the Court when making the order of suspension"; and

(2) "restructuring the consumer's obligations under any other credit agreements".

Before making such an order, the court or Tribunal must consider "the consumer's current means and ability to pay the consumer's current financial obligations that existed at the time the agreement was made" as well as "the expected date when any such obligation under a credit agreement will be fully satisfied, assuming the consumer makes all required payments in accordance with any proposed order".[54]

Moreover, the restructuring must be done in accordance with the magistrates' courts powers to rearrange a consumer's obligations as part of the debt review process.[55] Hence, the consumer's obligations can be re-arranged by:[56]

(1) "extending the period of the agreement and reducing the amount of each payment due accordingly";

(2) "postponing during a specified period the dates on which payments are due under the agreement";

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52 Section 80(1)(b)(ii) read with s 81(2) of the NCA. S 88(4) seemingly provides for a fourth category: "If a credit provider enters into a credit agreement, other than a consolidation agreement contemplated in this section, with a consumer who has applied for a debt re-arrangement and that re-arrangement still subsists, all or part of that new credit agreement may be declared to be reckless credit, whether or not the circumstances set out in section 80 apply." As Boraine and Van Heerden 2010 *THRHR* 652 point out, no consequences are ascribed to this category.

53 Sections 83(3)(a) and (b)(i)-(ii) of the NCA. See further Van Heerden "Over-indebtedness and Reckless Credit" para 11.5.7.2.

54 Section 83(4)(a)-(b) of the NCA.

55 Section 83(3)(b)(ii) read with s 87 of the NCA.

56 Section 87(1)(b)(ii) read with s 86(7)(c)(ii)(aa)-(dd) of the NCA.

(3) "extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement"; or

(4) "recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6".

2.2.3 Summary

Accordingly, depending on the kind of reckless credit involved, the court or Tribunal may:

(1) set aside the consumer's rights and obligations in part or in full, in accordance with what would be just and reasonable;

(2) suspend the force and effect of the agreement for a certain period; or

(3) suspend the force and effect of the agreement for a certain period plus restructure any of the consumer's other obligations.

When considering the different categories of reckless credit, it is apparent that the setting-aside remedy is not available for the third category, and that the restructuring remedy is not available for the first two categories. Suspension alone is also not possible for the third category, since it must be combined with a restructuring order. It is not clear why the legislature took this approach. On what basis should a setting-aside remedy not be available for the third category? And why should a restructuring order not be available for the first two categories? To my mind it would have been simpler to make all the remedies available in each instance, and then leave it up to the courts to exercise a proper discretion. It would also have been useful if the "just and reasonable" standard was required for each of the remedies and not for the setting-aside remedy only.

It can be mentioned that, notwithstanding what category the situation falls into, if the consumer can convincingly allege his over-indebtedness, the court is permitted to grant relief in the form of a debt rearrangement order.[57] Therefore, the usual debt rearrangement remedy is, when appropriate, available as an alternative option.

One should also consider that the granting of reckless credit qualifies as prohibited conduct under the NCA, and hence the Tribunal may impose an

[57] Section 85(b) read with s 87 of the NCA.

administrative fine on a credit provider who has engaged in such behaviour.[58] If a credit provider repeatedly fails to comply with the Act, the Tribunal may also suspend or cancel its registration as a credit provider.[59]

2.3 Some of the major uncertainties surrounding the remedies

Several uncertainties surround the application of these remedies, and authors like Boraine and Van Heerden have analysed these in detail.[60] In what follows I summarise the three most pressing uncertainties. Further below, I argue that a constitutional perspective may help to answer some of these doubts.

2.3.1 Uncertainty one

The first uncertainty is that it is not clear how a court should exercise its discretion when it comes to the choice between the setting-aside and suspension remedies. Also, if the court chooses the setting-aside remedy, how should it decide between setting it aside in part or in full?[61] Van Heerden and Boraine provide some suggestions in this regard, but it is not necessary to repeat these here.[62] Further below, I add my suggestions in this regard.

2.3.2 Uncertainty two

A second difficulty with the remedies is that the Act does not distinguish between the situations where the parties merely entered into the reckless credit agreement and those where either or both of them have already performed in terms of the agreement.[63] This is not really a problem for the suspension, restructuring or partial setting-aside remedy, since the contractual relationship between the parties will continue – either as normal after the suspension ends, or in accordance with the restructured or reduced obligations of the consumer.

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58 Section 151 of the NCA.

59 Section 57 of the NCA.

60 Boraine and Van Heerden 2010 *THRHR* 651, 652-656; Van Heerden and Boraine 2011 *De Jure* 402-408, 414-415; Van Heerden "Over-indebtedness and Reckless Credit" para 11.5.7.1.

61 Boraine and Van Heerden 2010 *THRHR* 651, 652; Van Heerden and Boraine 2011 *De Jure* 402-403, 414-415; Van Heerden "Over-indebtedness and Reckless Credit" para 11.5.7.1.

62 See eg Van Heerden and Boraine 2011 *De Jure* 404, 415; Van Heerden "Over-indebtedness and Reckless Credit" para 11.5.7.1.

63 Boraine and Van Heerden 2010 *THRHR* 652; Van Heerden and Boraine 2011 *De Jure* 402. Also see Van Heerden "Over-indebtedness and Reckless Credit" para 11.5.7.1.

Also, the matter seems relatively uncomplicated in instances where neither of the parties have performed yet and the obligations of the consumer are set aside in full. This would effectively amount to a cancellation of the agreement – it would end the credit relationship and absolve the parties from further reciprocal performance.[64] However, what would be the situation if either or both parties have performed (either in full or in part) and the consumer's obligations are set aside in full? Can the credit provider reclaim any moneys advanced or property delivered to the consumer, and can the consumer reclaim any payments made to the credit provider?[65]

Boraine and Van Heerden argue that, because section 83(2)(a) refers to the setting aside of rights and obligations "under that agreement", there is no restriction on the credit provider's ability to claim money or goods in terms of another cause of action, such as unjustified enrichment.[66] The Act also does not expressly oust any other causes of action.[67] Boraine and Van Heerden thus contend that the parties should be able to reclaim at least some of what they have performed.[68] In this respect, Sonnekus has also argued that the credit provider should have a claim in unjustified enrichment against the consumer.[69] Further below, I make a suggestion based on constitutional property law.

2.3.3 Uncertainty three

A third question is: what should happen to the property that is subject to the reckless credit agreement? When it comes to movable property that is subject to a lease or instalment agreement, this issue is particularly thorny because, in most instances, the credit provider would have reserved ownership until the debt is fully paid.[70] In cases of restructuring or partial setting aside, the answer is relatively straightforward, since the consumer would simply remain in possession as normal while the remaining debt is being paid off or while the restructured payment plan is being completed.

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64 Boraine and Van Heerden 2010 *THRHR* 653; Van Heerden and Boraine 2011 *De Jure* 403. Also see Van Heerden "Over-indebtedness and Reckless Credit" para 11.5.7.1.

65 Boraine and Van Heerden 2010 *THRHR* 653; Van Heerden and Boraine 2011 *De Jure* 403.

66 Boraine and Van Heerden 2010 *THRHR* 653; Van Heerden and Boraine 2011 *De Jure* 403, 415. Also see Van Heerden "Over-indebtedness and Reckless Credit" para 11.5.7.1.

67 Boraine and Van Heerden 2010 *THRHR* 656.

68 Boraine and Van Heerden 2010 *THRHR* 655, 656.

69 Sonnekus 2016 *TSAR* 361.

70 See the definitions of "instalment agreement" and "lease" in s 1 of the Act.

In the event of a full setting aside of the consumer's obligations, it has been suggested that "the credit provider, who remains the owner of the vehicle, would be entitled to restoration of the vehicle".[71]

In cases where the effects of a lease or instalment agreement pertaining to movable property are suspended, it is particularly difficult to determine what should happen with the property.[72] Boraine and Van Heerden refer to two possible answers. The first option is that the movable property should remain with the consumer during the period of suspension. The reasons for this theory include: the enforcement of the agreement (including the credit provider's right to repossess the property) is barred during suspension; the consumer is under no express duty to return the property for the period of the suspension; and the agreement is not cancelled or set aside.[73]

The second option is that the property should be returned to the credit provider during the suspension period. This theory is based on the goal of the Act to balance the rights of consumers and credit providers, which arguably renders it unfair to allow the consumer to retain the credit provider's depreciating security while not having to make any payments.[74] The second option has found support in case law[75] and is also the one favoured by Van Heerden and Boraine.[76]

Even so, there remains doubt regarding effect of especially a suspension order on movable property that is subject to a lease or instalment agreement, but for present purposes the focus is on mortgage agreements, so it is not necessary to express a concrete view. That being said, the arguments I make below regarding the impact of section 25(1) of the *Constitution* on the formulation of these remedies, will perhaps shed some light in the movable context too.

In the case of mortgage agreements, it is trite that the consumer remains the owner of the immovable property, while the credit provider holds a limited real right in the property as security until the debt is discharged.[77]

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71 *Mbatha* para 47. Also see *SA Taxi Securitisation (Pty) Ltd v Chesane* 2010 6 SA 557 (GSJ) para 28; *Nako* para 29; *SA Taxi Securitisation (Pty) Ltd v Xolile* 2012 JOL 29510 (ECM) para 24; *Campher* para 15.

72 Van Heerden and Boraine 2011 *De Jure* 405.

73 Van Heerden and Boraine 2011 *De Jure* 405.

74 Van Heerden and Boraine 2011 *De Jure* 406, 407.

75 *Mbatha* paras 45-48, 55; *Nako* para 29.

76 Van Heerden and Boraine 2011 *De Jure* 407, 415. Also see Van Heerden "Over-indebtedness and Reckless Credit" para 11.5.7.1.

77 The same is true for movables under a secured loan or pawn transaction.

In these cases, the full setting aside of the consumer's obligations will naturally have the effect that the real security right extinguishes, which is a consequence of the accessoriness principle.[78] Neither a partial setting aside nor a suspension will have this effect, and thus the credit provider's security will remain intact for the remaining portion of the debt or will become enforceable again once the suspension period ends. In none of these instances will the consumer lose his ownership of the property, and none of the reckless credit remedies permit a sale in execution of the property. Also, there is no basis upon which the creditor can temporarily dispossess the consumer during the suspension period.

This outcome may seem unfair in some mortgage cases. For instance, a full setting aside will mean that the property is totally freed of the mortgage while the consumer does not have to pay anything more toward the loan. The benefit enjoyed by the consumer and the attendant losses experienced by the credit provider may sometimes seem out of proportion compared to the damage inflicted on the consumer by the credit provider's reckless lending conduct. Below, I explain with reference to section 25(1) of the *Constitution* that the content of any remedy must be designed to ensure that there is a proper level of proportionality between the purpose of the remedy and the effects thereof.

3 The property clause and reckless credit

3.1 General

The general purpose of constitutional property law is to achieve a balance between the protection of vested rights and the promotion of the public interest in regulating the use of property.[79] To this end, section 25(1) of the *Constitution* (the property clause) provides that no one may be deprived of property except in terms of law of general application and that no law may permit the arbitrary deprivation of property.[80] Arguably, this constitutional norm can find useful application in the context of the NCA's remedies for

78 Boraine and Van Heerden 2010 *THRHR* 653.

79 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC*)* (hereafter *FNB*) para 50; Van der Walt *Constitutional Property* 100-101; Mostert and Badenhorst "Property" para 3FN6.2.2; Roux "Property" para 46.1.

80 On the property clause in general, see Van der Walt *Constitutional Property*; Roux and Davis "Property" ch 20; Mostert and Badenhorst "Property" ch 3FB; Badenhorst, Pienaar and Mostert *Law of Property* ch 21; Roux "Property" ch 46. Ss 25(2)-(9) of the *Constitution* deals with expropriation and land reform. These matters fall outside the scope of this article, as they do not relate to reckless credit.

reckless lending. There are at least three important questions revealed by section 25(1) for the present purposes: Does the creditor's right to receive payment under the credit agreement qualify as "property"? Do the remedies involve a "deprivation" of such property? And is this deprivation of property "arbitrary"?[81]

3.2 Creditors' rights as "property"

In the case of a mortgage agreement, the creditor primarily has two kinds of rights: first the personal claim for the repayment of the loan in accordance with the terms of the contract, and secondly the accessory real security right of mortgage. The question is whether these rights qualify as "property" for constitutional purposes?

The *Constitution* does not define "property" but states that "property is not limited to land",[82] which at least implies that property includes land. The Constitutional Court has also confirmed that land and corporeal movables are at the heart of the concept of property.[83] However, nowhere does the *Constitution* limit the concept to tangible assets, and accordingly commentators accept that the property concept should be interpreted generously to include, for instance, economically significant intangible assets.[84]

Classifying a mortgage as property is relatively straightforward. A mortgage is a limited real right in tangible immovable property, and hence the right of mortgage itself is commonly regarded as incorporeal immovable property.[85] Since "property" includes rights in property,[86] such as limited real rights,[87] it is not controversial therefore that a mortgage, as

81 The methodology for deciding a s 25 case was first established in *FNB* para 46. For the present purposes it is not necessary to fully explain the methodology or to go through every step. See further Roux "Property" para 46.1.

82 Section 25(4)(b) of the *Constitution*.

83 *FNB* para 51.

84 Van der Walt *Constitutional Property* 93, 114; Roux "Property" para 46.3(b); Roux and Davis "Property" para 20.3; Mostert and Badenhorst "Property" para 3FB6.1.2.

85 Badenhorst, Pienaar and Mostert *Law of Property* 36.

86 *FNB* para 51. Also see para 100(e), where it is implied that rights less than ownership are also protected.

87 Van der Walt *Constitutional Property* 140; Badenhorst, Pienaar and Mostert *Law of Property* 536; Roux "Property" para 46(b). Also see *Ex parte Optimal Property Solutions* 2003 2 SA 136 (C) para 19, where a servitude was classified as "property"; and *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 32-44, where mineral rights were classified as "property".

a real security right, qualifies as "property" for the purposes of section 25(1).[88]

The credit provider's claim for the repayment of the loan is more complex, since this personal right is neither a traditional object of property nor a right in property. Notwithstanding, there is strong support in academic scholarship for the prospect that a contractual right with a monetary value (an incorporeal thing) qualifies as "property" for constitutional purposes.[89] There are also several judgments of the high court and at least one of the Supreme Court of Appeal that support this view.[90]

Moreover, the Constitutional Court has on more than one occasion recognised personal rights as property for the purposes of section 25(1). The best example is *National Credit Regulator v Opperman*,[91] where the Court explained that, although a personal right is not a real right in property like ownership, the property clause does not deal with ownership but with property. The Court had previously assumed without finding that a claim for loss of earning capacity qualifies as "property"[92] and thus in *Opperman* the Court explained that "the recognition of the right to restitution of money paid, based on unjustified enrichment, as property under section 25(1) is logical and realistic".[93] By implication the Court also

88 Commentators agree that all (limited) real rights recognised by common law should be protected as constitutional property: see eg Van der Walt *Constitutional Property* 140; Roux "Property" para 46.3(b); Mostert and Badenhorst "Property" para 3FB6.2.2; Badenhorst, Pienaar and Mostert *Law of Property* 536; Brits *Mortgage Foreclosure* para 6.4.2.2; Brits *Real Security* 99. See also *Gainsford v Tiffski Property Investments (Pty) Ltd* 2012 3 SA 35 (SCA) paras 42-47, where it seems as if the Supreme Court of Appeal would have been willing to regard a mortgage as "property" were it not for the fact that *in casu* the mortgage was *ab initio* void due to s 34(1) of the *Insolvency Act* 24 of 1936.

89 Van der Walt *Constitutional Property* 96; Roux and Davis "Property" para 20.3; Mostert and Badenhorst "Property" para 3FB6.1.2, 6.2.2; Roux "Property" para 46.3(a), (c); Marais 2016 *TSAR* 581; Marais 2014 *SALJ* 217-222; Brits *Real Security* 11; Brits 2013 *PELJ* 465; Brits *Mortgage Foreclosure* para 6.4.2.3. See also Otto and Otto *National Credit Act Explained* 2nd ed 115 and n 158; Scott 2010 *THRHR* 623, 636; Cloete 2003 *Obiter* 71, 80-81.

90 See eg *FirstRand Bank v BL Smith* (24205/08) WLD (31 October 2008) (copy on file with author) para 25; *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA) paras 17, 42; *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* 2013 6 SA 471 (GNP) para 45; *Opperman v Boonzaaier* 2012 ZAWCHC 27 (17 April 2012) para 18; *Troskie v Von Holdt* 2013 ZAECGHC 31 (11 April 2013) para 37.

91 *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) (hereafter *Opperman*) para 61.

92 *Law Society of South Africa v Minister of Transport* 2011 2 BCLR 150 (CC) para 84.

93 *Opperman* para 63, citing Van der Walt *Constitutional Property* 115-116, 141-142.

agreed with the main reasons given by the court *a quo*[94] for why the restitution claim amounted to property, namely that this personal right is a concrete asset in the credit provider's estate, that it has a monetary value, and that it is transferable.[95] The Court therefore concluded that the enrichment claim *in casu* qualified as "property" for the purposes of section 25 of the *Constitution*.[96] Another example is *Chevron v Wilson*,[97] where the Constitutional Court accepted that moneys paid to a credit provider qualify as "property" in the credit provider's hands.

Therefore, from case law it is abundantly clear that a personal right that originates in unjustified enrichment amounts to "property" for constitutional purposes. By analogy, one can therefore comfortably accept that a contractual right with a monetary value qualifies as "property" too. This prospect is strengthened by the fact that the Constitutional Court has also held that personal rights under a liquor licence – a category far more controversial than contractual claims – qualify as "property" for constitutional purposes.[98]

3.3 The effects of the remedies as "deprivation" of property

Assuming then that the contractual and security rights of credit providers qualify as property, the next question is whether the granting of any of the reckless credit remedies involves a deprivation of such property. In other words, if a setting-aside, suspension or restructuring order is granted, is the credit provider "deprived" of property?

In *First National Bank v Commissioner of SARS* the Constitutional Court accepted that deprivation is a wide concept that includes "any interference with the use, enjoyment or exploitation of private property".[99] In *Mkontwana v Nelson Mandela Metropolitan Municipality*[100] the Court

94 *Opperman v Boonzaaier* 2012 ZAWCHC 27 (17 April 2012) para 18.

95 *Opperman* para 57.

96 *Opperman* para Para 64. Also see *Cherangani Trade and Invest 107 (Pty) Ltd v Mason* 2011 11 BCLR 1123 (CC) para 8; *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC) para 38.

97 *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* 2015 10 BCLR 1158 (CC) para 16 (hereafter *Chevron*). Also see para 18.

98 *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC) paras 57-72. See further Marais 2016 *TSAR* 576-592; Rautenbach 2015 *TSAR* 825-829; Slade 2015 *JQR* para 2.1.

99 *FNB* para 57.

100 *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) para 32. Also see *Chevron* paras 17-19.

seemingly regressed from this broad definition by finding that it needs to be a substantive interference that goes beyond the normal restrictions on property in an open and democratic society. However, in later judgments the Court appeared to have accepted the wider definition again,[101] and in *Opperman*[102] the Court confirmed that, for the interference to qualify as a deprivation, it must at least be "significant enough to have a legally relevant impact" on the affected rights.

For the present purposes, it is in my reasonably undisputed view that, when granted, each of the reckless credit remedies deprives the credit provider of its property. Although the degree of interference differs, both the setting-aside, suspension and restructuring remedies clearly entail legally significant interferences with or modifications of the enjoyment and/or enforcement of the credit provider's rights under the credit agreement.

3.4 The arbitrariness test

It is important to emphasise that, just because the creditor's rights are regarded as "property" and just because the undoing or modification of such rights qualifies as a "deprivation", this does not necessarily indicate that the statutorily authorised restriction is constitutionally problematic. A deprivation of property is never unconstitutional *per se*. The regulation (or deprivation) of the use and enjoyment of property in the public interest is a normal part of life in a democratic society, and thus it must be emphasised that only an "arbitrary" deprivation of property will violate the right contained in section 25(1).

The leading definition of the arbitrariness test is found in the Constitutional Court's *FNB* judgment. The Court found that the deprivation is arbitrary if the law "does not provide sufficient reason for the particular deprivation in question or is procedurally unfair".[103] Consequently, there are two forms of arbitrariness: substantive arbitrariness (insufficient reason) and procedural arbitrariness (procedurally unfair).

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101 See eg *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 36; *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC) paras 38-39, 41; *Tshwane City v Link Africa* 2015 6 SA 440 (CC) para 58; and see further Van der Walt *Constitutional Property* 206-209.

102 *Opperman* para 66. Also compare *South African Diamond Producers Organisation v Minister of Minerals and Energy* 2017 6 SA 331 (CC) paras 42-48.

103 *FNB* para 100.

Although it is not clear what exactly is meant with procedural arbitrariness,[104] in both *Opperman* and *Chevron*, for instance, the Constitutional Court found that the relevant deprivations were procedurally arbitrary because the statutory provisions in question did not afford the court a discretion, based on the facts of the case, whether or not to uphold the deprivation.[105] For the present purposes it can therefore be accepted that the provisions pertaining to the remedies for reckless credit are probably not procedurally arbitrary. The reason for this is that, in each instance, the court (or Tribunal) has a discretion as to whether or not to make the order. It also has a discretion regarding the content of each order – for instance the time period of the suspension and the extent of the setting aside. Regarding the latter remedy, the court is also required to make an order that is just and reasonable in the circumstances, which affords the court a large leeway to ensure that the order is justifiable on the facts of each case. Moreover, the restructuring remedy allows for a large degree of flexibility with respect to how the obligations can be rearranged. In other words, the fact that the court has oversight and wide discretionary powers when it comes to these remedies indicates that the procedural fairness requirement should rarely cause problems. The way the discretion is exercised is another matter, which relates to the second leg of the arbitrariness test.

The substantive arbitrariness test requires that the deprivation in question must have a sufficient reason. This test is very flexible and context sensitive, since the Court in *FNB* emphasised that it must "be decided on all the relevant facts of each particular case".[106] Basically, one must evaluate "the relationship between the means employed, namely the deprivation in question and the ends sought to be achieved, namely the purpose of the law in question".[107] In this respect one must consider a complexity of relationships, such as those between the purpose of the deprivation and the person whose property is affected; between the purpose of the deprivation and the nature of the property; and between the purpose and extent of the deprivation.[108] The Court also indicated that the type of property right involved (ownership versus a lesser right) as well as the extent of the deprivation (embracing all versus only some of the

104 Compare Van der Walt 2012 *Stell LR* 88-94.
105 *Opperman* paras 69, 76; *Chevron* paras 22-24.
106 *FNB* para 100(h).
107 *FNB* para 100(a).
108 *FNB* para 100(b)-(d).

incidents of the right) could impact on how compelling the purpose of the deprivation would have to be to pass the arbitrariness test.[109]

In other words, not only must the deprivation be buttressed by a valid public purpose, but in each individual case there must also be a sufficient relationship between this purpose and the effect that the deprivation has on the person whose property is affected.[110] Depending on the facts, the level of scrutiny will then be somewhere on a continuum between a mere rationality test and a proportionality test almost as strict as the one contemplated in section 36 of the *Constitution*.[111]

It is easy to identify and justify the purpose behind the reckless credit remedies. The NCA expressly seeks to discourage reckless lending and the ills that accompany it. Preventing and remedying reckless credit is also of socio-economic significance, since unaffordable loans can cause social and economic devastation for consumers, their families and society at large. Preventing the granting of unaffordable loans also contributes to the protection of consumers' inherent human dignity[112] and it instils prudential integrity in the broader financial industry. Hence, the first intended effect of these remedies is to discourage credit providers from concluding reckless credit agreements with consumers and, to this effect, to encourage them to do the required pre-agreement assessments.[113] The second intended effect is to provide debt relief for consumers who have suffered prejudice as a result of entering into a reckless credit agreement.

Although it is true that the reckless credit remedies have the effect of penalising the reckless credit provider,[114] in my view this effect is only incidental and not the prime purpose of these remedies. Instead, it is contended that the main aim is to bring relief to consumers who are over-indebted as a result of being granted credit in a reckless fashion. There are other ways to "punish" the responsible credit provider, such as with an

109 *FNB* para 100(e)-(f).

110 Compare the analysis by Brits 2013 *PELJ* 446-457 of the high court's and the Constitutional Court's application of the arbitrariness test in *Opperman*.

111 *FNB* para 100(g).

112 See s 10 of the *Constitution*.

113 See eg *ABSA Bank v Coe Family Trust* 2012 3 SA 184 (WCC) 188H-I; *Campher*) para 15; *Plastomark (Pty) Ltd v CK Injection Moulders CC; In re: Ultrapolymers (Pty) Ltd v CK Injection Moulders CC* 2015 ZAWCHC 129 (1 September 2015) para 14. Also see *ABSA Bank Limited v Potgieter* 2017 ZAECPEHC 8 (31 January 2017) para 60.

114 Van Heerden and Boraine 2011 *De Jure* 393; Vessio 2009 *TSAR* 281.

administrative fine imposed by the Tribunal,[115] or by suspending or cancelling its registration as a credit provider.[116]

In other words, there can hardly be any doubt about the general validity of the purpose behind the NCA's reckless credit provisions. However, the question is whether, in each individual case, there is a sufficient relationship between the purpose of the remedy and the effect thereof on the particular credit provider. Does the Act allow enough flexibility in the implementation of these remedies so that, in individual cases, arbitrary outcomes can be avoided? To my mind, a case cannot be made to declare the provisions in the NCA, which stipulate for these remedies, unconstitutional for permitting arbitrary deprivation of property. The fact that the NCA provides a wide discretion for the courts, not only when it comes to whether a remedy should be granted but also when it comes to the content of the remedies, indicates that the Act is nuanced enough to avoid both procedural and substantive arbitrariness.

4 Applying the arbitrariness test to the remedies

Although the sections in the NCA that provide for the reckless credit remedies do not fall short of section 25(1) of the *Constitution* in general, it is important that these provisions are applied in such a manner that arbitrary outcomes are avoided in individual cases – that a constitutionally appropriate balance is achieved between the interests of the credit provider and consumer in question. Regarding the court's discretion, the substantive arbitrariness test can in fact assist courts when deciding whether to grant a remedy as well as on the content of the remedy. In each case a court should ascertain what the effect on the credit provider would be and then ask whether such an effect is justified by the purpose of the remedy.

A general proposition is that the effect of any remedy should go only as far as is necessary to rectify the consequences of the reckless credit agreement – of the credit provider's prohibited behaviour. If it stays within such bounds, the deprivation of property has a sufficient reason and hence it is not arbitrary. But if it goes further than necessary, it becomes arbitrary because the effect on the credit provider is no longer sufficiently linked to the prejudice that was caused by the credit provider's actions. Take a simple example: If a credit provider grants a reckless loan of R100

115 Section 151 of the NCA.
116 Section 57 of the NCA.

000 and because thereof the consumer becomes over-indebted with R40 000, it would be arbitrary for a court to set aside the entire R100 000. Accordingly, the court should consider all factors, including the financial situation, to determine the appropriate remedy. Courts should avoid granting generic remedies, and should rather ensure that the content of each remedy is tailor made to the facts of the case before it. In view of the serious consequences that these remedies might have – especially the setting-aside remedy – courts should do a careful analysis and provide detailed reasons for the order they hand down. Since a deprivation of property takes place, the court is mandated to ensure that there is a sufficient reason for the effect that the remedy will have on the credit provider.

Furthermore, it is suggested that the substantive arbitrariness test can help answer some of the points that have been raised by authors with respect to the uncertainties that surround the reckless credit remedies. As explained above, the main uncertainties that have come to light from academic commentary are as follows:

a) How should one decide between the suspension and setting-aside remedies, and in the latter instance, how should one decide between a full and partial setting aside?
b) What happens if either or both parties have performed under the agreement?
c) What is the effect on the credit provider's security?

Boraine and Van Heerden, have considered these questions and have made some good suggestions.[117] I should like to add that the property clause's arbitrariness test can assist in answering these questions.[118] Essentially, whenever a court is called upon to formulate a remedy in the reckless credit context, it would have to do so in a way that avoids any arbitrary outcomes.

Inherent in this test, the court should consider whether and to what extent either of the parties have already performed under the agreement. The value of such performances should then be taken into account when the appropriate remedy is formulated. Consequently, matters of restitution

117 Boraine and Van Heerden 2010 *THRHR* 651, 652-656; Van Heerden and Boraine 2011 *De Jure* 402-408, 414-415; Van Heerden "Over-indebtedness and Reckless Credit" para 11.5.7.1.

118 Also see Brits *Mortgage Foreclosure* para 6.4.6.

should not be left to future litigation surrounding unjustified enrichment. As the court in *Standard Bank v Kelly*[119] commented:

> The court is unlikely to make any order relieving the consumer of its obligations if the result would be the unjust enrichment of the consumer at the expense of the credit provider.

This comment is illuminating because it suggests that, when the court decides on the remedy, it should make accommodation for the fact that the remedy should not unjustifiably enrich the consumer. This supports my proposal that the court should, when formulating a just and reasonable remedy, consider the performances that have been rendered already.

A similar approach would apply to the creditor's security. If it is assumed that the property remains with the consumer, then to avoid arbitrary outcomes, the content of the remedy must accommodate the monetary benefits enjoyed by the consumer as a result of having his property freed from the credit provider's security right, for example.

The arbitrariness test can also help to decide between the suspension and setting-aside remedies, as well as to decide on the extent of the setting-aside remedy. Broadly speaking, it will probably be arbitrary to grant a certain remedy if another remedy could achieve the same purpose in a way that imposes a lesser deprivation of property. Accordingly, to my mind the suspension remedy should always be the first choice, and the setting-aside remedy should only be an option if a suspension cannot provide the necessary relief to the consumer. Setting the consumer's obligations aside should not be the default course of action. In fact, courts should probably only resort to it in extreme cases.[120]

The same reasoning can apply when choosing the extent of a setting-aside remedy. The first choice should not be a full setting aside, since a less invasive option should be considered first. A full setting aside should be ordered only if it is truly necessary to rectify the damage done by the credit provider's reckless conduct.

In *De Beer* the court unfortunately did not spend a lot of time explaining the reason for its remedy. The judge merely stated that his choice of a full setting-aside remedy was influenced by three factors:[121]

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119 *Kelly* 8.

120 Also see Otto and Otto *National Credit Act Explained* 4th ed 91.

121 *De Beer* para 65.

a) the clear extent of the recklessness (the affordability assessment was irrational in that the surety's income was taken into account to determine the consumer's credit worthiness);
b) the advanced age of the consumers;[122] and
c) the fact that the property sought to be declared executable was the consumers' only home.

Interestingly, two of the reasons given by the court in *De Beer* are external to the express provisions of the NCA, which do not list the consumer's age or his home situation as factors when formulating a remedy. Of course, such issues should be included in the "just and reasonable" standard required for setting-aside remedies. Also, the extent of the recklessness, and thus the level of bad faith or turpitude on the credit provider's part should naturally be a strong contributing factor. However, other than these factors, it does not seem as if the court gave much (if any) attention to the finer details of the consequences of this full setting-aside order.

Because the performances already rendered did not appear to play a part in the court's determination, it seems instinctively that the consumers got an over-the-top windfall that is disproportionate to the prejudice they truly suffered at the hands of the credit provider's conduct. Also, in view of the facts revealed in the judgment, can it truly be said that the credit provider in this case deserves this momentous sanction in comparison to its level of turpitude and if measured against the prejudice suffered by the consumer? It is not suggested that a setting-aside order was inappropriate as such, but I am not convinced that a *full* setting aside of the consumer's obligations was just and reasonable on the facts of the case. To my mind, a strong case can also be made that the effects on the credit provider amounted to an arbitrary deprivation of property.

It can also be mentioned that a consumer mortgage agreement will very often comprise of a home loan. It is trite that this factor has important implications for mortgage foreclosure proceedings due to the constitutional protection of housing rights.[123] It is not necessary to extrapolate on this perspective here,[124] but suffice it to say that, in appropriate circumstances, the fact that the reckless credit agreement involves a home could

122 Also *Benade v ABSA Bank Limited* 2014 ZAWCHC 84 (16 May 2014) para 36.
123 Section 26 *Constitution*; *High Court Rule* 46(1)(a)(ii); *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC); *Gundwana v Steko Development* 2011 3 SA 608 (CC).
124 See Brits *Real Security* 68-103 and the other sources cited there.

influence the court's decision when formulating the appropriate remedy, as was evidently the case in *De Beer*.

7 Conclusion

The purpose of this article is not to create scepticism regarding the granting of the reckless credit remedies, but to highlight the importance of not making snap judgments on what remedy to grant.[125] More specifically, the main argument is that section 25(1) of the *Constitution*, and the principles underlying it, should play a role in formulating the appropriate remedy in each individual case. Because a credit provider's contractual claim to repayment of the loan as well as its real security right qualify as "property" and because each of the remedies potentially "deprives" the credit provider of his rights, it is important that the arbitrariness test should be met when these remedies are granted. All factors must be considered and there must be a sufficient reason for the limitation imposed on the credit provider's rights, which means that there should be a satisfactory relationship between the purpose of the remedy (to discourage reckless credit and to relieve the consumer) and the effects on the credit provider. If the purpose and effect are out of proportion, the arbitrariness test might not be satisfied.

As a rule of thumb, a reckless credit remedy should do no more than to rectify the prejudice suffered by the consumer due to the credit provider's conduct. One way to quantify the consumer's prejudice is the amount of the over-indebtedness that was caused by the reckless credit, but it can include other things like the impact on his dignity. The point is that the remedy should be tailored in such a way that the prejudice suffered by the consumer is removed. Anything more than that should be viewed with suspicion, otherwise the shift in patrimony from the credit provider to the consumer could be unjustified and unconstitutional.

125 See eg *Mbatha* para 37, where the court warned against "[an] overcritical armchair approach by the courts towards credit providers when evaluating reckless credit, or the imposition of excessive penalties upon lenders who have recklessly allowed credit".

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List of Abbreviations

Int Insolv Rev	International Insolvency Review
JQR	Juta's Quarterly Review
NCA	National Credit Act
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
SAPA	South African Press Association
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg