



Reckless Credit

Reckless Credit Practical Guideline for Debt Counsellors

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Reckless Credit – A Practical Guideline for Debt Counsellors is made available by the Debt Counsellors Association of South Africa



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Reckless Credit Assessment

1. Purpose of National Credit Act

The purpose of the National Credit Act¹ (NCA) is set out in Section 3 and states the following:

“...to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers...”

This is obtained by

- “(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;*
- (b) ensuring consistent treatment of different credit products and different credit providers;*
- (c) promoting responsibility in the credit market by-*
 - (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and*
 - (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;...”*

2. Debt Counsellor and reckless credit

When a Debt Counsellor accepts an application from a Consumer he must determine in the prescribed manner and within the prescribed time, whether the Consumer appears to be over-indebted² and if the Consumer seeks a declaration of reckless credit, whether any of the Consumer’s credit agreements appear to be reckless³.

A Debt Counsellor who accepts an application for Debt Review from a Consumer has a statutory obligation in terms of Section 86(6)(a) of the NCA to check for reckless credit within the first 30 business days after application, as per the Regulations to the Act.⁴

¹ National Credit Act 34 of 2005, hereinafter referred to as “the National Credit Act” or simply “the NCA”.

² Section 86(6)(a) of the National Credit Act 34 of 2005.

³ Section 86(6)(b) of the National Credit Act 34 of 2005.

⁴ Regulation 24(6) in GN R489 in GG 28864 of 31 May 2006.

Debt Counsellors should take into account that any Court or National Consumer Tribunal (“Tribunal”) is empowered by Section 83(1) of the NCA, to at any time, declare a credit agreement reckless. The Section states the following:

“Despite any provision of law or agreement to the contrary, in any court or Tribunal proceedings in which a credit agreement is being considered, the court or Tribunal, as the case may be, may declare that the credit agreement is reckless, as determined in accordance with this Part”.

3. Effect of the NCA Amendments

Section 83 of the NCA was amended to allow any Court or Tribunal to declare a credit agreement reckless. Debt Counsellors may therefore refer reckless credit matters to Court *or* as an alternative lodge a reckless credit complaint to the NCR⁵ whom in turn will refer the reckless credit complaint to the Tribunal⁶ to resolve the dispute.

Criteria to conduct affordability assessment have been introduced in Regulations to the NCA⁷. This includes minimum expense norms⁸ to be applied by Credit Providers. The expense norms start at R800 per month and for a Consumer with R50 000 income per month the expense norm is R4 905.38. The minimum expense norm provides reasonable protection for low income earners, however very modest protection to higher income earners. The effect of the affordability assessment criteria is that only bare minimum compliances by Credit Providers are required.

Regulation 23A⁹ also includes practical steps for Credit Providers to validate the Consumer’s income and to take into account the Consumer’s full debt repayment history.

4. Preparation of reckless credit application

When a Debt Counsellor accepts an application from a Consumer in terms of Section 86(6) of the NCA he must determine, as prescribed, whether the Consumer seems to be over-indebted and he must determine whether a Consumer’s credit agreement appears to be reckless, if a Consumer wants confirmation of same.

⁵ Section 136(1) of the National Credit Act 34 of 2005.

⁶ Section 137(1) of the National Credit Act 34 of 2005.

⁷ Regulation 23A in GN R202 in GG 38557 of 13 March 2015.

⁸ Regulation 23A (9) in GN R202 in GG 38557 of 13 March 2015.

⁹ In GN R202 in GG 38557 of 13 March 2015.

4.1. Conditions when reckless credit does not apply

If any of the following conditions exists reckless credit does not apply:

	Condition	NCA
1	Commencement date of the credit agreement prior to June 2007 (Schedule 3 Transitional Provisions(4)).	Schedule 3 Transitional Provisions(4)
2	Consumer is a juristic person.	Section 78(1) ¹⁰
3	Credit agreement is a school or study loan.	Section 78(2)(a) ¹¹
4	Credit agreement is an emergency loan.	Section 78(2)(b) ¹²
5	Loan is a public interest credit agreement.	Section 78(2)(c) ¹³
6	Loan is a pawn transaction.	Section 78(2)(d) ¹⁴
7	Loan is an incidental credit agreement.	Section 78(2)(e) ¹⁵
8	Loan is a temporary increase in the credit limit under a credit facility.	Section 78(2)(f) ¹⁶
9	An automatic increase of a credit facility where the Consumer has requested an automatic annual increase in terms of Section 119(4).	Section 80(1) ¹⁷

¹⁰ National Credit Act 34 of 2005.

¹¹ National Credit Act 34 of 2005.

¹² National Credit Act 34 of 2005.

¹³ National Credit Act 34 of 2005.

¹⁴ National Credit Act 34 of 2005.

¹⁵ National Credit Act 34 of 2005.

¹⁶ National Credit Act 34 of 2005.

¹⁷ National Credit Act 34 of 2005.

4.2. Conditions where reckless credit does apply

If the answer to points 1 to 6 *infra* is positive and one or more of the conditions mentioned in points 7 to 9 *infra* can be determined based upon 1 to 6, the provisions of reckless credit applies:

	Condition	NCA
1	Credit agreement approved after 1 June 2007.	Schedule 3 Transitional Provisions(4)
2	Consumer is not a juristic person ¹⁸	Section 78(1) ¹⁹
3	Consumer has requested an automatic annual increase and where the increase was approved more than once per annum in contravention to Section 119(4)(a) of the NCA.	Section 80(1) ²⁰
4	Consumer has requested an automatic annual increase but the annual increase amount exceeds the amount stipulated in Section 119(4)(b).	Section 80(1) ²¹
5	Credit Agreement is not an incidental credit agreement (Section 78(2)(e)).	Section 5(1)(d)
6	Provisions of reckless credit agreement is not excluded. (School or study loan, emergency loan, a public interest loan, pawn transaction, an incidental credit agreement, or a temporary increase of the credit limit)	Section 78(2)
7	Credit assessment not completed as required in Section 81(2) of the NCA.	Section 80(1) ²²
8	Assessment, as required in Section 81(2) of the NCA, conducted but Consumer did not understand the risks, costs or obligations relating to the credit agreement.	Section 80(1)(b)(i)

¹⁸ "Juristic person" includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if- (a) there are three or more individual trustees; or (b) the trustee itself is a juristic person, but does not include a stokvel.

¹⁹ National Credit Act 34 of 2005.

²⁰ National Credit Act 34 of 2005.

²¹ National Credit Act 34 of 2005.

²² National Credit Act 34 of 2005.

9	An assessment is conducted however upon granting additional debt Consumer will be over-indebted.	Section 80(1)(b)(ii) ²³
10	Additional debt approved for Consumer, after application for debt review in terms of Section 86(6) of the NCA was received.	Section 88(4) ²⁴

4.3. Credit assessment is not completed as required in terms of Section 81(2) of the NCA

Where it can be determined that no credit assessment was completed by the Credit Provider when the loan was approved, the credit agreement is reckless, irrespective of what the outcome of such an assessment might have concluded²⁵.

Every credit assessment is preceded by a credit application. In terms of Section 60(1) of the NCA, every adult natural person and every juristic person or association has a right to apply to a Credit Provider for credit, subject to Section 60(2) of the NCA²⁶. The NCA does not state the method of application but in terms of Section 82 read with Section 81(1) of the NCA it allows Credit Providers to determine the method of application as well as the information required. This means Credit Providers would have a policy to determine the method, process and information required for any credit application.

Credit Providers are required to apply for registration in terms of Section 40 of the NCA. In the event that a Credit Provider fails to register with the National Credit Regulator and extends credit, enter into a credit agreement or offer to do so²⁷, such agreement shall be unlawful and void²⁸.

A Credit Provider is defined as follows in the NCA²⁹:

- (a) *The party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement;*
- (b) *The party who advances money or credit under a pawn transaction;*
- (c) *The party who extends credit under a credit facility;*

²³ National Credit Act 34 of 2005.

²⁴ National Credit Act 34 of 2005.

²⁵ Section 81(2) read with Section 80(1)(a) of the National Credit Act 34 of 2005.

²⁶ *".. every credit provider has a right to refuse to enter into a credit agreement with any prospective consumer on reasonable commercial grounds that are consistent with its customary risk management and underwriting practice"*

²⁷ Section 40(3) of the National Credit Act 34 of 2005.

²⁸ Section 40(4) of the National Credit Act 34 of 2005.

²⁹ Defined in s 1 of the National Credit Act 34 of 2005.

- (d) The mortgagee under a mortgage agreement;*
- (e) The lender under a secured loan;*
- (f) The lessor under a lease;*
- (g) The party to whom an assurance or promise is made under a credit guarantee;*
- (h) The party who advances money or credit to another under any other credit agreement,
or*
- (i) Any other person who acquires the rights of a credit provider under a credit agreement
after it has been entered into.*

As stated in Section 82(1) of the NCA:

“A credit provider may determine for itself the evaluation mechanisms used, or models and procedures to be used, in meeting its assessment obligations under Section 81, provided that any such mechanisms, model or procedures results in a fair and objective assessment and must not be inconsistent with the affordability assessment guidelines made by the Minister.”

The criteria to conduct affordability assessments is contained in Regulation 23A³⁰ to the NCA which states the following:

“(1) These Regulations apply to –

- a) current, prospective and joint consumers;*
- b) all credit providers; and*
- c) all credit agreements to which this Act applies, subject to Regulation 2.*

(2) These Regulations do not apply to a credit agreement in respect of which the Consumer is a juristic person and do not apply to –

- a) a developmental credit agreement;*
- b) a school or student loan;*
- c) public interest credit agreement;*
- d) a pawn transaction;*
- e) an incidental credit agreement;*
- f) an emergency loan;*
- g) a temporary increase in the credit limit under a credit facility;*
- h) a unilateral credit limit increase in terms of sections 119(1); 119(4) and 119(5) of the Act under a credit facility;*

³⁰ In GN R202 in GG 38557 of 13 March 2015.

- i) a pre-existing credit agreement in terms of Schedule 3 item 4(2) of the Act;
- j) any change to the credit agreement and/or any deferral of waiver of an amount under an existing credit agreement in accordance with section 95 of the Act; and
- k) mortgage credit agreements that qualify for the Finance Linked Subsidy Programs developed by the Department of Human Settlement, and credit advanced for housing that falls within the thresholds set from time to time.”

Existing financial means and prospects

In terms of Section 81 of the NCA a Credit Provider is obliged to prevent reckless credit. Section 82 of the NCA allows the Credit Provider to determine for itself the evaluation mechanisms and models, but compliance to Regulation 23A³¹ is compulsory.

In terms of Regulation 23A³² the following is required:

“(3) A credit provider must take practicable steps to assess the consumer or joint consumers’ discretionary income to determine whether the consumer has the financial means and prospects to pay the proposed credit instalments.

(4) A credit provider must take practicable steps to validate gross income, in relation to-

(a) consumers that receive a salary from an employer:

(i) latest three (3) payslips; or

(ii) latest bank statements showing latest three (3) salary deposits;

(b) consumers that do not receive a salary as contemplated in (a) above by requiring:

(i) latest three (3) documented proof of income; or

(ii) latest three (3) months bank statements;

(c) consumers that are self-employed, informally employed or employed in a way through which they do not receive a payslip or proof of income as contemplated in (a) or (b) above by requiring:

(i) latest three (3) months bank statements; or

(ii) latest financial statements.

³¹ In GN R202 in GG 38557 of 13 March 2015.

³² In GN R202 in GG 38557 of 13 March 2015.

(5) Where the consumer's monthly gross income shows material variance, the average gross income over the period of not less than three (3) pay periods preceding the credit application must be utilised.

(6) The consumer must accurately disclose to the credit provider all financial obligations to enable the credit provider to conduct the affordability assessment.

(7) The consumer must provide authentic documentation to the credit provider to enable the credit provider to conduct the affordability assessment."

Existing financial obligations

"8) A credit provider must make a calculation of the consumer's existing financial means, prospects and obligations as envisaged in Sections 78(3) and 81(2)(a)(iii) of the Act.

(9) The credit provider must utilise the minimum expense norms table below, broken down by monthly gross income when calculating the existing financial obligations of consumers.

(10) The methodology in the table requires for:

(a) credit providers to ascertain gross income;

(b) statutory deductions and minimum living expenses to be deducted to arrive at a net income, which must be allocated for payment of debt instalments; and

(c) when existing debt obligations are taken into account, the credit provider must calculate discretionary income to enable the consumer to satisfy any new debt.

Table 1: Minimum Expense Norms

<i>Minimum</i>	<i>Maximum</i>	<i>Minimum Monthly Fixed Factor</i>	<i>Monthly Fixed Factor = % of income Above Band minimum</i>
<i>R0.00</i>	<i>R800.00</i>	<i>R0.00</i>	<i>100%</i>
<i>R800.01</i>	<i>R6 250.00</i>	<i>R800.00</i>	<i>6.75%</i>
<i>R6 250.01</i>	<i>R25 000.00</i>	<i>R1 167.88</i>	<i>9.00%</i>
<i>R25 000.01</i>	<i>R50 000.00</i>	<i>R2 855.38</i>	<i>8.20%</i>
<i>R50 000.01</i>	<i>Unlimited</i>	<i>R4 905.38</i>	<i>6,75%</i>

(11) The credit provider may however on an exceptional basis, where justified, accept the consumer's declared minimum expenses which are lower than those set out in Table 1 provided the questionnaire set out in the Schedule, as issued from time to time, is completed by the consumer or joint consumers.

(12) When conducting the affordability assessment, the credit provider must: –

(a) calculate the consumer's discretionary income;

(b) take into account all monthly debt repayment obligations in terms of credit agreements as reflected on the Consumer's credit profile held by a registered credit bureau; and

(c) take into account maintenance obligations and other necessary expenses.

Debt re-payment history as a Consumer under Credit Agreements

(13) A credit provider must take into account the consumer's debt repayment history as a consumer under credit agreements, as envisaged in Section 81(2)(a,) and must ensure that this requirement is performed: –

(a) within seven (7) business days immediately prior to the initial approval of credit or the increasing of an existing credit limit; and

(b) within fourteen (14) business days with regards to mortgages.

Avoiding double counting in calculating the Discretionary Income

(14) Where a credit agreement is entered into on a substitutionary basis in order to settle off one or more existing credit agreements, a credit provider must:

(a) record that the credit being applied for is to replace other existing credit agreement/s; and

(b) take practicable steps to ensure that such credit is properly used for such purposes.

Disclosure of the credit cost multiple and the total cost of credit

(15) A credit provider must: –

(a) disclose to the consumer the credit cost multiple and total cost of credit in the pre-agreement statement and quotation;

(b) ensure that the credit cost multiple disclosures for credit facilities is based on one year of full utilisation up to the credit limit proposed;

(c) ensure that the attention of the prospective Consumer is drawn to the credit cost multiple and that the cost of credit as disclosed, is understood by the prospective Consumer;

(d) disclose a total cost of credit which includes but not limited to, the following items:

(i) the principal debt;

(ii) interest;

(iii) initiation fee, if any;

(iv) service fee aggregated to the life of a loan; and

(v) credit insurance aggregated to the life of a loan, as set out in Section 106 of the Act.

Outcome of Affordability Assessment

(16) A consumer who is aggrieved by the outcome of an affordability assessment may at any time lodge a complaint in terms of Section 134 or 136 with the credit provider for dispute resolution.

(17) The credit provider must attempt to resolve the complaint within fourteen (14) business days after receiving notification of the complaint from the ombud in terms of Section 134.

(18) If the grievance is not addressed by the credit provider within the period referred to in sub-regulation 10A (15) above, the consumer can approach the National Credit Regulator.

(19) The National Credit Regulator must resolve the complaint within seven (7) business days.

(20) If the National Credit Regulator issues a notice of non-referral in response to a complaint, the consumer may refer the matter directly to the National Consumer Tribunal, subject to its rules of procedure.”

4.4. Consumer did not understand risks, costs or obligations

Assessment, as required in Section 81(2) of the NCA was conducted but the Consumer did not understand the risks, costs or obligations under the proposed credit agreement.

In terms of Section 63(1) of the NCA:

“A Consumer has a right to receive any documentation that is required in terms of this Act in an official language that the Consumer reads or understands.”

This means that to comply with Section 81(2) of the NCA, the Credit Provider is required to explain the risks, costs or obligations in such a way that the applicant will understand.

In terms of Section 64 of the NCA a Consumer has the right to information in a plain and understandable language.

A practical example is when the costs or obligations under the proposed credit is explained in Afrikaans to a person that can only understand Zulu or when the explanation provided is not provided in a plain or understandable language irrespective of language used, then Section 81(2) of the NCA might apply.

Credit assessment mechanisms and procedures have to comply with the NCA³³. In determining compliance to Section 81(2) of the NCA one requires information on the procedures applied by the Credit Providers and determine if the procedures used complies with the requirements of Section 82 of the NCA and if the Credit Providers followed this process.

4.5. Assessment conducted but over-indebted as a result of additional debt

A credit agreement is reckless in terms of Section 80(1)(b)(ii)³⁴ if a Credit Provider conducts an assessment³⁵ and enters into a credit agreement with the Consumer that would make the Consumer over-indebted.

Each Credit Provider determines its own assessment mechanisms and procedures in terms of Section 82³⁶ but irrespective of the test for over-indebtedness as set out in Section 79 such assessment needs to be applied.

In practical terms this means that based on the financial circumstances at the time of application the approval of the additional credit agreement resulted in the Consumer to be over-indebted.

The core of this determination is the ability of the Consumer to meet all his obligations based on the financial means, prospects and obligations.

It is important to understand the financial means, prospects and obligations³⁷ of the Consumer before this assessment is conducted. Financial means, prospects and obligations include the applicant’s own income, means and obligations and the financial means, prospects and obligations of any other adult person in the

³³ Section 82.

³⁴ National Credit Act 34 of 2005.

³⁵ In terms of Section 81(2) of the National Credit Act 34 of 2005.

³⁶ National Credit Act 34 of 2005.

³⁷ Section 78(3).

household in so far that this is requested and disclosed in the application for credit as required in Section 81(1)³⁸.

Credit Providers have different models and procedures for the assessment of a credit application but all credit assessment methods and models should result in a fair and objective assessment and must not be inconsistent with the affordability assessment regulations made by the Minister. In terms of the affordability guidelines set out in Regulation 23A³⁹ the following should be included:

- (a) Existing financial means and prospects;
- (b) Determining existing financial obligations; and
- (c) Debt repayment history.

4.6. Consumer obligations to avoid reckless credit

As stated in Regulation 23A(6) and (7)⁴⁰ a Consumer must accurately disclose to the Credit Provider all financial obligations as well as authentic documentation to enable the Credit Provider to conduct the affordability assessment.

Section 81(1) of the NCA clarifies the obligations of the Consumer in more detail when it states that the Consumer must fully and truthfully answer any request for information made by the Credit Provider as part of the assessment, as set out in Section 81 in the NCA.

The effect of Regulation 23A and Section 81(1) of the NCA is that an obligation exists on the Credit Provider to ask for the correct information and documentation. A Consumer has no duty to supply information not specifically asked for.

Section 81(4)(a)-(b) of the NCA states that it is a complete defense to an allegation that a credit agreement is reckless if the Credit Provider establishes that the Consumer failed to fully and truthfully answer any requests for information made by the Credit Provider as part of the assessment required by this Section and a Court or the Tribunal determines that the Consumer's failure to do so materially affected the ability of the Credit Provider to make a proper assessment.

Section 81(4)(a) is therefore linked to Section 81(4)(b) as follows:

“For all purposes of this Act, it is a complete defence to an allegation that a credit agreement is reckless if:

³⁸National Credit Act 34 of 2005.

³⁹ In GN R202 in GG 38557 of 13 March 2015.

⁴⁰ In GN R202 in GG 38557 of 13 March 2015.

- (a) the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required in this section and*
- (b) a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment".*

In cases where the Consumer was less than truthful in their application the test is if this materially affected the Credit Provider's ability to make a proper assessment. The NCA states that a Court or Tribunal must conduct this determination. What is required from the Debt Counsellor is to investigate and gather the required information to be placed in front of a Court or Tribunal for a determination.

5. Reckless credit investigation

The starting point for any reckless credit investigation is the time the agreement was entered into.

5.1. Conditions when reckless credit does not apply

If any of the conditions set out in paragraph 4.1 is identified, reckless credit does not apply.

5.2. Credit assessment not completed as required in Section 81(2)

Where it can be determined that no credit assessment was completed by the Credit Provider when the loan was approved, the credit agreement is reckless irrespective of what the outcome of such an assessment might have concluded as determined in Section 80(1)(a) of the NCA.

Such determination can only be made on receipt of the details of the credit assessment from the Credit Provider at the time of the approval. Credit Providers are obliged to provide details when requested to do so by a Debt Counsellor within a reasonable period. Where no information is received within a reasonable period the Debt Counsellor need to provide proof of request of information and inform the Court and/or National Consumer Tribunal of the information that was requested but not received within a reasonable period. Debt Counsellors should refrain from drawing unfounded conclusions and rather leave it to the Court to make an appropriate finding⁴¹.

If the answer to the following question is "yes", then no further action is required:

Did the Credit Provider conduct a credit assessment when the loan was approved?

⁴¹ Section 136 of the National Credit Act 34 of 2005.

5.3. The Consumer did not understand the risks, cost or obligations

In determining compliance of Section 81(2) of the NCA one needs information on the procedures applied by the Credit Provider and determine if the procedures complied with the requirements of Section 82⁴², and whether the Credit Providers followed this process.

Such determination can only be made on receipt from the Credit Provider of details of the credit assessment at the time of approval.

If the answer to the following question is “yes”, then no further action is required:

Did the Credit Provider take reasonable steps to explain the risks, cost and obligations to the Consumer?

5.4. Assessment concluded but the Consumers is over-indebted

In order to determine if entering into an agreement resulted on the Consumer becoming over-indebted as set out in Section 80(1)(b)(ii)⁴³, one needs information on the procedures applied by the Credit Provider to determine if the procedures complies with the requirements of Section 82 of the NCA and Regulation 23A thereto.

In order to make a determination, a Debt Counsellor will need the following information:

- Details of financial means and prospects when the credit agreement was approved.
- Existing financial obligations when the credit agreement was approved.
- Debt obligations of the Consumer when the credit agreement was approved.

The Debt Counsellor should request the abovementioned information from the Credit Provider who is obliged to supply the information requested within a reasonable time.

5.4.1. Details of financial means and prospects when the credit agreement was approved

If the answer on any of the questions below is “no”, then further investigation is required. If the answer to all the questions below is “yes”, then it is likely that the criteria for an affordability assessment by the Credit Provider was met:

- Was all the income of the Consumer at the time of approval of the debt used?
- Was the income of the Consumer adequately validated?

⁴² National Credit Act 34 of 2005.

⁴³ National Credit Act 34 of 2005.

- If the Consumer was self-employed or informally employed, was proof of income verified?
- If the information provided showed material variance in income was this taken into account when the assessment was done?
- Did the Consumer supply all the information requested by the Credit Provider?
- Did the Consumer supplied correct information and documentation as requested by the Credit Provider?

5.4.2. Details of existing financial obligations when the credit agreement was approved

Credit Providers are obliged to calculate if the Consumer's cash flow can sustain the additional repayment. The formula for this calculation is determined in Regulation 23A(8) – (12)⁴⁴.

If the answer to all the questions below is “yes”, it is likely all financial obligations were taken into account by the Credit Provider when the assessment was done and no further investigation is required on this aspect:

- Did the Credit Provider obtain a declaration of financial obligations from the Consumer as envisaged in Section 78(3) and Section 81(2)(a)(ii) of the NCA?
- Did the Credit Provider apply the minimum expense norm as set out in Regulation 23A(9)⁴⁵?
- Were all the Consumer's declared financial obligations taken into account in the credit assessment?
- Were all existing debt obligations, as reflected in the Consumers' credit profile, taken into account in the credit assessment?
- Were all maintenance obligations taken into account in the credit assessment?

5.4.3. Repayment calculation when the credit agreement was approved

Credit Providers are obliged to do the following calculation as part of the credit assessment:

Gross income	R
Less statutory deductions	R
Less maintenance payments	R
Less living expenses	R
Less existing debt repayments	R
Amount available to repay new debt	R
Less monthly debt repayment	R

⁴⁴ In GN R202 in GG 38557 of 13 March 2015.

⁴⁵ In GN R202 in GG 38557 of 13 March 2015.

Surplus/shortage

R

The abovementioned calculation will determine if the Consumer has a positive cash flow left after the new monthly debt repayment amount is deducted.

If the answer to the following question is “yes”, it is likely that the Credit Provider applied the required calculation and no further investigation is required on this aspect.

Was there a surplus when statutory deductions, maintenance payments, living expenses and existing debt repayments have been deducted from Gross Income by the Credit Provider?

5.5. Value of assets not part of affordability assessment

As part of the assessment Credit Providers are also required to check that the repayment term matches the income prospects of the Consumer. For instance, if a Consumer is due to go on retirement before the repayment term expires the Credit Provider needs to verify the continued source of income after retirement. In cases where the Consumer has not made provision for retirement a term exceeding the retirement age should not be approved. Credit Providers cannot rely on the security value of an asset to approve the application for debt.⁴⁶

5.6. Avoid double counting

Where a credit agreement is entered into and on the basis that existing debt will be settled double counting of the old and new debt is not required on condition that the Credit Provider complies with the following conditions set out in Regulation 23A(14):

- a. Credit Provider must record that the credit being applied for is to replace other existing credit agreements; and
- b. Take practicable steps to ensure that such credit is properly used for such purpose.

If the answer to the following question is yes”, no further action is required on this aspect:

Did the Credit Provider record that the debt applied for will replace other existing debt?

Was proceeds of the new credit used by the Credit Provider to settle the existing debt in full?

5.7. Debt used for a commercial purpose

⁴⁶ ABSA v De Beer and Others (267/2011) [2015] ZAGPHC 963.

As in cases where the debt is used for a commercial purpose such as running a business such as a shop, taxi, farm, or any other business venture, Credit Providers are required in terms of Section 81(2)(b) of the NCA to conclude that there is a reasonable basis that the business may prove to be successful. This means that the viability of the business venture and subsequent cash flow should be checked prior to the approval of the debt.

If the answer to the following question is “yes”, no further action is required on this aspect:

Was proceeds of the application for debt used for a business venture?

Did the Credit Provider conduct a business venture assessment?

Did the Credit Provider conclude that the business venture may prove to be successful?

6. Interaction with Credit Providers when reckless credit is investigated

When reckless credit is investigated, Debt Counsellors should make contact with the Credit Provider as part of the investigation.

6.1. Inform the Credit Provider

When a Debt Counsellor accepts an application for Debt Review in terms of Section 86(6) of the NCA, the Debt Counsellor should determine if the Consumer seeks a declaration of reckless credit or whether any of the Consumer’s credit agreements appears to be reckless.

Debt Counsellors should notify a Credit Provider that investigations of possible reckless credit in terms of Section 80⁴⁷ has commenced. This notification can include the request for information as set out below.

6.2. Request more information

A Debt Counsellor should request the Credit Provider in writing to supply information that will assist in the investigation into possible reckless credit. Credit Providers should in terms of Sections 86(5) of the NCA⁴⁸ cooperate and supply the information.

In order to conduct a reckless credit investigation in terms of Section 86(6) of the NCA the Debt Counsellor should request the following information from the Credit Provider:

⁴⁷National Credit Act 34 of 2005.

⁴⁸ Section 86(5): A consumer who applies to a Debt Counsellor, and each credit provider contemplated in subsection 4(b), must –

- (a) Comply with any reasonable requests by the Debt Counsellor to facilitate the evaluations of the consumer’s state of indebtedness and the prospects for responsible debt re-arrangements; and
- (b) Participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.

- (i) Approval date of the credit agreement.
- (ii) Copy or voice recording of the application.
- (iii) Detail of the credit assessment as required by Section 80(1)(a).
- (iv) Copy of the pre-agreement statement and quotation as required in Section 82 and 92.
- (v) Detail of how the risks, costs, as well as the rights and obligations in terms of Section 81(2)(a)(i) was explained to the Consumer.
- (vi) Detail of the payment history including the credit bureau report used to determine the Consumer's debt repayment under credit agreements as required in Section 81(2)(a)(ii).
- (vii) Detail of the Consumer's financial means, prospects and obligations in terms of Section 81(2)(a)(iii) used by the Credit Provider in the assessment.
- (viii) Details of compliance to the requirements of Section 82 and Regulation 23A.
- (ix) Copy of the credit agreement.

In addition to the requirement of Section 86(5) of the NCA to cooperate with any reasonable request from the Debt Counsellor, the Consumer has a right in terms of Section 65⁴⁹ to receive documents.

The abovementioned information should be used by the Debt Counsellor in the determination whether the credit agreement is reckless or not. Should the Debt Counsellor make a proposal to a Court recommending that the Magistrate make an order that one or more of the Consumer's credit agreements be declared reckless⁵⁰, the information received from the Credit Provider should be included.

Debt Counsellors who accepts an application for Debt Review in terms of Section 86(6) of the NCA is required to check for possible reckless credit. In order to complete an investigation into possible reckless credit the Debt Counsellor will need information from Credit Providers. Consumers who have applied for Debt Review are protected from any possible legal action in terms of Section 86(10). This protection expires when 60 business days from date of application for Debt Review lapses unless the matter has been issued in a Court or Tribunal.

In order to meet the deadlines set out in the NCA, the Debt Counsellor should notify the Credit Provider that the information requested is required within a reasonable time to allow the Debt Counsellor to complete the investigation.

⁴⁹ Section 65(1) of the National Credit Act 34 of 2005: Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any. Section 65(4): on written request from the consumer the credit provider must provide the consumer with-

- (a) A single replacement copy of a document required in terms of the Act, without charge to the consumer at any time within a year after date of the original delivery of that document, and
- (b) Any other replacement copy, subject to any search and production fees permitted by regulation.

⁵⁰ Section 86(7)(c) of the National Credit Act 34 of 2005.

Should the information be requested in writing from the Credit Provider but not be forthcoming the Debt Counsellor should inform the Court that the information requested from the Credit Provider was not received in the time frame requested. The Debt Counsellor should refrain from finalising the investigation without the correct information and should rather request the Court to instruct the Credit Provider to supply the information requested and to postpone the matter at the cost of the Credit Provider.

7. No reckless credit

In matters where no evidence was found of possible reckless credit the Debt Counsellor should inform the Court as follows:

I could not find any prima facie evidence regarding reckless lending on any of the credit agreements, and I recommend that the Court make no order regarding this issue.

8. Reckless credit assessment in preparation of application to Court

Debt Counsellors are obliged to provide full details of the reckless credit investigation and recommendation to the Court. A mere allegation of reckless credit is not sufficient. Where the reckless credit investigation and recommendation lacks the required detail the Debt Counsellor opens the door for possible cost orders.

Any proposal submitted by a Debt Counsellor to a Court requesting a determination of reckless credit needs to contain details of why and how the credit agreement should be declared reckless.

The following aspects should be covered in the investigation and recommendation to the Court:

- The commencement date of the credit agreement was after 1 June 2007.
- That the Consumer is not a juristic person.
- That none of the following conditions apply:
 - Automatic annual increase (Section 119(4)(a) and (b) of the NCA)
 - Credit Agreement is not an incidental credit agreement (Section 5(1)(b) of the NCA)
 - Credit Agreement is not a school or study loan, emergency loan, a public interest loan, pawn transaction or temporary increase of credit limit (Section 78(2) of the NCA)
- Completion of the credit assessment as required in Section 81(2), Section 82 and Regulation 23A of the NCA or the lack thereof with relevant information to substantiate non-compliance.
- Assessment completed as required in terms of Section 81(2) of the NCA but Consumer did not understand the risks, cost or obligations. In respect of reckless credit as described in Section 81(2)

of the NCA, the Court would require information demonstrating the Consumer's level or education and experience at the time that the credit agreement was approved.

- Where an assessment was conducted but over-indebtedness as a result of additional debt, as set out in Section 80(1)(b)(ii) of the NCA, details of the Consumer's over-indebtedness at the time that the agreement was approved as well as full details of the Consumer's income and expenditure should be provided. This information should be compared to the information supplied by the Credit Provider.
- Confirmation that the Consumer supplied all the information and documentation requested by the Credit Provider to indicate that full disclosure was made by the Consumer as required in Section 81(4) of the NCA.
- Details of additional debt approved after application for Debt Review in terms of Section 86(6) of the NCA.
- Compliance to the minimum expense norms as required in Regulation 23A(9).
- Compliance, or not, that the Consumer's debt repayment history as required in Section 81(2)(a) of the NCA was taken into account.
- Details of the repayment calculation when the credit agreement was approved. This has to be supported by information that will substantiate the calculation. The purpose of this calculation is to indicate to the Court that the cash flow of the Consumer was negative when the debt was approved. The format of the calculation should be as follows:

Gross income	R
Less statutory deductions	R
Less maintenance payments	R
Less living expenses	R
Less existing debt repayments	R
Amount available to repay new debt	R
Less monthly debt repayment	R
Surplus/shortage	R

- If the debt was used for a commercial purpose details of the business venture as well as an assessment if there was a reasonable basis to conclude that the commercial purpose may be successful⁵¹ must be supplied.

9. Reckless credit complaint to the NCR

⁵¹ Section 81(2)(b) of the National Credit Act 34 of 2005.

Debt Counsellors have the option to submit a complaint contravention concerning an allegation of reckless credit to the NCR in terms of Section 136(1) of the NCA.

The NCR will investigate the allegation for reckless credit and may refer the matter for investigation and on completion the NCR may refer the matter to the Tribunal.

This complaint to the NCR should be in the prescribed manner and form but no manner or form has been made available to date, and Debt Counsellors are advised to write a report to the NCR containing all the details as set out in 7 above. The complaint with supporting documents should be submitted to the NCR. A complaint with a mere allegation of reckless credit will not enable the NCR to investigate the matter.

10. Treatment of reckless credit matters in Debt Review application

When a reckless credit matter is referred to the Magistrate Court dealing with the Debt Review Application the credit agreement is included in the Debt Review Application and included in the repayment plan until such time as the Credit Agreement is declared reckless.

When a reckless credit complaint is submitted to the NCR the credit agreement is included in the Debt Review application and repayment plan until such time as the Credit Agreement is declared reckless.

When a complaint is submitted to the NCR the Debt Counsellor should inform the Court accordingly in the Debt Counsellor's Affidavit.

In cases where reckless credit matters are referred to the Magistrate Court the NCR may not intervene in the matter (Section 87(2) of the NCA).

Annexure A

Request for information from Credit Provider for reckless credit investigation

To: Credit Provider name

E-mail:

Date:

RE: REQUEST FOR COOPERATION IN TERMS OF SECTION 86(5) FOR THE PROVISION OF INFORMATION TO ENABLE RECKLESS CREDIT INVESTIGATION IN TERMS OF THE NATIONAL CREDIT ACT.

CONSUMERS: *(Name of Consumer(s))*

ID: *(id of consumer(s))*

Account number(s): *(list account numbers)*

We act as Debt Counsellors on behalf of abovementioned consumer(s) from whom we have instructions to address this correspondence to yourselves.

You have approved a credit agreement(s) for the consumer(s) listed above and in terms of Section 86 of the National Credit Act (NCA) we have a statutory obligation to investigate possible reckless credit. In order to complete our investigation you can assist by providing the following information within the next 10 business days:

- (i) Approval date of the credit agreement.
- (ii) Copy or voice recording of the application.
- (iii) Detail of the credit assessment as required by Section 80(1)(a).
- (iv) Copy of the pre-agreement statement and quotation as required in Section 82 and 92.
- (v) Detail of how the risks, costs, as well as the rights and obligations in terms of Section 81(2)(a)(i) was explained to the Consumer.
- (vi) Detail of the payment history including the credit bureau report used to determine the Consumer's debt repayment under credit agreements as required in Section 81(2)(a)(ii).
- (vii) Detail of the Consumer's financial means, prospects and obligations in terms of Section 81(2)(a)(iii) used by the credit provider in the assessment.
- (viii) Details of compliance to the requirements of Section 82 and Regulation 23A
- (ix) Copy of the credit agreement.

We remind you that in addition to the requirement of section 86(5) of the NCA to cooperate with any reasonable request from the Debt Counsellor the consumer has a right in terms of Section 65 of the NCA to receive documents. Please send the information to the address mentioned above. If the information is not being made available please reply accordingly for the record.

DC name and signature

DC number

Annexure B

Checklist when conditions of reckless does not apply

	Condition	NCA	Answer Yes or No
1	Commencement date of the credit agreement prior to June 2007.	Schedule 3 Transitional Provisions(4)	

2	Consumer is a juristic person.	Section 78(1)	
3	Credit agreement is a school or study loan.	Section 78(2)(a)	
4	Credit agreement is an emergency loan.	Section 78(2)(b)	
5	Loan is a public interest credit agreement.	Section 78(2)(c)	
6	Loan is a pawn transaction.	Section 78(2)(d)	
7	Loan is an incidental credit agreement.	Section 78(2)(e)	
8	Loan is a temporary increase in the credit limit under a credit facility.	Section 78(2)(f)	
9	An automatic increase of a credit facility where the Consumer has requested an automatic annual increase in terms of Section 119(4).	Section 80(1)	
If the answer is "yes" on any of the issues set out in point 1 to 9 the conditions of reckless do not apply.			

Annexure C

Reckless credit investigation checklist

	Condition	NCA	Answer Yes or No
1	Did the Credit Provider conduct a credit assessment when the loan was approved?	Section 82(2)	

2	Did the Credit Provider take reasonable steps to explain the risks, cost and obligations to the Consumer?	Section 82(2)	
3	Was all the income of the Consumer at the time of approval of the debt used?	Regulation 23A(3)	
4	Was the income of the Consumer adequately validated?	Regulation 23A(4)	
5	If the Consumer was self-employed or informally employed, was proof of income verified?	Regulation 23A(4)(c)	
6	If the information provided showed material variance in income was this taken into account when the assessment was done?	Regulation 23A(5)	
7	Did the Consumer supply all the information requested by the Credit Provider?	Regulation 23A(6)	
8	Did the Consumer supply correct information and documentation as requested by the Credit Provider?	Regulation 23A(7)	
9	Did the Credit Provider obtain a declaration of financial obligations from the Consumer	Section 78(3); and Section 81(2)(a)(ii)	
10	Did the Credit Provider apply the minimum expense norm?	Regulation 23A(9)	
11	Were all existing debt obligations, as reflected in the Consumers' credit profile, taken into account in the credit assessment?	Regulation 23A(11)(b)	
12	Were all maintenance obligations taken into account in the credit assessment?	Regulation 23A(11)(c)	

Repayment calculation

Gross income	R
Less statutory deductions	R
Less maintenance payments	R
Less living expenses	R
Less existing debt repayments	R
Amount available to repay new debt	R

Less monthly debt repayment R

Surplus/shortage R

The abovementioned calculation will determine if the Consumer has a positive cash flow left after the new monthly debt repayment amount is deducted.

	Condition	NCA	Answer Yes or No
13	Was there a surplus when statutory deductions, maintenance payments, living expenses and existing debt repayments have been deducted from Gross Income by the Credit Provider?	Regulation 23A(12)	
14	Did the Credit Provider record that the debt applied for will replace other existing debt?	Regulation 23A(14)(a)	
15	Was proceeds of the new credit used by the credit provider to settle the existing debt in full?	Regulation 23A(14)(b)	
16	Was proceeds of the application for debt used for a business venture?	Section 81(2)(b)	
17	Did the Credit Provider conduct a business venture assessment?	Section 81(2)(b)	
18	Did the Credit Provider conclude that the business venture may prove to be successful?	Section 81(2)(b)	
If the answer to questions 1 to 18 was "yes" this means that the conditions of the NCA are met and no further action is required.			
If the answer to questions 1 to 18 was "no" this means that it is possible that the conditions of the NCA are met and further investigation is required to test for reckless credit.			