

# The impact of the National Credit Act 34 of 2005 on standard acknowledgements of debt

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## OPSOMMING

### Die impak van die Nasionale Kredietwet op standardskulderkennings

Die Nasionale Kredietwet 34 van 2005 (die NKW of Wet) is op 'n veel wyer reeks kredietooreenkomste van toepassing as sy voorganger, die Wet op Kredietooreenkomste 75 van 1980, wat net op afbetalingsverkoopsooreenkomste en huurooreenkomste van toepassing was, en is ook nie soos voormelde wet aan 'n monetêre plafon onderhewig nie. Die omvattende beskerming wat die NKW bied word verder uitgebrei deurdat artikel 8(4)(f) van die Wet voorsiening maak dat benewens die benoemde krediettransaksies gelys in artikel 8(4)(a) tot (e) van die Wet, enige ander ooreenkoms, anders as 'n kredietfasiliteit of kredietwaarborg, waarkragtens betaling van 'n bedrag verskuldig deur een persoon aan 'n ander uitgestel word en enige heffing, fooi of rente betaalbaar is aan die kredietverskaffer ten aansien van die ooreenkoms of die bedrag wat uitgestel is, as 'n krediettransaksie vir doeleindes van die NKW kwalifiseer. In die praktyk gebeur dit dikwels dat 'n skuldeiser aan wie 'n skuldenaar 'n bedrag geld verskuldig is op grond van 'n bestaande skuld, vanweë die skuldenaar se onvermoë om die skuld te betaal op die datum soos aanvanklik ooreengekom, die skuldenaar akkommodeer deur 'n standardskulderkenning met hom aan te gaan ten einde afbetaling van die skuld in paaielemente en teen heffing van rente en ander koste te reël. Die doel van hierdie bydrae is om vas te stel of 'n standardskulderkenning aangegaan op of na 1 Junie 2007 wel as 'n artikel 8(4)(f) krediettransaksie kwalifiseer, die gevolge van toepassing van die NKW op sodanige skulderkenning uit te wys en voorstelle te maak om sodanige skulderkenning buite die toepassingsgebied van die Wet te plaas.

## 1 INTRODUCTION

The National Credit Act<sup>1</sup> (“the NCA” or “Act”) has provided South Africans with a comprehensive credit act which governs an extended range of credit agreements. This is due to the fact that the Act not only regulates instalment sale agreements and lease agreements in respect of movables as was done by its predecessor – the repealed Credit Agreements Act<sup>2</sup> – but applies to a much wider variety of credit agreements and also does not cap credit agreements at a specific monetary ceiling as was done by the Credit Agreements Act which donned a monetary regulatory cap of R500 000. As indicated below, credit agreements as

1 34 of 2005, which came into operation on 1 June 2007.

2 75 of 1980.

provided for in the NCA usually entail some deferral of payment accompanied by interest and/or a fee or charge.

In practice it often happens that a creditor accommodates a debtor by entering into an acknowledgement of debt with the debtor to facilitate repayment of an existing debt instead of instituting legal action for recovery of the debt. Thus, for instance, where a creditor lends an amount of money to a debtor which has to be repaid by a certain date, it will often happen that the debtor is unable to repay the money on the due date and the creditor would then accommodate the debtor by entering into an acknowledgement of debt with the debtor as a result of which the debtor will be afforded a longer period to repay the debt. The standard acknowledgement of debt usually provides for a deferral of payment in the form of instalments and further provides for interest to be charged as well as fees such as legal fees and collection commission. The question therefore arises whether a standard acknowledgment of debt constitutes a credit agreement for purposes of the NCA.

This discussion focuses on the application of the NCA to various types of credit agreements and whether it can be said that a standard acknowledgement of debt constitutes a credit agreement that falls within the ambit of the Act. The consequences, should the Act find application to standard acknowledgements of debt, are also discussed and suggestions are made regarding possible ways in which the issue may be addressed. It should be noted that this discussion is limited to standard acknowledgements of debt entered into on or after 1 June 2007.

## 2 SCOPE AND APPLICATION OF NCA

### 2.1 General

The NCA applies to every credit agreement between parties dealing at arm's length and made within or having an effect within, the Republic of South Africa.<sup>3</sup> "Credit", when used as a noun, is defined in the Act as a deferral of payment of money owed to a person or a promise to defer such payment; *or* a promise to advance or pay money to or at the direction of another person.<sup>4</sup> "Agreement" includes an arrangement or understanding between or among two or more parties which purports to establish a relationship in law between those parties.<sup>5</sup> Thus it is essential to establish whether a specific agreement entered into in South Africa or having an effect in South Africa constitutes a credit agreement as provided for in the NCA. It should also be borne in mind that even if an agreement constitutes a credit agreement as envisaged by the NCA, the Act will not apply if the agreement was not concluded at arm's length.

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3 S 4(1). This application is subject to s 5 (which provides for the application of the NCA to incidental credit agreements) and s 6 (which provides for the limited application of the NCA to certain juristic persons). See further Otto and Otto *The National Credit explained* (2010) ch 3 and Stoop "Kritiese evaluasie van die toepassingsveld van die 'National Credit Act'" 2008 *De Jure* 352. (All references to sections hereinafter are to sections of the NCA, unless otherwise indicated.)

4 S 1.

5 S 1.

On the topic of arm's length, the NCA specifically provides that in any of the following arrangements the parties are not dealing at arm's length:<sup>6</sup>

- (a) A shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider;
- (b) a loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer;
- (c) 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; and
- (d) any other arrangement in which a party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or that is of a type that has been held in law to be between parties who are not dealing at arm's length.

## 2.2 Parties to a credit agreement

The parties to a credit agreement governed by the NCA are referred to as the "consumer" and the "credit provider". A "consumer" in respect of a credit agreement to which the NCA applies, means<sup>7</sup>

- (a) the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement;
- (b) the party to whom money is paid, or credit granted, under a pawn transaction;
- (c) the party to whom credit is granted under a credit facility;
- (d) the mortgagor under a mortgage agreement;
- (e) the borrower under a secured loan;
- (f) the lessee under a lease;
- (g) the guarantor under a credit guarantee; or
- (h) the party to whom or at whose direction money is advanced or credit granted under any other credit agreement.

A "credit provider" in respect of any credit agreement to which the NCA applies, means<sup>8</sup>

- (a) the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement;
- (b) the party who advances money or credit under a pawn transaction;
- (c) the party who extends credit under a credit facility;
- (d) the mortgagee under a mortgage agreement;
- (e) the lender under a secured loan;
- (f) the lessor under a lease;

<sup>6</sup> S 4(2)(b). See also *Beets v Swanepoel* [2010] JOL 26422 (NC).

<sup>7</sup> S 1.

<sup>8</sup> S 1.

- (g) the party to whom an assurance or promise is made under a credit guarantee;
- (h) the party who advances money or credit to another under any other credit agreement; or
- (i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into.

### 2 3 Types of credit agreements

Three main types of credit agreements are regulated by the NCA, namely, credit facilities, credit transactions and credit guarantees or a combination of any of the aforesaid credit agreements.<sup>9</sup> It is expressly provided that a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance, and a lease of immovable property or a transaction between a *stokvel* and a member of that *stokvel* in accordance with the rules of that *stokvel*, irrespective of their form, are not credit agreements for purposes of the NCA.<sup>10</sup>

#### 2 3 1 Credit facility

An agreement, irrespective of its form, but not including an agreement contemplated in section 8(2) or section 8(4)(6)(b), constitutes a credit facility if in terms of that agreement<sup>11</sup>

- (a) a credit provider undertakes to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer, and either to defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount, or bill the consumer periodically for any part of the cost of goods or services, or any part of an amount; and
- (b) any charge, fee or interest is payable to the credit provider in respect of any amount deferred or any amount billed and not paid within the time provided for in the agreement.

#### 2 3 2 Credit transaction

An agreement, irrespective of its form, but not including an agreement contemplated in section 8(2) as indicated above, constitutes a credit transaction if it is<sup>12</sup>

- (a) a pawn transaction<sup>13</sup> or discount transaction;<sup>14</sup>

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9 S 8(1)(a).

10 S 8(2).

11 S 8(3).

12 S 8(4).

13 A pawn transaction means an agreement, irrespective of its form, in terms of which

- (a) one party advances money or grants credit to another, and at the time of doing so, takes possession of goods as security for the money advanced or credit granted; and

- (b) either

- (i) the estimated resale value of the goods exceeds the value of the money provided or the credit granted; or

- (ii) a charge, fee or interest is imposed in respect of the agreement, or in respect of the amount loaned or credit granted; and

- (b) an incidental credit agreement<sup>15</sup> subject to section 5(2);<sup>16</sup>
- (c) an instalment agreement;<sup>17</sup>
- (d) a mortgage agreement<sup>18</sup> or secured loan;<sup>19</sup>
- (e) a lease;<sup>20</sup> or

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(c) the party that advanced the money or granted the credit is entitled on expiry of a defined period to sell the goods and retain all the proceeds of the sale in settlement of the consumer's obligations under the agreement.

- 14 A discount transaction means a transaction, irrespective of its form, in terms of which (a) goods or services are to be provided to a consumer over a period of time; and (b) more than one price is quoted for the goods or service, the lower price being applicable if the account is paid on or before a determined date, and a higher price or prices being applicable if the price is paid after that date, or is paid periodically during the period.
- 15 It is to be noted that the NCA has limited application to an incidental credit agreement as set out in s 5. An incidental credit agreement means an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply: (a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or (b) two prices were quoted for the settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date.
- 16 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 the supplier of the goods or services that are the subject of that account, first charges a late payment fee or interest in respect of that account; or a pre-determined higher price for full settlement of the account first becomes applicable.
- 17 An instalment agreement means a sale of movable property in terms of which
- (a) all or part of the price is deferred and is to be paid by periodic payments;
  - (b) possession and use of the property is transferred to the consumer;
  - (c) ownership of the property either
    - (i) passes to the consumer only when the agreement is fully complied with; or
    - (ii) passes to the consumer immediately subject to a right of the credit provider to repossess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and
  - (d) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred.
- 18 A mortgage means a pledge of immovable property that serves as security for a mortgage agreement.
- 19 A secured loan means an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person (a) advances money or grants credit to another; and (b) retains, or receives a pledge or cession of the title to any movable property or other thing of value as security for all amounts due under that agreement.
- 20 A lease means an agreement in terms of which
- (a) temporary possession of any movable property is delivered to or at the direction of the consumer, or the right to use any such property is granted to or at the direction of the consumer;
  - (b) payment for the possession or use of that property is
    - (i) made on an agreed or determined periodic basis during the life of the agreement; or
    - (ii) deferred in whole or in part for any period during the life of the agreement;
  - (c) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred; and

*continued on next page*

- (f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of the agreement or the amount that has been deferred.

### 2 3 3 *Credit guarantee*

An agreement, irrespective of its form, but not including an agreement contemplated in section 8(2) as indicated above, constitutes a credit guarantee if, in terms of that agreement, a person 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 NCA applies.<sup>21</sup>

### 2 3 4 *Combined credit agreement*

- (a) If a particular credit agreement constitutes both a credit facility and a credit transaction,
- (b) subject to (c) below, that agreement is equally subject to any provision of the NCA that applies specifically or exclusively to either credit facilities or mortgage agreements or secured loans, as the case may be; and
- (c) for the purpose of applying section 108,<sup>22</sup> that agreement must be regarded as a credit facility; or in terms of section 4(1)(b)<sup>23</sup> read with section 9(4),<sup>24</sup> that agreement must be regarded as a large agreement if it is a mortgage agreement.

## 2 4 **Further categories of credit agreements based on size of agreement**

Credit agreements are further divided into small, large and intermediate credit agreements.<sup>25</sup> This distinction influences a number of aspects such as disclosure requirements and exemption from the application of the Act when entered into by certain juristic persons.

A credit agreement is a small agreement if it is a pawn transaction; a credit facility with a limit falling at or below R15 000 and any other credit transaction, except a mortgage agreement or credit guarantee, and the principal debt under that transaction or guarantee falls at or below R15 000.<sup>26</sup> It qualifies as an intermediate agreement if it is a credit facility with a credit limit that falls above R15 000 or any credit transaction except a pawn transaction, a mortgage agreement or a credit guarantee, and the principal debt under that transaction or guarantee falls between R15 000 and R250 000.<sup>27</sup> Large credit agreements are

- (d) at the end of the term of the agreement, ownership of that property either
- (i) passes to the consumer absolutely; or
  - (ii) passes to the consumer upon satisfaction of specific conditions set out in the agreement.

21 S 8(5).

22 S 108 deals with statements of account.

23 S 4(1)(b) provides for exemption from the application of the NCA where a small juristic person with an asset value or annual turnover of less than R1 million enters into a small or intermediate credit agreement.

24 S 9(4) indicates when a credit agreement will constitute a large agreement for purposes of the NCA.

25 S 9(1).

26 S 9(2).

27 S 9(3).

mortgage agreements or any other credit transaction except a pawn transaction or a credit guarantee, if the principal debt under that transaction or guarantee falls at or above R250 000<sup>28</sup>.

Pawn agreements will thus always be small agreements and mortgage agreements will always be large agreements whilst it should be noted that credit facilities can be small or intermediate agreements but are not treated as large agreements even though they may fall within the monetary threshold for large agreements.

### 3 EXEMPT AGREEMENTS AND LIMITED APPLICATION OF NCA TO JURISTIC PERSONS

An investigation into the scope and application of the NCA and the question as to whether a standard acknowledgement of debt constitutes a credit agreement will be incomplete unless the exemptions to the application of the Act and the instances of limited application of the Act to juristic persons are considered.

For purposes of comprehending the extent of the exemptions relating to juristic persons it is appropriate to point out that the NCA contains an extended definition of a juristic person which includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if there are three or more individual trustees or the trustee itself is a juristic person, but does not include a *stokvel*.<sup>29</sup>

#### 3.1 Exempt agreements

The following agreements are expressly provided to be exempt from the application of the Act, namely:

- (a) a credit agreement in terms of which the consumer is
  - (i) a juristic person whose asset value or annual turnover, *together with the combined asset value or annual turnover of all related*<sup>30</sup> *juristic persons* (my emphasis) at the time the agreement is made, equals or exceeds R1 million<sup>31</sup> (hereinafter a “large” juristic person);
  - (ii) the State;<sup>32</sup> or
  - (iii) an organ of State;<sup>33</sup>
- (b) a large agreement 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 million<sup>34</sup> (hereinafter “a small juristic person”);
- (c) a credit agreement in terms of which the credit provider is the Reserve Bank of South Africa;<sup>35</sup> or

28 S 9(4).

29 S 1. It should thus be noted that a trust will consequently qualify as a natural person if it has less than three trustees.

30 According to s 4(2)(d), 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 a person has direct or indirect control over both of them.

31 S 4(1)(a)(i).

32 S 4(1)(a)(ii). The “state” is not defined in the NCA.

33 S 4(1)(a)(iii).

34 S 4(1)(b). It should be noted that the asset value or annual turnover of related juristic persons are not taken into account for purposes of this specific exemption.

- (d) a credit agreement in respect of which the credit provider is located outside the Republic, approved by the Minister on application by the consumer in the prescribed manner and form.<sup>36</sup>

Note should also be taken of section 4(2)(c) which provides that the NCA applies to a credit guarantee only to the extent that the Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted. This effectively means that if the credit transaction or credit facility in respect of which the credit guarantee is granted falls outside the application of the NCA, the Act will also not apply to the credit guarantee. Thus the surety will not be able to rely on the provisions of the NCA for protection. As the subsection provides that the Act applies only to a credit guarantee *to the extent* (my emphasis) that the Act applies to the credit facility or credit transaction in respect of which the credit guarantee is granted, it is further submitted that a natural person consumer who stood surety for a juristic person to whom the Act applies, for example in respect of an intermediate credit transaction entered into by a small juristic person, will not be able to rely on the provisions of the Act relating to reckless credit and over-indebtedness as those provisions do not apply to juristic persons and the surety will only be afforded the protection of the Act *to the extent* that the Act applies to the underlying agreement.

It is further provided that the application of the NCA extends to a credit agreement or proposed credit agreement irrespective of whether the credit provider resides or has its principal office within or outside the Republic; or (subject to section 4(1)(c)) is an organ of state; an entity controlled by an organ of state; or an entity created by any public regulation or the Land and Agricultural Development Bank.<sup>37</sup> In terms of section 4(4) of the Act, if the NCA applies to a credit agreement it continues to apply to that agreement even if a party to that agreement ceases to reside or have its principal office within the Republic and it applies in relation to every transaction, act or omission under that agreement, whether that transaction, act or omission occurs within or outside the Republic.<sup>38</sup>

### 3 2 Limited application of NCA to juristic persons

From the aforementioned it is thus clear that, whereas the Act will not apply to credit agreements entered into with “large” juristic persons as indicated in section 4(1)(a)(i) or to large credit agreements, such as mortgage bonds, entered into by “small” juristic person consumers, the Act will in fact apply to small and intermediate credit agreements entered into by small juristic person consumers. However, such application is limited by section 6 of the NCA which indicates that the following provisions of the Act do not apply to a credit agreement or proposed credit agreement in terms of which the consumer is a juristic person:

- (a) Chapter 4, Parts C and D, which deal with credit marketing practices and over-indebtedness<sup>39</sup> and reckless credit<sup>40</sup> respectively;

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35 S 4(1)(c).

36 S 4(1)(d). See reg 2 for the prescribed manner and form 1 for the prescribed form.

37 S 4(3)(a) and (b).

38 S 4(4)(a) and (b). See further s 4(5) for “exemptions” relating to cheques and charges against credit facilities.

39 See s 79.

40 See s 80.

- (b) Chapter 5, Part A, section 89(2)(b) which deals with an agreement resulting from negative option marketing;
- (c) Chapter 5, Part A, section 90(2)(o) which deals with agreements at a variable interest rate; and
- (d) Chapter 5, Part C, which deals with the consumer's liability, interest, charges and fees.

Thus it may be concluded that with the exception of the parts and provisions of the NCA stated above, the remainder of the provisions of the NCA apply to those small juristic persons who enter into small and intermediate credit agreements.

As a result of the aforesaid limited application of the NCA to small juristic persons who enter into small and intermediate credit agreements, such juristic persons enjoy considerably less benefits under the NCA and will for instance not be able to access the debt relief provisions of the Act in respect of reckless credit and over-indebtedness and will also not be able to rely on the protection the Act affords consumers by prescribing certain rates of interest<sup>41</sup> or by imposing the statutory *in duplum* rule contained in section 103(5).

#### **4 DOES A STANDARD ACKNOWLEDGEMENT OF DEBT CONSTITUTE A CREDIT AGREEMENT FOR PURPOSES OF THE NCA?**

From the aforementioned explanation regarding the scope and application of the NCA it may be observed that a standard acknowledgement of debt entered into to arrange the repayment terms of an existing debt does not constitute a credit facility as it does not entail an undertaking by a credit provider to provide goods or services to or at the direction of the consumer – the goods or services have already been rendered sometime in the past as a result of another agreement or cause of action (such as a delict) between the parties. The purpose of the acknowledgement of debt is merely to negotiate how the amount owing to the credit provider is going to be repaid. These terms of repayment usually differ from the terms of repayment applicable to the original agreement between the parties. It is also clear that a standard acknowledgement of debt does not constitute a credit guarantee or any of the named credit transactions such as a pawn agreement, discount agreement, incidental credit agreement, instalment agreement, lease, secured loan or mortgage agreement.

However, due to the fact that it contains a deferral of payment and requires the payment of interest, fees and other charges as a result of such deferral, a standard acknowledgement of debt as described herein appears to fall within the ambit of the “catch all” credit transaction provided for in section 8(4)(f) as indicated above. This was indeed what was *inter alia* decided in *Carter Trading v Blignaut*,<sup>42</sup> where the court unfortunately did not elaborate on the implications of its

<sup>41</sup> See reg 42.

<sup>42</sup> 2010 2 SA 46 (ECP). At para 14 it is indicated that the acknowledgement *inter alia* contained the following clause: “1. I undertake to pay the undermentioned amount, interest calculated monthly in advance from . . . on the balance of the capital owing from time to time at the rate of 15.5% [fifteen and a half percent] per annum, the cost of preparing and negotiating and preparing this acknowledgement of debt and collection commission calculated with the Rules of the Law Society of the Cape of Good Hope.” The court held (paras 16 and 17) that in its view the payment of the amount owing was deferred to 24 December

findings other than to indicate that it requires compliance with the pre-enforcement provisions contained in sections 129 and 130 of the NCA. In *Grainco (Ltd) v Broodryk*,<sup>43</sup> however, the court after mentioning that the defendants alleged that the acknowledgement of debt constituted a section 8(4)(f) credit agreement and thus necessitated compliance with sections 129 and 130 of the Act, indicated that the underlying cause of action in respect of which the acknowledgement of debt *in casu* was entered into was a damages claim and not a money lending transaction.<sup>44</sup> Cillie J remarked that he agreed with counsel for the plaintiff that it could never have been the intention of the legislature that such a transaction should fall within the field of application of the NCA as it would constitute “an absurdity so glaring it could never have been contemplated by the legislature”.<sup>45</sup> The judge did not deal with the issue any further, save to indicate that the preamble to the NCA in which the objectives of the Act are described, confirms that it was not the objective that the Act should apply to such a mutual postponement of payment of damages.<sup>46</sup> However, it is submitted that it is unclear exactly which wording in the preamble to the Act prompted the court to come to the aforesaid conclusion.<sup>47</sup> It is further to be noted that in neither of the aforementioned cases the consequences of regarding an acknowledgment of debt as a section 8(4)(f) credit agreement were considered, save the indication in

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2008 and that the defendant undertook to pay, in addition to the amount owing, at least the cost of preparing the acknowledgement of debt and in the event of a failure to pay the sum owing, also collection commission and legal fees and that it would appear that those terms are exactly what is envisaged in the Act to be a s 8(4)(f) credit agreement. Van der Byl AJ remarked that there were other and perhaps even more persuasive considerations on which the acknowledgement in question must be adjudged as being a credit agreement envisaged in the Act (para 19). He then quoted the definition of a credit facility as per the NCA and indicated that insofar as the plaintiff provided goods to the defendant on credit on the basis of the acknowledgement of debt which was eventually concluded, it would appear that such an agreement would in any event have been a credit agreement, ie a credit facility (paras 21–23). In response to the defendant’s submission that an acknowledgement of debt constitutes a settlement between the parties and therefore a novation of the defendant’s obligation to pay for the goods sold and delivered, the court indicated that the acknowledgement of debt in the present matter was not a novation of the obligations of the defendant under the agreement in respect of the goods sold and delivered but rather appeared to be a confirmation that created a further obligation relating to the same performance and not as a replacement of the existing obligation (para 25).

43 2011 JDR 0172 (FB).

44 Para 7.3.

45 Para 7.4.

46 Para 7.5. It should be noted that the court did not indicate on which word or sentence in the preamble it based this conclusion.

47 The preamble reads as follows: “To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt reorganization in cases of over-indebtedness; to regulate credit information; to provide for registration of credit bureaux, credit providers and debt counselling services; to establish national norms and standards relating to consumer credit; to provide a consistent enforcement framework relating to consumer credit; to establish the National Credit Regulator and the National Consumer Tribunal; to repeal the Usury Act, 1968 and the Credit Agreements Act, 1980; and to provide for related incidental matters.”

*Carter v Blignaut* that it would require compliance with sections 129 and 130 of the Act.

The question therefore arises whether the legislature could ever have intended that a standard acknowledgement of debt, entered into on or after 1 June 2007, for purposes of rearranging the repayment terms of an existing debt in respect of which for instance money has already been advanced to a consumer a considerable period of time ago or where damages were suffered as a result of a delict such as a motor vehicle accident, should constitute a credit agreement for purposes of the NCA. Unfortunately the Act contains no clear indication regarding the intention of the legislature. Section 2(1) provides that the Act must be interpreted in a manner that gives effect to the purposes set out in section 3. The latter section contains no indication that the legislature intended standard acknowledgements of debt relating to the repayment of an existing debt to be excluded from the application of the Act and, it is submitted, nor does the section contain any provision from which such a specific intention may be inferred. If the legislature had intended to exclude acknowledgements of debt from the application of the Act, one would have expected it to be mentioned together with the exclusions in respect of insurance policies, leases of immovable property and *stokvels* provided for in section 8(2) or at least for it to be mentioned as an exemption under section 4. Standard acknowledgements of debt of the nature discussed herein are further usually entered into on terms that are in the best interests of the credit provider who is already displaying some leniency towards the consumer and would thus also not be able to escape the application of the Act on the basis that they are not entered into at arm's length. Due to the elements of deferral and charging of interest, fees and other charges in a standard acknowledgement of debt and in the absence of any express or implicit indication to the contrary, it would thus seem an inescapable conclusion that standard acknowledgements of debt entered into with natural person consumers and small juristic persons who conclude small or intermediate credit agreements fall within the category of credit transactions envisaged by section 8(4)(f) of the NCA.

## **5 CONSEQUENCES OF TREATING AN ACKNOWLEDGEMENT OF DEBT AS A CREDIT AGREEMENT**

### **5.1 Where the acknowledgement of debt is entered into with a natural person**

Acknowledgements of debt are usually entered into with natural persons even though the initial debtor in respect of the original debt or agreement in respect of which the acknowledgement of debt is signed, may have been a juristic person.

Regarding an acknowledgement of debt entered into with a natural person consumer on or after 1 June 2007 as a section 8(4)(f) credit transaction, it means that the creditor will have to comply with the NCA in all respects. It will *inter alia* have the following serious implications:

- (a) Where the creditor, alone or in conjunction with any associated person,<sup>48</sup> is the credit provider under at least 100 credit agreements (other than incidental

<sup>48</sup> According to s 40(2)(d), an "associated person" with respect to a creditor who is a natural person includes the credit provider's spouse or business partners. With respect to a credit provider who is a juristic person, it includes any person that directly or indirectly has a

credit agreements) or where the total principal debt owing to that creditor under all outstanding credit agreements (other than incidental credit agreements) exceeds R500 000, the creditor will have to apply to be registered as a credit provider.<sup>49</sup> Failure to register as a credit provider whilst under the obligation to register as such has the serious consequence that a credit agreement entered into by a creditor who is required to be registered as a credit provider under the NCA, but who is not so registered, is unlawful.<sup>50</sup> If a credit agreement is unlawful as envisaged in section 89, a court must order that the agreement is void as from the date it was entered into. It must then further order that the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider together with interest.<sup>51</sup> In addition, all the purported rights of the credit provider under that agreement to recover any money paid or goods delivered to, or on behalf of, the consumer, in terms of that agreement, are either cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or forfeited to the state, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.<sup>52</sup> Thus, clearly a no-win situation for the creditor.

- (b) Prior to entering into the acknowledgement of debt, the creditor will be obliged to conduct an extensive assessment as provided for in section 81 of the Act. Where he fails to do so the agreement will *per se* constitute reckless credit. Even where an assessment is duly conducted prior to entering into the acknowledgement of debt, it would still be possible for the consumer to raise reckless credit on the basis that, despite the assessment, he did not understand his risks, costs and obligations under the acknowledgement of debt or that entering into the acknowledgement of debt made him over-indebted as envisaged by the NCA.<sup>53</sup>
- (c) A debtor would be able to aver that he has become over-indebted since entering into the acknowledgement of debt, for example because he was retrenched. It will then be possible for him to voluntarily apply for debt review in terms of section 86 of the NCA in order to obtain a moratorium on enforcement<sup>54</sup> and achieve a restructuring of his credit agreement debt,<sup>55</sup> which will then include the debt as provided for in the acknowledgement of debt. If unable to apply for voluntary debt review prior to institution of action, the debtor would be able once court proceedings have commenced, to

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controlling interest in the credit provider, or is directly or indirectly controlled by the credit provider; any person that is directly or indirectly controlled by a person contemplated as aforesaid or any credit provider that is a joint venture partner of a person contemplated in s 47(2)(d).

49 S 40(1)(a) and (b).

50 S 40(4) read with s 89(2)(d).

51 S 89(5)(b). The interest is calculated at the rate set out in the agreement and for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer.

52 S 89(5)(c)(i) and (ii). See *Cherangani Trade and Investment 107 (Edms) Bpk v Mason* unreported case no 6712/2008 (O).

53 S 80 read with s 79.

54 S 88(3). See further Scholtz *et al Guide to the National Credit Act* (2008) para 11.3.3.6.

55 S 86(7)(c) read with s 87.

apply to the court in its discretion to refer him to a debt counsellor in accordance with section 85 of the Act.<sup>56</sup>

- (d) The provisions of the NCA regarding interest and costs as set out in sections 100 to 107, read with regulations 39 to 48, apply to the agreement. This *inter alia* means that the creditor will not be able to recover more interest than the prescribed rate as set out in regulation 42 and also that the statutory *in duplum* rule as set out in section 103(5)<sup>57</sup> operates in favour of the debtor.
- (e) The consumer rights relating *inter alia* to the right to receive documents in an official language, the use of plain and understandable language and the right to receive documents as set out in Part A<sup>58</sup> of Chapter 4 of the Act as well as the provisions of the Act relating to confidentiality, personal information and consumer credit records will apply to the agreement.
- (f) The provisions of the Act regarding unlawful agreements, provisions and supplementary agreements as set out in sections 89, 90 and 91 respectively, will apply to the agreement and the debtor will most probably also be entitled to statements of account as provided for in the NCA.<sup>59</sup>
- (g) Before any legal action can be taken against the consumer, the creditor will have to comply with the provisions of Part C of Chapter 6 of the Act relating to pre-enforcement procedures. This will entail affording the consumer a notice in terms of either section 129(1)(a)<sup>60</sup> (or 86(10)<sup>61</sup> should the debtor be under debt review).
- (h) Once legal action is instituted the creditor will have to allege and observe extensive procedural compliance as set out in section 130(1) and (3) of the Act, which if not complied with will provide the debtor with a variety of technical defences and objections that he would not otherwise have had.
- (i) The court will further be provided with an extended range of powers as catered for in section 130(4).<sup>62</sup>
- (j) It is debatable whether the agreement will also have to comply with the disclosure and content requirements of the Act as it seems illogical and absurd to require such compliance, including providing a quotation, given the nature and circumstances of the acknowledgement of debt.

<sup>56</sup> See Scholtz *et al* para 11.3.3.5 for a detailed discussion of s 85 of the Act.

<sup>57</sup> S 103(5) provides that despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in s 101(1)(b)–(g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs. As regards the operation of the statutory *in duplum* rule, see *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA).

<sup>58</sup> See ss 60–66.

<sup>59</sup> See ss 107–115.

<sup>60</sup> S 129(1)(a) obliges the credit provider to deliver a written notice to the consumer-debtor in which the consumer's attention is drawn to his default under the credit agreement and it is proposed that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intention that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.

<sup>61</sup> S 86(10) provides for termination of debt review where the consumer is in default and at least 60 business days have lapsed since the consumer applied to a debt counsellor for debt review. See further Scholtz *et al* para 11.3.3.3.

<sup>62</sup> For a discussion of these powers, see Scholtz *et al* para 12.9.

## 5.2 Where the acknowledgement of debt is entered into with a juristic person

As indicated above, where an acknowledgement of debt is entered into as a small or intermediate section 8(4)(f) credit transaction with a small juristic person, the NCA will have limited application to the acknowledgement of debt as set out in section 6 of the Act. This will *inter alia* entail the following:

- (a) The provisions relating to registration as a credit provider in accordance with section 40, as discussed above, will apply.
- (b) The provisions relating to unlawful agreements, provisions and supplementary agreements as set out in sections 89, 90 and 91 will apply with the exception of section 89(2)(b)<sup>63</sup> and section 90(2)(o).<sup>64</sup>
- (c) The provisions of the Act relating to consumer rights will apply, as indicated above. This includes the provisions relating to confidentiality, personal information and consumer credit records.
- (d) As indicated above, the provisions of Part C of Chapter 6 relating to pre-enforcement requirements contained in section 129 will apply as well as the provisions regarding debt procedures in a court set out in section 130.
- (e) The courts will have extended powers, as indicated above, in enforcement proceedings that are afforded by section 130(4) of the Act.

Although the creditor will thus have a lighter compliance obligation than in the case of a natural person as he does not have to observe the provisions of the Act relating to interest, fees and other charges and will not have to deal with issues of reckless credit and over-indebtedness, as these are not to the avail of the juristic person debtor, it is clear that the creditor will still be saddled with various issues he would not have had to deal with if the acknowledgement did not constitute a credit agreement governed by the NCA.

## 6 INFLUENCE OF THE CAUSE OF ACTION THAT GAVE RISE TO THE ACKNOWLEDGEMENT OF DEBT

The cause of action in relation to which the acknowledgement of debt was entered into may be based either on contract or delict. Where it is based on a contract or agreement which constitutes a credit agreement, it is submitted that the insertion of a no-novation clause into an acknowledgement of debt will not serve to take the agreement subsequently concluded out of the ambit of the NCA. However, where the debt initially arose as a result of a delict, it is submitted that the insertion of a no-novation clause might have the effect of preserving the original cause of action, namely the delict, and thus cause the matter to fall outside the scope of the NCA.

## 7 CONCLUSION AND SUGGESTIONS

It is debatable whether the legislature considered the effect of the NCA on standard acknowledgements of debt during the drafting of the Act. It is, however, not unlikely that this was done given that the intention of the legislature was, *inter alia*, to extend protection by means of section 8(4)(f) to a consumer who

<sup>63</sup> S 89(2)(b) provides that a credit agreement entered into as a result of negative option marketing is unlawful.

<sup>64</sup> S 90(2)(o) provides that a provision which states or implies that the rate of interest is variable, except to the extent permitted by section 103(4), is unlawful.

enters into a credit agreement that falls outside the named credit transactions in section 8(4)(a) to (e).

Although one might argue that it could never be the intention of the parties, when arranging the repayment terms of an existing debt, to enter into a credit agreement, the fact of the matter remains that such acknowledgement of debt entails a deferral of payment (usually by means of monthly payments) in respect of which interest, fees and other charges are then levied, causing it to fall squarely into the catch-all net of section 8(4)(f). It should be noted that the definition of “credit” for purposes of the NCA does not necessarily entail that money should be advanced as a result of entering into the agreement, but explicitly includes deferral of money owed to a person, thus including money owed in respect of a pre-existing debt.

One may of course wonder whether the mere fact that a further “credit agreement” is extended to a consumer who is already unable to pay his debts and is clearly either over-indebted or likely to become so in future would not constitute reckless credit. The answer to this predicament would most probably be that the acknowledgement of debt should be viewed in substitution of the previously unpaid debt in respect of which it is entered, with the effect that such debt cannot be added into the over-indebtedness calculation together with the amount owing in terms of the acknowledgement of debt. Thus, if a credit assessment is done prior to entering into the credit agreement and the result thereof is that the debtor will be able to afford the repayment of the debt in accordance with the terms of the acknowledgement of debt, the fact that he was previously unable to settle that debt on its original payment terms will not cause the acknowledgement of debt to constitute reckless credit.

The practical reality is most probably that many creditors who enter into standard acknowledgements of debt with consumer debtors on a regular basis are, due to the nature of their core business, already registered as credit providers, such as banks who provide credit in terms of a variety of credit agreements. To them the further implications of treating an acknowledgement of debt as a section 8(4)(f) credit agreement, such as the compulsory prior assessment required in terms of section 81, the limitation of interest and the pre-enforcement and enforcement requirements might be less cumbersome given that they will already have structures in place to deal with these aspects. However, should the creditor for instance be a natural person who is not actually in the business of extending credit and who advanced a large amount of money in excess of R500 000 to another natural person on terms that are at arm’s length and the parties enter into an acknowledgement of debt for repayment of the loan amount, the implications for the creditor may be severe as he would be required to register as a credit provider and will have to comply with the applicable provisions set out in paragraph 5 above.<sup>65</sup>

In an attempt to avoid the onerous application of the NCA to a specific standard acknowledgement of debt relating to repayment of an existing debt, it is submitted that the judgment in *Voltex (Pty) Ltd v Chenleza CC*<sup>66</sup> might probably

<sup>65</sup> It is conceded that much of the problems that this specific creditor would encounter would be as a result of the inequitable operation of the credit-provider registration requirements in s 40(1)(a) and (b) of the NCA in respect of creditors of the nature mentioned in this example. A detailed discussion of this section is beyond the scope of this article.

<sup>66</sup> 2010 5 SA 259 (KZP).

offer a solution, as the court held: “No charge, fee or interest was payable to the plaintiff in terms of the agreement, save the interest which was payable as damages in consequence of the breach of contract. Such interest was not fixed or determined by the agreement *but by operation of law*.”<sup>67</sup>

Clearly, if the acknowledgement of debt only caters for a deferral without requiring payment of interest, fees and other charges, it will not comply with the requirements of section 8(4)(f) and will consequently be able to escape the application of the Act. This would, however, not be an economically feasible option for most creditors who have already been forced to wait for repayment of debts owing to them. It would consequently seem that such creditors would at least be able to recover *mora* interest at the rate of 15,5% as indicated in the Prescribed Rate of Interest Act<sup>68</sup> as damages in consequence of breach of contract without risking the NCA becoming applicable to the acknowledgement of debt.

Where the acknowledgement of debt is for the repayment of a debt based on delict, there is also, as pointed out above, the option of inserting a no-novation clause into the acknowledgment in order to preserve the delict as underlying *causa* and so avoid the application of the Act to the acknowledgement.

It is indeed true that a creditor to whom an amount is owing by a debtor can choose whether to enter into an acknowledgement of debt or not. If he does not wish to do so, he can institute action against the debtor and if he obtains judgment, he can then proceed with execution against the debtor’s assets. The latter choice is of course only viable where the debtor indeed has assets that would make it worthwhile to opt for litigation and execution. There are, however, a large number of debtors against whose assets execution is not an economically-viable option or who do not possess assets that can be executed against. Given the protection of a person’s right of access to adequate housing contained in section 26 of the Constitution of the Republic of South Africa, 1996, and the strict enforcement of this right by the Constitutional and other courts,<sup>69</sup> the prospects of executing against immovable property which is the debtor’s home have also become more restricted. It has been held that one of the factors that a court might consider when deciding whether to authorise a warrant of execution against the debtor’s home is whether the debt in regard to which the warrant is sought could have been satisfied by other reasonable means.<sup>70</sup> Entering into an acknowledgement of debt with the debtor would of course in many instances constitute such reasonable means, thus creating a catch 22-situation for many creditors effectively leaving them with no other option than to enter into an acknowledgement of debt with the debtor. It is, however, submitted that the creditor’s unenviable situation might be alleviated if at least it is possible to avoid the application of the NCA and its onerous protective provisions to acknowledgements of debt for repayment of existing debt by debtors who have already been shown their fair share of leniency.

67 Para 39; my emphasis.

68 55 of 1975.

69 *Jaftha v Schoeman; Van Rooyen v Stolz* 2005 2 SA 140 (CC); *Nedbank v Mortinson* 2005 6 SA 462 (W); *Standard Bank of South Africa Ltd v Saunderson* 2006 2 SA 264 (SCA); *Gundwana v Steko Development CC* 2011 3 SA 408 (CC) and *Firstrand Bank Ltd v Folscher* 2011 4 SA 314 (GNP).

70 See *Jaftha* paras 56–60.