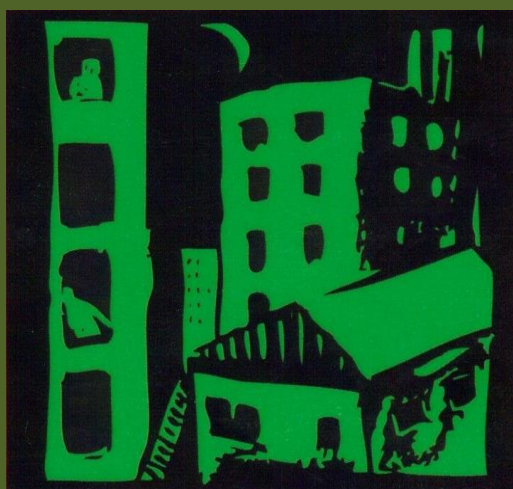


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**The implications of
*Truworths Limited v
Minister of Trade
and Industry* 2018
(3) SA 558 (WCC)
for access to credit
by historically
disadvantaged and
low-income
consumers**

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ABSTRACT

The problem of safe and affordable credit for low-income consumers has remained a conundrum for policy makers. More pointedly, sustainable participation of historically disadvantaged and low-income consumers in the mainstream

*credit market has proved to be problematic in South Africa. Despite the introduction of the National Credit Act 34 of 2005 ("NCA") numerous South Africans are still trapped in debt. To alleviate this problem the NCA was amended by the National Credit Amendment Act 19 of 2014 ("NCAA") to promote responsible lending and borrowing. Nonetheless, certain regulations that were promulgated under the NCAA were challenged in *Truworths v Minister of Trade and Industry 2018 (3) 558 (WCC) ("Truworths")* on the basis that they discriminated against the informally employed and financially excluded since they require consumers to provide bank statements, pay slips or financial statements as proof of income. This article presents a reflective appraisal of *Truworths* in the light of its support for access to credit by those on the peripheries of South Africa's credit market. Although the authors applaud the decision in *Truworths* as having the potential to open up the credit market to the financially excluded, they also raise concerns about whether striking down regulations that encourage consumers to open bank accounts is the optimal approach to promoting financial inclusion in South Africa.*

Keywords: National Credit Act; Financial inclusion; Over-indebtedness; Historically disadvantaged individuals; Low-income consumers; Affordability assessment regulations; Reckless lending

1 INTRODUCTION

The introduction of new legislation and regulations in the field of consumer credit law is hardly amicable due to the multiplicity of conflicting interests at stake.¹ On the one hand consumers are entitled to access safe and affordable credit and on the other hand the credit providers, their shareholders and investors are equally entitled to a fair profit or return on investment.² The issue of consumer credit regulation is very contentious in South Africa because of its history of systematic disempowerment which caused economic unevenness and precluded the majority of South Africans from involvement in the mainstream economic activities including the credit market.³

Following the advent of democracy in 1994, the opening of the economy to external financial flows and global influences encouraged the alignment of national laws and policies with international norms and standards.⁴ The new age of political liberty was seen as the appropriate basis for economic freedom and financial inclusion.⁵ The post-apartheid policy environment has therefore been concerned with redressing the

¹ Kelly-Louw M (with contributions by Stoop P) *Consumer credit regulation in South Africa* (Cape Town: Juta & Company 2012) at 292.

² Feldman LP *Consumer protection: problems and prospects* (Michigan: West Publishing Company 1976) at 47.

³ See Department of Trade and Industry *Making credit markets work: a policy framework for consumer credit* (2004) at 8.

⁴ Hawkins P "The visible hand: shaping stability and inclusion in the South African financial sector" in Bhorat H *et al* (eds) *The Oxford companion to the economics of South Africa* (Cape Town: Oxford University Press Southern Africa 2014) at 174.

⁵ Bhorat H *et al* "The economic policy of South Africa: past, present and future" in Bhorat (2014) at 1.

historical legacy of the apartheid regime and creating a new society founded on human dignity, equality and freedom.⁶ Also, there is a widespread belief in the new South Africa that “[s]ustainable and inclusive economic growth and development will be aided by improving access to financial services for the poor, vulnerable and those in rural communities”.⁷

The National Credit Act⁸ (“NCA”) and its regulations were *inter alia* enacted to promote access to credit by those who could not previously access it and to combat reckless lending.⁹ However, the number of consumers with good credit scores has progressively deteriorated despite the NCA.¹⁰ As a result, the legislature amended the

⁶ See s 1(a) of the Constitution of the Republic of South Africa 1996 (“Constitution”). The equality principle is one of three democratic values that are central in the Bill of Rights (“BOR”). It is noteworthy that the right to equality is the first right contained in the BOR. Section 9 of the Constitution provides as follows:

“ (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
 (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
 (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
 (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
 (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

The Promotion of Equality and Prevention of Unfair Discrimination Act 55 of 2003 (“PEPUDA”) was enacted to give effect to the right to equality. In South Africa, the concept of equality does not merely entail identical treatment of persons in identical circumstances (formal equality) but rather it permits differential treatment aimed at achieving genuine social equality in the form of substantive equal outcomes. See for instance *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC). For an in-depth discussion of the right to equality, see Currie I & De Waal J *The Bill of Rights handbook* 6th ed (Cape Town: Juta Law 2013) chap 9; and Albertyn C & Goldblatt B “Equality” in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2nd ed (Cape Town: Juta Law 2008) chap 35.

⁷ See National Treasury *A safer financial sector to serve South Africa better* (2011) Policy document at 7.

⁸ Act 34 of 2005. It should be noted that all sections of legislation or regulations cited in this article refer to those of the NCA or its regulations, unless otherwise indicated. The NCA was enacted at a time when population groups consisting of poor people were drowning in debt. By November 2006, approximately 75 000 consumer debt defaults had already issued and about 4 million South Africans had been blacklisted by the credit bureaux. The number of administration orders that were granted annually skyrocketed to such an extent that they were referred to as an “industry”. See Boraine A “Some thoughts on the reform of administration orders and related issues” (2003) 45(1) *De Jure* at 217; Boraine A “The reform of administration orders within a new consumer credit framework” in Kelly-Louw M *et al* (eds) *The future of consumer credit regulation: creative approaches to emerging problems* (Abingdon, UK: Routledge 2008) at 187; and Kelly-Louw M “The prevention and alleviation of consumer over-indebtedness” (2008) 20 *SA Merc LJ* 200 at 204.

⁹ See s 3(a) and s 3(d).

¹⁰ The 2017-2018 annual report shows that as at 31 December 2017 there were 25.31 million credit active consumers of whom 9.70 million had impaired credit records. See National Credit Regulator “Annual report” 2017/18 available at <https://www.ncr.org.za/annual-reports> (accessed 06 April 2019). The NCA became fully operational on 1 June 2007. See Proc 22 in GG 28824 of 11 May 2006. For a discussion of how the Act was implemented, see Otto J & Otto RL *The National Credit Act explained* 4th ed (Durban: LexisNexis 2016) at 8-11.

Act¹¹ to provide the Minister with the power to promulgate new regulations¹² pertaining to credit provision. Some of these new regulations were recently challenged before the Western Cape High Court in *Truworths v Minister of Trade and Industry* (“*Truworths*”).¹³ This case is crucial because it has a major bearing on the future participation of historically disadvantaged individuals (“HDIs”)¹⁴ and low-income consumers in South Africa’s financial services sector, especially the credit market.¹⁵

Research on credit behaviour and its potential implications for policy and regulation conducted by FinMark Trust on behalf of the National Credit Regulator (“NCR”) indicates that 39 percent of adults in South Africa (13 155 679 individuals) can be categorised as HDIs.¹⁶ A large majority of them live in rural areas, are under the age of 30 and are not economically settled. Many of them rely on government grants or family members for income. They have low levels of income in the range of about R2 000 or less per month and some of them do not have an income at all.¹⁷ Most HDIs face infrastructure problems relating to water, sanitation and electricity as well as physical proximity to mainstream financial institutions. Research conducted by FinMark Trust also shows that 49 percent of HDIs have commercial bank products, 7 percent use formal non-bank products, 12 percent rely solely on informal financial services, and 32 percent of them do not use any financial products at all.¹⁸ This article presents a reflective analysis of the *Truworths* case and discusses its implications for access to credit by HDIs and low-income consumers in South Africa.

2 CONTEXTUAL BACKGROUND

Before the NCA, the credit market that had developed in South Africa was characterised by discrimination, abuse of consumers and inadequate consumer protection.¹⁹ The

¹¹ See National Credit Amendment Act 19 of 2014 (“NCAA”).

¹² See GN R202 in GG 38557 of 13 March 2015.

¹³ 2018 (3) SA 558 (WCC).

¹⁴ HDIs are defined in s 2(6) of the NCA as consumers that were previously excluded from participating in the mainstream economy on the basis of race. See also *FirstRand Bank Ltd v Maleke and Three Similar Cases* 2010 (1) SA 143 (GSJ).

¹⁵ Financial inclusion which means that “all persons have timely and fair access to appropriate, fair and affordable financial products and services”, has become an important policy goal in South Africa. National Treasury has underscored the need to enhance financial inclusion in South Africa under the “twin peaks” system of regulation. See s 1 of the Financial Sector Regulation Act 9 of 2017. See also National Treasury (2011) at 7. For further discussion of financial inclusion, see Hannig A & Jansen S “Financial inclusion and financial stability: current policy issues” (2010) *ADB Working Paper* 259 at 1-29; and Claessens S “Access to financial services: a review of issues and public policy objectives” (2006) 21 *World Bank Research Observer* at 207.

¹⁶ See FinMark Trust *Credit and borrowing in South Africa: FinScope consumer survey South Africa* (2012) A report for the National Credit Regulator at 15 and 19.

¹⁷ See FinMark Trust (2012) at 15 and 19.

¹⁸ See FinMark Trust (2012) at 15 and 19. Regrettably, there are no available recent statistics regarding the aggregate numbers of low-income or low-asset debtors in South Africa. See Coetzee H “Is the unequal treatment of debtors in the natural person insolvency law justified? A South African exposition” (2016) 25 *Int. Insolv. Rev.* 36 at 38 fn 17.

¹⁹ Kelly-Louw (2012) at 14.

measures that were available to prevent reckless extension of credit were ineffective.²⁰ Thus, the NCA was enacted *inter alia* to democratise access to credit under sustainable conditions.²¹ This means that the Act and its regulations ought to negotiate the delicate balance between combatting reckless credit and promoting access to credit for HDIs and low-income consumers. In *SA Taxi Securitisation (Pty) Ltd v Mbatha ("Mbatha")*,²² the Court, per Levenberg AJ, most eloquently noted :

"While one purpose of the NCA is to discourage reckless credit, the Act is also designed to facilitate access to credit by borrowers who were previously denied such access. An over-critical armchair approach by the Courts towards credit providers when evaluating reckless credit, or the imposition of excessive penalties upon lenders who have recklessly allowed credit, would significantly chill the availability of credit especially to the less affluent members of our society."²³

Originally, the NCA provided broad guidelines to credit providers on how to conduct pre-agreement assessments of the consumer's ability to repay credit. Section 81(2) of the NCA only required the credit provider to evaluate the consumer's "general understanding and appreciation of the risks and costs of the proposed credit, the rights and obligations of a consumer under a credit agreement; debt repayment history ... and existing financial means, prospects and obligations".²⁴ Credit providers were virtually at liberty as to how they structured and conducted section 81 assessments.²⁵ Because the NCA did not prescribe specific requirements on how pre-agreement assessments were to be conducted, numerous South Africans acquired credit they could not afford.²⁶ The high levels of over-indebtedness prompted various changes in terms of the NCAA which *inter alia* provides the Minister with the power to prescribe the criteria for conducting

²⁰ For a brief discussion of the history of the NCA, see Kelly-Louw (2012) at 13-18.

²¹ See s 3(a).

²² 2011 (1) 310 (GSJ). It is noteworthy that the NCA in s 3(d) seeks to promote equality in the credit market by balancing the rights and duties of consumers and credit providers. Nonetheless, despite the NCA professing to balance the interests of consumers and credit providers, major aspects of the Act clearly aim to promote the consumer's position in order to proactively address past injustices, and to prevent and relieve over-indebtedness. See Brits R "The National Credit Act and the Bill of Rights: towards a constitutional view of consumer credit legislation" (2017) 3 *TSAR* 470 at 492.

²³ *Mbatha* para 37.

²⁴ See s 81(2)(a). For a comprehensive discussion of the reckless lending provisions before the NCAA, see Renke S "Measures in South African consumer credit legislation aimed at prevention of reckless lending and over-indebtedness: an overview against the background of recent developments in the European Union" (2011) *THRHR* at 208; Renke S *An Evaluation of debt prevention measures in the National Credit Act 34 of 2005* (unpublished LLD thesis, University of Pretoria, 2012) chap 8; and Boraine A & Van Heerden CM "Some observations regarding reckless credit in terms of the National Credit Act" (2010) 73 *THRHR* at 650.

²⁵ Van Heerden CM & Renke S "Perspectives on the South African responsible lending regime and the duty to conduct pre-agreement assessments as a responsible lending practice" (2015) 24 *Int. Insolv. Rev.* 67 at 77.

²⁶ At the end of December 2015, credit bureaux had the records of 23.74 million credit active consumers, of whom 9.87 million had impaired credit records. See National Credit Regulator "Credit bureau monitor" Fourth Quarter December 2015 <http://www.ncr.org.za/documents/CDM/CDM%20December%202015.pdf> (accessed 06 April 2018).

affordability assessments.²⁷ Credit providers are now therefore allowed to determine their own pre-agreement assessment mechanisms, models and procedures provided that any such mechanism, model or procedure results in a fair and objective assessment, which must be consistent with the affordability assessment regulations made by the Minister.²⁸ Accordingly, the affordability assessment regulations provide a yardstick against which a credit provider's compliance with its pre-agreement assessment obligation in terms of section 81 is measured.²⁹

The affordability assessment regulations which became effective on 14 September 2015³⁰ amended the National Credit Regulations *inter alia* by inserting regulation 23A entitled "Criteria to conduct affordability assessment".³¹ Regulation 23A applies to current, prospective and joint consumers,³² all credit providers and all credit agreements to which the NCA applies.³³ At the time when the NCA and regulation 23A were enacted, many South Africans, particularly low - income population groups were drowning in debt. Thus, it is pleasing that these new changes were introduced with the need to promote responsible lending and borrowing in mind.³⁴

3 FACTS AND DECISION

In *Truworths* three major retail clothing companies in South Africa, namely, Truworths Limited, Foschini Retail Group (Pty) Ltd and Mr Price Group Limited³⁵ (" applicants") made an application to the High Court seeking an order to review and set aside regulations 23A(4),³⁶ (5)³⁷ and (7)³⁸ of the National Credit Regulations.³⁹ The applicants

²⁷ See s 82(2) as amended.

²⁸ Section 82(1) as amended.

²⁹ Van Heerden & Renke (2015) at 83.

³⁰ It should be noted that affordability assessment regulations came into effect on 13 March 2015, but after negotiations with credit providers the Minister in August 2015 granted a retrospective six-months moratorium to allow them time to adapt their businesses to the said regulations. See *Truworths* para 21.

³¹ See reg 23A.

³² See reg 1.

³³ See reg 23A(1). A detailed discussion of reg 23A is beyond the scope of this article. For further discussion of reg 23A, see Renke S "Die nuwe bekostigbaarheidsassessering regulasies ingevolge die Nasionale Kredietwet 34 van 2005 van naderby beskou" (2015) *LitNet Akademies* at 432.

³⁴ See *Truworths* para 8.

³⁵ The applicants sell their products for cash and on credit. The consumers who wish to make their purchases on credit have to apply for a store card which enables them to open an account, purchase goods on that account up to a given limit and pay for the purchased products in accordance with the terms of that card. See *Truworths* para 10. The NCA applies to these types of credit agreements and requires credit providers to comply with the relevant provisions of the NCA and its regulations. See s 8. See also Stoop P "Kritiese evaluasie van die toepassingsveld van die 'National Credit Act'" (2008) 14(2) *De Jure* at 352; and Du Pisani A A *critical analysis of the transactions to which the National Credit Act applies* (unpublished LLM dissertation, University of Pretoria, 2011).

³⁶ Regulation 23A(4) is part of the new affordability assessment regulations introduced by the Minister to assist credit providers in determining whether consumers are able to repay their credit. Regulation 23A(4) provides as follows:

"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

challenged regulation 23A(4) on the basis that it unfairly discriminates against the unbanked and informally employed; it was promulgated without taking into account relevant considerations; it is *ultra vires* the NCA; and the manner in which it was enacted is procedurally unfair.⁴⁰ The applicants further argued that regulation 23A(4) of the National Credit Regulations is discriminatory and unreasonable because underprivileged members of society would not be able to comply with the prescribed methods of validating their gross income.⁴¹ The Minister and the NCR (“respondents”) rejected the applicants’ claim that regulation 23A(4) was discriminatory against unbanked and informally employed persons. The Minister contended that he prescribed the affordability assessment regulations because the existing mechanisms were insufficient to curb high levels of over-indebtedness.⁴² He asserted that when drafting the affordability assessment regulations he took cognisance of the fact that some South Africans neither have bank accounts nor receive pay slips regularly.⁴³ According to the Minister, that is the reason why he revised draft regulation 23(4)⁴⁴ to require self-employed and informally employed individuals who do not receive proof of income to produce their latest bank statements or financial statements.⁴⁵ The respondents also contended that regulation 23A(4) was not discriminatory because letters and affidavits from employers were also acceptable proof of income.⁴⁶

The Court held in favour of the applicants and set aside regulation 23A(4). However, it was not convinced that a case had been made out to set aside regulation 23A(5) and (7). The main basis for setting aside regulation 23A(4) was that it unfairly

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- 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.”

³⁷ Regulation 23A(5) provides that “[w]here 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.”

³⁸ Regulation 23A(7) provides that “[t]he consumer must provide authentic documentation to the credit provider to enable the credit provider to conduct the affordability assessment”.

³⁹ *Truworths* para 9.

⁴⁰ *Truworths* para 44.

⁴¹ *Truworths* para 44. It is noteworthy that when credit providers are conducting an affordability assessment, they are required to verify the (prospective) consumer’s gross income. Gross income “means all income earned without deductions from whatever source”. See reg 1.

⁴² *Truworths* para 52.

⁴³ *Truworths* para 47.

⁴⁴ Draft reg 23A(4) which was published for public comment reads as follows: “A credit provider is required to take practicable steps to validate gross income by referring to: (a) recent three (3) months consumer’s pay slips; (b) recent three (3) months bank statements; or (c) *any other similar credible confirmation.*” [Emphasis added.] See GN R597 in GG 37882 of 1 August 2014.

⁴⁵ *Truworths* para 47.

⁴⁶ *Truworths* para 49.

discriminates against unbanked, informally and self-employed individuals. The Court adopted the view that it was manifestly unfair to require unbanked and informal traders to produce financial statements to validate their gross income because most of them cannot comply with such a requirement.⁴⁷ According to the Court, even if these informal traders earn relatively well to repay their credit, requiring them to produce bank or financial statements presents an insurmountable obstacle to access credit.⁴⁸

The Court rejected arguments by the Minister and the NCR that an affidavit or letter from one's employer could qualify as a "financial statement" for the purposes of validating gross income.⁴⁹ According to the Court, "[f]inancial statements are specific documents which are produced on a regular (usually annual) basis, usually by an accountant. The core financial statements are a balance sheet, an income and expenditure statement, and a statement showing the use and application of funds".⁵⁰ The Court pointed out that the "latest financial statements" prescribed in regulation 23A(4) refer to regular statements and not a single document such as an affidavit or letter from an employer.⁵¹ The Court further pointed out that the respondents' interpretation of financial statements was absurd in relation to self-employed persons. It questioned whether self-employed persons should write themselves letters confirming their gross income. The Court concluded that this would be contrary to the purpose for which the regulation was promulgated.⁵²

Furthermore, the Court noted that although regulation 23A is meant to prevent reckless lending, regulation 23A(4) undermines the purpose of the Act to open the credit market to all South Africans, specifically those who historically could not access credit under sustainable conditions.⁵³ It held that regulation 23A(4) excludes HDIs and other low-income consumers from accessing credit, instead of merely curbing reckless lending.⁵⁴ The Court therefore concluded that the regulation is neither reasonable nor rationally connected to the purpose for which it was enacted.⁵⁵ Furthermore, the Court held that unfair discrimination against HDIs is in contravention of sections 14(2) and 14(3)⁵⁶ of PEPUDA.⁵⁷ Nonetheless, the Court refrained from making a finding on the

⁴⁷ *Truworths* para 45. See also reg 23A(4)(c).

⁴⁸ *Truworths* para 45.

⁴⁹ *Truworths* para 50.

⁵⁰ *Truworths* para 50.

⁵¹ *Truworths* para 50.

⁵² *Truworths* para 50.

⁵³ *Truworths* para 52.

⁵⁴ *Truworths* para 52.

⁵⁵ *Truworths* para 52.

⁵⁶ Section 14 of PEPUDA provides, among other things, factors that have to be taken into account when determining whether discrimination is fair or unfair. Some of the factors include whether discrimination impairs or is likely to impair dignity; or the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage.

⁵⁷ *Truworths* para 53.

applicants' submission that regulation 23A(4) contravenes section 9(3) of the Constitution, in that it discriminates on the basis of race.⁵⁸

Another reason why the High Court set aside regulation 23A(4) was that the Minister did not take account of important factors when he enacted this regulation.⁵⁹ According to the Court, the draft regulation which the Minister initially published for public comment would have been sufficiently flexible to accommodate unbanked and informal traders. The wording of that draft regulation required consumers to produce bank statements, pay slips and "any other similar credit confirmation" as validation of their gross income.⁶⁰ The Court adopted the view that the key provision of the draft regulation was more elastic and accommodating compared to the rigid requirements set out in the impugned regulation, which *prima facie* excludes unbanked consumers from accessing credit.⁶¹ Furthermore, the Court asserted that the impugned regulation is skewed towards consumers with bank accounts because it was crafted along the lines of the proposal made by Capitec Bank. According to the Court, when Capitec Bank made the proposal, it had its own consumers in mind and not the interests of the financially excluded.⁶² The Court thus decided that regulation 23A(4) was arbitrarily inserted into the regulations since the Minister accepted and used Capitec Bank's proposal virtually verbatim, despite numerous comments received from the public. For these reasons, the Court concluded that regulation 23A(4) must be set aside because it fails the test of legality which provides that both the legislature and executive "are constrained by the principle that they may exercise no power or perform no function beyond that conferred upon them by law".⁶³

However, the Court rejected the applicants' submission that affordability assessment regulations are *ultra vires* to the extent that they require credit providers to "validate and verify" the consumer's financial circumstances; whereas sections 81 and 82 of the NCA impose a duty on credit providers only to "assess", meaning that they merely have to "calculate and place a value on" the consumer's financial situation.⁶⁴ According to the Court, the duty to assess implies that the credit provider must come to a correct and accurate assessment. However, information provided by a consumer may not be accurate because of a mistake or the desperate need to qualify for credit. Thus, in order to curb reckless credit, the Court adopted the view that credit providers should verify and validate information provided by the consumer. Accordingly, the Court refused to set aside regulations 23A(5) and (7) which require credit providers to verify and validate the consumer's information.⁶⁵ According to the Court, removing a specific

⁵⁸ The Court also refrained from making a finding on whether the manner in which the Minister revised draft reg 23A(4) was procedurally unfair. *Truworths* paras 53 and 61.

⁵⁹ *Truworths* para 48.

⁶⁰ See footnote 44 above for draft reg 23A(4).

⁶¹ *Truworths* para 48.

⁶² *Truworths* para 48.

⁶³ *Truworths* para 55. In this regard the Court referred to *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) paras 48 and 49. See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 58.

⁶⁴ *Truworths* paras 57 and 58.

⁶⁵ *Truworths* para 67.

provision for validating gross income does not do away with the need to ascertain gross income as a step towards calculating discretionary income.⁶⁶

4 ANALYSIS

There is no doubt that the NCAA and the affordability assessment regulations **dramatically changed** the manner in which consumer credit is granted in South Africa. Before the affordability assessment regulations, credit providers were at liberty to determine their own evaluation mechanisms provided that the mechanisms were fair, objective and not based on unfair discrimination.⁶⁷ This means that credit providers were allowed to accept any form of income validation provided it was fair, objective and non-discriminatory.⁶⁸ However, when the new affordability assessment regulations became effective, they prescribed the manner in which credit providers have to validate the consumer's gross income. The forms of validation that were acceptable include bank statements, financial statements, documented proof of income and pay slips. According to the Court in *Truworths*, these forms of validation unfairly discriminate against unbanked, self-employed and informally employed persons since many of them may not have access to these required forms of validation despite the fact that they may be able to repay their debts.

The implication of *Truworths* is that credit providers should accept forms of income validation or confirmation that are more flexible and sensitive to the unique circumstances of HDIs, unbanked and informally employed consumers. The Court noted that draft regulation 23A(4)(c) which allowed consumers to produce "other similar credible confirmation" was more flexible in allowing access to credit to the unbanked and informally employed who can afford to repay credit. Indeed, credit evaluation mechanisms that are rigid can push these vulnerable consumers to the fringes of the credit market where they can be subjected to exploitative practices by informal credit providers.⁶⁹ Failure by mainstream or regulated financial institutions to accommodate these HDIs and low-income consumers can lead to their financial exclusion and over-

⁶⁶ *Truworths* para 67. Discretionary income means : "Gross Income less statutory deductions, such as, income tax, unemployment insurance fund, maintenance payments and less Necessary Expenses (at a minimum defined [in the regulations]); less all other committed payment obligations as disclosed by a consumer including, such as may appear from the applicant's credit records as held by any Credit Bureau which income is an amount available to fund the proposed credit instalment." See reg 1.

⁶⁷ See s 82(1) of the NCA as originally enacted read with s 61(5). The Constitutional Court in *Harksen v Lane* 1998 (1) SA (CC) 300, set out the three distinct steps to determine whether an alleged violation of the right to equality amounted to unfair discrimination. See also Freedman W "Understanding the right to equality" (1998) 115 *SALJ* at 243; and Coetzee (2016) at 42.

⁶⁸ Section 81(4) of the NCA provides a credit provider with a complete defence if a consumer does not "fully and truthfully" answer any request for information by the credit provider to enable the latter to carry out a proper pre-agreement assessment. See for instance *Horwood v Firstrand Bank Ltd (GSJ)* unreported case no 36853/2010 (21 September 2011). For a detailed discussion of a credit provider's complete defence against an allegation of reckless lending, see Kelly-Louw M "A credit provider's complete defence against a consumer's allegation of reckless lending" (2014) 26(1) *SA Merc LJ* 24 at 47.

⁶⁹ See Wilson T "Responsible lending or restrictive lending practices? Balancing concerns regarding over-indebtedness with addressing financial exclusion" in Kelly-Louw M *et al* (eds) *The future of consumer credit regulation: creative approaches to emerging problems* (Abingdon, UK: Routledge 2008) at 91.

indebtedness.⁷⁰ *Truworths* has thus opened up the credit market to those consumers who were on the peripheries of the financial services sector, specifically the unbanked, informally employed and self-employed.⁷¹ Consumers that are informally employed or unbanked can now access credit despite not having a bank statement, pay slip or financial statement.

However, this case does not preclude credit providers from requiring consumers to validate their income for the purposes of ascertaining discretionary income.⁷² It merely allows credit providers to be more flexible in the manner in which they validate the consumer's gross income. The draft affordability assessment regulations did not provide a definition of what constitutes "other similar credible confirmation". Furthermore, the Court did not provide guidance on the forms of credible confirmation that credit providers must accept from unbanked and informal traders. It seems that credit providers will on their own determine the credible confirmation that they would accept as sufficient for purposes of gross income validation. However, the forms of gross income validation that they will accept must not unfairly discriminate directly or indirectly against any consumer.⁷³ It is nonetheless submitted that the Minister and the NCR should provide some guidelines pertaining to the credible confirmation that can be accepted from unbanked, informally employed and self-employed consumers.⁷⁴ This will assist in ensuring equitable treatment of consumers by credit providers and that credit is not extended based on unreliable forms of gross income validation.⁷⁵

Although the decision in *Truworths* is laudable for improving access to credit for HDIs and low-income consumers, it can also be argued that the decision is a step backwards from a financial inclusion perspective. The problem of financial exclusion in South Africa can be effectively dealt with if behavioural patterns of HDIs and low-income consumers are changed. Financial experts agree that having a bank account in a

⁷⁰See Wilson (2008) at 91.

⁷¹ This decision will have a tremendous impact on financial inclusion because most HDIs and low income consumers do not have bank accounts. It was noted in *Truworths* para 20 that 20 percent of South Africans do not have bank accounts. Therefore, the forms of gross income validation that were prescribed by reg 23A(4) presented a barrier to access credit for many in less privileged social clusters. See also FinMark Trust "FinScope South Africa 2015 survey brochure" (2015) available at <http://www.finmark.org.za/finscope-south-africa-2015-survey-brochure/> (accessed 06 April 2018).

⁷² See *Truworths* para 67.

⁷³ See s 61(1) of the NCA read with s 9(3) of the Constitution and chap 2 of PEPUDA.

⁷⁴ Proposed guidelines aimed at assisting credit providers to ascertain or validate a consumer's gross income have been recently issued for public comment. For informal traders and unbanked consumers, the guidelines allow credit providers to accept "other forms" of income verification. See Proposed Guidelines for Ascertaining Consumers Gross Incomes and Discretionary Incomes for the Purposes of Regulation 23A of the National Credit Regulations, GN 224 GG 41604 of 4 May 2018. These guidelines are flexible and will promote access to credit by the unbanked and informal traders. However, the proposed guidelines neither define nor provide an example of what "other forms" of income validation are. An example of "other forms" of income validation that credit providers may accept from unbanked consumers and informal traders will provide important guidance and will ensure that credit is extended based on flexible and reliable forms of income validation.

⁷⁵ See concerns raised by Gumede M "Court ruling leaves credit providers in catch-22 situation" *Business Day* 28 March 2018 available at <https://www.businesslive.co.za/bd/companies/financial-services/2018-03-28-court-ruling-leaves-credit-providers-in-catch-22-situation/> (accessed 22 April 2018).

financialised⁷⁶ economy is a necessary step towards effective participation in the financial services sector.⁷⁷ As such, laws and policies that encourage those on the fringes of the financial services sector to open bank accounts may be required in South Africa more than ever. The impugned regulation 23A(4) is one such provision that could have been used to encourage the self-employed, informally employed as well as unbanked to open bank accounts in order to enable their effective participation in the financial services sector. Thus, from a financial inclusion perspective it is arguable that setting aside regulation 23A(4) was tantamount to taking “one step forward, two steps back”.⁷⁸ However, the inclination of South African courts to prefer human rights considerations over economic concerns is not unique to this case.⁷⁹ Economic rationality almost invariably plays second fiddle to equality concerns in South Africa. Perhaps the history of racial disempowerment and exclusion has much to do with the approach that the Court adopted in trying to liberalise credit access for HDIs and low-income consumers in South Africa.

⁷⁶ In modern consumerist societies, most consumers need banking and credit services to meet their basic needs. Financialisation refers to “[t]he growing necessity, even sometimes the constraint, to use financial products to meet every day needs e.g from the basic needs such as accommodation to other social needs which are necessary to participate in society . . . financialisation means that financial products are less and less avoidable to lead a ‘normal’ life”. See Gloukiefzoff cited by Wilson T “The responsible lending response” in Wilson T (ed) *International responses to issues of credit and over-indebtedness in the wake of a crisis* (Abingdon, UK: Routledge 2013) at 127.

⁷⁷ Research shows that the use of formal bank accounts can bring many benefits to the poor and those who live in rural communities. It indicates that the use of bank accounts is associated with an enabling environment for accessing financial services such as lower account costs and proximity to financial intermediaries. Thus, it may be more expensive for an individual without a bank account to access financial services than for a person who has one. Although some may argue that it is costly to open and maintain a bank account, it is noteworthy that innovation has enabled financial services providers to offer basic and low cost accounts for those who were previously excluded. See Allen F *et al* “The foundations of financial inclusion: understanding ownership and use of formal accounts” (2012) *Policy Research Working Paper* 62 at 2; and Oji CK “Promoting financial inclusion for inclusive economic growth” (2015) *South African Institute of International Affairs Occasional Paper* 210 at 5.

⁷⁸ However, from behavioural economics and law perspectives, it should be noted that HDIs and low-income consumers are not the most rationale economic agents. The fact that there are laws that encourage these groups to open bank accounts does not essentially mean that they will open them. This is particularly true amongst historically disadvantaged groups because of low levels of financial literacy in South Africa. Thus, laws that encourage change in behavioural patterns should be accompanied by robust financial education and literacy initiatives in order to have a substantive impact. For a detailed discussion of the behavioural approach to law and economics, see Wright JD & Ginsburg DH “Behavioral law and economics: its origins, fatal flaws and implications for liberty” (2012) 106 *Northwestern University Law Review* at 1033; and Sunstein CR *et al* “A behavioral approach to law and economics” (1998) *Coase-Sandor Institute for Law and Economics Working Paper No.55* at 2. For further discussion of financial inclusion and financial literacy, see Pearson G, Stoop PN & Kelly-Louw M “Balancing responsibilities – financial literacy” (2017) 20 *PELJ* at 1; and Rootman C & Antoni X “Investigating financial literacy to improve financial behaviour among black consumers” (2015) 8 *Journal of Economic and Financial Sciences* at 474.

⁷⁹ See *Hoffman v South African Airways* 2000 (12) BLLR 1365 (CC). See also Osode PC “Defining the limits of permissible employment discrimination against persons living with HIV/AIDS in South Africa: *Hoffman v South African Airways* [2000] 12 BLLR 1365” (2001) 45 *Journal of African Law* 217 at 226. See further comments made by Cameron J in a dissenting judgement in *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (5) BCLR 509 (CC).

5 CONCLUSION

The regulation of reckless lending are arguably the most controversial provisions of the NCA.⁸⁰ It is difficult to balance the need to promote access to credit for underprivileged consumers with the need to combat reckless lending. Nonetheless, the Court in *Truworths* succeeded in striking a balance between these conflicting societal interests. Although the Court has removed the obstacle in regulation 23A(4), the judgment still requires flexible forms of gross income validation. Therefore, it is both desirable and important that the proposed guidelines recently issued by the NCR on the forms of gross income validation that credit providers could accept, are brought to finality as soon as possible. Such a development would go a long way to ensure equitable treatment of consumers and simultaneously avoid reckless lending. The judicial pronouncement in *Truworths* has undoubtedly enlarged the space for the unbanked and informally employed to participate in the financial services sector. Nonetheless, concerns remain as to whether striking down regulations that encourage the unbanked to open bank accounts is the most effective approach to achieving financial inclusion in South Africa.

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⁸⁰ Kelly-Louw (2012) at 292.

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