ALEXANDRIA AMOO

STUDENT NUMBER: 200415751

FACULTY OF LAW

UNIVERSITY OF NAMIBIA

DISSERTATION 2011

DISSERTATION TITLE: The need for a more developed legislation that regulates Consumer Protection in Namibia with particular emphasis on Micro Finance.

Page

Acknowledgments

Firstly, I would like to thank my supervisor Ms. E Namwoonde, for all the time and effort she put in to assist me during the writing of this paper. I would also like to thank my family for their support during this time. Last but not least, the Almighty, for granting me strength and resilience to complete this paper.

Dedications

I would like to dedicate this paper and research to my family.

Chapter 1

Introduction

1.1 Statement of the Problem

This study seeks to analyse Consumer Protection in Namibia with specific emphasis on micro-finance. As it stands the existing legislation that is aimed at regulating market conduct with regard to micro-finance consumers does not directly and sufficiently offer the required protection. This has resulted in the high interest rates charged by lenders at the expense of their consumers.

The problem that exists is that micro-lending has led to reckless lending and borrowing and high interest rates charged to a borrower which is contrary the Credit Agreements Act[1]. Micro-lenders' interest rates are higher than bank rates as they provide funds over a shorter period, and at greater risk of 'bad debts' if their customers fail to pay.

Put in another way, as a result of a lack of a specific mandate that restricts micro-finance more specifically micro-lenders, the cash loan agencies have exacerbated the problem by charging exorbitant finance charges under very strict conditions to borrowers. In addition, these agencies demand the bank cards of clients as collateral security, and repayments are strictly effected within a month at more than 50% of the borrower's monthly income.[2]

As this discussion continues, it is important to note that micro-lending is a facet under micro-finance. This lending institution provides financial services to low-income clients or solidarity lending groups including consumers and the self-employed, who traditionally lack access to banking and related

[1] Act, 75 of 1980.
[2] Beaver, B.E. "Micro-lending or Finance in Namibia" (unpublished article) p2-3. Available at the University of Namibia Short Loan Section.

services.[3] The main objective of this is to provide people with little or no cash income access to financial services. These are usually loans under N$50 000 which must be repaid over a maximum period of 60 months to the 'lender', usually in instalments.[4] Micro-lenders are often unkindly referred to as 'loan sharks'.

The legal question is whether there are adequate protection mechanisms in place for consumers under micro finance schemes, taking in to account the high interest rates charged by lenders due to the effectiveness or absence of legislation regulating micro-financing in Namibia.

1.2 Historical Background

The micro finance industry has been seen as a saviour to most borrowers who are not able to obtain finance from the larger financial institutions like banks. This industry mostly provides its services to the lower financial sector of the Namibian population. Its main consumers are teachers, bank employees, the police (civil servants) and employees of parastatals whose loans are usually very small and range between the average of N$500 to N$ 1 000 for a maximum period of two months. In most cases the loans are used merely as consumption credit or for minor productive activities such as paying of school fees and other demanding debts.[5]

However, these lenders have been said to exploit their desperate customers as they corner them into paying exorbitant interest on the loan in contravention of the Act. The interest on the loan may be as high as about 2000% per annum. In some cases the lenders may charge usurious rates as high as 30%

[3] Ministry of Justice.2010. Three-day workshop on Consumer Protection Legal Framework in Namibia. Held in Okahadja 5-7 April.
[4] Supra at footnote 2
[5] Ibid p3

a month or even 100% and they cream off the profits. As a result of this, they have been perceived as daylight robbers and are commonly labelled as "loan sharks."[6]

Currently, in Namibia provisions protecting the consumer or that opt to protect the consumer against rights violations can be found in various pieces of legislation. Protection itself is not direct but rather indirect as the pieces of legislation regulate market conduct within the sector that it applies to. For instance at present in terms of micro-lending , regulations promulgated in terms of the Usury Act[7] are in force. This Act requires micro-lenders to register with the Permanent Secretary of the Ministry of Finance in order to be exempt from the maximum interest rates prescribed in the Usury Act.[8]

If they do so, they may continue to be exempted when lending amounts less than N$10 000 for loan periods not exceeding 60 months.[9] However, it is important to note that although these regulations are in place they still do not protect these vulnerable borrowers from the exorbitant interest charges as they exempt the registered microlenders from the interest rate ceilings set by the Usury Act. The Government Notice 34 2267 of 2 February 2000 requires the registered microlenders to use standard form agreements which should contain all the terms and conditions of a micro loan transaction clearly reflecting the rights and obligations of the borrower.[10]

The growth of the Microlending industry has been a result of two main factors, namely the exemption from the Usury Act which removed interest rate ceilings on small loans under N$10 000,and failure of the formal financial sector (for example banks) to serve a certain segment of its potential market. This has been caused by a combination of high risk, high cost and low returns associated with the running of such business

[6] Ibid p3
[7] S15A of the Usury Act 73 of 1980.
[8] Ibid.
[9] s1
[10] s2 of Annexure

1.3 Literature Review

Due to the absence of specific legislation that regulates the market conduct with regard to consumers in Namibia, there is an inconsiderable amount of literature that has discussed micro-finance and consumer protection in Namibia. There is however, an extensive amount of literature that deals with consumer protection in general. There are those who have written about who the consumer is and why the consumer should be protected by law. They have pointed out and discussed the rights and duties that exist between the consumers and the supplier.

The literature that dealt with Namibian legislation was from an unpublished article written by B.E Beaver.[11] This article largely deals with micro-finance and lending in Namibia and the legislation that governs these institutions. Beaver discusses the micro-lending industry and highlights its problems in Namibia. He further points out the growth rate of these lending institutions and the lack of protection of consumers thereof. In the introduction of this article, Beaver states that "the development of this industry is seen as a positive element in the development of a financial system that is expanding its outreach into lesser-serviced segments of the economy. Notwithstanding its positive elements, the industry has proved to be a cause of indebtedness among the poorer sector of society."[12] Based on his findings and observations this research was able to discuss the current growth rate and discuss the legislation that currently protects the consumers from a domestic origin and or source, as most works on this particular subject matter are of foreign origin.

In terms of consumer protection, David Oughton with John Lowry[13] as well as Geraint Howels and Stephen Weatherhill,[14] respectively write about consumer protection law as a result of the inequality that exists between the consumer and the seller. Given the inequality that exists, the supplier tends to

[11] B. E. Beaver, "Micro-Lending or finance in Namibia",(Unpublished Article)
[12] Ibid p2
[13] D. Oughton et al. *"Consumer Law"*, Blackstone Press (1997)
[14] G. Howells et al. "*Consumer Protection Law* ," University Press Cambridge (1995)

take advantage of the consumer, and therefore these writers set out the rights and duties of the consumer. David Oughton and John Lowry[15] define who the consumer is and further explain why it is important to protect the consumer. They provide the rationale behind consumer protection and explain the general theories which underlie consumer protection law. This work adequately dealt with the importance of consumer protection as well as outlined the general relationship of supply and demand. However, it does not satisfactorily deal with the concept of micro-finance and its relation to consumer protection. It concentrates more on the general aspect of consumer protection law, whilst on the other hand, Howells and Weatherhill[16] deal with the common law perspective of consumer protection law. This work dealt with impact and enforcement of international instruments on consumer protection in the United Kingdom. The purpose of this literature was to provide a comparative analysis of the process of protecting the consumer and the lengths and legal instruments that regulate this process in the United Kingdom. Put another way this work in many ways explores the same theme as that of this study but focuses more on the legal part of consumers and the regulations of these instruments rather than dealing with the consumers of micro-financial institutions, thus not exposing the impacts of inadequate protection for consumers in finance.

Given the information above regarding the literature used, the work of *Francois du Bois in Wille's Principles of South African Law*[17] thoroughly discusses and investigates consumer protection with particular attention to micro-financial institutions. The significance of this literature is that it is the only literature that adequately distinguished between a loan for consumption and a loan for use. Both these loans fall under micro finance. The literature captured the theme of this study in that it provided the 'lenders obligations' (supplier) and the 'borrowers obligations' (consumer). Du Bois[18] in this literature narrowed the consumer protection aspect to focus on the lending institutions. He set out the

[15] Supra at footnote 13 p2
[16] Supra at footnote 14 p22
[17] F du Bois, ''*Wille's Principles of South African Law*'' Juta & Co (1997) p948
[18] Ibid p949

principles to be followed when taking out a loan, as well as defining an "interest" and determined what constitutes an 'exorbitant or high interest.' Accordingly, Du Bois[19] defined "a loan for consumption (micro-loan) as a contract in terms of which one person (the lender) agrees to deliver some thing, or things, that can be consumed by use to another person (the borrower) for a certain period of time or to achieve a particular purpose with the intention that the borrower become the owner."[20] It is upon this premise that the relationship between the lender and borrower is established and accordingly the rights and the duties that are imposed upon them.

In light of the above, this study seeks to establish the relationship between the lender(supplier), the borrower (consumer) and the breakdown in the protection of the consumer under micro-finance and its legislation thereof.

1.4 Research Objectives

The objectives of this research are to:

(a) to further establish the need for consumer protection in general;

(b) to establish the need for more effective consumer protection in micro-finance;

(c) to investigate the Micro-Finance institutions and the reason why cash loan agencies have exorbitant finance charges by lending institutions that charge exorbitant interests on loans;

(d) to advocate the importance of an effective modernised consumer protection, by comparing the South African approach in terms of its new Consumer Protection legislation;

(e) to discuss Namibia Financial Institution Supervisory Authority's (NAMFISA) role in protecting consumer rights and the measures for such protection;

[19] Ibid p949
[20] ibid

(f) Identify the gaps in the current legislation on micro-finance protection and providing recommendation

1.5 Research Methodology

The entire research was based on qualitative desk top research which involved reviewing and analysing secondary materials and literature. Furthermore, consultations with the Law Reform in the Ministry of Justice were conducted in order to ensure that critical issues are picked up and analysed.

Research Instruments and Procedure

The research instrument used was primary data gathering. Primary data collection was met by desk research where there were reviews and analysis of secondary materials and literature. In terms of the process as research which is mainly desk based, the data will be collected through a critical reading of secondary materials and literature. Literary texts were gathered from existing books, reports and the world wide web. The data that was gathered from desk research will be broken into respective parts and segments which will answer the research questions.

1.6 Structure of Study

Chapter 1 is an outline of the focus and content of the study.

Chapter 2 addresses Consumer Protection and its practice in Namibia. Here, each of the key concepts: Micro-Finance, Micro-lending and Usury are defined. A discussion of Consumer Protection is also provided in order to establish the link between consumer protection, micro-lending and usury in the context of Micro-finance.

Chapter 3 is an overview of micro-lending and its regulation under legislation. The essence of this chapter is to introduce the topics under discussion: its nature, existence, and value. The chapter goes on to expose the vulnerability that consumers are subjected to in Namibia.

Chapter 4 examines the Financial Institutes and Marketing Bill being promulgated that seeks to curb high interest rates charged by lenders; by introducing equal treatment, privacy and confidentiality, choice, disclosure, fair and honest dealings and terms and conditions. Also, this chapter will scrutinise the purpose and aims for the drafting of the Consumer Protection Bill that were presented at the Consumer Protection Conference held in 2001. At the core of this chapter is the effectiveness of mechanisms in place to protect the consumer from high interest rates.

Chapter 5 concludes with a brief comparative analysis of similar pieces of legislation into neighbouring countries that deal with micro-lending. Particularly the new Consumer Protection Act of South Africa that came into effect on the 1st of April 2011. Lastly, the way forward for consumer protection in Namibia and recommendations are made to address this urgent and desperate situation faced by consumers in Namibia.

Chapter 2: **Consumer Protection in Namibia**

2.1 Introduction of Key Concepts

As a point of departure, in answering the question, whether the legislation that regulates micro-finance in Namibia has adequate protection mechanisms for the consumers taking into account the high interest rates charged by lenders, it is important to define and understand the key concepts involved in this inquest. The key concepts involved in this regard include:

- Consumer Protection;
- Micro-Finance;
- Micro-lending; and
- Usury.

2.1.1 Consumer Protection

Consumer protection cannot be defined in isolation without defining the aspects that can be regarded as consumer protection. Therefore, to understand what consumer protection means one should be able to define a consumer; goods; service and consumption.

A consumer maybe defined as one that consumes goods and services within an economy and this includes both natural and juristic person. Additionally, goods includes movable or immovable goods, corporeal or incorporeal goods, tangible and intangible goods. A service includes both professional

and non-professional services. Lastly, consumption includes purchasing goods and services by cash or on credit.[21]

Upon consuming goods and services the consumer assumes that s/he is receiving quality goods, that these goods are safe and that the providers of goods and services accept liability for these goods and services. The consumer also unseeingly assumes that the goods and services comply with all relevant legislation.

Therefore, with regard to the consumer and consumer protection, the Namibian economy consists of the goods market and the service market and it is within these markets that the consumer consumes the goods and services.

Currently, in Namibian legislation provisions protecting the consumer or that opt to protect the consumer against rights violations can be found in various legislation. It is important to note however, that protection itself is not direct but rather indirect as the legislation regulates market conduct within the sector that it applies to. Consequently, in the micro-finance sector, the Usury Act,[22] indirectly regulates or rather protects the consumer.

Furthermore, according to Oughton,[23] for purposes of determining who the law purports to protect it is necessary to define what a consumer is. In a literal sense, a consumer is 'one who purchases goods or services.'[24] This would include any user or goods or services supplied by another, for the purposes of consumer protection law, the term 'consumer' has a narrower meaning which is based on the capacity in which the consumer and the supplier of the goods or services supplied have acted. The traditional view of a consumer, or at least that given by the thrust of modern consumer protection, is

[21] Ministry of Justice.2010. Three-day workshop on Consumer Protection Legal Framework in Namibia. Held in Okahadja 5-7 April
[22] 73 of 1968
[23] D. Oughton et al. *"Consumer Law"*, Blackstone Press (1997) p8
[24] Longman Dictionary of the English Language, 2nd ed. Harlow:Longman, 1991

of an individual dealing with a commercial enterprise. However, the term 'consumer' can also be used to describe a person who makes use of the services provided by public-sector bodies or privatised monopolies subject to public control or scrutiny. On this basis, consumer protection law would also cover complaints by individuals about the services provided.

Why Protect the Consumer[25]

Based on the above, it is necessary to clarify the importance of protecting the consumer. Many of the assumptions which underlie common law rules, especially those concerned with the law of contract may be seen to be fundamentally at odds with the idea of consumer protection. Much of the law of contract is premised upon the freedom of the individual to make whatever contract he likes, on the assumption that all contracting parties have roughly equal bargaining strength.[26] In many respects, this position is understandable, since common law rules relating to contracts can do little more than lay down a general framework within which all contracting parties must work. Thus the common law has to deal with both contracts between business or commercial enterprises and those in which one of the parties is a consumer. The general framework of the common law cannot stray too far in favour of disadvantaged parties such as consumers, since the establishment of a general rule will apply across the board to all types of contract.[27]

Furthermore, Oughton[28] states that, the background against which common law rules operate consists of a mixed economy in which many transactions are left subject to market forces operating according to the laws of supply and demand, but at the same time there are aspects of government planning which are geared towards subduing some of the greater excesses of the market. It is within this area of State planning that consumer protection legislation finds its place.

[25] Ibid p12
[26] Ibid
[27] Ibid.
[28] Ibid p13

2.1.2 The concept of Micro-Finance

Micro finance has been defined as a type of banking service that is provided to unemployed or low-income individuals or groups who would otherwise have no other means of gaining financial services.[29] Ultimately, the aim of microfinance is to give low income people an opportunity to become self-sufficient by providing a means of saving money, borrowing money and insurance.

Investopedia explains microfinance as a fairly historic concept.[30] Small microcredit operations have existed since the mid-1700s. Although most modern microfinance institutions operate in developing countries, the rate of payment default for loans is surprisingly low - more than 90% of loans are repaid. [31]

Like conventional banking operations, microfinance institutions must charge their lenders interests on loans.[32] In simple terms, micro-finance has been defined as an alternative to banking service that is offered to people of low income. Gert van Maanen[33] is of the opinion that micro-finance, is banking the unbankables, bringing credit, savings and other essential financial services within the reach of people who are too poor to be served by regular banks, in most cases because they are unable to offer sufficient collateral. In general, banks are for people with money, not for people without." It can therefore be inferred from both definitions that micro-finance is an alternative banking service that is offered to people of low income as they are unable to offer sufficient collateral.

The reason why people of low income are not bankable is the lack of collateral, steady employment, income and a verifiable credit history, because of this reasons they can not even meet the minimal qualifications for ordinary credit. By helping people with microfinance it gives them more available

[29] B. E. Beaver, "Micro-Lending or finance in Namibia",(Unpublished Article) p2
[30] http://www.investopedia.com/terms/m/microfinance.asp
[31] Beaverp2
[32] http://www.investopedia.com/terms/m/microfinance.asp
[33] G Van Maanen, Microcredit: Sound Business or Development Instrument, Oikocredit (2004)

choices and opportunities. It has successfully enabled poor people to start their own business generating or sustain an income and often begin to build up wealth and exit poverty.[34]

It is important to note, that micro-lending is an institution which falls under micro finance that enables the consumer to obtain loans. This institution allows the consumer to obtain the loan without having to adhere to the requirements and process of traditional lenders i.e. banks. With this in mind, the concept of micro-lending (lending) will be discussed.

2.1.3 The Concept of Micro-lending

Similar to the micro-finance definition, micro-lending/lender is an organization that makes business loans to individuals who are not able to obtain financing from traditional lenders. Lenders typically charge higher-than-average interest rates; [35]

In *Wille's Principles of South African Law*[36] a more substantial definition of micro-lending has been provided, it is defined as a loan for consumption (*mutuum or verbruikleen*) which is a contract in terms of which one person (the lender) agrees to deliver something, or things, that can be consumed by use to another person (the borrower) for a certain period of time or to achieve a particular purpose with the intention that the borrower is become the owner. However, it is understood that the borrower is bound subsequently to return to the lender, in the case of money lent, a sum of money equal to that lent with an interest rate charged, or, in the case of other fungibles, objects of the same kind, quality and quantity.[37]

Distinctive Features of the Contract[38]

[34] http://www.investopedia.com/terms/m/microfinance.asp
[35] http://biztaxlaw.about.com/od/glossarym/g/Microlenders.htm
[36] F du Bois, ''*Wille's Principles of South African Law*'' Juta & Co (1997) p948
[37] Joubert (Henning) 'Loan' LAWSA First Re-issue vol 15
[38] Supra at p948

(a) Return

The borrower must be obliged to return an equivalent of the thing received. If a person gives another person a sum of money and it is agreed that it is not to be repaid, the contract is not one of loan.

(b) Equivalent of what was lent

If the borrower has to return the particular thing lent, the contract is one of loan for use.

(c) Time for return

Some period of time must elapse after the thing or things have been received before their equivalent is to be returned.

(d) Gratuious

The Roman-Dutch authorities required the contract of mutuum to be gratutitous on the part of the lender. This is no longer the case. The contract does not cease to be mutum if it is agreed that the borrower shall pay remuneration, particularly where money is lent, in which case the remuneration is termed 'interest.'

Subject Matter[39]

The thing lent for consumption must be something that can be consumed by use or, as sometimes expressed, be measured, counted or weighed. The most common example is money.

Effect of the Contract[40]

Unlike the borrower in a loan for use, the borrower in a loan for consumption becomes the owner of the thing when it is delivered.

Lenders Obligation[41]

[39] F du Bois, ''*Wille's Principles of South African Law*'' Juta & Co (1997) p949
[40] ibid

Transfer of possession and title

The lender must place the borrower in possession of the thing lent, and must also transfer title in the thing to entitle the borrower to consume it. In order to do this, the lender must either have title in the thing and the capacity to contract, or, at least, the authority of the owner to do so. If the lender then, pursuant to the contract of loan, delivers the thing with the requisite intention of transferring ownership, the borrower will become the owner of the thing lent.[42] As owner, the borrower will bear the risk of any loss or deterioration in the thing lent, and will be able to consume it.[43]

Borrower's obligation[44]

Duty to return

(a) What must be returned?

The borrower must return the equivalent of that delivered.[45] In the case of a loan of money, this will be equivalent in value. In the case of a loan of fungibles other than money, this will be goods of the same kind, quality and quantity.

(b) Time for return

The borrower must return the equivalent at the time agreed on. If no such time has been fixed, the borrower is not bound to return the equivalent immediately, but only on expiration of a reasonable period in the circumstances, after notice.[46] If a loan is made by way of periodical payments, the implication is that repayment cannot be demanded until the expiration of the whole period over which the periodical payments of the loan have been made.[47]

---

[41] Ibid p950
[42] ibid
[43] ibid
[44] Grotius 3.10.5 cited in F du Bois, ''*Wille's Principles of South African Law*'' Juta & Co (1997) p950
[45] ibid
[46] ibid
[47] Crispette and Candy Ltd v Michaelis NO 1947 (4) SA 521 (A) at 544.

Interest[48]

Interest can be defined as an amount of money payable by the borrower to the lender for the use of money. Interest is not payable on a debt unless there is an agreement to that effect or there is default or mora on the part of the debtor.[49] An agreement to pay interest may be implied from the circumstances, eg where a bank allows its customer an overdraft facility on his or her account.

Rate of Interest[50]

The amount payable as interest, or finance charges, is usually expressed as a percentage of the capital sum owing for a particular period. Therefore as a general example, if R20 is payable for a loan of R200 for a year, the 'rate of interest' is said to be 10 per cent per annum.[51]

The rate of interest is usually fixed by the agreement of the parties. An agreement may also provide that the rate of interest will be determined from time to time at the discretion of one of the parties to the agreement, but such discretion must be exercised reasonably.[52]

2.1.4 The concept of Usury

Usury can simply be defined as the lending of money with an interest charge for its use, especially the lending of money at exorbitant interest rates.[53] Put another way, usury can be understood to refer to the practise of charging financial interest in excess of the principal amount of a loan, although in some

[48] ibid
[49] ibid
[50] ibid
[51] Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty) Ltd 1988 (4) SA 73 (N)
[52] The rate of interest was discussed in Standard Bank of SA Ltd v Lotze 1950 (2) SA 698
[53] Ulpain,Book 43 ad Edictum, Digest XII.6.26.1

instances, more especially in more recent times, it has been interpreted as interest above the legal and socially acceptable rate.[54]

It is important to note that interest rates or finance charges are today controlled mainly by the Usury Act[55]. Additionally, the general rules of the law of contract still play an important role in this regard. A court has the power to declare a contract void should it be regarded against public policy or good morals. Therefore interest which is proved to be extortionate and usurious, cannot be claimed by a lender.[56]

This point has been reinforced by Grove[57] who stated that, a court has the power to declare a contract partially enforceable to the extent that the interest is not usurious. In determining whether a rate is usurious or not, the court will take all relevant circumstances into considerations, such as the rate of interest which is generally applied in the economy at the time, the risks involved in the transaction, the period of the loan, the amount lent, the relative positions of the parties and the circumstances existing at the time of the conclusion of the contract. [58] Grove has further suggested, on the authority of *Magna Alloys and Research (SA) (Pty) Ltd. V Ellis*[59] that the time for determining the enforceability of the rate will depend on the circumstances. Where the parties have agreed on a fixed rate, the date of conclusion of the contract will usually be the relevant date to determine whether the interest should be allowed in full. And the relevant time to test for enforceability might well be the date when interest becomes payable or when an action is instituted.[60]

Interest under Usury

[54] Wayne, A.M, MacIntosh, V & MacIntosh,A. 1998. 'A Short Review of the Historical Critique of Usury' Available at www.che.ac.uk.PeopleAlastairusury.htm. Accessed on the 23/10/11
[55] 73 of 1968
[56] A.J.Kerr, The Principles of the Law of Contract 4th ed.,(1989) p255
[57] Grove, 1989. Gemeenregtelike en Statuere Beheer oor Woekerrente' p138
[58] Ibid.
[59] 1948 4 SA 874 A
[60] Otto,J.M.1994 "Consumer Credit" first reissue vol.5(1)LAWSA p 52.

From the earliest times, the maximum rate of interest that the parties may fix has been regulated.[61] Under the common law, usury, ie interest at a rate exceeding the maximum rate as determined from time to time, was condemned.

(a) Statutory regulations of interest rates

Loans for consumption, including money lending transactions are regulated by the Usury Act.[62] Francois du Bois[63] states that in connection with any money lending transaction under the Usury Act,[64] no moneylender was permitted to stipulate for, or demand, or receive, from the borrower finance charges at an annual finance charge greater than the annual percentage prescribed by the Registrar.[65] Contravention of these provisions constituted an offence,[66] the lender was precluded from recovering an amount as finance charges in excess of statutorily prescribed maximum,[67] and the borrower is entitled to recover any finances charges in excess of the prescribed limit paid to the lender.[68]

Disclosure[69]

Under the Usury Act[70], a money lender who was engaged in the business of money lending was required to make certain disclosures in relation to finance charges to the borrower on demand before the conclusion of the contract, and, further, within the time period stipulated by the legislation, to

[61] LTA Construction BPK v Administrateur, Transvaal 1993 91 SA 473 (a)
[62] Act 73 of 1968
[63] F du Bois, ''*Wille's Principles of South African Law*'' Juta & Co (1997) p951
[64] 73 of 1968
[65] As to the calculation of finance charges under the Usury Act 73 of 1968 see Ex Parte Minister of Justice 1978 (2) SA 572 (A)
[66] s5,ss2(1)(a) Act 71 of 1968; S v International Computer Banking and Leasing (Pty) Ltd 1996 (3) SA 582 (W).
[67] s5 Act 73 of 1968. Note in this regard that interest capitalised at intervals does not lose its character as interest for the purposes of determining whether the statutorily prescribed maximum rate of interest has been exceeded
[68] S7 Usury ACT 73 OF 1968
[69] F du Bois, ''*Wille's Principles of South African Law*'' Juta & Co (1997) p951
[70] 73 OF 1968

furnish the borrower with a copy of the instrument of debt containing the details required to be disclosed.[71] The lender was required to disclose the principle debt, as defined,[72] and its constituents, the finance charges, expressed both as an annual percentage and as a cash amount, and other charges; details of repayments, the number of instalments dates and amounts.[73]

Certain persons who contravened these provisions were guilty of an offence and liable to pay a fine of R10 000 or imprisonment for a period of three years or both.[74] Non-compliance with these disclosure provisions did render the contract invalid.[75] The Usury Act[76] provides that a moneylender is not permitted to stipulate for, demand or receive from a borrower finance charges in excess of those disclosed in an instrument of debt.

Early Repayment[77]

In the case of money lending transactions under the Usury Act,[78] the borrower could give notice after the passing of an agreed minimum period of not less than 90 days of an intention to pay the debt on a day that could not be earlier than 90 days after the date of the notice. The loan had to be paid on that date and the interest on that loan was the interest payable to that date ie the finance charges had to be recalculated for the shortened period of the loan.[79]

Compound interest[80]

Compound interest, ie interest charged on unpaid interest, was not allowed in Roman Dutch law.[81] The prohibition against compound interest has been abrogated by disuse and it is now claimable if

[71] Act 73 of 1968, ss3(1)
[72] s1 principal debt Act 73 of 1968
[73] Supra at 47
[74] s17 Act 73 of 1968
[75] Ss3(8),5 Act 73 of 1968
[76] Ss2(9)Act 73 of 1968
[77] F du Bois, ''*Wille's Principles of South African Law*'' Juta & Co (1997) p954
[78] Act 73 of 1968
[79] Supra at footnote 77
[80] F du Bois, ''*Wille's Principles of South African Law*'' Juta & Co (1997) p954

there is agreement, express or implied, between the parties to that effect.[82] The agreement may provide that the arrear interest be capitalised monthly. It is stated in Wille's Principles[83][84] that there is no reason, in principle, why the right to claim interest on interest should be confined to instances regulated by agreement and why it should not extend to the right to claim mora interest on unpaid interest that is due and payable.

Arrear interest not to exceed capital[85]

Arrear interest, whether accruing as simple or compound interest, ceases to run when it reaches the amount of the unpaid loan, and consequently the lender cannot claim as arrear interest an amount greater than the capital amount of the outstanding loan. This is the so-called '*in duplum*' rule (this rule will be discussed in detail below).[86] Interest capitalised at intervals does not lose its identity as interest and is therefore subject to the rule. Where the *'in duplum'* rule suspends the further running of interest, all credit to the debtor's account must be appropriated to pay the interest before being applied to the capital.[87] If a payment is made that reduces the accumulated interest to an amount less than the amount of the unpaid capital sum, interest begins to run again and may again be accumulated up to the amount of the outstanding capital.[88]

[81] Van der Linden 1.15.3.4 cited in F du Bois, ''*Wille's Principles of South African Law*'' Juta & Co (1997) p954
[82] The National Bank of SA v Graaf (1904) 21 SC 457 cited in F du Bois, ''*Wille's Principles of South African Law*'' Juta & Co (1997) p954
[83] ibid
[84] ibid
[85] ibid
[86] Ibid p955
[87] ibid
[88] ibid

The rule does not apply in respect of interest accruing after the creditor has commenced proceedings to enforce payment of the debt.[89] On judgement being granted, interest on the full amount of the judgment debt begins to run afresh , but ceases to accrue when it reaches an amount equivalent to the judgment debt comprising both the capital sum and interest for which judgement was granted. Waiver of this rule is unenforceable as being against public policy.

The In Duplum Rule[90]

This is a well-known rule of the common law, which states that interest may not exceed the capital. The moment that the amount of interest reaches the capital sum, interest stops running. However, any interest paid is left out of consideration for this purpose. The moment any amount of interest is paid, interest runs afresh. It is therefore possible, and indeed happens in the case of long-term loans, that the total amount of interest actually paid exceeds the capital by far. This common law rule only has an effect on the accrual of unpaid interest. The common law rule is still applied in South Africa and Namibia and it is submitted that nothing in the Usury Act, not even section 4 detracts from this.[91]

This application of this rule was discussed in the *Commercial Bank of Zimbabwe Ltd V MM Builders and others*[92] where it was held that interest stops running when it equals the unpaid capital. This case also discussed the historical scope of the rule and formulated the rule. The court further held that the rule applied to all debt where capital sum is owed together with interest thereon at prescribed rate, including bank overdrafts.

[89] T J M Otto 'Consumer Credit' first reissue vol 5(1) LAWSA (1994) p52he *in duplum* rule was discussed in Standard Bank of SA v Onenate Investments (Pty) Ltd in liquidation

[90]

[91] J M Otto 'Consumer Credit' first reissue vol 5(1) LAWSA (1994) p52

[92] ibid

Furthermore, in the case of *Standard Bank of South Africa Ltd v Oneanate Investments*[93] the court held that *in duplum* rule is based on public policy and is designed to protect borrowers from exploitation by lenders. The court also held that it cannot be waived by borrowers or altered by banking practice. The banking practise is the capitalising of unpaid interest not resulting in interest losing character as interest.

The case of *Sanlam Life Insurance Ltd v South African Breweries Ltd*[94] the court stated that the *in duplum* rule was confined to arrear interest alone, and that its purpose was to protect debtors from having to pay more than double the capital owed by then at the date on which the debt was claimed, and not to punish investors who were entitled to more than double their investment because the addition of interest to their capital investment would produce such a result. The court further held that it could never be public policy to prevent an investor, who had invested his money over a period of time and who by agreement had delayed receiving the fruits thereof, from getting more than double his money.

The court further held that the commercial and economic exigencies of the modern business world meant that the effect of the *in duplum* rule had to be limited and not extended, and further that the opprobrium attached to money lending transactions in Roman and Roman Dutch Law no longer applied. Money lending was the very lifeblood of modern commerce and interest rates now depended on principles of supply and demand rather than the moral considerations that have applied in the past. The court argued that in modern commerce the *in duplum* rule gave the dishonest debtor an opportunity to escape his obligations rather than alleviating the plight of overburdened debtors.

[93] 1998(1) SA 811 (SCA)
[94] 2000(2) SA 647.

It can therefore be said based, on the above, that the *in duplum rule* which has been discussed in the above cases that the judgment in the *Sanlam Life Insurance Ltd*[95]was incorrectly decided because although there might be a great difference between the money lending transactions that took place in the Roman and Roman-Dutch times and the modern time, public policy should still play a certain role in the determination of interest and in the application of the *in duplum rule*.

Mora interest[96]

(a) When is such claimable?

Where there has been no agreement for interest but the borrower fails to repay the capital when it is due, the lender is entitled to claim, as compensation or damages,[97] interest from the date of default. Under Roman Dutch law mora interest was claimable only if the creditor demanded such interest before accepting the principal sum, but today there is no distinction in this respect between interest ex contractu and interest ex mora. Interest is payable on all judgement debts from the date on which the judgment debt is payable unless the judgment order provides otherwise.

(b) At what rate is mora interest claimable?

The rate of such arrear interest depends in the first instance on whether a rate of mora interest has been agreed upon by the parties, in which case arrear interest runs at the agreed rate. Where no interest rate was agreed upon, it generally runs at the statutorily prescribed rate, unless a court exercises the discretion granted to it to order otherwise. Judgments in foreign currency also attract interest at the prescribed rate.[98]

[95] 1948 4 SA 874 A
[96] F du Bois, ''*Wille's Principles of South African Law*'' Juta & Co (1997) p955
[97] Bellairs v Hodnett 1978 (1) SA 1109 (A) at 1145-7
[98] Supra at footnote 96

2.2 The Relationship between Consumer Protection and Micro-finance: (Lending and Usury)

Evidently micro finance, and particularly micro-lending and usury are not mutually exclusive concepts. In many ways the three are depended on each other. Immediately, one identifies that under micro finance exists micro lending and usury which are both lending institutions that provide financial assistance to low income people. Conversely a failure to protect consumers in micro finance indicates direct failure to protect the consumers in the micro lending and usury institutions if the relationship between consumer and supplier fell under the lending institution.

To be more specific, once exorbitant interest rates are charged to lenders and the borrowers of these small loans become over-indebted, a collapse in the economy will be inevitable. If this collapse occurs billions of Namibian dollars will be lost to low income communities in the form of interest charged on micro loans. Therefore, it will then clear that consumer protection has been abandoned in the lending and usury institutions and overall micro-finance.

Therefore the relationship between consumer protection and micro finance is such that where there is link between the abuse of consumer rights and exorbitant interest rates under the lending institutions then there is a demand for consumer protection law.

2.3 Summary

It is important to note that a distinction can be drawn between two types of credit: credit for need and credit for convenience. Typically lower waged people borrow to make ends meet, whilst the more affluent borrow to increase their purchasing power of consumer durables. Therefore, with regard to micro finance, consumer protection seeks to protect lower wagered "consumers from the abuse of the lending institutions (micro lending and usury's).''

Chapter 3: Micro-lending Legislation in Namibia

Introduction

Micro-lending in Namibia is regulated under both the common law and statutory law.

3.1 Common Law position in Micro-lending

3.2 The In Duplum Rule

Interest may not exceed the principle amount. The moment that the amount of interest reaches the capital sum, interest stops running. This historical development of the rule and the case in which the rule has been applied shall be discussed briefly.

Historical Development of the In Duplum Rule

In the case of *Commercial Bank of Zimbabwe Ltd. V MM Builders & Suppliers (Pvt) Ltd*[99] the court gave a historical overview of the *in dupum* rule, which will be briefly outlined. The court held that the rule is derived from the formulation*: Supra duplum autem usurae, et usurarum usurae, nec in stipulatum deduci necese possunt: et solutae repetuntur…''* The court translated this to mean that interest and interest on interest however can either be stipulated for or recovered beyond twice the amount, and if paid may be recovered.

It was held that the *duplum* rule is regarded as a particular instance in the Roman law where public policy required an invasion into the autonomy of the contracting parties to regulate their own affairs; an invasion which, even once the law permitted the recovery of interest by way of stipulation, required regulation both as to interest rates, and as to limitations on the amount of accrued interest that could be recovered. Dependent upon prevailing views of public policy as it was, the precise

[99] 1997 (2) SA 285 (ZH)

content of the rule underwent various changes. The classical rule set out above (which is an extract from Ulpian) only prevented the recovery at any one time of interest is an amount exceeding the capital.[100]

Also dating from the early Empire is the following:

> *'Usurae per tempore solutae non proficient reo ad dupli computationem. Tunc enim, dur sortis summan usurae non extiguntur, quoties tempore solutionis summa usurarum audit eam computationem.*

The court translated this to mean that, "interest paid from time to time is of no assistance to the debtor in calculating the double." "For then, whenever the amount of interest as paid from time to time is of no assistance to the debtor in calculating the double. For then, whenever the amount of interest as paid from time to time exceeds the calculation, that interest is not considered to be beyond the double sum of the capital."[101]The effect of excluding from computation of the double all payments of interest previously made from time to time is to limit the rule against recovery of interest *supra duplum* to arreas of interest claimed all at once.

This rule had, by the Justinian time, been made stricter so as to forbid not simply the recovery of arrear interest *supra duplum* but to prevent the recovery at all of interest in excess of the capital. Thus in post classical times the accrual of interest also ceased, rather strangely, when the amount of interest paid had reached the amount of the capital sum.[102]

This Roman rule against recovery of interest *supra duplum* was received into Roman Dutch law. Groenewegen[103] records this rule as follows:

---

[100] ibid
[101] (Codex iv 32)
[102] A Birnie, 'The History and Ethics of Interest' p173
[103] Simon Van Leeuwen Censura Forensis 1.4.4.35; Barber and MacFayden's translation

> ‘interest ceases to rum when it has increased beyond the amount of the principal, both the interest which is due on account of an agreement or pact and that which is due on default, because interest cannot be claimed and demanded beyond the double amount…and this is the case both as regards what is past, and has been paid, and as regarded that which has still to be paid, and that which has been paid can be reclaimed by condictio indebti or considered as principal…’[104]

The rule against recovery of interest *supra duplum* as received into Hollland was in due course received into South Africa. In the *Niekerk v Niekerk*[105] there was an action, by the beneficiaries of the estate of the late Niekerk against an executor of that estate and guardian of the children, for the payment of their inheritance together with interest. Reliance was placed on the executor, who consented to execution in the sum of the capital amount together with interest equivalent to that sum, upon the *duplum* rule. The court held the rule of the Dutch law to be clear, that interest could not be claimed, even from a guardian, to a greater amount than that of the capital on which the judgment arose…[106]

This case was the earliest reported instance of the application of the *duplum* rule in Southern Africa, the case also shows that the rule was applied to debts other than debts arising out of loans. It further suggests that the rule against the recovery of interest *supra duplum* applies not only to interest in excess of the capital amount of the original debt, but, where the debt is partially discharged prevents the accrual of interest beyond the double of the reduced outstanding capital amount.

Furthermore, the case of *Van Diggelen v Triggs 1911 SR 154 at 160*[107] brought out two principles. Firstly, it was held that a payment could properly be appropriate by the creditor to interest rather than

[104] ibid
[105] (1830) 1 Menz 452
[106] Niekerk v Niekerk at 454 in fine
[107] 1911 SR 154 at 160

capital, and secondly the decision constituted an application of the rule in such a way as to exclude from computation of the double previous payments of accrued interest. And in restricting the application of the principle to interest claimed in the summons the learned judge Watermeyer was applying the law as it was known in classical Roman law and as received in Holland; that is without alteration of Justinian concerning piecemeal payments.[108]

After the court had gone through the historical overview of the *in duplum* rule in Roman and Roman Dutch law the court then formulated the in duplum rule as follows:

> 'interest, whether it accrues as simple or compound interest, ceases to accumulating upon any amount of capital owing once the accrued interest equals the amount of capital outstanding, whether the debt arises and a result of financial loan or out of any contract whereby a capital sum is payable together with interest thereon as a determined rate. Upon judgment being given, interest on the full amount of the judgment debt commences to run afresh but will once again cease to accrue when it reaches the amount of the judgment debt, being the capital and interest thereon for which cause of action was instituted.'

How the *in duplum* rule protects the consumer

In the *Standard Bank of South Africa v Oneanate Investments (in liquidation)*[109]case the *in duplum* rule was said to be a rule that was developed in response to the common law's inability to provide a workable mechanism for setting limits on the interest that can accrue on a debt. In short, the common law *in duplum* rule provides that interest stops running on a debt when the unpaid interest equals the outstanding capital.[110]

[108] Commercial Bank of Zimbabwe v MM Builders & Supplier (Pvt) Ltd. 1997 (2) SA 285 at 296 D-G
[109] 1998 (1) SA 811 (SCA) 827H
[110] M Nathan 'The Common Law of South Africa' vol. II at 669 s808.

Therefore, according to the *in duplum* rule when, due to payment, unpaid interest drops below the outstanding capital, interest again begins to run until it once again equals the amount of the outstanding capital.[111] Thus, for example, a consumer who borrows R1000 per month at interest of 120% per year will have to repay R230 per month over six months. If as a result of retrenchment the borrower is able to repay only R30 per month for six months, she will after five months be in arrears with interest payments in the total amount of R1000.[112]This amount is equal to the outstanding capital of R1000, [113]and interest will therefore stop running at the end of five months. When unpaid interest is less than the capital outstanding, interest will start to accrue again.

3.3 Statutory Provisions

The leading legislation for micro lending is the Usury Act[114] as already explained. In order for one to fully discuss the concept of micro lending in Namibia it is necessary to define micro lending in terms of the Usury Act 73 of 1968 as well as give a brief analysis of the Notice in terms of section 15A[115]. The act stipulates that;

A money lender is

(a) any person who is granting or has granted a loan of a sum of money to a prospective borrower or to a borrower in terms of a money lending transaction;

[111] *LTA Construction Bpk v Administrateur, Transvaal* 482C. cited in J Campbell, 'The Cost of Credit in the Micro-finance Industry in South Africa LLM paper(2006)

[112] The monthly shortfall of R200 (R230 instalment less R30 paid) x 5 months = R1000 cited in J Campbell, 'The Cost of Credit in the Micro-finance Industry in South Africa LLM paper(2006)

[113] The outstanding capital is the same as the initial loan amount, since monthly payments accrue first to interest and then only to capital, and the monthly interest due is always greater than R30 in the first five months cited in J Campbell, 'The Cost of Credit in the Micro-finance Industry in South Africa LLM paper(2006)

[114] 73 of 1968

[115] ibid

(b) any person to whom, whether by delegation, cession or otherwise, the rights or the rights and obligations of a moneylender in respect of a money lending transaction have passed;

(c) the holder of an instrument of debt executed in respect of a money lending transaction;

(d) any manager

The Act defines a 'money lending transaction' as,

"any transaction which, whatever its form may be and whether or not it forms part of another transaction, is substantially one of money lending…[116]

The Government Notice in Terms of section 15A of the Usury Act 1968 defines a 'microlender' as,

"A person whose business includes the carrying of a micro loan transactions and who is registered with the Permanent Secretary."[117]

The notice also defines a 'micro loan transaction as: a money lending transaction in respect of which the loan amount –

(a) does not exceed N$10 000;

(b) together with the total charge of credit which is owing by the borrower, shall be paid to the microlender, whether in instalments or otherwise, within a period of 60 months after the date on which the sum of money has been advanced to the borrower; and

(c) is not paid in terms of a credit card scheme or withdrawn from a cheque account with a bank, so as to leave such account with a debit balance.[118]

[116] Section 1 of the Usury Act no. 73 of 1968.
[117] S15A Usury Act 73 of 1968
[118] S1 Usury Act 73 of 1968

From the above sections in the Act a micro lending institution or micro lender can therefore be said to be any person including a juristic person or business, dealing with money lending transactions provided the loan amount does not exceed N$ 10 000. The legal micro-lending institutions would be those registered with the Permanent Secretary of the Ministry of Finance

Regulations:

Section 2 of the Notice[119], which sets out the conditions, is the first regulation advanced. In terms of section 2[120] a micro loan transaction is exempted on the condition that the person advancing the loan amount under a micro loan transaction is not a bank or a building society registered in terms of the Buildings Societies Act[121]. The person must be registered with the Permanent Secretary of Finance and the microlender should at all times comply with the notice.[122]

The Notice also lays down rules for the purposes of exemption under section 15A of the Usury Act[123] in the Annexure to the Notice. The rules provide for **confidentiality** and **disclosure**. According to the Annexure the microlender should not, without the express consent of the borrower, disclose any confidential information obtained in the course of a micro loan transaction.[124] The microlender should make these rules available to the borrower and should use standard written agreements, which should be approved by the Permanent Secretary. The standard written agreements should contain all the terms and conditions of a micro loan transaction and should clearly reflect the rights and obligations of the borrower and a microlender.[125] Furthermore, the microlender must prior to the conclusion of the loan transaction and at the conclusion of the agreement, provide the borrower with a schedule setting out the following:

[119] Notice 34 2267 of 2 February 2000.
[120] Ibid.
[121] 2 of 1968
[122] S2 of Government Notice 34 2267 of 2 February 2000.
[123] 73 of 1968
[124] s1 of Annexure
[125] S2 of annexure

(i) the loan amount in Namibian dollars;

(ii) the total repayable amount at the current interest rate, over the repayment period and the elements comprising the total charge of credit;

(iii) the annual rate of the total charge of credit;

(iv) the annual rate of the total charge of credit;

(v) the nature and amount of any insurance, including the name of the insurer and the amount of premiums payable;

(vi) The penalty interest and any additional costs that would become payable in the case of default by the borrower or how that would be calculated;

(vii) The instalment amount in Namibian dollars and cents, at the then current interest rate and the number of instalments; and

(viii) The repayment period in respect of the micro loan transaction.[126]

The micro lender should before the conclusion of the agreement explain the essential terms of the micro loan agreement in a language understood by the borrower, and after the conclusion of the agreement provide the borrower with a copy of the signed micro loan agreement.

The principle of microlending, its definition, nature and regulations were discussed in the *Open Learning Group Namibia Finance CC v Permanent Secretary of the Ministry of Finance & 3 others Case*[127]. This was an appeal case where the court had to determine whether the Open Learning Group(OLG) could be distinguished as a registered microlender as the applicants (Open Learning Group) alleged that they give loans to students and receive payments back over a period of time, with

[126] S2(4) of Annexure
[127] GN 80/2010

interest. The loans were used to further studies. The court in determining whether OLG was a microlender or not, ruled that OLG was a microlender because it *inter alia* granted various loans to students as contemplated by the Usury Act.[128]

3.4 The Role of the existing legal framework to consumers

The Usury Act[129] as stated before regulates the relationship between the lender and the borrower (consumer). What has been discussed above in terms of lending and consumer legislation is not a true reflection of all the legislation available for consumer protection in Namibia. The following section of this chapter will discuss lending and its related legislation.

To begin with, The Government Notice in terms of section 15A of the Usury Act[130] provides that under s2(3) of the Annexure the lenders should use standard written agreements which should be approved by the Permanent Secretary. However, these standard written agreements which should be approved by the Permanent Secretary contain all the terms and conditions of a micro loan transaction clearly reflecting the rights and obligations of the borrower and are can be said to give the borrowers an unfair advantage over the consumer.[131] It is important to note, as stated earlier the lending institutions protect their interests through the use of standard form of contracts.

Standard Form Contracts

Standard form contracts can be defined as contracts used in an open market transaction to govern the legal relationship between parties. These contracts are pre-printed forms used by the seller and

[128] 73 of 1968
[129] 73 of 1968
[130] 73 of 1968
[131] Ibid.s2 of Annexure

offered to the buyer on a 'take it or leave it basis'. Examples of these are parking lot tickets, wholesale contracts and micro loan contracts.[132]

Prof. Kessler states that the development of the large-scale enterprise with its mass production and mass distribution made a new type of contract inevitable [133]. He called this contract the 'the standardised mass contract".[134] He mentions that once a business firm has formulated the contents of a standardized contract, it will be used in every bargain dealing with the same product or service and will only be varied so far as the circumstances of each contract require.[135]

There are a number of advantages why the use of standard form contracts has become very common in the modern commercial business transactions. Some of the advantages have been discussed hereunder.

They are said to make risks calculable, by increasing real security, which is said to be a necessary basis of initiative and the assumption of foreseeable risks.[136]Prof. Kessler notes that the uniformity of terms of a contract typically recurring in a business enterprise is an important factor in the exact calculation of risks. He also mentions that risks, which are difficult to calculate, can be excluded altogether, and unforeseeable contingencies affecting performances, such as strikes, fires, and transportation difficulties can be taken care of.[137]

The standardized contracts take advantage of the lessons of experience and enable a judicial interpretation of one contract to serve as an interpretation of all contracts. They thus become an important means of excluding or controlling the irrational factor in litigation.[138]The standardized

[132] Beaver(5)
[133] Kessler, 1943."Contracts of Adhesion-Some thoughts About Freedom of Contract"43 Colum.L.Rev,p629.
[134] Ibid 630
[135] ibid
[136] Fransworth, E.A. & Young,W.F. 1988. 'Contracts Cases and Materials 4th ed, The Foundation Press, Inc, p372
[137] Ibid p374
[138] Ibid

contracts take advantage of the lessons of experience and enable a judicial interpretation of one contract to serve as an interpretation of all contracts. They thus become an important means of excluding or controlling the irrational factor in litigation.[139] The standardized contracts are said to reduce uncertainty and save time and trouble.

The Use of Standard Form Contracts

The lending institutions are required to use standard form contracts by the regulation that is presently in place. However, not only do these standard form of contracts serve to secure the interests of the lenders, but they also give the lenders an opportunity to legitimately exploit the borrower. Standard form contracts pose a special problem in law, because the contract itself is not a result of the free consenting minds of the parties, but of the imposition of the terms set by the stronger party onto the weaker party of the contract. This is of course in contradiction with the essence of the law of contract. As stated earlier standard form contracts are contracts used in an open market transaction to govern the legal relationship between the parties. The contracts are formulated unilaterally by the lender, pre-printed and offered to the buyer who has to accept on a 'take it or leave it basis.[140]' This illustrates that despite high interest charging the lending industry also has a problem of unfair contractual terms in the lending industry.

3.5 The effects of the absence of direct legislation regulating the lending industry and its failures with regard to consumers

The lending industry in Namibia has grown rapidly since its exemption from the Usury Act[141] that removed interest rate ceilings on small loans under N$10 000 and thus can be said to be a unregulated

[139] Ibid
[140] "Final Report relating to Standard Form Contracts",**New Jersey Law Revision Commission** (October 1998) p.5
[141] B. E. Beaver, "Micro-Lending or finance in Namibia",(Unpublished Article)p5

market. The industry has been fuelled by private capital and is currently seeing large amounts of investment from the formal financial sector. Its growth can also be attributed to the fact that the industry provides access to credit individuals who need relatively small amounts of credit at a time. These credit individuals represent the poorer sector in society, who do not have access to formal bank loans, to credit cards or other automatic debit facilities. The development of this industry is seen as a positive element in the development of a financial system that is expanding its outreach into lesser-serviced segments of the economy.[142]

However, notwithstanding its positive elements, the industry has proved to be a cause of indebtedness among the poorer sector of society, because of the exorbitant interest rate charges on loans granted, and the imposing of unfair contractual terms.

The Charging of High Interest Rates:

The exemption from the interest rate ceilings of the Usury Act puts the borrower (consumer) in a very vulnerable position where the borrower is susceptible to exploitation by the lender. Exploitation in this regard can be seen as lending to a borrower more than he or she needs or wants and charging higher interest or by adding on extra charges that are most of the time not necessarily connected to the paying back of the loan. Exploitation can also take the form of not providing accurate information to the borrower about the implications of the cost of lending and the borrower not being aware of other options. The base cause of these conditions is due to aggressive lenders, uninformed clients, and poor information flow between clients about alternative options.[143]

Most Micro-lenders base their defence of charging high interest on the fact that they have to cater for many of their 'hidden costs', such as ledger fees, stamp duties, and other levies charged for every service rendered when dealing with formal banks. They also mention that other factors like risk

[142] Ibid 3
[143] ibid

premiums, opportunity costs and the profit margin play a role in the setting of their interest rates.[144] However, despite all these defences, the fact still remains that the interest rates charged are extremely high and need to be regulated.

The injustices in Standard Form Contracts

As discussed above although these standardized contracts have proved to be advantageous to businesses which deal with contracts on a mass large scale, they have proved to be very prejudicial towards the individual contracting party. They are a means by which one party imposes its will upon another unwilling or even an unwitting party.[145] These standard form of contracts provide the parties that present them with a lot of temptation and means to impose their will on other contracting parties- usually an ignorant individual. And even if the individual is not ignorant of some unfair terms of the standard contract, he/she will find it very difficult or impossible to avoid submission to the terms of the standardized contract.[146] They therefore defy the concept of 'freedom of contract' which is said to be one of the cardinal principles of the law of contract. The standardized form contracts have been said to be contracts, which are more of a collection of rules made by an organization and imposed upon all who belong to it or deal with it.[147] The other damages are namely:

(1) They do not allow for equal bargaining between the contracting parties. They are usually used by certain business enterprises with disproportionately strong economic power that it can dictate its terms to the weaker party.[148]

[144] Ibid p4.
[145] E A Fransworth & W F Young, 'Contracts Cases and Materials 4th ed.', The Foundation Press, Inc (1988) p372-373
[146] M P Furnston, 'Cheshire & Fifoot's Law of Contract 9th ed. The Founding Press, Inc (1988) p373.
[147] Ibid p25
[148] Supra at footnote 83

(2) The lack of opportunity to bargain leaves the weaker party with no option but to either accept the contract on the terms presented to forfeit. And in situations where an individual would be in dire need of fast cash they would opt to accept the contract.[149]

(3) In most cases the one party may be completely, or at least relatively, unfamiliar with the terms of the contract. These contracts are usually used by a party who usually has the advantage of time and expert advice in preparing it while the other party may have the opportunity to scrutinize it. This is usually compounded by the use of fine print and convoluted clauses.[150]

The Growth of the Lending Industry in Namibia

The lending institutions have succeeded in overcoming the formal credit market failure by utilising innovative techniques to minimise information and transaction costs. They have developed innovative forms of collateral, for example, the requirement that clients must hand over their bankcards and secret 'personal identification number' PIN numbers to the microlenders, which in principle ensures that lenders have access to their borrowers' salary for repayment purposes. They have also succeeded in lowering high costs associated with administering small accounts. This is achieved by limiting the number of services offered, decentralising decision making and keeping paper work simple and to an absolute minimum.

These factors also allow the microlending institutions to employ less skilled, and thus lowly paid, staff that is normally required by the banks. The micro lending institutions prove to be most favourable because they locate themselves close to most of their clients' base and approve loans quickly.[151] The

[149] ibid
[150] ibid
[151] B. E. Beaver, "Micro-Lending or finance in Namibia",(Unpublished Article)p1.

microlending institutions prove to be most favourable because they locate themselves close to most of their clients' base and approve loans quickly.[152]

Therefore these microlending institutions exist and succeed because they meet the demands for financial services by the small loan borrowers that are not provided by the formal sector. They accomplish this by solving the administrative headaches that an individual who just needs an extra N$2000 will have to go through, if they were to apply for the loan at a formal financial institution.[153]

As a special mention Mr Beaver[154] adds that the reasons for failure of the formal sector and the growth of microlending institutions by expressing the following:

> '….The growth of microlenders in developing countries is a reflection of the polarisation of societies. If everybody in a country would have been equally poor or rich, it is hard to imagine that microlenders could exist. Rich people with money in the midst of millions without it, is the first requirement for an environment where access to microlending becomes a way of survival. And if rich people are unscrupulous, they will press as much profits put of the poor as the latter has the ability to sustain.[155]

The unavailability of bank loans to consumers of a lower income

Banks are normally very careful in granting credit, because the delay involved in discharging the debt obligation exposes the credit transaction to considerable risk. To offset these risks, banks perform three tasks, which are often very difficult and costly to undertake in the case of small loan borrowers. The three tasks are as follows:

(i) the screen potential borrowers to establish the risk of default;

[152] ibid p1-2
[153] Ibid p2
[154] Ibid p5
[155] Ibid p2

(ii) they create incentives for the borrowers to fulfil their promises; and

(iii) they develop various enforcement actions to make sure those who are able to repay, do so

The banks also recognise that there are major differences between the small loan borrowers and the large loan borrowers, with regard to important information needed for the application of a loan. In order to circumvent these differences banks normally attach collateral requirements to loans. Unfortunately these requirements generally cannot be applied to small loan borrowers because they seldom have sufficient forms of conventional title. The lack of some or all of these requirements would typically result in very high interest rates being levied to compensate for feared large risks. Yet, even with the resulting high interest rates the banks are still generally reluctant to provide credit to such a small borrower. Furthermore, the high operating costs relative to the size of the small loan borrower's account often deter banks from serving them. Along with their highly skilled personnel, banks employ standardised procedures for deposits, withdrawals or lending irrespective of the size of the account. These factors make the unit cost of small accounts prohibitively high.[156]

Additionally, the borrowers are also very willing to deal with lenders for a number of reasons. Firstly, the majority of them do not have access to formal finance and therefore they highly value any other form of finance that maybe to their disposal, especially when it enables them to avail many other financial obligations.

Secondly, there is immediate access to funds; that is they are no application forms that need to be filled in and there is no need to wait for higher authorisation and in some instances good personnel relationships are created and built between the lenders and the borrowers. Thirdly, the inordinately high transaction costs often associated with gaining access to the formal banking sector (for example, time and transportation costs involved in applying, collecting and repaying loans, and in depositing

[156] Ibid p2.

and withdrawing funds from deposit accounts) are usually not incurred when dealing with the lenders because they are usually close to the borrower.[157]

Therefore the failure of the formal financial sector to serve most of these borrowers, the exemption from the Usury Act[158] and the demand for financial services by these borrowers have led to the widespread emergence of micro financial institutions in Namibia. These institutions have succeeded in overcoming the formal credit market failure by utilising innovate techniques to minimise information and transaction costs. They have developed innovative forms of collateral, for example, the requirement that clients must hand over their bankcards and secret PIN numbers to the microlenders, which in principle ensures that lenders have access to their borrowers' salary for repayment purposes. They have also succeeded in lowering the high costs associated with administrating small accounts.

This is achieved by limiting the number of services offered, decentralising decision making and keeping paper work simple and to an absolute minimum. These factors also allow the lending institutions to employ less skilled, and thus lowly paid, staff that is normally required by the banks. The microlending institutions prove to be most favourable because they locate themselves close to most of their clients' base and approve loans quickly.[159]

3.6 Summary

In summarizing this chapter it is important to note, as discussed above, the regulations promulgated in terms of this Notice[160] in Namibia are at present the only legal standing regulations, which exclusively govern the micro lending institutions. Put another way, the regulations of the Government Notice in

[157] Ibid. p 1-4
[158] Act 73 of 1968
[159] Supra p2
[160] 34 2267 of 2 February 2000.

terms of Section 15A[161] in addition to the *in duplum* rule constitute the only legal framework that will secure the protection of the borrowers from being exploited by the lenders. Although some may argue that these regulations and this Act[162] curb the problem of microlending and can guarantee the protection of the lenders, I disagree with that view.

In my opinion the regulations and the in *duplum rule* may partly protect the borrower but do not wholly secure their protection, in that although these legal standing regulations have been put in place, but they have not succeeded in stopping the industry from growing in Namibia and therefore not curbing the exorbitant interest rates. For example, it is still impossible for a low income borrower to comply with the requirements of a loan from the bank and as long as we do not have legislation that directly deals with this industry it will continue growing. This, I would submit, will therefore secure the protection of the borrowers from being exploited by the lenders.

[161] 73 of1968
[162] Ibid.

Chapter 4

Analysis on the FIM Bill with regards to consumer Protection

The Financial Institutions and Markets Bill, is the latest proposed legislation that is said to regulate consumer protection in Namibia.[163] This Bill is said to be the future of consumer protection in the regulated sector. In the case of Namibia, the challenge being faced is not only to protect the existing customers, but the need to put more effort in bringing the estimated 51% of the population excluded from the mainstream of financial services.

It is against that background, that the Bank of Namibia has recognized the need to advocate for financial inclusion as one of its new key strategic focus. Michael Mokete[164] stated that research reveals that financial exclusion allied phenomenon; lack of financial education, lack of consumer protection and therefore, financial discrimination; and the lack of suitable products and services has led to the need for an Act that can curtail these problems.[165]

Consumer protection in Namibia therefore seeks to level the playing field between suppliers and consumers of financial services. Financial services are in fact often complicated, while often involving large amounts of money for individuals. It is true that the need for consumer protection is not unique to the financial area.

[163] Ministry of Justice.2010. Three-day workshop on Consumer Protection Legal Framework in Namibia. Held in Okahadja 5-7 April
[164] Michael Mambo Mokete: Role of Bank in Namibia in consumer protection issues-BIS central Bankers speeches available at http://www.bis.org/review/r110323c.pdf accessed on 23/10/11
[165] ibid

He further stated another function of the Namibia Financial Institutions Supervisory Authority, is the establishment ***of Financial Services Ombuds Office,*** in terms of the Draft Financial Institutions and Markets Bill. This Office will be financed and resourced by the two institutions. It is expected to serve as an additional mechanism for redress for consumers who are aggrieved by their financial service providers. This is as a result from the overwhelming response from the public that many micro-lenders and retailers with hire-purchase services either stopped or changed loan provisions at will and mostly without consulting clients beforehand.[166]

The fundamental aims of the Bill are namely[167]: to promote fair business practices; consumer protection; improved consumer awareness and information; consumer confidence, empowerment and responsibility; responsible and informed consumer choice; education; equal treatment: in respect of credit, medical aid funds; privacy and confidentiality, protection of credit consumer information; choice; disclosure; fair reasonable marketing; far honest dealing; terms and conditions; and accountability.

Furthermore, the Bill is meant to consolidate and harmonise the laws regulating financial institutions in Namibia; to establish NAMFISA to exercise supervision over the compliance with financial services laws; to provide for the functions of NAMFISA; and to provide for incidental matters.

4.1 NAMFISA and its role in Consumer Protection

NAMFISA is a public body established in terms of the Namibia Financial Institutions Supervisory Authority Act 2001 (Act no 3 of 2001), the Act, and is tasked with the responsibility of regulating and supervising non-banking financial institutions in Namibia.

[166] The Namibian: New Bill Plugs loopholes in the Financial sector Consumers are set to benefit by Brigitte Weidlich 28.08. 2008
http://www.namibian.com.na/index.php?id=28&tx_ttnews%5Btt_news%5D=43387&no_cache=1
[167] Okahandja Consumer Protection Conference.

NAMFISA protects the consumer in that it regulates and supervises a broad range of institutions, which include pension and retirement Funds, long term insurance, short term insurance, medical aid schemes, friendly societies, unit trust management schemes, the stock exchange, asset managers, participation bond schemes, public accountants' and auditors', micro lenders, and hire purchase outlets.[168]

4.2 Excerpts of the Bill on Supervision of Financial Institutions by NAMFISA, 2010[169]

PART IV

CONSUMER RIGHTS

415. Right to apply for credit.

416. Protection against discrimination in respect of credit.

417. Right to reasons for credit being refused.

418. Right to information in plain and understandable language.

419. Right to receive documents.

420. Protection of consumer credit rights.

PART X

CONSUMER'S LIABILITY, INTEREST, CHARGES AND FEES

453. Prohibited charges

[168] www.namfisa.com.na accessed on the 23/10/11
[169] FIM Bill 2010

454. Cost of credit

456. Fees or charges

457. Interest

458. Changes to interest, credit fees or charges

459. Maximum rates of interest, fees and charges

460. Credit insurance

4.3 Summary

The above excerpts of the Bill clearly indicate the current development of the Namibian legislation that seeks to curtail the high interest rates charged by the microlenders. It also includes a provision that clearly sets out consumer protection rights in terms of credit. Additionally Part X, creates liability for consumers. Unlike previous legislation, this Bill does not put a limitation on the interest rate ie the Usury Act[170] which removed interest rate ceilings on small loans under N$10 000.

[170] 73 of 1968

Chapter 5

A comparative analysis of Namibia's Position and the Consumer Protection Act in South Africa

In South Africa, the development of the common law *in duplum* rule was a response to the inability of the common law and legislation in regard to usury to provide sufficient protection to consumers from the effects of the accumulation of further debt from high interest rates. Whilst it is clear that the *in duplum* rule is deeply entrenched in the common law, the rule has been significantly fortified through clarification and extension via the National Credit Act, and the new Consumer Protection Act.[171]

5.1 The Micro Finance Regulatory Council (MFRC)

In South Africa the MFRC was set up to control registered micro lenders in the micro lending industry. The MFRC also protects the rights of consumers when taking loans from micro lenders. This Council has gained the powers to do so in terms of the Exemption Notice of the Usury Act.

The main purpose of setting up the MFRC was to make sure that all micro lenders register with the MFRC, and act lawfully in terms of its rules and ensure protection of the general public. The MFRC performs the following functions:

1. The registration and accreditation of micro money lenders with the council, in accordance with the accreditation criteria approved by the Minister of Department

[171] Kern *The Regulation of the Micro-lending Industry in Terms of South African Law and RelatedAspects 13–14.* cited in J Campbell, 'The Cost of Credit in the Micro-finance Industry in South Africa LLM paper(2006)

Trade and Industry. The Compliance Department ensures that all accredited money lenders are acting legally and are complying with the Usury Act Exemption Notice and the Council's rules. The Complaints and Enforcement Unit handles complaints lodged by consumers. The latter Unit conducts inspections of accredited lenders and enforces the Exemption Notice and the Council's rules.

2. The Education and Communication Division educates, informs and communicates with borrowers, lenders and all members of the public on the MFRC, its functions and roles.[172]

5.2 Consumer Protection Act[173]

The 1st of April 2011 was the watershed event in the historical development for a broad based consumer movement in South Africa.[174] This Act[175] seeks to promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements.

Until 1992, all money lending transactions were subject to the limits on interest rates imposed by the Usury Act.[176] At the end of 1992 (when micro-loans were first exempt from the Usury Act), the maximum permissible interest rate in terms of the Usury Act for loans not exceeding R6 000 was set

[172] http://www.helplinelaw.com/article/south%20africa/405 South Africa Consumer Rights-How and where to file complaints accessed on the 23/10.11
[173] 68 of 2008
[174] Ministry of Justice.2010. Three-day workshop on Consumer Protection Legal Framework in Namibia. Held in Okahadja 5-7 April
[175] Consumer Protection Act 68 of 2008
[176] 73 of 1968

at 30% per annum, and for loans greater than R6 000 was set at 27% per annum.[177] The formal banking sector was not in a position to provide necessary credit to South Africa's lower-income groups.[178] The reasons for this are many, but revolve primarily around the fact that low-income earners were not in a position to provide the collateral security necessary to reduce risk to credit providers.[179] This meant that the vast majority of the population were excluded from the formal credit market, and lower income groups were desperate for credit, primarily for housing, small business enterprises and for consumption purposes.[180]The Usury Act limitations effectively denied credit to this sector of the population which it was intended to protect.

These circumstances gave rise to the emergence of the so-called "cash loans industry", which operated largely unlawfully, charging interest rates way in excess of the Usury Act limitations.[181] Lawful micro-lending practice was not an economically viable business at this time, since lenders did not consider it profitable to lend small amounts of money to consumers offering little or no security at Usury Act-compliant interest rates.[182] Otto and Grové provided two reasons for the net return on lenders' capital being small:[183]

(a) Micro-lenders were not deposit-taking institutions, and therefore had to borrow capital from financial institutions at relatively high rates of interest.

---

[177] Usury Act 1968, R3273 Government Gazette 14438, 4 December 1992.
[178] *Lurama Vyftien (Pty) Ltd and 49 Others v The Minister of Trade and Industry and Another 22125 of 1999*
[179] For further discussion in this regard, see Department of Trade and Industry "Consumer Credit Law Reform: Policy Framework for Consumer Credit (August 2004)" 12–15. http://www.thedti.gov.za/ccrdlawreview/policyjune2005.pdf (accessed 14 March 2006).
[180] Lurama 10
[181] SALC Working Paper 46 at 220.
[182] 73 of 1968
[183] Kern *The Regulation of the Micro-lending Industry in Terms of South African Law and RelatedAspects 13–14.* cited in J Campbell, 'The Cost of Credit in the Micro-finance Industry in South Africa LLM paper(2006)

(b) The overheads of the micro-lender were more or less the same for small loans as they were for larger loans, which adversely affected profit margins if interest rates for all loans were the same.

Millions of low-income consumers were forced to turn to the illegal cash loans industry, where they found themselves at the mercy of an unregulated market in which they enjoyed no legal protection whatsoever, in spite of the existence of the Usury Act.[184] For these reasons, it was believed that exemption of micro-lenders from the limitations of the Usury Act was essential to enable a large sector of South Africa's population to gain access to credit from lenders who were not operating illegally. However this did not work as the illegal loans were still running large. Thus the need for the new Consumer Protection Act.[185]

In comparison, the MRFC can be equated to NAMFISA in Namibia in that both these institutions seek to ensure that 'all accredited lenders act legally.' Due to these two financial institutions there has been an increased awareness to consumers and the need to ensure legislation for the consumer. In Namibia the Law Reform and Development Commission has also been aggressive lately to ensure that Namibia follows suit on the heels of South Africa to develop Consumer Protection Policy and Law in Namibia. Further, Ministry of Justice held in 2009 a ground breaking workshop to sensitise on consumer protection from a legal perspective. There is also considerable effort in terms of financial literacy to bring consumer rights to the public domain in the country. The Ministry of Finance, Bank of Namibia and NAMFISA can be complemented on embarking on a nationwide financial literacy programme to educate the public on consumer financial education.[186]

[184] 73 of 1968 cited in J Campbell, 'The Cost of Credit in the Micro-finance Industry in South Africa LLM paper(2006)

[185] 68 of 2008

[186] Ministry of Justice.2010. Three-day workshop on Consumer Protection Legal Framework in Namibia. Held in Okahadja 5-7 April

Summary

All these efforts by Namibia have been put in place in order bridge the gap in consumer protection. It is evident that Namibia has seen the need to eradicate the loopholes in consumer protection with regard to Micro-finance.

Chapter 6: Conclusion and Recommendations

6.1 Findings

An analysis of Consumer Protection within micro-finance in Namibia has been established that:

1. Threatened Low income earning Consumers

There is no doubt that as it stands today, that the Micro-finance industry provides access to credit individuals who need relatively small amounts of credit at a time. These credit individuals represent the poorer sector in society, who do not have access to formal bank loans. Without stringent measures to address this problem consumers are left vulnerable to pay high interest charges. Such interest will become due every month for between 1 and 36 months after each loan is disbursed (depending on the duration of the loan) and will be paid when due, or will be paid months or sometimes even years later if the borrower falls into arrears with payments. The cost of the initial loan is therefore often borne (and the impact felt) for years after the initial transaction.[187] This leaves the borrower(consumer) owing more that the initial amount, leaving the consumer in a worse of position than when he had sought the loan and thus left over-in debt.

According to Campbell[188] every year an excessive amount of money in the form of interest on micro-loans is being drained out of the hands of poor communities into the hands of micro-lending enterprises, whose wealth is being enhanced directly at the expense of these

[187] cited in J Campbell, 'The Cost of Credit in the Micro-finance Industry in South Africa LLM paper(2006).

[188] Ibid p96

communities. This money is not being recycled back into poor communities, but rather is lost to them. High interest rates on micro-loans have therefore resulted directly in the exacerbation of poverty, and the money lost to poorer communities is increasing as levels of indebtedness of the lowest-income groups increase.[189]

2. Ineffective legislation and failure to protect these consumers

This study shows that the law in place to protect consumers is only effective in for loans over the N$10 000 as provided in the Usury Act[190]. This Act requires micro-lenders to register with the Permanent Secretary of the Ministry of Finance in order to be exempt from the maximum interest rates prescribed in the Usury Act.[191] Although these regulations are in place they still do not protect these vulnerable borrowers from the exorbitant interest charges as they exempt the registered microlenders from the interest rate ceilings. As a result of this the "cash loans industry" has grown significantly and runs unlawfully and with no regulation, and charges high interest rates in contravention of the Usury Act, these rates may be comparable with or in excess of those charged by the registered sector.[192] Finally, a borrower has close to no legal recourse in the face of an exorbitantly priced loan legitimised by exemption from the Usury Act.[193]

5. Lack of monitoring mechanisms

The study shows that despite the statutory provisions and legislation in place to curb the microfinance industry these institutions are able to trade unlawfully in an uncontrolled environment, with little policing of their actions. The size of this unregistered sector,

[189] Kern *The Regulation of the Micro-lending Industry in Terms of South African Law and RelatedAspects 13–14.* cited in J Campbell, 'The Cost of Credit in the Micro-finance Industry in South Africa LLM paper(2006)
[190] 73 of 1968
[191] Ibid.
[192] Supra at footnote 188.
[193] 73 of 1968

although difficult to quantify, are scattered all over Namibia and it is thus difficult to monitor their activities. The lack of monitoring mechanisms in Namibia leaves it impossible to restrict and limit this industry. These findings point to the consequences of the prevailing lack of protection to borrowers (consumers) in the micro-finance industry

6.2 Recommendations

The recommendations that follow address the findings made in this study.

1. Like South Africa there is need for a Consumer Protection Act[194] to curb the microfinance lending industry which is the driving force for the high interest charging on consumers. This will clearly and specifically prohibit the micro lending industry.

2. At regional level, specific regional monitoring mechanisms, that will be able to quantify this unregistered sector. As it stands, the current position is that these micro-financers are scattered all over Namibia and is with no regional mechanism it is difficult to protect borrowers.

3. The Usury Act limit which is N$10 000[195] is not practical this limitation has not developed to the practical needs of society. Put another way, the limitation placed was fine in 1968, however after independence there has been an increased demands for goods and services which makes the N$10 000 limit impractical. In my opinion, in as much as the lenders are violating the Act their actions maybe justified due to the open and free market economy that we have. South Africa moved from the Usury Act[196] as it was too limiting in terms of its

[194] 26 of 2008
[195] S15A 73 of 1968 Act
[196] 73 of 1969

scope and how it applied to South African consumers. Furthermore, general international trends in the World Economy such as the credit crunch, globalization have made it more imperative to have an all-encompassing domestic Consumer Protection Act[197] which meets international consumer needs.

6.3 Concluding Remarks

The problem of high interest charging in the Micro-financing institution needs to be curbed. As discussed in this paper the growth of this industry proves to be tremendous and consumers are left in a vulnerable position and are not afforded legal recourse. The only way that excessive credit costs can be challenged by consumers is by the Usury Act[198] or by the common law position, these positions have proved to be inadequate means in that they do not provide for changing and developing needs of the consumers. This point can be affirmed by Prof Otto[199], who stated that:

> "It is a well-known fact that many poor consumers have been enticed in recent years to enter into credit agreements that they could ill afford."

Namibia needs an Act that goes a long way to curb this. Consumer protection is not done without creating administrative burdens for creditors. Consumer protection comes at a price, and one can expect it to be a rather expensive exercise for credit providers and the State's coffers alike. Only time will tell: '*was die kool die sous werd?'* [200]

[197] 26 of 2008
[198] Supra at footnote 96
[199] Otto *The National Credit Act Explained* (2006) 6.14 Jooste
[200] ibid – who is going to pay for it?" (2006) 6 *Without Prejudice* 21 demonstrates the excessive cost of the implementation of the Act to be borne by both Government and credit providers

REFERENCE PAGE

Statutes

Buildings Societies Act 2 of 1968

Consumer Protection Act 68 of 2008

Credit Agreements Act 75 of 1980

Usury Act 73 of 1968

Usury Amendment Act 1 of 2000;

Government Notice in terms of section 15a of the Usury Act, 1968 (Government Notice 34 2267of 2 February 2000);

Books:

A.J. Kerr, The Prinicples of the Law of Contract 4th ed. (Butterworths; Durban), 1989;

E.A. Fransworth & W. F. Young, Cases and Materials on Contract 4th ed., (The Foundation Press, Inc.,Westbury, New York), 1988;

H. Grotius, *Grotius's Jurisprudence of Holland – Text and Translation* by RW Lee (Claredon Press: Oxford), 1926

M P Furnston, 'Cheshire & Fifoot's Law of Contract 9th ed.(Butterworths, London), 1976;

F. Du Bois, D. Hutchison, B. van Heerden, DP Visser, and CG van der Merwe *Wille's Principles of South African Law* 9th ed (Juta: Capetown) 2007

Articles and Reports

B.E Beaver, Micro-lending or Finance in Namibia, (Unpublished Article)

Codex *The Codex of Justinian in The Civil Law* SP Scott (1973) AMS Press Inc: New York. *C.*

Examination on Costs and interest Rates in the Small Loans Sector, South African Government Gazette 21381 GN 706/2000, (21 July 2000)

NJ Grové, & JM Otto, *Basic Principles of Consumer Credit Law* 2 ed (2002) Juta: Lansdowne.

NJ Grove, Geemeenregtelike en Statutere Beheer oor woekerrente, Randse Afrikaanse Universiteit (February 1989)

Grotius, Hugo *Grotius's Jurisprudence of Holland – Text and Translation* by RW Lee (1926), Clarendon Press: Oxford.

L. Hawthorne, "Consumer law in South Africa, by D McQuoid-Mason: book review" (1998) 61 *THRHR* 746.

J Campbell, *'The Cost of Credit in the Micro-finance Industry in South Africa*, LLM paper (2006).

J.M. Otto, Consumer Credit, first reissue vol.5(1) Laws of South Africa, W.A Joubert; L.T.C Harms; P.J Rabie (ed), Butterworths Durban(1994)

J.M. Otto, and N.J. Grove South African Law *The Usury Act and Related Matters: New Credit* Commission *Legislation for South Africa* (Working Paper 46; Project 67) (1991). Cited as SALC Working Paper 46.

Kessler, Contracts of Adhesion-"Some thoughts About Freedom of Contract" 43 Colum. L.Rev

A.J Kern *The Regulation of the Micro-lending Industry in Terms of South African Law and RelatedAspects.*

Cases

AAA Investments (Pty) Ltd v The Micro-finance Regulatory Council and the Minister of Trade and Industry 2006 (11) BCLR 1255 (CC).

Afrox Health Care Bpk v Strydom 2002 (6) SA 21 (SCA).

Amod v Multilateral Motor Vehicle Accident Fund 1999 (4) SA 1319 (A).

Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T).

Bank of Lisbon and South Africa Ltd v De Ornelas 1988 (3) SA 580 (A).

Bellairs v Hodnett 1978 (1) SA 1109 (A) at 1145-7

Brisley v Drotsky 2002 (4) SA 1 (SCA).

Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pty) Ltd and Others and Three Similar Cases 1997 (2) SA 285 (ZH).

Georgias and Another v Standard Chartered Finance Zimbabwe Ltd 2000 (1) SA 126(ZS).

LTA Construction Bpk v Administrateur, Transvaal 1992 (1) SA 473 (A).

Lurama Vyftien (Pty) Ltd and 49 Others v The Minister of Trade and Industry and Another (Case No. 22125 of 1999) and The Association of Micro Lenders v The

Minister of Trade and Industry and Another (Case No. 23453 of 1999) (unreported TPD).

Magna Alloys & Research (SA) Ltd v Ellis 1984 (4) SA 874 (A).

Meyer v Catwalk Investments 354 (Pty) Ltd en Andere 2004 (6) SA 107 (T).

Micro-finance Regulatory Council v AAA Investment (Pty) Ltd and Another 2006 (1) SA 27 (SCA).

Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and Others ((Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (C).

Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 (1) SA 419 (A).

SA Securities Ltd v Greyling 1911 TPD 352.

Sanlam Life Insurance Ltd v South African Breweries Ltd 2000 (2) SA 647 (W).

Standard Bank of SA Ltd v Essop 1997 (4) SA 569 (D).

Standard Bank of South Africa v Oneanate Investments (in liquidation) 1998 (1) SA 811 (SCA).

Van Diggelen v Triggs 1911 SR 154 at 160

Internet Sources

G Van Maanen, Microcredit: Sound Business or Development Instrument, Oikocredit (2004) http://www.investopedia.com/terms/m/microfinance.asp accessed 20/4/11

Wayne, A.M, Maclntosh, V & Maclntosh,A. 1998. 'A Short Review of the Historical Critique of Usury' Available at www.che.ac.uk.PeopleAlastairusury.htm. Accessed on the 23/10/11

Michael Mambo Mokete: Role of Bank in Namibia in consumer protection issues-BIS central Bankers speeches available at http://www.bis.org/review/r110323c.pdf accessed on 23/10/11

www.namfisa.com.na accessed on the 23/10/11

http://www.helplinelaw.com/article/south%20africa/405 South Africa Consumer Rights-How and where to file complaints accessed on the 23/10.11