

Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 (Part 1)

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OPSOMMING

Enkele praktiese en vergelykende aspekte van die kansellasië van afbetalingsooreenkomste ingevolge die Nasionale Kredietwet 34 van 2005

Teen die agtergrond van die toepassingsgebied van die Nasionale Kredietwet 34 van 2005 behandel hierdie artikel sekere praktiese aspekte met betrekking tot die kansellasië van 'n afbetalingsooreenkoms ingevolge dié Wet, deur die proses onder andere met die voormalige Wet op Kredietooreenkomste se kansellasiëbepalings rakende 'n afbetalingsverkooptransaksie ingevolge daardie Wet, kortliks te kontrasteer. Verder word die proses, insluitende sommige probleem-aspekte rakende die 2005 Wet, behandel. Die skrywers maak sekere aanbevelings rakende die praktiese hantering van 'n kansellasië van 'n afbetalingsooreenkoms in die lig van bepaalde uitlegprobleme en waarskynlike leemtes ingevolge laasgenoemde Wet.

1 Introduction

The main obligation of a consumer to whom credit was extended in terms of a credit agreement is to pay the debt by means of instalments.¹ Consequently, failure to pay instalments when they are due, is the most frequent form of breach of contract committed by consumers. As credit providers do not always want to rely on *ex lege* remedies² to rectify breach of contract by the consumer, it has become standard practice to insert remedy clauses³ in the contract.⁴ These clauses frequently have harsh consequences for the consumer. One of the purposes of consumer credit legislation is therefore to curb the exercise of the credit provider's contractual

1 Diemont and Aronstam *The Law of Credit Agreements and Hire-Purchase in South Africa* (1982) 134.

2 Or remedies by operation of law – see par 2 below.

3 Consensual or agreed remedies – see par 2 below.

4 See Grové and Otto *Basic Principles of Consumer Credit Law* (2002) 41.

remedies in order to protect the consumer and to level the playing field between the contracting parties.⁵

In March 2002 the Department of Trade and Industry established a task team to review the then existing consumer credit legislation. A detailed report and a policy framework⁶ that underlined the need for a new regulatory framework⁷ were published. This eventually culminated in the National Credit Act⁸ that was assented to by the President on 2006-03-10, whereafter the Act came into effect in a piecemeal fashion.⁹ The Act, as its predecessors, amongst other objectives, also strives to protect the consumer against the use of unfair clauses in standard contracts.¹⁰

The purpose of this article is to examine and compare the influence of the Act and that of its immediate predecessor, the Credit Agreements Act,¹¹ on the exercise of his or her contractual rights by a credit provider¹² to enforce his or her contractual rights by cancelling a credit agreement¹³ in the event of breach of contract by the consumer.¹⁴ This is done against

5 See South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters" (1993) 62 (hereafter Working Paper 46).

6 See the Department of Trade and Industry South Africa Consumer Credit Law Reform: Policy Framework for Consumer Credit 2004 (hereinafter "Policy Framework").

7 The Policy Framework 13ff stated various reasons for this need, eg an outdated and ineffective regulatory framework, the need for a single law that treats all transactions equivalently and for measures helping consumers make informed choices. The Policy Framework 13 also emphasised the need to review the current framework for contract enforcement and debt collection.

8 34 of 2005 (hereinafter "the Act").

9 The Act became effective on 2006-06-01, 2006-09-01 and 2007-06-01: See Proc 22 of 2006 in GG 28824 of 2006-05-09. In terms of the transitional provisions (Sch 3 item 4) the provisions of the Act also apply to agreements that were concluded before the date upon which the Act came into operation.

10 One of the objectives of the Act is to protect the consumer by, *inter alia*, promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers – s 3(d). Further, see the Policy Framework 26 that states that "[c]onsumers' rights are frequently undermined by the inclusion of complex and compromising clauses into contracts. Credit providers also commonly attempt to reduce the consumer's common law rights through certain contractual clauses".

11 75 of 1980 (hereafter "the Credit Agreements Act"). S 172 of the Act repealed the Credit Agreements Act and the Usury Act 73 of 1968 (hereafter "the Usury Act") on 2006-06-01.

12 Hereafter also referred to as the "creditor". The term "credit provider" is defined in s 1 of the Act *inter alia* as the party who supplies goods or services or advances money or credit to another under different types of credit agreements. It includes a person who acquires the rights of a credit provider under a credit agreement after it has been entered into.

13 The right of the credit provider to enforce the agreement by claiming specific performance or alternatively to cancel the agreement will hereafter also be referred to as "debt enforcement" – also see par 4 1 below. The influence of these Acts on the payment of damages will be considered as well.

14 Hereafter also referred to as the "debtor". S 1 of the Act defines "consumer" *inter alia* as the party to whom goods or services are sold or to whom money is paid or credit granted under different types of credit agreements.

the backdrop of the measures of the Act dealing with debt enforcement and by providing a framework for dealing with this aspect in practice. The article largely focuses on instalment agreements¹⁵ and more specifically on the cancellation thereof.¹⁶ An attempt is also made to highlight problematic aspects that may be encountered in practice and to offer possible solutions thereto.

2 Remedies and Impact of the Credit Agreements Act

2.1 General

Should a debtor fail to pay his or her debt, in other words commit breach of contract in the form of *mora debitoris*, the creditor has a choice to either enforce the payment thereof or to cancel the agreement. Payment of the debt can be enforced by claiming specific performance at common law¹⁷ or by making use of an acceleration clause provided for in the contract.¹⁸ Acceleration clauses normally stipulate that in the event of breach of contract all future instalments shall immediately become due and payable.¹⁹

As cancellation is a drastic remedy the creditor may only cancel the contract as a result of *mora debitoris* in terms of the common law where time is of the essence,²⁰ or where he or she has otherwise acquired the right to cancel the contract. This right to cancel is acquired by delivering a notice of rescission to the debtor allowing him or her another opportunity to perform within a reasonable time.²¹ To avoid the burden of having to acquire the right to cancel a contract, the parties may insert a special clause (*lex commissoria*) in the contract allowing for the cancellation thereof in the event of breach of contract.²²

In addition to the abovementioned remedies the creditor also has a claim for damages or prejudice that he may have suffered as a result of the breach of contract.²³ The purpose of a claim for damages is to put the

15 See par 3.2 below.

16 See further par 4.1 below.

17 In which case only instalments that are already due and payable may be claimed. Payments that are only due in future cannot be claimed *ex lege* – see Nagel *et al Commercial Law* (2006) 122 and Grové and Otto 41–42.

18 If such a clause was agreed upon. Agreed remedies are usually intended to exclude or replace the common-law remedies. The injured party does not have a choice to make use of the common-law remedies instead of the agreed remedies unless the contract provides for such a choice – see Nagel *et al* 118.

19 Nagel *et al* 122. This means that the total amount still outstanding at the time of breach of contract may be claimed at once, as well as instalments due in future.

20 See Nagel *et al* 123.

21 See Otto “Commentary” 1991 *Credit Law Service* (hereafter *Credit Law Service*) par 28 and Nagel *et al* 123–124.

22 *Credit Law Service* par 28; Nagel *et al* 122–123.

23 See Nagel *et al* 118ff for a full exposition of these remedies. Also see Grové and Otto 41. A claim for damages is a combination remedy as it is usually combined with a claim for specific performance or for cancellation of the contract – see Nagel *et al* 126.

injured party in the position in which he or she would have been if breach of contract had not been committed.²⁴ Damages may be claimed *ex lege* or in terms of a penalty clause.²⁵

2 2 The Credit Agreements Act

2 2 1 General

The Credit Agreements Act regulated the contractual aspects of agreements in terms of which movable goods were bought or leased on credit.²⁶ This Act more specifically applied to credit transactions, instalment sale transactions and leasing transactions of movable goods.²⁷ Credit transactions included contracts of sale of movable goods on credit.²⁸ However, the definition of “credit transaction”²⁹ did not address the transfer of ownership to the buyer. The buyer therefore became the owner of the goods immediately upon the delivery thereof to the buyer.³⁰ The instalment sale transaction was also a contract of sale of movable goods on credit and therefore a *species* of credit transactions.³¹ Of importance was that this type of contract either contained an ownership reservation clause³² or a clause entitling the seller to the return of the goods should the purchaser commit breach of contract.³³ Such a clause in the contract distinguished the instalment sale transaction from an ordinary credit transaction.³⁴ Numerous provisions in the Credit Agreements Act were aimed at balancing the interests of the contracting parties.³⁵ These included statutory limitations on the credit grantor’s rights in the event of breach of contract by the credit receiver.

24 Grové and Otto 41.

25 Parties may include a penalty clause in their contract in terms of which a pre-determined amount of damages shall be payable should breach of contract occur. This is done in order to avoid the problems surrounding the claiming of damages in terms of the common law – see Nagel *et al* 126.

26 See *Credit Law Service* paras 7–9 and Grové and Otto 13–16 for a discussion of the scope of the Credit Agreements Act.

27 As forms of credit agreements – see s 2(1) read with s 1. However, the Act only applied to credit agreements or categories of credit agreements as determined by the relevant minister from time to time.

28 The definition of a credit transaction also provided for the rendering of services on credit. However, the relevant minister responsible for the application of the Credit Agreements Act never extended the application of the Act to the rendering of services.

29 Hereafter referred to as an “ordinary credit transaction” to distinguish it from an “instalment sale transaction”. Certain provisions in the Credit Agreements Act only applied to instalment sale transactions.

30 Nagel *et al* 186 and Grové and Otto 14.

31 The part of the definition of a credit transaction dealing with purchase and sale contracts included instalment sale transactions.

32 Eg a clause that the purchaser would only become the owner of the goods on payment of the final instalment.

33 See Grové and Otto 13–14.

34 Although all instalment sales were therefore credit transactions, ordinary credit transactions were not instalment sale transactions.

35 The credit receiver (buyer or lessee) and credit grantor (seller or lessor) respectively – s 1.

2 2 2 *Specific Performance*

Neither the credit grantor's common-law claim for specific performance nor an acceleration clause in the contract was limited by the Credit Agreements Act. This meant that the credit grantor could freely exercise an acceleration clause in accordance with the terms of the contract. The failure of the Credit Agreements Act to curtail acceleration clauses is one of its most serious shortcomings as these clauses have an onerous effect on consumers.³⁶

2 2 3 *Cancellation of the Contract and Return of Goods*

Otto³⁷ provides a detailed explanation of the legal position of a credit grantor who elected to cancel a credit agreement that was subject to the provisions of the Credit Agreements Act and to institute a claim for the return of the goods to which such agreement related.

In brief, in order for the credit grantor to be entitled to institute a claim for the return of the goods to which the credit agreement related in the event of breach of contract by the credit receiver, the credit grantor had to send a letter of demand in terms of section 11 of the Credit Agreements Act to the credit receiver –

- (a) notifying the credit receiver that he or she had committed breach of contract which could lead to the cancellation of the agreement and the nature thereof;
- (b) requiring the credit receiver to rectify the breach of contract, and stating how that could be achieved, and within what period of time;³⁸
- (c) stating, in the absence of a *lex commissoria* in the contract, that the credit grantor would be entitled to cancel the agreement should the breach of contract not be rectified.³⁹

36 See Grové and Otto 42. The Credit Agreements Act's predecessor, the Hire-Purchase Act 36 of 1942, contained restrictions on acceleration clauses. A certain portion of the purchase price had to be due and unpaid before an acceleration clause could be enforced – s 12(a). In terms of s 12(b) the seller had to send a letter of demand to the buyer, demanding payment of the instalments in arrears, before an acceleration provision in the contract could be relied upon. The notice period had to be at least ten days.

37 *Credit Law Service* par 29. Also see Grové and Otto 42–46 and Diemont and Aronstam 162–164.

38 Notice in terms of 11 had to be given every time that the credit receiver committed breach of contract. Therefore with regard to the first two s 11 notices the credit receiver had to be afforded at least 30 calendar days within which to rectify his/her breach of contract. For the third and any further s 11 notices only 14 calendar days notice were required – s 11 Credit Agreements Act.

39 The notice was also required where the contract contained a *lex commissoria*. S 11 Credit Agreements Act. S 11 applied to ordinary credit transactions, instalment sale transactions and leasing transactions (see par 2 2 1 above). The letter of demand had to be in writing, handed over to the credit receiver personally (for which an acknowledgement of receipt had to be obtained) or posted to the credit receiver by prepaid registered mail at his/her address stated in the credit agreement (or the address that was validly changed in terms of 5(4) Credit Agreements Act). See also Otto *Credit Law Service* par 29 and Grové and Otto 43–44.

Compliance with section 11 formed part of the *facta probanda* of the particulars of claim in an action for the return of the goods.⁴⁰ Once the breach of contract was rectified by the credit receiver acting on the section 11 notice, the credit grantor's cause of action to claim the return of the goods elapsed. Although it is important to realise that section 11 of the Credit Agreements Act only related to claims for the recovery of the goods and not to cancellation *per se*, Otto⁴¹ argues convincingly that compliance with section 11 was a requirement for cancellation of the contract as well.⁴²

The question also arose whether the goods could be attached in the interim⁴³ pending the expiry of the section 11 notice period,⁴⁴ thereby preventing the goods from depreciating in value or even protecting it against destruction or damage. Various divisions of the high court dealt with this issue but the matter still remains unresolved. In *Santam Bank Bpk v Dempers*⁴⁵ the Free State court decided the question in the affirmative.⁴⁶ The court reasoned that a credit grantor who applies for an interim interdict in terms of section 30 of the Magistrates' Courts Act, pending the institution of an action for cancellation and return, is not yet proceeding with the enforcement of that action.⁴⁷ According to the court section 11 of the Credit Agreements Act contained no prohibition against the granting of an interdict for the protection of the goods sold or leased during the period within the 30-day time period.⁴⁸

A decision to the contrary followed in the Witwatersrand Local Division of the High Court in *First Consolidated Leasing and Finance Corporation Ltd v NM Plant Hire (Pty) Ltd*.⁴⁹ The court held that before the cancellation of the contract the respondent⁵⁰ was entitled to the possession of the goods. Section 11 expressly disentitled the applicant to claim "the return of the goods" at this stage⁵¹ and attachment, albeit by the deputy-sheriff, would have amounted to such a claim.⁵² The court⁵³ referred to a previous

40 See Grové and Otto 45.

41 *Credit Law Service* par 29. Also see Grové and Otto 45.

42 The reason is that restitution is a normal result of cancellation. Strictly speaking a contract containing a *lex commissoria* could have been cancelled immediately in the event of breach of contract. However, the issuing of a summons simultaneously claiming confirmation of the cancellation and the return of the goods was not possible without first adhering to the provisions of s 11.

43 For instance, in terms of s 30 of the Magistrates' Courts Act 32 of 1944 (hereinafter the "Magistrates' Courts Act") or in terms of the Credit Agreements Act.

44 In other words, before the action for cancellation of the agreement and for the permanent return of the goods could be instituted.

45 1987 4 SA 639 (O).

46 645G-H. The only qualification is that the action for cancellation of the agreement and for the return of the goods has to be instituted as soon as possible.

47 644D-F.

48 647C.

49 1988 4 SA 924 (W).

50 The buyer in terms of the credit agreement.

51 In other words, pending the expiry of the s 11 notice period.

52 925B-D.

53 925C-E.

Witwatersrand decision, *Fil Investments (Pty) Ltd v Levinson*,⁵⁴ that also concerned an application for interim attachment. The sale of the relevant goods was governed by section 12(b) of the Hire-Purchase Act 36 of 1942 that required a period of time to elapse after written notice before “forfeiture” could be claimed. The judge in *Fil Investments* interpreted the word “forfeiture” to mean “loss of property or of the right to possess property”.⁵⁵

First Consolidated Leasing, which in our view was decided incorrectly,⁵⁶ was subsequently overruled in the Witwatersrand in *BMW Financial Services (Pty) Ltd v Mogotsi*.⁵⁷

The matter regarding the granting of interim attachment orders pending the expiry of the section 11 Credit Agreements Act notice period was therefore far from clear. Otto states in this regard: “This is one of those cases where a definite answer is not that easy.” He goes on to say that he is inclined to support the decisions that were in favour of the granting of interim attachment orders.⁵⁸

Other statutory rights of the credit grantor aimed at safeguarding the goods to which the credit agreement related, such as those against the depreciation in value, misuse of the goods by the credit receiver *etcetera*, are discussed below.⁵⁹

In conclusion it is important to note that had a credit grantor recovered possession of the goods to which the credit agreement related otherwise than by an order of court,⁶⁰ the Credit Agreements Act⁶¹ bestowed the right on the credit receiver to unilaterally request to be reinstated with regard to his or her rights and obligations in terms of the credit agreement.⁶² This right could be exercised even after the cancellation of the

54 1949 4 SA 482 (W).

55 *Ibid.*

56 S 12(b) of the Hire-Purchase Act 36 of 1942 read that “[n]o seller shall, by reason of any failure on the part of the buyer to carry out any obligation . . . be entitled to enforce any provision in the agreement for the payment of any amount as damages, or for any forfeiture or penalty, or for the acceleration of the payment of any instalment”. It is our viewpoint that the word “forfeiture” thus referred to a normal forfeiture clause and not to “the loss of property”. It is also important to notice that the legislature did not use the word “forfeiture” in s 11 Credit Agreements Act but the words “to claim the return of the goods”. It is therefore our submission that *Santambank Bpk* and *BMW Financial Services* were correctly decided.

57 1999 3 SA 384 (W). The judge (387G) concurred with *Santambank Bpk*.

58 *Credit Law Service* par 29. *Cf* the views of commentators referred to by Otto (*Credit Law Service* par 29 n 64) who argued against the granting of interdicts *pendente lite* in this instance. The main argument of these writers in support of their viewpoint is that a cause of action or at least a *prima facie* cause of action is required for a court to be able to make an order or interim order. According to them, before compliance with the provisions of s 11 there was no such cause of action. It is, however, submitted that the relief sought by means of an interim interdict or attachment should be viewed separately.

59 See par 2 2 5.

60 The credit provider eg recovered possession of the goods unlawfully.

61 S 12(1). See Otto *Credit Law Service* par 33 and Grové and Otto 46–47 for a discussion of s 12.

62 The credit receiver had to pay all amounts that were due and unpaid in terms of the contract within 30 days after the credit grantor recovered possession of the

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contract by the credit grantor.⁶³ The credit grantor was then obliged to return the goods to the credit receiver.

2 2 4 *Penalty Clauses*

The Credit Agreements Act and the Usury Act contained various provisions⁶⁴ intended to protect the consumer against the harsh consequences of penalty clauses⁶⁵ in the contract. The end result of this protection was that, irrespective of the amount of the penalty stipulation in the contract, the credit grantor was only entitled to claim the amount of the actual patrimonial loss suffered as a result of the breach of contract.⁶⁶

2 2 5 *Interdicts*

Section 17(2) of the Credit Agreements Act empowered a court to make certain orders on application by the credit grantor, including orders restricting or prohibiting the use of the goods to which the credit agreement related, or orders regarding the custody of the goods.⁶⁷ This subsection was used by credit grantors to obtain an interim order⁶⁸ for the attachment⁶⁹ of the relevant goods by the sheriff of the court.⁷⁰ However, section 17(2) only applied to instalment sale transactions⁷¹ in respect of which the credit grantor had already instituted proceedings for the return of the goods.⁷²

goods, together with the reasonable costs incurred by the credit grantor in order to recover the goods.

63 In instances where the credit receiver himself had terminated the agreement he lost his s 12 right to be reinstated in the agreement.

64 See ss 14 and 15 Credit Agreements Act and ss 4 and 5 Usury Act. The application of these sections depended on the applicable Act, the type of credit agreement involved and whether the agreement was cancelled by the credit grantor or not.

65 If agreed upon. Penalty clauses in credit agreements were valid – s 1 of the Conventional Penalties Act 15 of 1962.

66 See Grové and Otto 48–52 and Otto *Credit Law Service* par 42 for an exposition of the legal position regarding penalty and forfeiture clauses in credit agreements.

67 See Grové and Otto 52–53 and Otto *Credit Law Service* par 38 for a discussion of s 17(2) interdicts.

68 Pending the finalisation of the action proceedings to claim permanent return of the goods and damages.

69 S 17(2) was used in other words to regain possession of the goods.

70 The credit grantor had to make use of application proceedings to obtain such an order.

71 See par 2 2 1 above. In case of lease transactions, such applications had to be made in terms of s 30 of the Magistrates' Courts Act for instance.

72 In other words the summons claiming the permanent return of the goods must already have been issued by the credit grantor. This was of course only possible once the s 11 Credit Agreements Act notice period had already expired. In practice the summons (whereby damages and permanent return of the goods were claimed) and the s 17(2) application (whereby the goods were repossessed on a temporary basis) were prepared simultaneously. Thereafter the summons was issued (but not served on the credit receiver yet). This constituted compliance with the requirement in s 17(2) that proceedings for the return of the goods must already have been instituted by the credit grantor.

When summons⁷³ was issued by a credit grantor in connection with or arising from any credit agreement,⁷⁴ the credit grantor could include a notice in such summons whereby any person was prohibited from using the goods in question or removing them from the place where they were.⁷⁵ Such notice had the effect of an automatic interdict restraining any person having knowledge thereof, from using the goods or allowing them to be used or removed.⁷⁶

3 Field of Application of the National Credit Act and the Form of Credit Agreements

3 1 General

The Act, as a general rule, applies to basically every credit agreement made within, or having an effect within, the Republic.⁷⁷ The only qualification is that the parties to the credit agreement must be dealing at arm's length.⁷⁸

3 2 Credit Agreements in terms of the Act

An agreement⁷⁹ constitutes a credit agreement for the purposes of the Act if it qualifies as a credit facility, credit transaction, credit guarantee or a combination thereof.⁸⁰

In case of an agreement⁸¹ by a credit provider to supply goods or services or to pay an amount or amounts⁸² to a consumer, such agreement constitutes a credit facility.⁸³ The definition of a credit facility, therefore,

73 Including a summons for the return of the goods. Such a summons could only be issued once the s 11 notice period had expired.

74 In other words, an ordinary credit transaction, instalment sale transaction or lease.

75 S 18(1) Credit Agreements Act. See Grové and Otto 52 and Otto *Credit Law Service* par 38 with regard to s 18 interdicts.

76 S 18(2). S 18(2) could therefore not be used by the credit grantor to regain the possession of the goods. Non-compliance with such a notice constituted an offence – s 18(4) read with s 23 Credit Agreements Act.

77 S 4(1). See further Otto *The National Credit Act Explained* (2006) 15–27.

78 S 4(1). See the discussion in par 3 3 below.

79 Irrespective of its form. It is therefore submitted that the definition of credit facility provides for agreements that were concluded orally as well.

80 S 8(1).

81 Excluding s 8(2) agreements – see par 3 3 below.

82 As determined by the consumer from time to time.

83 S 8(3). However, in order for the agreement to constitute a credit facility it is required that the consumer's obligation to pay any part of the cost of such goods or services or to repay to the credit provider any part of such amount is deferred or that the credit provider undertakes to bill the consumer periodically for any part of such costs or amount. It is further required that a charge, fee or interest has to be payable to the credit provider in respect of the deferred payment or amount billed (and not paid within the time provided in the agreement). See Ch 5 Part C (ss 100–105) of the Act and GN R489 in GG 28864 of 2006-05-31 (hereafter "National Credit Regulations, 2006" or "Regulations to the Act") reg 39–48 with regard to the consumer's liability, interest charges and fees.

provides for contracts of purchase and sale of movable goods⁸⁴ on credit,⁸⁵ money lending transactions⁸⁶ and agreements in terms of which services are supplied to consumers.

The definition of a credit transaction⁸⁷ *inter alia* includes instalment agreements regarding the sale of movable property. These agreements are characterised by the fact that payment of the price or part thereof is deferred⁸⁸ and is to be paid by periodic payments.⁸⁹ Possession and use of the property is transferred to the consumer immediately. The contract either contains an ownership reservation clause in terms of which the consumer only becomes the owner of the property once the contract is fully complied with⁹⁰ or it allows for ownership to pass to the consumer immediately subject to a right⁹¹ of the credit provider to re-possess the property⁹² if the consumer fails to satisfy all his or her financial obligations under the agreement.⁹³

Should a contract of purchase and sale of movable goods not contain a clause regarding the passing of ownership of the property, such contract will constitute a credit facility (as a contract of purchase and sale).⁹⁴ In such

84 An undertaking by the credit provider to supply goods to the consumer. The purchasing of goods by means of in store cards is as an example of such a credit facility if credit is extended to the consumer and if interest or another *quid pro quo* is payable by the latter.

85 Cash sales are not covered by the definition of a credit facility.

86 The part dealing with an undertaking by a credit provider to pay an amount (or amounts) of money to a consumer (or on behalf of or at the direction of a consumer). All forms of money lending transactions including credit card transactions are covered by the definition of a credit facility. See Otto *Credit Law Service* par 10 and Grové and Otto 17–18 for a discussion and examples of genuine and disguised money lending transactions.

87 S 8(4). An agreement constitutes a credit transaction irrespective of its form – see above. S 8(2) agreements are again excluded – see par 3 3 below.

88 The payment of interest, fees or other charges to the credit provider in respect of the agreement or the deferred amount is another characteristic of instalment agreements.

89 The definition of the Act only provides for periodic payments and not for a lump sum payment in future as well. This is in contrast with the definition of instalment sale transaction in the Credit Agreements Act. See wrt the payment requirement in the definition of instalment sale transactions in the Credit Agreements Act *Ukubona 2000 Electrical CC and Abb South Africa (Pty) Ltd v City Power Johannesburg (Pty) Ltd* 2004 6 SA 323 (SCA) and the discussion thereof by Renke 2004 *THRHR* 710. See also Otto *Credit Law Service* par 7 and *The National Credit Act Explained* 18.

90 Normally such a clause in the contract will state that the purchaser will only become the owner of the goods once the final instalment has been paid.

91 The contract will have to contain a clause providing for the right of the seller to claim the return of the goods should the buyer commit breach of contract.

92 See in this regard Diemont and Aronstam 272.

93 S 1. The instalment agreement in terms of the Act is therefore very similar to the instalment sale transaction in terms of the Credit Agreements Act – see par 2 2 1 above. Also see Otto *The National Credit Act Explained* 18 who states that the well-known instalment sale transaction (of eg a motor vehicle or furniture) may serve as an example of an instalment agreement.

94 Discussed above. The definition of a credit facility does not provide for clauses regarding the passing of ownership and can therefore be compared to the first
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a case the common-law rules would apply, in terms of which ownership of the property will pass to the buyer immediately upon delivery thereof to the buyer.⁹⁵

The Act also applies to pawn transactions,⁹⁶ discount transactions,⁹⁷ incidental credit agreements,⁹⁸ mortgage agreements,⁹⁹ secured loans,¹⁰⁰ leases¹⁰¹ and other agreements¹⁰² as forms of credit transactions.¹⁰³

part of the definition of "credit transaction" in terms of the Credit Agreements Act which dealt with the sale of movable goods on instalments. This definition also did not address the transfer of ownership – see par 2 2 1 above and Grové and Otto 14.

95 Nagel *et al* 186. Also see Grové and Otto 14.

96 A pawn transaction is an agreement in terms of which one party advances money or grants credit to another and takes possession of goods as security for the money advanced or credit granted. Either the estimated resale value of the goods exceeds the value of the money advanced or credit granted or a charge, fee or interest is imposed. On expiry of a defined period the party who took possession of the goods as security is entitled to sell the goods and retain the proceeds of the sale in settlement of the consumer's obligations under the agreement – s 1. The Act therefore applies to normal pawnbroker transactions. See in this regard Nagel *et al* 336ff.

97 A discount transaction is an agreement in terms of which goods or services are to be provided to a consumer over a period of time and where a lower and higher price is quoted for the goods or services. If the account is settled on or before a determined date, the lower price is payable. If payment occurs after that date, or is paid periodically during the period, the higher price(s) will apply – s 1. Prepayment of the debt (payment on or before a determined date) and a discount that is given with respect to the prepayment are essential elements of discount transactions.

98 S 1 defines an incidental credit agreement as an agreement in terms of which an account was tendered for goods or services that have been provided to the consumer and either or both of the following conditions apply: a fee, charge or interest became payable when payment of any amount charged in terms of the of account was not made on or before a determined period or date, or a lower or higher price is quoted for settlement of the account. If the account is settled on or before a determined date, the lower price applies. After that date, the higher price will be payable. In terms of s 5(2) the parties to an incidental credit agreement are deemed to have made that agreement on the date that is 20 business days after a late payment fee or interest in respect of the account is first charged or a pre-determined higher price for full settlement of the account first becomes applicable. (When a number of business days is provided for between two events, the number of days must be calculated by excluding the day on which the first event occurs and by including the day on or by which the second event is to occur. Any public holidays, Saturdays or Sundays are also to be excluded – s 2(5).) An example of an incidental credit agreement would be an attorney who renders services and sends an account to the client. Should the account specify that interest, a fee or charge only becomes payable if the account is not settled on or before a determined period or date, incidental credit is only granted 20 business days after the date upon which the attorney first charges any interest or a late payment fee. An agreement in terms of which a supplier of a utility or other continuous service will defer payment by the consumer until the supplier has provided a periodic statement of account (for the utility or other continuous service) and will not impose a charge contemplated in terms of s 103 in respect of the deferred amount unless the consumer fails to pay the full amount due within at least 30 days after the date of delivery of the statement to the consumer, is not a credit facility. Any overdue amount in terms of such agreement constitutes incidental credit – s 4(6)(b).

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An agreement¹⁰⁴ constitutes a credit guarantee if a person in terms thereof undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the Act applies.¹⁰⁵

The Act applies to a (proposed) credit agreement¹⁰⁶ irrespective of whether the credit provider

- (a) resides or has its principal office within the Republic or not;¹⁰⁷
- (b) is an organ of state;¹⁰⁸
- (c) is an entity controlled by an organ of state;
- (d) is an entity created in terms of any public regulation; or
- (e) is the Land and Agricultural Development Bank.¹⁰⁹

“Utility” is defined in s 1 as the supply to the public of an essential commodity (eg water or electricity) or service (eg waste removal or access to telecommunication networks). S 1 defines “continuous service” as the supply for consideration of a utility or service (which can also be combined with the supply of any goods that are essential for the utilisation of that utility or service by the consumer) other than credit or access to credit. The service (or utility) is made available by the supplier on a continuous basis as long as the agreement remains in force. The Act only has limited application to incidental credit agreements – see s 5.

- 99 Meaning a credit agreement that is secured by a pledge of immovable property – s 1. “Mortgage” is defined as a pledge of immovable property that serves as security for a mortgage agreement – s 1.
- 100 A secured loan is an agreement (excluding an instalment agreement) in terms of which a person advances money or grants credit to another and retains or receives a pledge or cession of the title to movable property or other thing of value as security for all amounts due under that agreement – s 1.
- 101 Defined in s 1 as leasing transactions of movable property. Payment for the possession or use of the property is made on an agreed or determined periodic basis during the life of the agreement or deferred in whole or in part for any period during the life of the agreement. Interest, fees or other charges are payable to the credit provider in respect of the agreement or deferred amount. At the end of the term of the agreement, ownership of the property either passes to the consumer absolutely or upon satisfaction of specific conditions set out in the agreement.
- 102 Except a credit facility or credit guarantee in terms of which payment of an amount owed by one person to another is deferred and a fee, charge or interest is payable to the credit provider in respect of the agreement or deferred amount – s 8(4)(f).
- 103 See s 8(4). The Act applies to these agreements irrespective of their form – see above. S 8(2) agreements discussed in par 3.3 below are excluded.
- 104 Irrespective of its form – see above. S 8(2) agreements are excluded.
- 105 S 8(5). Also see s 4(2)(c) which makes it clear that the Act applies to a credit guarantee only to the extent that it applies to a credit facility or credit transaction in respect of which the credit guarantee is granted. It is clear that the Act applies to suretyships as well.
- 106 S 4(3)(a)–(b).
- 107 However, see the exception in terms of s 4(1)(d) below. Once the Act applies to a credit agreement, it continues to apply to that agreement even if a party thereto ceases to reside or have its principal office within the Republic. It also applies in relation to every transaction, act or omission under such agreement, whether such transaction, act or omission occurs within the Republic or not – s 4(4)(a)–(b).
- 108 As defined in s 239 of the Constitution – see s 1.
- 109 However, the Act does not apply if the credit provider is the Reserve Bank of South Africa – s 4(1)(c).

3 3 Exclusions

In the following instances the parties to a credit agreement are not dealing at arm's length and therefore the Act does not apply:¹¹⁰

- (a) A shareholder loan or other credit agreement between a juristic person,¹¹¹ as consumer, and a person who has a controlling interest in that juristic person, as credit provider.¹¹²
- (b) A credit agreement between natural persons who are in a familial relationship and are co-dependent on each other or one is dependent upon the other.¹¹³
- (c) Any other arrangement in which each party is not independent of the other.¹¹⁴

The Act does not apply to credit agreements in terms of which the consumer is a juristic person,¹¹⁵ the state¹¹⁶ or an organ of state.¹¹⁷ The same holds true for credit agreements in terms of which the credit provider is the Reserve Bank of South Africa¹¹⁸ or in respect of which the credit provider is located outside the Republic.¹¹⁹

The following agreements do not constitute credit agreements and therefore the Act does not apply to such agreements:

¹¹⁰ See par 3 2 above.

¹¹¹ Juristic person, for purposes of the Act, includes a partnership, association or other body of persons corporate or unincorporated. It also includes a trust if there are three or more individual trustees or if the trustee itself is a juristic person. However, the concept juristic person does not include a *stokvel* – s 1.

¹¹² And *vice versa*. See s 4(2)(b).

¹¹³ S 4(2)(b).

¹¹⁴ And consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction. Arrangements of a type that has been held in law to be between parties who are not dealing at arm's length are included as well – s 4(2)(b).

¹¹⁵ Whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made (in other words the value stated as such by that juristic person at the time it applies for or enters into that agreement – s 4(2)(a) equals or exceeds R1 000 000 – s 4(1)(a)(i) read with GN 713 in GG 28893 of 2006-06-01 (hereafter "Threshold Regulations, 2006"). A juristic person is related to another juristic person if one of them has direct or indirect control over the whole or part of the business of the other or if a person has direct or indirect control over both of them – s 4(2)(d). S 4(1)(b), read with the Threshold Regulations, 2006, also excludes a large agreement (mortgage agreements or any other credit transaction, except a pawn transaction, with a principal debt of R250 000 or above or a credit guarantee with respect to any such agreement constitute large agreements – s 9(4)) in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below R1 000 000. In instances where the Act does apply to (proposed) credit agreements in terms of which the consumer is a juristic person it only has limited application – s 6.

¹¹⁶ S 4(1)(a)(ii).

¹¹⁷ S 4(1)(a)(iii).

¹¹⁸ S 4(1)(c).

¹¹⁹ Approved by the minister on application by the consumer in the prescribed manner and form – s 4(1)(d).

- (a) A policy of insurance.¹²⁰
- (b) A lease of immovable property.¹²¹
- (c) A transaction between a stokvel¹²² and a member of that stokvel in accordance with the rules of that stokvel.¹²³

Lastly, it needs to be noted that certain parts of the Act have limited application.¹²⁴

3 4 Form of a Credit Agreement

As was mentioned above, a credit agreement may be concluded orally or in writing.¹²⁵ The Act states in section 93(1) that the credit provider must deliver to the consumer without charge, a copy of a document in a paper form or electronic format that records their credit agreement. Sections 93(2) to (3) requires in certain cases that such document must comply with forms prescribed in the regulations to the Act, or where no such forms have been prescribed that the credit provider may determine the format thereof.

It is clear from section 93 that different forms and prescriptions will apply to the different forms of credit agreements, that is small, intermediate or large agreements. For instance, in the case of intermediate and large agreements, regulation 31 of the Regulations to the Act, prescribes the rights and duties of the parties to the agreement to be recorded comprehensively.

Failure to reduce the agreement to writing as prescribed will not, however, void the contract, but the consumer may for instance enforce compliance with section 93. The Act also does not make non-compliance an offence.¹²⁶

(To be continued)

120 Or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance – s 8(2)(a).

121 S 8(2)(b).

122 Defined in s 1 as a formal or informal rotating financial scheme with entertainment, social or economic functions. It consists of two or more persons in a voluntary association each of whom has pledged mutual support to the others towards the attainment of specific objectives. It also establishes a continuous pool of capital by raising funds by means of the subscription of its members, grants credit to and on behalf of members, provides for members to share in profits from, and to nominate management of the scheme and relies on self-imposed regulation to protect the interest of its members.

123 S 8(2)(c).

124 Eg the part of the Act concerning over-indebtedness and reckless credit does not apply to all credit agreements. See s 78.

125 See par 3 2.

126 The fact that an agreement in terms of the Credit Agreements Act was not reduced to writing amounted to an offence but it also did not void the contract – see ss 5(2) and 23 of the Credit Agreements Act.