

National Credit Act – New Affordability Assessment Regulations

The National Credit Act 34 of 2005 (the “NCA”) came into effect on 1 June 2007 and in doing so replaced the Usury Act, 73 of 1968 and the Credit Agreements Act, 75 of 1980 as the founding legislation regulating consumer credit in South Africa. The aim behind the NCA is *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.*

One particular area of focus of the NCA, as contained in Chapter 4: Part D, has been the monitoring of the advancement of credit to consumers in an attempt to protect consumers from being advanced reckless credit which they simply cannot afford to repay and inevitably finding themselves over-indebted. In particular, section 81 of the NCA, which regulates the prevention of reckless credit to consumers, places an obligation on a credit provider, such as a bank, to conduct an affordability assessment on a consumer, prior to entering into, or amending, a credit agreement with that consumer. Aside from providing that the credit provider conduct a fair and objective assessment, at its enactment, section 81(2) did not contain further guidelines on how the affordability assessment should be conducted nor did any other provision or Regulation contained therein. As a result, credit providers, in their sole discretion, determined the manner in which the affordability assessments were conducted.

This position changed on 13 March 2015 when the National Credit Amendment Act 19 of 2014 (“**Amendment Act**”) came into effect. The Amendment Act inserted Regulation 23A in the National Credit Regulations, 2006 (“**NCA Regulations**”) which contained the *Criteria to Conduct an Affordability Assessment*. Essentially, credit providers are still entitled to utilise their own mechanisms in order to determine affordability, however, these mechanisms must not be inconsistent with the affordability regulations as contained in Regulation 23A.

The following is a brief exposition of the 7 sections in Regulation 23A, which sets out guidelines for service providers that need to be applied when assessing a particular customer’s affordability, is divided into.

Application

The first leg of the affordability assessment focuses on whether or not the Regulations are applicable to the particular credit transaction, i.e. whether the credit provider is in fact obliged to conduct an affordability assessment prior to granting credit. In general, Regulation 23A applies to current, prospective and joint consumers, all credit providers and all credit agreements to which the NCA applies. Regulation 23A(2) sets out various types of agreements or circumstances under which the Regulation will not apply such as where the consumer is a juristic person or where it is for an emergency loan. Naturally, the same persons and credit agreements that are exempted from the reckless provisions of the NCA (as set out in section 78 of the NCA) are not subject to Regulation 23A, and as such an affordability assessment will not be conducted in these instances.

Existing Financial Means and Prospects

Once it is determined that an affordability test is to be conducted, the second leg of the affordability assessment deals with the prospective consumers existing financial means and prospects. Regulation 23A places an obligation on the credit provider to take the necessary practicable steps to assess the consumer's discretionary income in order to determine whether that consumer has the financial means and prospects to pay the proposed credit instalments. The Amendment Act defines discretionary income as the consumer's gross income less statutory deductions, less necessary expenses, less all other committed payment obligations as disclosed by the consumer, including obligations disclosed by the consumer's credit record as held by credit bureaux.

Regulation 23A(4) places a further obligation on the credit provider to take practicable steps to validate the gross income of a consumer in the various circumstances under which such gross income is earned by the consumer. The Amendment Act defines gross income as all income earned from whatever source without deductions. In relation to consumers that receive a salary from an employer, the credit provider must validate such gross income by means of the latest 3 payslips or latest bank statement showing the latest 3 salary deposits. In relation to consumers that do not receive a salary, the credit provider must validate such gross income by means of the latest 3 written proof of income or latest 3 months bank statements. In relation to consumers that are self-employed, informally employed or employed in a way through which they do not receive a payslip or proof of income, the credit provider must validate such gross income by means of the latest 3 months bank statements or latest financial statements.

The consumer is required to accurately disclose all financial obligations and provide authentic documentation to the credit provider to enable the credit provider to conduct the affordability assessment.

Existing Financial Obligations

The third leg of the affordability assessment deals with the consumers existing financial obligations. A credit provider is required to make a calculation of the consumers existing financial means, prospects and obligations as required in sections 78(3) and 81(2)(a)(iii) of the NCA.

Regulation 23A provides for a minimum expense norms table which is broken down by monthly gross income when a credit provider is calculating the existing financial obligations of a consumer. The methodology in the table requires credit providers to ascertain gross income, statutory deductions and minimum living expenses to be deducted to arrive at a net income, which must be allocated for payment of debt instalments. When existing debt obligations are taken into account, the credit provider must calculate discretionary income to enable the consumer to satisfy any new debt. The credit provider may however on an exceptional basis, where justified, accept the consumers declared minimum expenses which are lower than those set out in the minimum expenses table, provided the questionnaire set out in the schedule is completed by the consumer.

The credit provider is now obligated to calculate the consumer's discretionary income, take into account all monthly debt repayment obligations in terms of credit agreements as reflected on the consumers credit profile held by a registered credit bureau and take into account maintenance obligations and other necessary expenses. The Amendment Act defines necessary expenses as the consumer's minimum living expenses including maintenance payments but excluding monthly debt repayment obligations in terms of credit agreements.

Debt Re-Payment History

The fourth leg of the affordability assessment places an obligation on the credit provider to take into account the consumers debt re-payment history with all other credit agreements. This requirement is to be performed within 7 business days immediately prior to the initial approval of credit or the increasing of an existing credit limit, and within 14 business days with regards to mortgages.

Avoiding Double Counting

The fifth leg of the affordability assessment is applied in instances where the credit agreement is entered into on a substitutionary basis in order to set off one or more existing credit agreements. In this instance, a credit provider must record that the credit being applied for is to replace other existing credit agreements and take practicable steps to ensure that such credit is properly used for such purposes.

Credit Provider Disclosures

Regulation 23(15) places an obligation on a credit provider to disclose the credit cost multiple and total costs of credit in the pre-agreement statement and quotation as based on one year of full utilisation up to the credit limit proposed.

Outcome of Affordability Assessment

The Regulations empower a consumer who is aggrieved by an outcome of the affordability assessment to lodge a complaint to a credit ombud with jurisdiction, consumer court or alternative dispute agent, as the case may be, as set out in section 134 of the NCA or initiate a complaint with the National Credit Regulator (“NCR”) as set out in section 136 of the NCA.

The credit provider is obliged to attempt to resolve the complaint within 14 business days of notification of the complaint from a credit ombud in terms of section 134. Where a credit provider fails to address the complaint within the specified timeframe, the consumer can approach the NCR and the NCR must resolve the complaint within 7 business days.

Conclusion

With the introduction of Regulation 23A, credit providers now have a framework with which to conduct an affordability assessment and as a result there should be more clarity and consistency amongst credit providers when conducting assessments. However, the broad categorisation of certain aspects contained in the provisions may lead to some difficulties in the future.

The addition of Regulation 23A and the corresponding definitions theoretically goes a long way to help both credit providers answer the question whether a consumer can afford the credit they seek and expounds the purpose of the NCA in protecting consumers. In time, further clarity will be gained as and when issues arise and are dealt with accordingly.

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