A CRITICAL ANALYSIS OF THE TRANSACTIONS TO WHICH THE NATIONAL CREDIT ACT 34 OF 2005 APPLIES

by

ANNELIZE DU PISANI
24183564

Submitted in partial fulfilment of the requirements for the

MASTERS DEGREE IN CONTRACT LAW,
UNIVERSITY OF PRETORIA

Study Supervisor: Mr Stefan Renke

November 2011
SUMMARY

Due to the ineffectiveness of previous credit legislation to deal with the demands of a complex consumer market, a need for legislative reform in this area arose in South Africa. The National Credit Act was introduced to create a single system to regulate credit and to address the shortcomings of the previous consumer credit legislation. The Act came into full force and effect on 1 June 2007. It has a wider field of application that its predecessors and offer greater protection to consumers who enter into credit agreements with credit providers. The Act applies to all credit almost all credit agreements between parties dealing at arm's length and made, or having an effect within the Republic of South Africa, subject to certain exclusions. Three main categories of credit agreements can be identified in the Act. They are credit facilities, credit transactions and credit guarantees. The second main category also has sub-categories of agreements which are also defined in the Act. It is sometimes difficult to distinguish between the different credit agreements but it remains important since different rules apply in respect of each credit agreement. In order to distinguish a credit agreement from another, it is important to look at the elements of each definition closely and to identify characteristics which are unique to that specific agreement. It is widely accepted that every credit agreement contains two essential elements. Firstly there has to be a deferral of payment by the credit provider in respect of a debt owed by the consumer and secondly the credit provider charges a fee or interest in respect of the deferred payment. It is interesting in this regard that some of the definitions in the Act do not require a fee or interest to be levied such as in the case of a mortgage agreement or a secured loan. Coincidentally, these two definitions are also problematic in the sense that they introduce concepts which are not recognised in our legal system. It will be interesting to see what our courts make of these concepts and how they will go about incorporating it into the general principles of South African law. The different agreements to which the Act applies and their irregularities will be discussed and critically analysed.
# TABLE OF CONTENTS

1. Introduction ........................................................................................................ 1

2. The field of application .................................................................................. 2

3. Credit facilities ............................................................................................... 3

   3.1. General ...................................................................................................... 3

   3.2. Discussion ................................................................................................ 4

      3.2.1. Supply of goods .................................................................................. 4

      3.2.2. Rendering of services ......................................................................... 5

      3.2.3. Payment of an amount or amounts of money ................................... 6

      3.2.4. As determined by the consumer from time to time ......................... 7

      3.2.5. Deferral of payment ........................................................................... 8

      3.2.6. Charge, fee or interest ........................................................................ 9

      3.2.7. Small or intermediate credit agreement ............................................ 11

3.3 Case law .......................................................................................................... 11

3.4. Conclusion ..................................................................................................... 14

4. Credit transactions .......................................................................................... 14

   4.1. General ...................................................................................................... 14

   4.2. Pawn transactions .................................................................................... 15

      4.2.1. General .............................................................................................. 15

      4.2.2. Discussion .......................................................................................... 15

   4.3. Discount Transactions .............................................................................. 16

      4.3.1. General .............................................................................................. 16
4.3.2. Discussion ................................................................. 16

4.4. Incidental credit agreement .............................................. 17
   4.4.1. General ................................................................. 17
   4.4.2. Discussion ............................................................ 18
      4.4.2.1. Supply of goods or services ............................... 18
      4.4.2.2. Tendering of an account ................................... 19
      4.4.2.3. Charge, fee or interest ..................................... 19
      4.4.2.4. Limited application of the Act ........................... 20
      4.4.3. Moment of conclusion of the agreement .................... 21
   4.4.4. Overlap with discount transaction and credit facilities .... 24
   4.4.5. Case law .............................................................. 26

4.5. Instalment agreement ................................................... 28
   4.5.1. General ............................................................... 28
   4.5.2. Discussion ........................................................... 28
      4.5.2.1. Periodic payments ........................................... 29
      4.5.2.2. Transfer of ownership ...................................... 29
      4.5.2.3. Overlap with the definition of a credit facility ....... 31
      4.5.2.4. Miscellaneous ................................................... 32

4.6. Mortgage agreement ...................................................... 33
   4.6.1. General ............................................................... 33
   4.6.2. Discussion ........................................................... 33

4.7. Secured loan ............................................................... 35
4.7.1. General ................................................................. 35
4.7.2. Discussion ............................................................ 35
  4.7.2.1. Retention of title ............................................. 35
  4.7.2.2. Pledge or cession of title ................................. 36
  4.7.2.3. Other thing of value ...................................... 36
  4.7.2.4. Miscellaneous .............................................. 37
4.8. Lease ........................................................................ 37
  4.8.1. General ............................................................. 37
  4.8.2. Discussion ......................................................... 38
4.9. Any other credit agreement ........................................ 39
  4.9.1. General ............................................................. 39
  4.9.2. Discussion ......................................................... 40
4.10. Conclusion ............................................................. 40
5. Credit guarantee .......................................................... 41
  5.1. General ................................................................. 41
  5.2. Primary and accessory guarantees ............................ 41
  5.3. Characteristics of a credit guarantee ......................... 45
    5.3.1. A person undertakes to perform ‘on demand’......... 45
    5.3.2. A person undertakes to satisfy obligation of another consumer ........................................ 46
    5.3.3. The principal agreement must be subject to the National Credit Act ................................. 47
    5.3.4. Small, intermediate or large agreement ............... 48
  5.4. Case law ............................................................... 50
5.5. Conclusion .......................................................................................... 52

6. Conclusion .............................................................................................. 52

7. Bibliography ............................................................................................ 55
1. INTRODUCTION

The credit market has evolved significantly on a political, economic, social and technological level over the last forty years and the regulatory measures which were in place became outdated. As a result of this and also due to increasing concerns raised by consumer representatives about the effectiveness of the consumer credit law that was in place,¹ especially regarding the protection of lower income consumers, there was a need to reform the consumer credit law.²

As a response to this need for reformation, the National Credit Act³ was assented to by the President on 10 March 2006. A proclamation⁴ was signed in order to put the Act into operation in three different stages⁵ to give creditors an opportunity to get their financial systems, contract documents and other forms in place and to attend to their registration as credit providers.⁶

The Act has replaced both the Credit Agreements Act and the Usury Act and its purpose is to create a single system by which to regulate the granting of credit in South Africa.⁷ It bears very little resemblance to its predecessors⁸ and it is therefore important to establish what the field of the application of the National Credit Act is.

In paragraph 2 of this dissertation a broad overview of the field of application is given, after which the dissertation focuses specifically on one aspect of the field of application, namely the transactions to which the Act applies. There are three

---

¹ The Credit Agreements Act 75 of 1980 (hereinafter the “Credit Agreements Act”), the Usury Act 73 of 1968 (hereinafter the “Usury Act”) and the Exemption Notices in terms of the Usury Act 1992 and 1999.
³ 34 of 2005 (hereinafter “the Act”). All sections referred to will pertain to the National Credit Act unless the contrary is indicated.
⁴ Proc 22 in GG 28824 of 2006-05-09.
⁵ The Act was put into operation on 2006-06-01, 2006-09-01 and 2007-06-01.
⁶ Otto & Otto 8.
⁸ Otto & Otto 3.
main categories of transactions to which the Act applies and the first of these transactions is called a credit facility, which will be discussed in paragraph 3. Paragraph 4 focuses on the second type of transaction which falls within the ambit of the Act, namely a credit transaction. Paragraph 5 deals with credit guarantees, the third type of transaction.

2. THE FIELD OF APPLICATION OF THE ACT

The Act applies to nearly every credit agreement between parties dealing at arm's length and made, or having an effect, within the Republic.\(^9\) It is important to realise from the onset that the Act only applies to agreements where credit is granted. The term "credit" basically means that the payment of money which is owed to a credit provider is deferred.\(^10\)

The word "agreement" means an "arrangement or understanding between or among two or more parties which purports to establish a relationship in law between those parties".\(^11\) It, therefore, bears the ordinary meaning in terms of which consensus has to be reached by two or more people in such a way that a contract is formed.\(^12\)

An agreement is regarded as a credit agreement to which the Act applies if it falls within one of the three main categories provided for in section 8. These categories are: a credit facility\(^13\), a credit transaction\(^14\) and a credit guarantee.\(^15\) A credit agreement can also be a combination of any of these three categories. It is important to distinguish between the different categories of credit agreements

---

\(^9\) § 4(1).
\(^10\) Or that a credit provider has promised to defer such payment or has promised to advance money – s 1. Credit has also been defined as a trade practice according to which goods or services are supplied to a receiver and where the parties agree that the receiver is entitled to pay for the goods or services at a future date – Grové & Otto 1.
\(^11\) § 1.
\(^12\) Nelson Mandela Bay Metropolitan Municipality v Nobumba 2010 1 SA 579 (ECG) at 589B-C.
\(^13\) § 8(3).
\(^14\) § 8(4).
\(^15\) § 8(5).
because different rules apply depending on which type of credit agreement is under consideration.\textsuperscript{16} Each category, with their sub-categories is discussed in more detail below.

It must be noted here that where a person sells goods or supplies services and accepts payment from the buyer in the form of a cheque or similar instrument upon which payment is subsequently refused, the resulting debt which the buyer owes to the seller or supplier is not a credit agreement for purposes of the Act. The same holds true in the case where a buyer pays for goods or services by means of a charge against a credit facility in terms of which a third person is the credit provider. Should the credit provider subsequently refuse that charge, the resulting debt owed by the buyer to the seller also does not constitute a credit agreement for purposes of the Act.\textsuperscript{17}

3. CREDIT FACILITIES

3.1. General

The first type of transaction to which the Act applies is called a credit facility. A credit facility is an agreement in terms of which a credit provider undertakes to supply goods or services to a consumer or to pay an amount or amounts to the consumer, or on behalf of the consumer, or at the direction of the consumer. The consumer determines the goods or services to be provided, or amounts to be paid from time to time by the credit provider. The credit provider then either defers the consumer's obligation to pay in full or in part for any such goods, services or amounts, or the credit provider bills the consumer periodically for any part of the cost of the goods or services, or any part of the amount paid. The credit provider imposes a charge, fee or interest which is payable by the

\textsuperscript{16} Otto (2011) TSAR 547.
\textsuperscript{17} S 4(5).
consumer in respect of any amount deferred or any amount billed and not paid within the time provided in the agreement.\textsuperscript{18}

Agreements contemplated in section 8(2) are excluded and do not constitute credit facilities. These are agreements pertaining to a policy of insurance or credit extended by the insurer to maintain the payment of the premiums of the insurance policy, a lease of immovable property or a transaction between a stokvel\textsuperscript{19} and a member of the stokvel in accordance with the rules of the stokvel.\textsuperscript{20}

3.2. Discussion

The definition of a credit facility contains a variety of elements and all of them deserve to be discussed in detail. Each element has been separated for a focused discussion, however, it must be realised that these elements do not function in isolation and many of them have to be present at the same time in order for the agreement to qualify as a credit facility.

3.2.1. Supply of goods

The definition of a credit facility provides for an undertaking by the credit provider to supply goods to the consumer. The definition, therefore, includes a contract of sale of movable goods on credit by a credit provider.\textsuperscript{21}

\textsuperscript{18} s 8(3).
\textsuperscript{19} A stokvel is a formal or informal rotating financial scheme with entertainment, social or economic functions, which (a) 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; (b) establishes a continuous pool of capital by raising funds by means of the subscriptions of the members; (c) grants credit to and on behalf of members; (d) provides for members to share in profits from, and to nominate management of, the scheme; and (e) relies on self-imposed regulation to protect the interest of its members – see s 1.
\textsuperscript{20} s 8(2). See also Lombard & Renke (2009) SA Merc LJ 488.
An example of a contract of sale of movable goods which constitutes a credit facility is the purchasing of goods by means of an in-store card in which event credit is being extended to the consumer.\textsuperscript{22} In the case of an in-store card, the consumer is allowed to buy goods up to a determined limit, payment is deferred to a later date or dates and the consumer is billed on a monthly basis. A fee may be charged for the right to use the card and, if the full balance is not paid, monthly interest is charged on the shortfall. The consumer decides how much to pay or repay each month as long as it is an amount equal to or higher than a minimum amount which has been stipulated by the credit provider.\textsuperscript{23}

Another credit agreement, in terms of which a contract of sale for movable goods on credit can come into existence, is called an instalment agreement. The difference between the two types of contracts will be dealt with in more detail when the latter transaction is discussed.\textsuperscript{24}

### 3.2.2. Rendering of services

A credit facility can also come into existence in the case where a credit provider undertakes to render services to a consumer on credit. An agreement in terms of which a consumer has an account with a car rental company may serve as an example in this regard. In terms of such an agreement the car rental company provides their services to the consumer on an ongoing basis and payment is deferred to the end of each month. The consumer can choose the amount he wishes to repay at the end of each month, subject to a specified minimum amount, to settle the outstanding account. Interest may be charged on the monthly shortfall if the full balance is not paid.

\textsuperscript{22} Renke, Roestoff & Haupt (2007) Obiter 231.
\textsuperscript{23} JMV Textiles (Pty) Ltd v De Chalain Sporinvest 14 CC 2010 6 SA 173 (KZD) at 178C-G.
\textsuperscript{24} Par 4.5. below.
3.2.3. Payment of an amount or amounts of money

A credit facility can further also include an undertaking by a credit provider to pay an amount or amounts of money to a consumer, or on behalf of a consumer, or at the direction of a consumer. The definition of a credit facility, therefore, includes money lending transactions.\textsuperscript{25}

The Act also applies to most forms of money lending, as long as the obligation to repay the amount borrowed is deferred and a fee, charge or interest is payable for this privilege.\textsuperscript{26} A money-lending transaction will, however, only be classified as a credit facility if it complies with all the elements of this category of credit agreements.

An example of a money lending transaction which constitutes a credit facility is a credit card transaction. The credit provider pays an amount to a person from whom the cardholder buys goods or obtains services. This is also an example of an agreement where the credit provider pays an amount of money on behalf of the consumer. A credit provider may, however, also disburse cash to the cardholder. The amount of money may, therefore, also be provided directly to the consumer. Repayment, in both instances, is deferred and the monthly billing results in interest being charged if the full amount is not paid by the consumer. In some cases a fee is charged for the right to use the card.\textsuperscript{27} A credit provider can also pay an amount of money at the direction of a consumer, for instance where a bank honours a cheque drawn by the consumer in favour of someone else.\textsuperscript{28}

\textsuperscript{26} Renke, Roestoff & Haupt (2007) Obiter 232.
\textsuperscript{27} JMV Textiles (Pty) Ltd v De Chaloin Spareinvest 14 CC 2010 6 SA 173 (KZD) at 178C-G.
\textsuperscript{28} Lombard & Renke (2009) SA Merc LJ 488.
3.2.4. As determined by the consumer from time to time

According to the definition the credit provider undertakes to provide goods, services or an amount or amounts of money to the consumer, as determined by the consumer from time to time.

The question has been raised as to the meaning of the words "as determined by the consumer from time to time" and whether any special meaning should be attached to it at all. Lombard and Renke\textsuperscript{29} are of the opinion that these words indicate that the legislature had revolving credit in mind when defining a credit facility. Revolving credit means that the payment of instalments by the debtor creates new credit for the debtor.\textsuperscript{30} Therefore, should the debtor pay or repay a certain amount in settlement of the debt that he owes, that amount which has been paid or repaid, may be used again in the future.

Wallis J seemed to agree with this interpretation in the recent case of \textit{JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC}\textsuperscript{31} where he makes the following remark:

"In my view sec 8(3) is directed at the provision by credit providers of charge cards and credit cards and similar arrangements and not at conventional sales on credit."

It is interesting to note in this regard that Otto\textsuperscript{32} makes no mention of the words "as determined by the consumer from time to time". In fact, he refers to examples such as personal money loans and services by professional people such as doctors. Usually, these types of credit agreements are not agreements for revolving credit. It therefore seems as if he is of the opinion that agreements for

\textsuperscript{29} Lombard & Renke (2009) \textit{SA Merc LJ} 488.
\textsuperscript{30} Grové & Otto 80 fn 89.
\textsuperscript{31} 2010 6 SA 173 (KZD) at 1798.
\textsuperscript{32} Scholtz \textit{et al} 8-3; Otto & Otto 18.
both revolving credit and fixed-sum credit\textsuperscript{33} are covered in the definition of a credit facility.

It is my submission that revolving credit is indeed an important distinguishing characteristic of a credit facility. The definition of a credit facility exclusively provides for credit agreements in terms of which revolving credit is granted. My submission is based on the use words “as determined by the consumer from time to time” and the presumption that legislation does not contain futile or nugatory provisions.\textsuperscript{34} Furthermore, section 119 of the Act provides for the increase of a credit limit under a credit facility and the fact that a consumer has the option of increasing such limit from time to time. This practice is consistent with transactions where revolving credit is granted, and cannot be reconciled with transactions where fixed-sum credit is granted.

3.2.5. Deferral of payment

If the credit provider undertakes to provide goods or services or an amount of money for the benefit of the consumer, the consumer must also undertake to pay the credit provider for such goods or services, or to repay the amount of money. However, in the case of a credit facility, the consumer’s obligation to pay the price or repay the money can be either deferred by the credit provider or the credit provider can bill the consumer periodically.

This requirement of deferral of payment was excellently explained in the case of \textit{JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC} by Wallis J. According to this judgment it is part and parcel of the agreement between the consumer and credit provider that the consumer may take advantage of the offer of credit and that the consumer is then entitled to a deferral of his obligation to make payment in full or in part. The consumer then repays the amount outstanding by means of

\textsuperscript{33} Fixed-sum credit means that payment of the debt does not create new credit for the debtor - Grové & Otto 80 fn 89.

\textsuperscript{34} Botha 73.
a number of smaller payments, subject to paying interest for the privilege of
being allowed the deferral of payment. Indeed the expectation is that most
consumers will, either on a regular basis or at least from time to time, take
advantage of the availability of credit and be willing to incur the charges, usually
by way of interest, resulting from their doing so. That is how the credit provider
profits from the agreement.\textsuperscript{35}

3.2.6. Charge, fee or interest

Another characteristic of a credit facility is that a fee, charge or interest is payable
by the consumer for the privilege of being granted a deferral of his payment
obligation by the credit provider in respect of the goods, services or amount of
money that the consumer has already received. A charge, fee or interest is also
payable to the credit provider in respect of the deferred amount where the
consumer is billed periodically and does not pay within the time provided in the
agreement, for example interest that is payable on a credit card account where
the amount billed is not paid before the date stipulated for payment on the
account.\textsuperscript{36}

The Act prohibits a credit provider to charge the consumer a higher amount
under a credit agreement in respect of goods and services than he would have
charged in the ordinary course of business if the transaction were a cash
transaction.\textsuperscript{37} This means that “loading” of the price of goods in order to
circumvent the provisions of the Act is prohibited.\textsuperscript{38}

The Act, furthermore, contains a closed list of fees, charges, interest and other
items that a credit provider may recover from consumers.\textsuperscript{39} The list includes the

\textsuperscript{35} 2010 G SA 173 (KZD) at 179E-F.
\textsuperscript{36} Otto & Otto 18. See also Lombard & Renke (2009) SA Merc LJ 488.
\textsuperscript{37} s 100(2).
\textsuperscript{38} Scholtz et al 10-3.
\textsuperscript{39} S 101(1)(a)-(g).
principal debt, a fee for initiating the agreement, a service fee\textsuperscript{40}, interest, credit insurance, default administration charges\textsuperscript{41} and collection costs.\textsuperscript{42} A credit provider may not charge an amount which exceeds the maximum amount\textsuperscript{43} that may be charged in accordance with the Act.\textsuperscript{44}

The only fee which is problematic in respect of credit facilities is the service fee. Service fees may be charged periodically, for example monthly or annually, but in the case of a credit facility it may also be charged on a per transaction basis.\textsuperscript{45} Transaction may take place in random intervals throughout the month or year, and if a service fee could be charged on a per transaction basis, this would not be in line with the definition of a service fee.\textsuperscript{46} Scholtz submits that this problem can easily be solved and that the Act must be interpreted as allowing the credit provider to require payment of a transaction-based fee, but that the service fee may be debited to the consumer's account only at the end of the month in which the transaction occurred or else periodically. This interpretation is strengthened by the regulations\textsuperscript{47} which provide that transaction-based service fees may be levied at the end of the month in which the transaction occurred.\textsuperscript{48}

\textsuperscript{40} This is a fee which may be charged periodically if the credit provider incurs routine administration costs in order to maintain the agreement – see s 1.
\textsuperscript{41} These are charges that the credit provider incurs when the consumer is in default – see s 1.
\textsuperscript{42} These are costs which the credit provider incurs to enforce the consumer's financial obligations – see s 1.
\textsuperscript{43} Prescribed by regulation in ch 5 of the Regulations in GN R489 in GG 28864 of 31 May 2006.
\textsuperscript{44} S 100(1). See also Scholtz \textit{et al} 10-1 and 10-3.
\textsuperscript{45} S 101(1)(c).
\textsuperscript{46} S 1 allows a "service fee" to be charged periodically only.
\textsuperscript{47} Reg 41.
\textsuperscript{48} Scholtz \textit{et al} 10-8.
3.2.7. Small or intermediate credit agreement

It is important to note that due to the nature of a credit facility it is either a small^49 credit agreement or an intermediate^50 credit agreement. It can never be a large^51 credit agreement.^52

3.3. Case law

In *Bridgeway Ltd v Markam*^53 it was held that a sale of rights at a discount does not constitute a credit facility. The facts of this case are fairly simple. The respondent sold his land to a third party. Thereafter, he sold his rights in respect of the purchase price to the applicant at a discount and the rights were also transferred to the applicant by way of cession. This manner of financing is not uncommon. It means that the respondent receives his money at an early stage when he needs it and the applicant gets his cut when he later receives the full purchase price from the third party.^54

The reason that the court came to its conclusion is that in the transaction described above no payments were to be made periodically and no payments were to be deferred. The arrangement is that the applicant pays the respondent the discounted price up front and thereafter he steps into the shoes of the seller.

---

^49 A credit agreement is small if it is a pawn transaction, a credit facility with a credit limit of no more than R15 000, or a credit transaction (other than a mortgage agreement or credit guarantee) in respect of which the principal debt under the credit transaction or guarantee does not exceed R15 000 — see s 9.

^50 A credit agreement is small if it is a pawn transaction, a credit facility with a credit limit of no more than R15 000, or a credit transaction (other than a mortgage agreement or credit guarantee) in respect of which the principal debt under the credit transaction or guarantee does not exceed R15 000 — see s 9.

^51 A credit agreement is a large transaction if it is a mortgage agreement (regardless of the size) or a credit transaction (other than a pawn transaction or credit guarantee) and the principal debt in terms of the credit transaction or guarantee equals or exceeds R250 000 — see s 9.


^53 2008 6 SA 123 (W).

The transaction is not a money-lending transaction; it is merely a contract of sale at a discount.\footnote{55}{Bridgeway Ltd v Markham 2008 6 SA 123 (W) at 128D-F. For a detailed discussion on this case see Otto (2009) TSAR 198-203.}

In Nelson Mandela Bay Metropolitan Municipality v Nobumba\footnote{56}{2010 1 SA 579 (ECG).} the applicant had instituted action against the respondent for due but unpaid rates, interest owed as a result of the unpaid rates as well as outstanding service charges. It was decided in this matter that the Act does not apply to a claim for rates. Rates are a tax imposed by the municipality in terms of section 2(1) of the Rates Act which empowers it to do so. The obligation on the part of a property owner to pay rates arises from this source and not from an agreement. As the Act concerns itself only with agreements, it consequently does not apply to proceedings instituted by a municipality to recover due but unpaid rates.\footnote{57}{Nelson Mandela Bay Metropolitan Municipality v Nobumba 2010 1 SA 579 (ECG) at 590C.} Furthermore, the entitlement of the municipality to claim interest on due but unpaid rates also arises from legislation, therefore, the also does not apply to the municipality’s claim for interest.\footnote{58}{Nelson Mandela Bay Metropolitan Municipality v Nobumba 2010 1 SA 579 (ECG) at 594C-E.}

The duty to supply municipal services and the corresponding obligation to pay for them is based on a service agreement entered into between the municipality and individual consumers of municipal services in terms of which the former supplies services to the latter and the latter undertakes to pay when he or she is billed periodically for the consumption of those services. On the face of it this type of agreement may be a credit facility as defined in section 8(3) of the Act. Section 4(6)(b) of the Act concerns the supply of a “utility\footnote{59}{A “utility” means first of all the supply to the public of an essential commodity such as electricity, water or gas. Secondly it means the supply to the public of an essential service such as waste removal, access to sewage lines, telecommunication networks, or transportation infrastructure – see s 1.} or other continuous service”\footnote{60}{“Continuous service” means the supply of a utility or service for consideration, or the supply of a utility or service combined with the supply of goods that are essential for the utilisation of that utility or service by the consumer. The must be the intention of the parties that, for as long as the agreement to supply}
and exempts credit providers, who have structured their agreements with consumers, from the most onerous aspects of the Act.\textsuperscript{61} If an agreement provides that a supplier of a utility or continuous service will defer payment until it has provided a periodic statement of account to the consumer and the supplier undertakes not to impose any charge contemplated in section 103 in respect of the deferred amount, unless the consumer fails to pay the full amount due within 30 days after the date on which the periodic statement is delivered to the consumer, such agreement is not a credit facility. The agreement is also not an incidental credit agreement,\textsuperscript{62} however, interest charged on the overdue amount is considered to be incidental credit to which this Act applies to a limited extent. It has been argued that failure to provide in the service agreement for a period of 30 days within which the account must be paid will cause the agreement to be a credit facility.\textsuperscript{63}

This exemption in section 4(6)(b) appears to have been created specifically for agreements between municipalities and consumers, although providers of other continuous services, would also be able to structure their agreements to fall within this exemption.\textsuperscript{64}

The municipality could not prove that its standard form service agreement meets the requirements of set out in section 4(6)(b) of the Act. It could therefore not prove that service agreement is exempted from definition of a credit facility and that the Act does not apply to claims for due but unpaid service charges.\textsuperscript{65}

\begin{footnotes}
\footnote{the utility or service remains in force, the supplier will make the service continuously available to be used, accessed or drawn upon from time to time as determined by the consumer – see s 1.}
\footnote{\textit{Nelson Mandela Bay Metropolitan Municipality v Nobumba} 2010 1 SA 579 (ECG) at 590H-591A.}
\footnote{See par 4.4. below.}
\footnote{\textit{Nelson Mandela Bay Metropolitan Municipality v Nobumba} 2010 1 SA 579 (ECG) at 591A-C. See also Otto & Otto 20.}
\footnote{\textit{Nelson Mandela Bay Metropolitan Municipality v Nobumba} 2010 1 SA 579 (ECG) at 591E-F. See also Scholtz et al 4-8.}
\footnote{\textit{Nelson Mandela Bay Metropolitan Municipality v Nobumba} 2010 1 SA 579 (ECG) at 593E-F.}
\end{footnotes}
3.4. Conclusion

It is evident from the discussion above that there are many elements to the definition of a credit facility. Most of these elements can, however, also be found in respect of other types of credit agreements. Although there is still uncertainty as to whether a credit facility exclusively applies to agreements in terms of which revolving credit is granted, it is submitted that this is the only characteristic which distinguishes a credit facility from other types of credit agreements. If revolving credit is not granted in terms of the agreement, the agreement may possibly be classified as another type of credit agreement to which the Act applies, but it will not constitute a credit facility.

4. CREDIT TRANSACTIONS

4.1. General

The second main category of agreements to which the Act applies is called credit transactions. A credit transaction can be any one of the following transactions: a pawn transaction; a discount transaction; an incidental credit agreement; an instalment agreement; a mortgage agreement; a secured loan; a lease; or other agreement in terms of which payment is deferred and interest is charged. It is important to note here that the agreements mentioned in section 8(2) is excluded from the definition of a credit transaction. Each of the transactions which do constitute credit transactions will now be discussed in more detail.

---

66 S 8(4).
67 These agreements have already been discussed in par 3.1. above.
4.2. Pawn Transactions

4.2.1. General

A pawn transaction is an agreement in terms of which a creditor provides credit, or advances money to a person, and at the same time takes possession of goods as security for the credit provided or money advanced to such person. Either the estimated resale value of the goods exceeds the amount of the credit provided or money advanced or the credit provider imposes a charge, fee or interest. The credit provider is entitled to sell the goods after a certain period has lapsed and may retain all the proceeds of such sale in the event that the consumer fails to settle his debt.\(^{68}\)

4.2.2. Discussion

A credit provider who enters into a pawn transaction with a consumer must specify in the agreement the date on which the agreement comes to an end. Such credit provider must also retain the goods given as security for the debt until the end of the agreement. The credit provider retains the property at his own risk. When the consumer settles the outstanding debt before or on the date of the end of the agreement, the credit provider must return the goods which were given as security to the consumer.\(^{69}\)

An example of a pawn transaction is where consumer A takes his furniture worth R8 000 to a pawnbroker B. He borrows R6 000 from B and the agreement stipulates that A must repay the amount within six months otherwise the furniture will be sold and the proceeds will be for B’s pocket. A fails to repay the debt, B consequently sells the goods for R7 500 and is entitled to the whole amount.\(^{70}\)

---

\(^{68}\) S 1. See also Otto & Otto 18 and Scholtz et al 8-4.

\(^{69}\) S 99(1).

\(^{70}\) Scholtz et al 8-4. It is unclear as to why the credit provider is entitled to the entire amount when selling the goods upon default of the debtor and it is also contrary to the common law. In terms of the common
It is important to note that, a pawn transaction is classified as a small transaction and can never be an intermediate or large credit agreement. Furthermore, pawn transactions have been exempted from the application of certain sections of the Act. Section 78(2)(d) determines that the sections dealing with reckless credit do not apply to pawn transactions. Pawn transactions are also exempt from the application of section 89 dealing with unlawful agreements and the sections dealing with the provision of a statement of account by the credit provider.

4.3. Discount Transactions

4.3.1. General

A discount transaction is an agreement which determines that goods or services will be provided to a consumer over a period of time. Two prices are quoted for settlement of the debt. A lower price is payable if the account is paid on or before a certain date, and a higher price is payable if the amount is paid after that date or if the debt is paid periodically during this period.

4.3.2. Discussion

An example of a discount transaction is where A buys goods from shop B. The cash price of the goods is R7 000 provided A pays the price within six months. If he pays the amount after this period the price becomes R8 400.

law, should the credit provider sell the goods and the proceeds from the sale exceeds the value of the debt, the surplus must be repaid to the debtor. The only instance in which the credit provider need not repay the surplus is when agreement has been reached between the parties that the credit provider will take over the goods given as security at a specified price if the price is market-related at the time of the debtor’s default – see Van Schalkwyk & Van der Spuy 311-312 and 343-344.

71 § 1.
72 ss 81-84.
73 § 89(1).
74 ss 108-110.
75 § 1.
A discount transaction is one of the few credit agreements in the National Credit Act which does not necessarily require a charge, fee or interest to be levied by the credit provider. It is only when the higher of the two amounts quoted is applicable that it can be said a fee, charge or interest has probably been included in the amount charged.

The definition of a discount transaction overlaps with the definition of an incidental credit agreement. This will be discussed in more detail when the latter transaction is dealt with hereafter.\(^76\)

### 4.4. Incidental credit agreement

#### 4.4.1. General

The term “incidental credit agreement” is new to the South African legal landscape. It has been described as being a “meaningless expression”\(^77\) and as an “unhappy one”.\(^78\)

The Act describes an “incidental credit agreement” as an agreement, irrespective of its form, in terms of which an account is tendered for goods and services that were provided to the consumer or goods or services that are to be provided to a consumer over a period of time. One of the following conditions also has to be applicable: a fee, charge or interest becomes payable when payment of the amount charged is not made on or before a certain date; or two prices are quoted for settlement of the account. The lower price is payable if the account is paid on or before a certain date, and the higher price is payable if the amount is paid after that date.\(^79\)

---

\(^76\) Par 4.4. below.
\(^77\) Otto & Otto 19.
\(^78\) Wallis J in JMV Textiles (Pty) Ltd v De Cholain Spareinvest 14 CC 2010 6 SA 173 (K2D) at 180D-F.
\(^79\) S 1.
4.4.2. Discussion

The type of agreements covered by the definition of 'incidental credit agreement' is really nothing other than ordinary sale and service contracts which are well-known in the legal and commercial world. These contracts usually do not have credit terms when first entered into but they do have default or penalty provisions in the event of late or non-payment.\footnote{Otto (2010) THRHR 638 and 649.} An example of such an incidental credit agreement is a doctor's account that was provided to a patient which provided for the date by which payment was to be made and furthermore provided that if payment was not made by that date, then interest of a certain amount would become payable.\footnote{De Kock (2010) De Rebus 27.}

Compared to the other credit agreements covered by the Act, incidental credit agreements have some unique characteristics which will now each be discussed separately.

4.4.2.1. Supply of goods or services

The first aspect which is clear from the definition of "incidental credit agreement" is that such a transaction entails the provision of goods or services or the future provision of goods or services. It seems, therefore, that it does not matter whether the goods or services have already been delivered to the consumer or whether the credit provider undertakes to provide such goods or services to the consumer over a period of time in the future. The impression is thus created that the credit provider may bill the consumer for goods or services that have not been provided yet.\footnote{Renke (2011) THRHR 464.}
4.4.2.2. Tendering of an account

The second aspect is that an account has to be tendered for the goods and services which have been provided or are to be provided over a period of time in the future. The word “tender” in the definition is in itself problematic. According to the general principles a consumer may choose to accept or reject a tender. The answer is probably that rejection would rarely happen in practice because the original agreement will normally provide for the rendering of accounts which the consumer will, at least by necessary implication, have to receive and act upon. It has been suggested that the legislature intended to use the word “render” instead of “tender”.\textsuperscript{83}

4.4.2.3. Charge, fee or interest

A charge, fee or interest may only be imposed by the credit provider if agreement was reached with the consumer in respect of the amount of such charge, fee or interest, or the basis on which it became payable.\textsuperscript{84} This agreement must have been reached on or before the date on which the relevant goods or services were supplied. If no such agreement was reached, then the credit provider is not entitled to a charge, fee or interest.\textsuperscript{85}

If the credit provider does not charge a late payment fee or interest or the higher price for full settlement of the account after such agreement has been reached, then the provisions relating to incidental credit agreements will not come into operation and the supplier need not deal with the matter in terms of the Act.\textsuperscript{86}

Section 5(3)(a) places a limitation on what may be charged in respect of fees, charges or interest. A credit provider may only recover a fee, charge or interest in

\textsuperscript{83} Otto & Otto 19 fn 21.
\textsuperscript{84} S S(3)(b).
\textsuperscript{86} De Kock (2010) De Rebus 27.
respect of a deferred amount under an incidental credit agreement as provided for in section 101(d), (f) and (g) subject to the maximum rates of interest or fees provided for in 105. According to section 101(d), (f) and (g), the only charges that may be imposed are those of interest, default administration charges and collection costs. Due to the nature of an incidental credit agreement a credit provider may not impose an initiation fee or a service fee.\textsuperscript{87} The maximum interest rate prescribed in respect of incidental credit agreements is 2\% per month.\textsuperscript{88}

\textbf{4.4.2.4. Limited application of the Act}

Incidental credit agreements are exempt from certain parts or sections of the Act.\textsuperscript{89} This is due to the incidental nature of an incidental credit agreement which was not necessarily meant to be a credit agreement upon conclusion of the agreement. In such a case it would be impractical for the seller of goods or services to comply with the more burdensome provisions of the Act, such as conducting a reckless-credit assessment and providing a pre-agreement statement and quote and an agreement in prescribed form, prior to selling the goods or services. It is not the intention of the National Credit Act to govern all transactions for the sale and purchase of goods and services.\textsuperscript{90}

Section 5 of the Act specifies which chapters, parts and sections of the Act apply to incidental credit agreements. The remainder of the Act does not apply to incidental credit agreements. The most important sections that a credit provider in terms of an incidental credit agreement does not have to comply with are the provisions dealing with registration requirements and procedures that have to be followed by the credit provider,\textsuperscript{91} credit marketing practices,\textsuperscript{92} reckless credit,\textsuperscript{93}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{88} Reg 42.
  \item \textsuperscript{89} Otto & Otto 29-30. See also Renke (2011) \textit{THRHR} 466-468; Otto (2010) \textit{THRHR} 642.
  \item \textsuperscript{90} Scholtz et al 4-9. See also See also Renke (2011) \textit{THRHR} 471.
  \item \textsuperscript{91} S 39-53 and 57-58.
  \item \textsuperscript{92} S 74-77.
\end{itemize}
\end{footnotesize}
unlawful credit agreements,\textsuperscript{94} unlawful provisions in credit agreements,\textsuperscript{95} pre-agreement disclosure,\textsuperscript{96} form and contents of credit agreements,\textsuperscript{97} disclosure of goods\textsuperscript{98} and surrender of goods,\textsuperscript{99} record-keeping obligations,\textsuperscript{100} statutory reporting.\textsuperscript{101}

4.4.3. Moment of conclusion of the agreement

The most important question which possibly arises in respect of an incidental credit agreement relates to the time of conclusion of the agreement. Due to the very nature of an incidental credit agreement, it is deemed to have been concluded only after a certain period of time has passed and not at the time that the goods or services are provided.\textsuperscript{102} Section 5(2) of the Act deals with this aspect and provides for two possibilities.

The first possibility is that the parties to an incidental credit agreement are deemed to have made the agreement on the date that is 20 business days\textsuperscript{103} after the credit provider has levied a late payment fee or interest for the first time in respect of the account tendered.\textsuperscript{104} If, for example, a credit provider has supplied goods and rendered an account to the consumer in respect of which payment for such goods must take place on or before 30 June 2011 and the consumer fails to pay by this determined date, the credit provider may start to levy interest or a late payment fee on any date after 30 June 2011 if the parties

\textsuperscript{93} S 81-84.
\textsuperscript{94} S 89.
\textsuperscript{95} S 90.
\textsuperscript{96} S 92.
\textsuperscript{97} S 93 and reg 31.
\textsuperscript{98} S 97.
\textsuperscript{99} S 127. See also Scholtz et al 4-9.
\textsuperscript{100} S 69(2).
\textsuperscript{101} Reg 62.
\textsuperscript{102} Otto & Otto 19. See also Renke (2011) THRHR 465.
\textsuperscript{103} Business days are calculated by excluding the day on which the first such event occurs and including the day on or by which the second event is to incur. Furthermore public holidays, Saturdays and Sundays that fall on or between the days contemplated are excluded – s 2(5). In effect the LIFO (Last In First Out) principle can be applied here i.e the last day is included and the first day excluded in the calculation.
\textsuperscript{104} S 5(2)(a) of the Act.
had agreed thereto. Should the credit provider commence with the levying of interest for example, on 4 July 2011, incidental credit will only be deemed to have been extended 20 business days after 4 July 2011.

The second possibility is that the parties to an incidental credit agreement are deemed to have made the agreement only upon the expiry of 20 business days after the date upon which a pre-determined higher price for full settlement of the account first becomes applicable.  

The next question which arises pertains to the status of the agreement and the legal position of the parties after an account has been rendered to the consumer and a late payment fee or interest charged by the credit provider, but pending the expiry of 20 business day period in terms of section 5(2).

Even though the agreement is not yet recognised by the Act as an incidental credit agreement, a deferral of payment has taken place and a fee or interest has been imposed or a higher amount charged. Therefore, it is clear that credit has been extended by the credit provider and that some sort of credit agreement is in existence pending expiry of the 20 business day period. It may be argued that, pending the expiry of the 20 business day period, a section 8(4)(f) other credit agreement has been concluded, since the requirements of that section has been met. It is, however, a completely impracticable solution and will lead to absurd results if one were to regard a credit agreement as a section 8(4)(f) agreement for a couple of weeks and thereafter as an incidental credit agreement. The main reason for this is that all the sections in the Act apply to section 8(4)(f) other agreement but the Act only has limited application to

\[105\] Renke (2011) THRHR 465.
\[106\] See par 4.9, below for a discussion of this type of agreement.
\[107\] Namely that payment of an amount by one person to another person is deferred and interest is levied in respect of the agreement.
\[110\] S 5(1).
incidental credit agreements. For instance, the Act requires a credit provider to be registered if it should conclude a section 8(4)(f) other agreement, but it was clearly intended to exempt providers of incidental credit from the scope of the Act.\textsuperscript{111}

Section 5(1) indicates which sections of the National Credit Act apply to incidental credit agreements. Renke\textsuperscript{112} submits that this section, and more specifically, the proviso in sec 5(1)(f) can be used as an indicator as to what the nature of the credit agreement is pending expiry of the 20 business day period. According to him it is significant that only Parts D and E of chapter 5 apply to the agreement once the incidental credit agreement is deemed to have been made in terms of section 5(2), which is upon expiry of the 20 business days. He further submits that due to the fact that the other subsections do not contain the specific wording of section 5(1)(f), the most likely conclusion is that the chapters, sections and parts in chapters mentioned in section 5(1)(a)-(e) and (g) already apply to the incidental credit agreement before expiry of the 20 business day period.\textsuperscript{113}

Therefore, a tie is created between the credit provider and the consumer the moment that there is compliance with the definition of an "incidental credit agreement" in terms of section 1 of the Act, meaning the moment a fee, charge or interest becomes payable or once the higher of the quoted prices became applicable due to the fact that the debtor has not paid timeously in terms of the agreement. Though an incidental credit agreement in the sense intended by the legislature has not yet come into existence, the fact that there is a legal tie between the parties is evidenced by the application of certain sections in the Act.\textsuperscript{114} If it had been the legislature's intention that all the chapters, sections and parts of chapters mentioned in sec 5(1) have to apply to an incidental credit agreement only once the agreement is deemed to have been made in terms of

\textsuperscript{111} Otto (2010) THRHR 647.
\textsuperscript{112} Renke (2011) THRHR 469.
\textsuperscript{113} Renke (2011) THRHR 469.
\textsuperscript{114} Renke (2011) THRHR 472. See also Otto (2010) THRHR 647.
section 5(2), it would have been easy to include a specific provision to that effect as the legislature had done in section 5(1)(f).

It is still unclear as to what the purpose of the 20-day provision in section 5(2) is. It is clear, however, that even though the incidental credit agreement in its legislative form only comes into existence 20 business days after interest is first levied or a higher amount is charged, there is nonetheless a valid and binding credit contract between the parties, be it a contract for sale of goods or a contract for the delivery of services, pending expiry of that period. This may be illustrated by an example. Manufacturer A provides stock to retailer B. The parties agree that payment for the goods must be effected within 30 days from the date of delivery. Should B fail to pay the purchase price, the outstanding amount will attract interest at a rate of 2% per month after the credit period of 30 days. According to the Act the incidental credit agreement will only come into being 20 days after A starts charging interest. A contract of sale existed right from the start, however.116

4.4.4. Overlap with discount transactions and credit facilities

When comparing the definition of an incidental credit agreement with the definition of a discount transaction, there is clearly an overlap in the definitions. Both definitions make provision for an agreement in terms of which goods or services are supplied over a period of time. Both definitions also provide for the possibility of a lower price being applicable if the account is paid on or before a certain date, where after a higher price applies.117 According to Otto118 the main difference between the two types of credit transactions is that in the case of an incidental credit agreement an account is tendered for the provision of the goods or services and in the case of a discount transaction such account is not

117 Scholtz et al 8-5; Otto & Otto 19.
required. I do not agree with this distinction since section 108 requires the credit provider to deliver a statement of account in the case of a discount transaction if the debtor has not paid timeously and the higher amount of the two quoted amounts becomes applicable. The definition of a discount transaction also makes mention of an account. Therefore, in the case of both transactions, an account must be rendered by the credit provider. The only other difference is that the definition of a discount transaction does not require a fee, charge or interest to be levied.\textsuperscript{119}

It becomes very difficult, if not impossible, to distinguish when an agreement is a discount transaction and when it is an incidental credit agreement. Yet it is very important to determine which type of transaction one is dealing with because a large number of the Act’s provisions do not apply to incidental credit agreements but they do apply to discount transactions.\textsuperscript{120} This issue may be subject of much litigation in times to come.

A credit facility and an incidental credit agreement also share certain common features. Both these agreements provide for the delivery of goods or services, the granting of credit and the payment of a charge, fee or interest. The main difference between the two types of agreements has been authoritatively explained in \textit{JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC}.\textsuperscript{121} A fee, charge or interest only becomes payable in the case of an incidental credit agreement if the consumer does not pay his debt on or before the agreed date, whereas in the case of a credit facility interest runs \textit{ab initio}.

The only inference that can be drawn is that there was a deliberate distinction made in this regard by the legislature between the two definitions. If a contract provides for the delivery of goods or services and interest starts to run \textit{ab initio} it should, therefore, be regarded as a credit facility. If the contract is subject to a

\begin{itemize}
\item \textsuperscript{119} Otto (2010) \textit{THRHR} 640.
\item \textsuperscript{120} Otto (2010) \textit{THRHR} 640.
\item \textsuperscript{121} 2010 6 SA 173 (KZD) 179C-H.
\end{itemize}
condition that interest will only be charged if payment was not made before a certain date, it should be treated as an incidental credit agreement.\textsuperscript{122}

One other distinction between a credit facility and an incidental credit agreement is that an account is tendered in the case of the latter. In other words a single account is envisaged, although this may obviously be followed by further accounts if the amount remains unpaid. In the case of a credit facility periodic bills are sent.\textsuperscript{123}

\textbf{4.4.5. Case Law}

In a recent unreported case, \textit{TS Dlamini v Body Corporate of Frenoleen}\textsuperscript{124} the question arose as whether levies charged by a body corporate or interest in respect of unpaid levies fall under the definition of an "incidental credit agreement" and thus within the scope of the Act. The court, in coming to its decision, reasoned in this matter that firstly, a body corporate does not supply goods or services to its members, nor does it advance money or credit to its members. Secondly, levies charged by a body corporate to its members do not constitute an account tendered for goods or services provided to its members. Thirdly, the members' obligations to pay levies do not arise from an agreement, but they are payable due to the mandatory provisions of the Sectional Titles Act\textsuperscript{125} and its Regulations.\textsuperscript{126} Maree argues in this regard that once it is accepted that an obligation to pay levies does not arise from an agreement, the mere fact that interest is raised in respect of levies in arrears does not change the arrangement to an incidental credit agreement.\textsuperscript{127}

\begin{flushleft}
\textsuperscript{122} Otto (2010) \textit{THRHR} 640.
\textsuperscript{123} Otto (2010) \textit{THRHR} 640-641.
\textsuperscript{124} Unreported case AR 611/09 (KZNPC)
\textsuperscript{125} 95 of 1986.
\textsuperscript{126} Mills (2010) \textit{De Rebus} 61.
\textsuperscript{127} Maree (2009) \textit{De Rebus} 20.
\end{flushleft}
In *Mitchell v Die Beheerliggaam*¹²⁸ the same question was addressed. It was also found that levies paid by members to a body corporate in terms the Sectional Title Act¹²⁹, and interest charged on arrear levies, are not subject to the National Credit Act. They are not paid in terms of any agreement, but rather by virtue of an obligation imposed by statute.¹³⁰

In the above discussion¹³¹ of *Nelson Mandela Bay Metropolitan Municipality v Nobumba*¹³² the provision by a supplier of a utility or other continuous service in terms of section 4(6)(b) of the Act has been dealt with in much detail. The only observation which is of relevance here is that only the interest which has been imposed by the supplier in respect of overdue amounts, constitutes incidental credit. The fact that an agreement for municipal services can give rise to incidental credit agreement, where interest is charged in respect of overdue amounts, does not mean that institutions such as municipalities are exempted from the Act or that their agreements with the public will always give rise to incidental credit agreements. It depends on the wording and conditions of the particular agreement whether it will be dealt with as an incidental credit agreement at all, or rather as another form of credit agreement such as a credit facility.¹³³ So, for instance, a municipal agreement for the rendering of services can only be treated as an incidental credit agreement if the consumer is allowed 30 days to pay his debt. If not, it may be regarded as a credit facility.¹³⁴

---

¹²⁸ 2010 5 SA 75 (GNP).
¹²⁹ 95 of 1986.
¹³⁰ *Mitchell v Die Beheerliggaam* 2010 5 SA 75 (GNP) at 81C-D.
¹³¹ Par 3.3 above.
¹³² 2010 1 SA 579 (ECG).
¹³⁴ *Nelson Mandela Bay Metropolitan Municipality v Nobumba* 2010 1 SA 579 (ECG) at 590H-591D. See also Otto & Otto 20.
4.5. Instalment agreement

4.5.1. General

An instalment agreement is a transaction in terms of which movable property is sold to a consumer. Payment of the purchase price is deferred in whole or in part and is to be paid in instalments. Possession and use of the movable property is transferred to the consumer. Ownership is either reserved by the seller until the agreement is fully complied with, or ownership is transferred to the consumer immediately while the seller retains a right to repossess the movable property should the consumer fail to satisfy his financial obligations. The consumer has to pay interest, fees or charges in respect of the agreement itself or in respect of the amount deferred. \(^\text{135}\)

4.5.2. Discussion

Due to the fact that the majority of the people in South Africa cannot afford to pay a large amount of cash in a lump sum for basic as well as luxurious items, instalment agreements are a common feature in many agreements for the sale of movable property today.

A single example of such agreement is where a credit provider sells furniture to a consumer and the consumer pays the price over a number of months by means of monthly instalments. The agreement usually, but not necessarily, contains a provision that the consumer does not become owner until the last instalment has been paid. \(^\text{136}\)

Below, certain elements of an instalment agreement will be considered in more detail.


\(^{136}\) Otto & Otto 21.
4.5.2.1. Periodic payments

The definition of "instalment agreement" provides that the debt must be repaid by means of periodic payments. It is, therefore, clear that only contracts of sale in which the price is payable by means of instalments is covered in this category of credit transactions. The controversy which existed under the Credit Agreements Act, where it was decided that instalment sale transactions included agreements in terms of which the price is payable in a lump sum,\textsuperscript{137} has come to an end. The definition of "instalment agreement" in the National Credit Act makes reference only to transactions where the price is paid by means of periodic payments and clearly lump sum contracts are not included.\textsuperscript{138}

There is nothing in the definition, however, which suggests that these periodic payments should be equal in size. In practice the instalments will generally be of equal size. Instances where a deposit is required and where the final instalment is a balloon payment are examples where the instalments will not be of equal size.\textsuperscript{139}

4.5.2.2. Transfer of ownership

The definition of an instalment agreement affords a choice to the credit provider as to the provisions pertaining to the transfer of ownership. The credit provider can either choose to reserve the passing of ownership of the movable property or to enter into a contract whereby ownership passes immediately to the consumer. In the latter instance, the credit provider will have a right to repossess the movable property should the consumer be in default.\textsuperscript{140}

\textsuperscript{137} Sandoz Products (Pty) Ltd v Van Zyl NO 1996 3 SA 726 (C) at 732C; Ukubona 2000 Electrical CC v City Power Johannesburg (Pty) Ltd 2004 6 SA 323 (SCA) at 327C.
\textsuperscript{138} Otto & Otto 21.
\textsuperscript{139} Scholtz et al 8-7 fn 28.
\textsuperscript{140} Renke & Pillay (2008) THRHR 642.
Ownership reservation clauses may reserve the passing of ownership of the movable property only until certain payments have been made. Usually, however, ownership of the movable property is reserved or until the final instalment in terms of the agreement has been paid.\textsuperscript{141} It is important to realize that reservation of ownership does not suspend the whole sale. An ownership reservation clause does, however, create a suspensive condition. The effect of such clause is the suspension of the passing of ownership under a completed sale.\textsuperscript{142}

If a contract of sale of movable goods contains a clause reserving ownership, ownership remains with the seller during the period between the conclusion of the contract and the payment of the instalments agreed upon. The fact that ownership remains with the seller during this period provides important security, in the form of a real right of ownership, to the seller who has lost possession of the object of the sale and has supplied credit for the payment of the purchase price. Should the buyer alienate the object of the sale during the interim period to a third party, the seller could institute the common law \textit{rei vindicatio} to claim the goods back from the third party.\textsuperscript{143}

Where the credit provider has chosen to enter into an instalment agreement which allows for the immediate passing of ownership with a right of repossessio, the credit provider loses his most important for of security to ensure payment of the purchase price, namely ownership of the movable property. Otto argues in this regard that a credit provider may only exercise his right of repossessio in the event of non-payment by the consumer. This is evidenced by the words "consumer fails to satisfy all of the consumer’s \textit{financial obligations}”. It has been argued that it seems to be the legislature’s intention to prohibit general clauses in the instalment agreement, entitling the credit provider to repossess the goods

\textsuperscript{141} Renke & Pillay (2008) \textit{THRHR} 645. See also Otto 58 in this regard.
\textsuperscript{142} Renke & Pillay (2008) \textit{THRHR} 646. \textit{Info Plus v Scheelke} 1998 3 SA 184 (SCA) at 1901-J.
upon any form of breach of contract by the consumer. Otto, however, criticises the method used by the legislature to prohibit such practices by, for instance, hiding the prohibition in the definitions clause of the Act. In actual fact, the consequence is that the agreement which provides for repossession in any case other than a breach of a “financial obligation” does not qualify as an instalment agreement for the purposes of the Act. Such agreement will probably, nevertheless, be subject to the Act on the basis of section 8(4)(f). In practice, however, one does not often find an instalment agreement where ownership is transferred immediately subject to repossession upon a specified event. Although this type of contract is not commonly used in practice sellers may still want to make use of it. A good example is where the value of the movable property which is the object of sale is minimal or might not serve as adequate security for the payment of the purchase price an ownership reservation clause is not of much value to the credit provider. It is important that credit providers are acquainted with of the options available to them and their consequences in order to protect their interests accordingly.

4.5.2.3 Overlap with the definition of a credit facility

A question arises as to what the difference is between a credit facility and an instalment agreement. Both credit agreements are agreements for the sale of movable property on credit. One difference lies in the transfer of ownership to the consumer. An instalment agreement as per the definition must contain a clause regarding the transfer of ownership of the property, but this is not required in the case of a credit facility. In the latter case, the common-law rules will apply, in terms of which ownership of the property will pass to the buyer immediately upon delivery thereof to the buyer. Another difference is the fact that in the event of

---

145 Scholtz et al 8-7, 8-8.
an instalment agreement fixed-sum credit is granted. It was argued earlier\textsuperscript{148} that a credit facility pertains exclusively to agreements in terms of which revolving credit is granted.

If it is a contract for the sale of movable property which does not contain a clause regulating the transfer of ownership and the agreement also does not comply with the elements of a credit facility, this does not necessarily mean that the agreement will escape the ambit of the Act altogether. It may still be a credit transaction in terms of section 8(4)(f) and, therefore, subject to the Act provided a fee, charge or interest is payable.\textsuperscript{149}

4.5.2.4. Miscellaneous

In terms of section 121 of the Act, an instalment agreement is one of only two agreements to which a cooling-off right applies. This right only applies if the agreement was concluded on premises other than the registered business premises of the credit provider. In terms of this cooling-off right, the consumer has the right to cancel the instalment agreement within 5 business days by delivering the appropriate notice to the credit provider.\textsuperscript{150}

Another right which is applicable specifically in respect of instalment agreements is the right to surrender the goods, which is the subject of the instalment agreement, to the credit provider at any stage if the credit provider is in possession thereof or by returning possession to the credit provider.\textsuperscript{151} The consumer may then require the credit provider to sell the goods in order to satisfy the outstanding debt. If the goods are not in the credit provider’s possession, the consumer must deliver the goods to the credit provider within 5 business days.

\textsuperscript{148} Par 3.2.4. above.
\textsuperscript{149} Par 3.2.4. above.
\textsuperscript{150} S 121 (2).
\textsuperscript{151} S 127.
after written notice was given to terminate the secured loan agreement.\textsuperscript{152} If the credit provider, however, sells the goods for an amount which is higher than the amount which the consumer owes the credit provider, the surplus of the sale must be given to the consumer.

4.6. Mortgage agreement

4.6.1 General

A mortgage agreement is defined in section 1 of the Act as a credit agreement that is secured by a pledge of immovable property. The term ‘mortgage’ is similarly defined in the Act as a pledge of immovable property that serves as security for a mortgage agreement.\textsuperscript{153}

4.6.2. Discussion

The definition of a “mortgage agreement” has been described as "a monstrosity"\textsuperscript{154} and as "unfortunate".\textsuperscript{155} In South African law only movable property can be pledged. Immovable property cannot be pledged, even if the owner surrenders physical control thereof in favour of the credit provider.\textsuperscript{156} The manner in which immovable property is burdened is by the registration of a mortgage bond over such property.\textsuperscript{157} Renke, Roestoff and Haupt are of the opinion that "hypothecation" of immovable property would probably have constituted a better choice of words.\textsuperscript{158} It can, however, be deduced from the words "pledge of immovable property" that the legislature intended that the immovable property should serve as security for the repayment of money which

\textsuperscript{152} S 127(1)(a)-(b).
\textsuperscript{153} S 1.
\textsuperscript{154} Otto & Otto 22.
\textsuperscript{156} Van Schalkwyk & Van der Spuy 303.
\textsuperscript{157} Van Schalkwyk & Van der Spuy 327.
has been deferred.\textsuperscript{159} It ought therefore to be clear that a debt in terms of a housing loan which is secured by the registration of a mortgage bond over the land concerned is included in the definition of a mortgage agreement. To make the definition more suitable to the terminology used in South African law it has been suggested by Otto and Otto that the words ‘pledge of immovable property’ should be construed as meaning ‘registration of a bond over immovable property.’ The same argument also applies to the definition of a mortgage.\textsuperscript{160}

Furthermore, the definition of a mortgage agreement makes no mention of the charging of a fee or interest.\textsuperscript{161} It is, therefore, unclear whether it is a requirement for such an agreement to fall within the scope of the Act. It seems, however, as if it is not an additional requirement if one considers first, the definition of the noun “credit”,\textsuperscript{162} which merely requires that there must be a deferral in respect of the payment owing to the credit provider. Secondly, the wording used in section 102 of the Act provides that if a credit agreement is a mortgage agreement the credit provider may include any of charges or fees listed in that section.\textsuperscript{163}

It is also important to note that a mortgage agreement is always a large agreement for purposes of the Act.\textsuperscript{164}

\textsuperscript{159} Stoop (2008) \textit{De jure} 359-360.

\textsuperscript{160} Otto & Otto 22.

\textsuperscript{161} Otto & Otto 22.

\textsuperscript{162} S 1.

\textsuperscript{163} The legislature may have intentionally omitted the requirement for the payment of a charge fee or interest in this regard to provide for e.g a money loan between friends where a mortgage bond is registered over immovable property of one person as security for the repayment of the money to the other. In such instance there is a deferral of payment and such a transaction would therefore qualify as a transaction which is covered by the Act even if no interest or fees are charged.

\textsuperscript{164} S 9. See also Otto & Otto 22.
4.7. Secured loan

4.7.1. General

A secured loan is an agreement in terms of which a credit provider grants credit, or advances money to a consumer. In addition, the credit provider 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 the agreement. Instalment agreements are explicitly excluded from the definition of a secured loan.\textsuperscript{165}

4.7.2. Discussion

As is the case with the definition of a mortgage agreement, the definition of a secured loan is another example of bad drafting on the part of the legislature. Nevertheless, in the discussion that follows an attempt will be made to make sense thereof in the context of South African law.

4.7.2.1 Retention of title

According to Otto,\textsuperscript{166} the words "retains, or receives a pledge or cession" refer to the word "title". The word "title" can only mean ownership. The definition makes provision for retention of ownership as security. It is indeed possible to retain ownership of a movable thing. A common example of retention of ownership is an instalment agreement which contains an ownership reservation clause. A further example is a contract of lease. The obvious difference here is that in the case of an instalment agreement and a lease, the credit provider is the owner of the thing. In the case of a secured loan in the South African context, the consumer is the owner who gives possession of the thing to the credit provider without the intention of transferring ownership. Furthermore, instalment

\textsuperscript{165} S 1.
\textsuperscript{166} Otto & Otto 22.
agreements are expressly excluded by the definition of a secured loan and the Act provides separately for a lease agreement.

4.7.2.2. Pledge or cession of title

The part of the definition which relates to the “pledge or cession of the title” is also problematic. In law it is not possible to pledge or cede ownership. The words used were probably intended to mean the pledge of the movable thing itself, not the pledge of ownership.167 An example of a pledge is for instance where A owes B money, A can hand over any movable property of which he is the owner to B, to keep in pledge until he has settled his debt with B. Should A fail to settle his debt, B can sell the pledged property in order to convert it into cash as payment for A’s debt.168

The definition of ‘secured loan’ overlaps to a certain extent with that of a pawn transaction.168 The main difference is that in the case of a pawn transaction, the credit provider is entitled to all the proceeds resulting from a sale of goods.170 Again, however, it is important to determine which transaction is at hand, since pawn transactions are exempt from the application of certain provisions of the Act.

4.7.2.3. Other thing of value

The definition, furthermore, extends to a “cessión de...other thing of value as security”. The word “thing” can be given a rather wide meaning and should probably be done bearing in mind the apparent intention of the definition and the use of the word “cessión”. In such a case, a “thing” may even include a right with

167 Otto & Otto 22.
168 Van Schalkwyk & Van der Spuy 302.
169 See par 4.2.1. above.
170 Scholtz et al 8-11.
the effect that a cession *in securitatem debiti* falls within the ambit of a secured transaction.\textsuperscript{171}

In fact, by the use of the words "other thing of value", the definition is wide enough to even include a mortgage bond over immovable property. But once again the Act already has a separate category of transaction called a mortgage agreement.\textsuperscript{172}

4.7.2.4. Miscellaneous

Again, as in the case with a mortgage agreement, it is not a requirement for a loan that payment of a fee, interest or charge is required to qualify as a secured loan for the purposes of the Act.\textsuperscript{173}

In the case of a secured loan, the consumer also has a right to surrender the goods which are in the credit provider’s possession.\textsuperscript{174} This right has already been discussed elsewhere.\textsuperscript{175}

4.8. Lease

4.8.1. General

A lease is an agreement in terms of which temporary possession or the right to use movable goods is granted to a consumer. Payment of the rent occurs on a determined periodic basis in instalments or is deferred in whole or in part for any period during the subsistence of the agreement. A fee, charge or interest is payable by the lessee in respect of the deferral of payment. At the end of the agreement, ownership in the movable goods passes to the consumer either

\textsuperscript{171} Scholtz *et al* 8-11.

\textsuperscript{172} Otto & Otto 22. See also Scholtz *et al* 8-11.

\textsuperscript{173} Otto & Otto 22.

\textsuperscript{174} S 127(5)(a).

\textsuperscript{175} See para 4.5.2.4. above.
absolutely or when certain conditions specified conditions are complied with. An example of such a condition is that a consumer may be required to pay the lessor an amount which represents the value of the movable thing at the time that the lease expires. 176

4.8.2. Discussion

The definition in the Act of a lease is completely different from the common-law concept of a lease in that the definition provides for the transfer of ownership. The Act’s definition is contrary to both the common law and the modern South African law prior to the enactment of the National Credit Act and it has confused the concept of a lease with that of a sale. This raises the question as to which common law rules should be applied to the so-called lease. 177

In fact, it is difficult to distinguish the definition of a “lease” from the definition of an “instalment agreement”. Both these definitions make provision for the possession and use of movable goods, payment in the form of interest-bearing instalments and the eventual transfer of ownership. 178

The definition of a “lease” is, furthermore, contradictory. It refers to “temporary possession” but thereafter provides that ownership passes to the lessee at the end of the agreement. If the agreement provides that ownership will remain with the lessor, the agreement is not a lease for the purposes of the Act. It can, however, be regarded as a credit transaction in terms of section 8(4)(f) and will, therefore, also subject to the Act but only if a fee, charge or interest is payable. 179

A lease agreement is the other agreement, apart from an instalment agreement where the cooling-off right in terms of section 121 of the Act is applicable. This

177 Otto & Otto 23. See also Scholtz et al 8-12.
178 Otto & Otto 23. See also Scholtz et al 8-12.
right only applies if such agreement was concluded on premises other than the registered business premises of the credit provider. In terms of this cooling-off right, the consumer has the right to cancel the lease agreement within 5 business days by delivering the appropriate notice to the credit provider.

The consumer in terms of a lease agreement also has the right to surrender the leased goods to the credit provider at any stage if the credit provider is in possession thereof or by returning possession to the credit provider.\textsuperscript{180}

4.9. Any other credit agreement

4.9.1. General

Section 8(4)(f) of the Act contains a general category to cater for the granting of credit which falls outside the definitions of the above credit transactions. It covers any deferral of payment of an amount which is owed by one person to another when a charge, fee or interest is payable.

An example of a section 8(4)(f) other agreement is a transaction for the sale of land for residential purposes. The parties agree that the price is payable by means of monthly instalments over a period of five years. Interest is also levied by the seller. In this instance the Alienation of Land Act\textsuperscript{181} also applies to the contract.\textsuperscript{182} It is important to note here that where provisions of chapter 2 of the Alienation of Land Act is in conflict with the provisions of the National Credit Act, the provisions of the National Credit Act will prevail.\textsuperscript{183}

\textsuperscript{180} S 127.
\textsuperscript{181} 68 of 1981.
\textsuperscript{182} Renke, Roestoff & Haupt (2007) \textit{Obiter} 235 fn 42. See also Grové & Otto 104-106; Otto & Otto 24.
\textsuperscript{183} See schedule 1 to the Act.
This category may also include transactions such as an ordinary direct money loans, an interest-bearing lease where transfer of ownership does not take place and a house improvement scheme in terms of which the building contractor is paid over a period of time and, by agreement, charges interest on the contract amounts.

4.9.2. Case law

In *Carter Trading (Pty) Ltd v Blignaut* an acknowledgement of debt was signed by the defendant in respect of goods purchased from the plaintiff. The question arose as to whether an acknowledgement of debt constitutes a credit agreement in terms of section 8(4)(f) of the Act. Van der Bijl AJ was of the opinion that an acknowledgement of debt does not constitute a novation of the obligations to the credit provider; it is rather a confirmation that creates a further obligation relating to the same performance. It was, therefore, decided that an acknowledgement of debt is indeed a credit agreement, but it could only be classified as a section 8(4)(f) other agreement in terms of the Act.

It was further also decided in *Bridgeway Ltd v Markham* that a sale of rights at a discount does not fall within the broad definition in sec 8(4)(f).

4.10. Conclusion

Credit transactions are the largest category of credit agreements for which the Act makes provision. Every credit transaction is unique and even though some of the definitions may overlap, every single transaction has some element which

---

184 Scholtz et al 8-14 fn 62.
185 Otto & Otto 24 fn 53.
187 2010 2 SA 46 (ECP).
189 *Carter Trading (Pty) Ltd v Blignaut* 2010 2 SA 46 (ECP) at 52B-D.
distinguishes it from the other. From the discussion of all these various credit transactions it should be clear that the legislature intended the scope of the Act to be as wide as possible and to bring almost every single credit agreement within the ambit of the Act.

5. CREDIT GUARANTEES

5.1. General

A credit guarantee is an agreement in terms of which 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 National Credit Act applies.\(^\text{191}\)

Certain agreements are excluded from the scope of the Act in terms of section 8(2). These agreements are a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance, a lease of immovable property or a transaction between a stokvel and a member of the stokvel in accordance with the rule of that stokvel.

5.2. Primary and accessory guarantees

The definition of a credit guarantee is by no means clear and has given rise to different opinions as to what the legislator intended when it included the definition in the Act. Some authors\(^\text{192}\) are of the opinion that the definition refers to accessory guarantees such as ordinary suretyship agreements, and some\(^\text{193}\) are of the opinion that it refers to a guarantee of a primary nature such as demand guarantees or letters of credit.

\(^{191}\) S 8(5).
\(^{192}\) Stoop & Kelly-Louw (2011) PER 67.
Because a suretyship agreement is an essential tool that credit providers use to limit their risk when granting credit, it is important to determine whether an ordinary suretyship agreement qualifies as a credit guarantee and thus as a credit agreement in terms of the National Credit Act. If the answer is in the affirmative, it will mean that a surety is entitled to the protection of the National Credit Act, both prior to the conclusion of the agreement as well as at the time that the surety is held liable for performance and that the credit provider will have to comply with the requirements of the Act when requesting the surety to perform.

Forsyth and Pretorius suggested the following definition of a suretyship agreement, which was recognised by the Appellate Division (as it was called then):

"an accessory contract by which a person (the surety) undertakes to the creditor of another (the principal debtor), primarily that the principal debtor, who remains bound, will perform his obligation to the creditor and, secondarily, that if and so far as the principal debtor fails to do so, the surety will perform it or, failing that, indemnify the creditor."

According to this definition it is clear that a suretyship agreement has two important characteristics. First, a suretyship contract is accessory in nature, meaning every suretyship agreement is conditional upon the existence of a valid principal obligation between the debtor and the creditor. In the absence of a valid principal obligation, the surety is generally not bound and the surety can raise any defense that the principal debtor can raise. Secondly, the creditor can only

---

194 Stoop & Kelly-Louw (2011) PER 68.
195 Stoop & Kelly-Louw (2011) PER 68.
198 Trust Bank of Africa Ltd v Frysche 1977 3 SA 562 (A) at 584E; Sopirstein v Anglo African Shipping Co (SA) Ltd 1978 4 SA 1 (A) at 11H; Nedbank v van Zyl 1990 2 SA 469 (A) at 473I.
demand performance from the surety if the principal debtor has committed
breach of contract.\textsuperscript{201}

Lötz\textsuperscript{202} agrees that a suretyship agreement has an accessory nature and that a
surety's liability is triggered only when the principal debtor fails to perform, but he
critises the definition given by Forsyth and Pretorius in one respect. While it can
be accepted that at the time of contracting it will be in the minds of both the
creditor and the surety that the principal debtor will perform, it is incorrect to say
that the surety's primary undertaking is that the principal debtor will perform as
such "primary undertaking" clearly does not create any obligation between the
creditor and the surety. If such primary obligation were indeed created, a creditor
would probably have to call on a surety to perform in terms of the primary
obligation (for instance the surety may have to persuade the principal debtor to
perform) before enforcing the secondary obligation and that is not the law. Whilst
recognizing that there is no universally accepted definition of suretyship, he
proposed the following improved definition\textsuperscript{203} of a suretyship agreement to be:

\begin{quote}
"a contract in terms of which one person (the surety) binds himself as debtor to
the creditor of another person (the principal debtor) to render the whole or part of
the performance due to the creditor by the principal debtor if and to the extent
that the principal debtor fails, without lawful excuse, to render the performance
himself."
\end{quote}

In reaction to the criticism, Forsyth has since amended the definition by deleting
the word "primarily" and "secondarily". According to him it should now be clear
that a surety has but one obligation, that is to perform if the debtor fails to
perform.\textsuperscript{204}

\textsuperscript{201} Stoop & Kelly-Louw (2011) \textit{PER} 79.
\textsuperscript{202} Lötz 192-193.
\textsuperscript{203} Lötz 192-193.
\textsuperscript{204} Forsyth 29 fn 10.
Contrary to the accessory nature of suretyship agreements, primary guarantees, such as demand guarantees and letters of credit, create primary obligations which are not dependent on the existence of a principal debt between the principal debtor and the creditor.\textsuperscript{205} In the case of a primary guarantee the creditor has a choice to claim from the debtor or from the credit guarantor. The creditor does not have to wait for the debtor to fail to perform. He can claim against the credit guarantor at any time, provided there is a valid credit agreement concluded between the creditor and debtor. This is in contrast with the liability of the surety that can never arise unless the principal debtor is in default.\textsuperscript{206} Primary guarantees are typically found in relation to property transfers where bank guarantees are used or a documentary letter of credit which is a highly liquid instrument frequently used in international trade.\textsuperscript{207}

In South African law the words “guarantee” and “suretyship” have often been used interchangeably by academics and the courts. It is, however, evident from the discussion above that these terms do not necessarily mean the same and that the term “guarantee” has a much wider meaning than that of “suretyship”. Unfortunately the practice of using these two terms interchangeably is etched in the South African law reports and will be difficult to eradicate.\textsuperscript{208} One must always look at the facts of every case to determine whether a specific court had a primary guarantee or an accessory guarantee in mind when handing down its judgment, even though it may have used incorrect terminology to define the obligation.

\textsuperscript{205} Stoop & Kelly-Louw (2011) \textit{PER} 69; Lütz \textit{Suretyship} 195; List \textit{v} Jungers 1979 3 SA 106 (A) at 126G.
\textsuperscript{206} Mostert (2009) \textit{De Rebus} 53.
\textsuperscript{207} Mostert (2009) \textit{De Rebus} 55; See also Forsyth 30-31.
\textsuperscript{208} Stoop & Kelly-Louw (2011) \textit{PER} 70; Forsyth 27 In 7 and 30-32; See also Mouton \textit{v} Die Mynwerkersunie 1977 1 SA 119 (A) at 126A-B where Wessels JA said that a “guarantee” most commonly meant to bind oneself as surety and Basil Read (Pty)Ltd \textit{v} Beta Hotels (Pty) Ltd 2001 2 SA 760 (C) at 766E-F where a contract of guarantee was held to be in the nature of a suretyship.
5.3. Characteristics of a credit guarantee

The question which remains to be answered is whether the definition of "credit guarantee" in terms of the National Credit Act encompasses guarantees that are unconditional and primary in nature or guarantees of an accessory nature that are conditional upon breach of contract by the debtor.\textsuperscript{209}

From the definition, the following characteristics of a credit guarantee may be highlighted: (a) a person undertakes to perform on demand; (b) a person undertakes to satisfy the obligation of another consumer; (c) the Act applies to the credit guarantee only insofar as it applies to the credit facility or credit transaction in relation to which the credit guarantee was concluded. A discussion of these characteristics follows below.

5.3.1. A person undertakes to perform ‘on demand’

An agreement is a credit guarantee if a person undertakes to satisfy another consumer’s obligation \textit{on demand}. One might ask if an ordinary suretyship agreement indeed falls within the ambit of this definition, considering the fact that liability on the part of a surety can arise only when the principal debtor is in default and not as stated in the definition merely ‘upon demand’.\textsuperscript{210}

Mostert has argued that the definition of a credit guarantee in the National Credit Act cannot be reconciled with the definition and characteristics of an ordinary suretyship agreement. His main argument is based on the fact that a surety does not have to perform the principal obligation on demand. A surety is entitled to raise any defense that the principal debtor may raise, he is entitled to a number of common law benefits and can be released from his obligation if it is found that

\textsuperscript{209} Stoop & Kelly-Louw (2011) \textit{PER} 78.
\textsuperscript{210} Stoop & Kelly-Louw (2011) \textit{PER} 78; Mostert (2009) \textit{De Rebus} 53.
the creditor prejudiced him in his dealings with the debtor.\textsuperscript{211} The gist of Mostert's argument is, therefore, that because of the words "on demand" which the legislator uses in section 8(5) of the National Credit Act in referring to the liability of the debtor, it intended to exclude ordinary suretyship agreements from the scope of the Act. According to him, the definition of a credit guarantee provides only for primary guarantees such as a demand guarantee or a letter of credit.\textsuperscript{212}

Sloop and Kelly-Louw have criticised Mostert's opinion and they have argued in this regard that the words "upon demand" used in the definition of a credit guarantee must not be read too literally and must not be over-emphasised.\textsuperscript{213} These words in the Act simply mean that in terms of this type of agreement the person (surety) promises to satisfy any obligation of another consumer (principal debtor) when the credit provider has informed him that the consumer (principal debtor) has defaulted and thereby demands (calls upon) the surety to perform. Until a creditor calls upon a surety to perform in terms of the suretyship agreement, the surety might not even be aware of the default of the principal debtor and that his obligation to perform has now arisen.\textsuperscript{214} It is unfortunate that the legislator chose to use the words "upon demand" as it could unnecessarily lead one to the wrong conclusion that the definition of "credit guarantee" does not cater for the conditional nature of a contract of suretyship.\textsuperscript{215}

5.3.2. A person undertakes to satisfy obligation of another consumer

A credit guarantee exists when "a person undertakes or promises to satisfy upon demand any obligation of another consumer". This phrase clearly creates the impression that the existence of a credit guarantee in terms of section 8(5) is

\textsuperscript{211} Mostert (2009) De Rebus 53.
\textsuperscript{212} Mostert (2009) De Rebus 55.
\textsuperscript{213} Sloop & Kelly-Louw (2011) PER 79.
\textsuperscript{214} Sloop & Kelly-Louw (2011) PER 79-80.
\textsuperscript{215} Sloop & Kelly-Louw (2011) PER 80-81.
dependent on the existence of a principal debt.\textsuperscript{216} It possibly indicates that a “credit guarantee” as defined in the National Credit Act has an accessory nature.

5.3.3. The principal agreement must be subject to the National Credit Act

The last part of the definition of a credit guarantee is that the agreement to which the guarantee applies must itself be subject to the Act. This means that there has to be a principal agreement which is either a credit facility\textsuperscript{217} or a credit transaction\textsuperscript{218} which falls within the ambit of the National Credit Act.\textsuperscript{219} If the Act does not apply to the credit facility or credit transaction in respect of which the guarantee is granted, it does not apply to the credit guarantee. For example, if a member of a small\textsuperscript{220} close corporation gives a guarantee in respect of an instalment agreement\textsuperscript{221} entered into by the close corporation, and the principal debt equals or exceeds R250 000, the underlying agreement is not subject to the Act and the credit guarantee likewise falls outside the scope of the Act.\textsuperscript{222} (Or an example from one of the cases)

Cognisance must further be taken of section 4(2)(c) of the National Credit Act. Section 4(2)(c) explicitly states that the Act will apply to a credit guarantee only to the extent that the Act applies to the underlying credit facility or credit transaction in respect of which the credit guarantee is granted. Therefore, if the Act does not apply to the credit facility or credit transaction (the primary debt) in respect of which the credit guarantee is granted, the Act will not apply to the guarantee.

\footnotesize
\textsuperscript{216} Stoop & Kelly-Louw (2011) PER 78.
\textsuperscript{217} See par 3 above.
\textsuperscript{218} See par 4 above.
\textsuperscript{219} Scholtz \textit{et al} 8-14.
\textsuperscript{220} With an asset value or annual turnover below R1 000 000.
\textsuperscript{221} See par 4.5. above for a discussion on instalment agreements.
\textsuperscript{222} In this example the agreement is not subject to the Act because it is a large agreement entered into by a small juristic person which is exempt from the application of the Act – see s 4(1)(b). See also Scholtz \textit{et al} 8-14.
It is, therefore, submitted that if one takes account of the definition of a credit guarantee in section 8(5) in conjunction with the provisions of section 4(2)(c) the deduction can be made that the term “credit guarantee” clearly includes accessory guarantees, such as suretyships, because a clear reference is made to a primary debt. The deduction is also further strengthened by the fact that accessory guarantees are normally subject to the same substantive law and the same jurisdiction to which the underlying transaction itself is subject and section 4(2)(c) of the Act makes it clear that the Act will apply to the credit agreement only to the same extent that will apply to the primary debt.\textsuperscript{223}

5.3.4. Small, intermediate or large agreement

A credit guarantee has to be classified as either a small, intermediate or large credit agreement in accordance with section 9 of the National Credit Act.\textsuperscript{224} According to Mostert’s interpretation of section 9, the legislator has included a credit guarantee under a small as well as an intermediate credit agreement, but it has expressly excluded it as a large credit agreement.\textsuperscript{225} Otto’s view\textsuperscript{226} in this regard is not helpful as he has excluded credit guarantees from all three categories in his discussion on small, intermediate and large agreements.

I cannot agree with either Mostert’s interpretation or Otto’s discussion of section 9 in this regard. I submit that the legislature’s poor use of punctuation is the source of the confusion in this regard. The words used in section 9(2)(c)\textsuperscript{227}, 9(3)(b)\textsuperscript{228} and 9(4)(b)\textsuperscript{229} are exactly the same in each section. Section 9(2)(c) provides that a credit agreement is a small credit agreement if it is any other credit transaction except a mortgage agreement or a credit guarantee, and the

\textsuperscript{223} Stoop & Kelly-Louw (2011) \textit{PER} 80.
\textsuperscript{224} S 9(1).
\textsuperscript{225} Mostert (2009) \textit{De Rebus} 55.
\textsuperscript{226} Otto & Otto 31.
\textsuperscript{227} Dealing with small credit agreements.
\textsuperscript{228} Dealing with intermediate agreements.
\textsuperscript{229} Dealing with large credit agreements.
principal debt under that transaction or guarantee falls at or below the determined threshold. Similarly section 9(3)(b) provides that a credit agreement is an intermediate credit agreement if it is 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 the determined thresholds. Lastly, section 9(4)(b) also provides that a credit agreement qualifies as a large credit agreement if it is any credit transaction, excluding a pawn transaction or a credit guarantee where the principal debt under that transaction or guarantee falls at or above the threshold established in section 7(1)(b).

Since credit guarantees are explicitly covered by the Act, it is impossible that such guarantees does not constitute a small, intermediate or large transaction. I submit that it was the legislature’s intention to include credit guarantees in each of the three categories. A more appropriate phrase in the case of small credit agreements would have been “a credit agreement is a small credit agreement if it is any other transaction, except a mortgage agreement, or a credit guarantee and the principal debt under that transaction or guarantee falls at or below the determined threshold”. The phrases in respect of intermediate and large credit agreements should be similarly changed or interpreted.

A further question which Mostert poses deals with the question as to how a suretyship should be classified in the case of an expressly unlimited suretyship or where the suretyship itself is silent as to its limits. Mostert (2009) De Rebus 55. My submission in this regard is that regard must then be had to the provisions of the principal obligation. According to the general principles relating to ordinary suretyship agreements, a surety is only liable to the same extent as the principal debtor. Furthermore, it is also important to have regard to the nature of the principal agreement, for example a mortgage agreement can never be a small or an intermediate agreement. Due to the provisions of section 4(2)(c), the Act will only apply to the credit guarantee to the extent that it applies to the underlying agreement.
Therefore, if the underlying credit agreement is regarded as a large credit agreement, the credit guarantee should also be regarded as a large credit agreement to determine to which extent the Act applies to it.

5.4. Case law

A variety of cases\textsuperscript{231} have come before the courts in which the nature of a credit guarantee has been considered. Unfortunately, the National Credit Act did not find application in any of the matters, since in each instance the principal agreement was found to be outside the scope of the National Credit Act. For instance, in \textit{Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd}\textsuperscript{232} the court had to decide whether a surety and co-principal debtor was a consumer to whom a default notice in terms of section 129 of the National Credit Act had to be given. In this case, the underlying agreement fell outside the scope of the Act since the principal debtor was a juristic person\textsuperscript{233} who concluded a mortgage agreement which is regarded as a large credit agreement in the Act.\textsuperscript{234} The court, however, remarked that "there was no doubt" that if the principal agreement fell within the scope of the National Credit Act, the surety will have also enjoyed the protection of the Act since a suretyship falls within the definition of a credit guarantee.\textsuperscript{235}

The very recent case of \textit{Structured Mezzanine Investments (Pty) Ltd v Davids}\textsuperscript{236} is another example where the principal agreement was excluded from the application of the National Credit Act by virtue of the principal debtor being a juristic person with a higher asset value or annual turnover than the threshold set out in s 4(1)(a)(i) of the Act, and because of the agreement being large

\textsuperscript{231} \textit{Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd} 2009 3 SA 384 (T); \textit{Geodis Wilson South Africa (Pty) Ltd v ACA (Pty) Ltd} unreported case no. 41609/2008 (SGI); \textit{Nedbank Ltd v Wizard Holdings 2010 S SA 523 (GSL)}; \textit{Structured Mezzanine Investments (Pty) Ltd v Davids} 2010 6 SA 622 (WCC).

\textsuperscript{232} 2009 (3) SA 384 (T).

\textsuperscript{233} A "juristic person" for the purposes of the Act includes a partnership, an association or other body of persons, incorporated or unincorporated, and a trust of which there are three or more individual trustees or where the trustee itself is a juristic person – see s 1.

\textsuperscript{234} \textit{Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd} 2009 3 SA 384 (T) at 389C-D and 390B-D.

\textsuperscript{235} \textit{Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd} 2009 3 SA 384 (T) at 390A-B.

\textsuperscript{236} 2010 6 SA 622 (WCC).
agreement as contemplated in sec 4(b) of the Act. The court as per Yekiso J was also clearly of the view that a suretyship agreement fell within the definition of a credit guarantee as contemplated in section 8(5) of the National Credit Act. The court, in this matter, further held that since the respondents in this matter signed as sureties and due to the provisions of the National Credit Act not applying to the principal agreement, they also did not apply to the sureties.

This accessory nature of a suretyship was also highlighted in the unreported case of Geodis Wilson South Africa (Pty) Ltd v ACA (Pty) Ltd. The court as per Mbha J held that it does not have the slightest doubt that the obligations under a contract of suretyship fall squarely within the definition of a credit guarantee in terms of the National Credit Act. However, section 8(5) of the Act specifically requires the credit guarantee to apply to the obligations of another consumer in terms of a credit facility or credit transaction to which this Act applies. Accordingly, it follows that if the National Credit Act does not apply to the principal agreement, sureties cannot claim that the Act applies to them on the basis that their obligations arise in terms of a credit guarantee as set out in section 8(5) of the Act.

In Standard Bank of SA Ltd Hunkydory Investments 188 (Pty) Ltd the court rejected the argument that sec 4(1)(a), 4(1)(b) and 4(2)(c) of the National Credit Act are unconstitutional because they protect sureties of natural persons but not those of large juristic persons or juristic persons concluding large credit agreements.

---

237 Structured Mezzanine Investments (Pty) Ltd v Davids 2010 6 SA 622 (WCC) at 627E-628C.
238 Structured Mezzanine Investments (Pty) Ltd v Davids 2010 6 SA 622 (WCC) at 628F-G.
239 Structured Mezzanine Investments (Pty) Ltd v Davids 2010 6 SA 622 (WCC) at 628C.
240 Unreported case no. 41609/2008 (SGJ).
241 Geodis Wilson South Africa (Pty) Ltd v ACA (Pty) Ltd unreported case no. 41609/2008 (SGJ). Also see in this regard Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd 2009 3 SA 384 (T) at 391E.
242 2010 1 SA 627 (C).
243 Standard Bank of SA Ltd Hunkydory Investments 188 (Pty) Ltd 2010 1 SA 627 (C) at 632H-633D.
It follows from *Nedbank Ltd v Wizard Holdings*\(^{244}\) that even if it is a natural person that has signed a suretyship the National Credit Act will still not apply if the principal debt does not fall within the ambit of the Act.\(^{245}\)

Where the principal agreement is not a credit agreement that falls within the scope of the National Credit Act, the suretyship will be regulated by the common law and the surety will not be entitled to raise any of the defenses or provisions of the National Credit Act.\(^{246}\)

### 5.5. Conclusion

It seems, therefore, that the definition of a credit guarantee in the National Credit Act provides for the accessory nature of an ordinary suretyship agreement.\(^{247}\) On the flipside, the definition probably does not cater for guarantees of a primary nature because a clear reference is made in the definition to a primary debt. If the definition were also to include guarantees of a primary nature there would not have been any reference to the primary debt as these types of guarantees are not concerned in the least with the underlying contract.

### 6. CONCLUSION

This dissertation has focused on the transactions to which the National Credit Act applies. The fact that a credit agreement must constitute a credit facility, a credit transaction or a credit guarantee, is merely one of the requirements in terms of the Act in order for the Act to be applicable to such transaction. It is possible that a credit agreement does in fact fall into one of the aforementioned categories to which the Act applies but that it is excluded from the ambit of the Act due to the fact that it does not comply with one or more of the other requirements, such as

---

\(^{244}\) 2010 5 SA 523 (GSJ).

\(^{245}\) *Nedbank Ltd v Wizard Holdings* 2010 5 SA 523 (GSJ) at 525E and 526H-527B.

\(^{246}\) *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 3 SA 384 (T) at 390 A-D.

\(^{247}\) Scholtz et al 8-14 See also Stoop & Kelly-Louw (2011) PER 89; *Nedbank Ltd v Wizard Holdings* 2010 5 SA 523 (GSJ) at 525E and 526H-527B.
the fact that the agreement was not concluded at arm's length, or that it was not made, or does not have an effect within the Republic of South Africa.\textsuperscript{248} Another possibility is that the credit agreement may be expressly excluded by the Act from its field of application.\textsuperscript{249}

After having analysed the above transactions it is my conclusion that the National Credit Act is definitely a step in the right direction to more effectively protect consumers. The Act is a comprehensive piece of legislation which affords protection to consumers over a wider range than was the case with its predecessors. Even though it is one of the objectives of the Act to make the consumer credit market accessible to those persons who are historically disadvantaged,\textsuperscript{250} the Act has not been limited in its protection to those people who can afford to borrow millions of rands, thus affording the same protection to each individual person.\textsuperscript{251}

More consumers are also protected due the fact that the Act applies to just about every conceivable form of credit granting. It specifically makes provision for credit facilities in terms of which revolving credit is granted. It also applies to agreements in terms of which fixed-sum credit is granted, such as the different credit transactions. The application of the Act is not limited to credit agreements in respect of only certain goods, services or money loans. Sureties are now also protected by the Act to the same extent that the principal debtors in terms of the primary agreement are protected.

A point of criticism is that some of the definitions and phrases in the Act could have been drafted more eloquently.\textsuperscript{252} There are definitions in the Act which deviate completely from the basic principles of South African law and the

\textsuperscript{248} \S\ 4.
\textsuperscript{249} See \S\ 4 for a list of these exclusions.
\textsuperscript{250} \S\ 3. See also Department of Trade and Industry South Africa Consumer Credit Law Reform: Policy Framework for Consumer Credit 2004 8 and 16-19.
\textsuperscript{251} Otto & Otto 2.
\textsuperscript{252} Eg the definitions of “mortgage agreement” and “secured loan” in \S\ 1.
consequences thereof are not clear.\textsuperscript{253} This position is undesirable and the legislature will either have to intervene or we will have to wait for clarification in this regard once cases on these aspects have been decided in court. Another point of criticism is that the legislature has resorted to introducing new concepts, some\textsuperscript{254} of which are completely foreign to our legal system. Also in this regard, there is no doubt that the courts and academic writers will play a big role in interpreting and applying many of the concepts or definitions and in finding a way to incorporate them into the South African legal system.

\textsuperscript{253} E.g the definition of “lease” in s 1 which describes a lease as a contract in which ownership passes absolutely at the end of the agreement.

\textsuperscript{254} E.g “incidental credit agreement” in s 1.
# BIBLIOGRAPHY

## BOOKS

<table>
<thead>
<tr>
<th>Title</th>
<th>Author(s)</th>
<th>Mode of Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Botha C (2005) Statutory Interpretation: An Introduction for Students Cape Town: Juta</td>
<td>Botha</td>
<td></td>
</tr>
<tr>
<td>Forsyth C F (2010) Caney’s The Law of Suretyship in South Africa Cape Town: Juta</td>
<td>Forsyth</td>
<td></td>
</tr>
</tbody>
</table>

## ARTICLES

<table>
<thead>
<tr>
<th>Title</th>
<th>Author(s)</th>
<th>Mode of Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reference</td>
<td>Title</td>
<td>Journal/Volume/Issue/Year</td>
</tr>
<tr>
<td>--------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------</td>
<td>---------------------------</td>
</tr>
<tr>
<td>Maree T (2009)</td>
<td>“Sectional Title Levies and the NCA”</td>
<td>De Rebus December</td>
</tr>
<tr>
<td>Mills L (2010)</td>
<td>“Applicability of National Credit Act to Sectional Title Levies”</td>
<td>De Rebus May</td>
</tr>
<tr>
<td>Mostert D (2009)</td>
<td>“Suretyship Agreement Must Comply with the NCA”</td>
<td>De Rebus June</td>
</tr>
<tr>
<td>Otto J M (2009)</td>
<td>“Verkoop van Regte teen ’n Diskonto en die Toepaslikheid van die National Credit Act”</td>
<td>Tydskrif vir die Suid Afrikaanse Reg vol 1</td>
</tr>
<tr>
<td>Otto J M (2011)</td>
<td>“The Distinction Between a Credit Facility and an Incidental Credit Agreement”</td>
<td>Tydskrif vir die Suid-Afrikaanse Reg vol 3</td>
</tr>
<tr>
<td>Renke S (2011)</td>
<td>“Aspects of Incidental Credit”</td>
<td>Tydskrif vir Hedendaagse Romeins-Hollandse Reg vol 74</td>
</tr>
<tr>
<td>Renke &amp; Pillay (2008) THRHR</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Renke, Roestoff &amp; Haupt (2007) Obiter</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rossouw J (2010) “Written Acknowledgement of Debt – Is it a Credit Agreement in terms of the National Credit Act?” De Rebus August p 45</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rossouw (2010) De Rebus</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stoop &amp; Kelly-Louw (2011) PER</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**REPORTS**

Department of Trade and Industry South Africa

*Consumer Credit Law Reform: Policy Framework for Consumer Credit 2004*

**MODE OF CITATION**

Department of Trade and Industry South Africa

*Consumer Credit Law Reform: Policy Framework for Consumer Credit 2004*


**MODE OF CITATION**


**LEGISLATION**

*Credit Agreements Act 75 of 1980*

**MODE OF CITATION**

Credit Agreements Act
<table>
<thead>
<tr>
<th>National Credit Act 34 of 2005</th>
<th>The Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sectional Title Act 95 of 1986</td>
<td>Sectional Title Act</td>
</tr>
<tr>
<td>Usury Act 73 of 1968</td>
<td>Usury Act</td>
</tr>
</tbody>
</table>

### CASE LAW

<p>| Basil Read (Pty) Ltd v Beta Hotels (Pty) Ltd 2001 2 SA 760 (C) | Basil Read (Pty) Ltd v Beta Hotels (Pty) Ltd 2001 2 SA 760 (C) |
| Bridgeway Ltd v Markam 2008 6 SA 123 (W) | Bridgeway Ltd v Markam 2008 6 SA 123 (W) |
| Carter Trading (Pty) Ltd v Blignaut 2010 2 SA 46 (ECP) | Carter Trading (Pty) Ltd v Blignaut 2010 2 SA 46 (ECP) |
| Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd 2009 3 SA 384 (T) | Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd 2009 3 SA 384 (T) |
| Geodis Wilson South Africa (Pty) Ltd v ACA (Pty) Ltd unreported case no 41609/2008 (SGJ) | Geodis Wilson South Africa (Pty) Ltd v ACA (Pty) Ltd unreported case no 41609/2008 (SGJ) |
| Info Plus v Scheelke and Another 1998 3 SA 184 (SCA) | Info Plus v Scheelke and Another 1998 3 SA 184 (SCA) |
| JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC 2010 6 SA 173 (KZD) | JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC 2010 6 SA 173 (KZD) |
| List v Jungers 1979 3 SA 106 (A) | List v Jungers 1979 3 SA 106 (A) |</p>
<table>
<thead>
<tr>
<th>Mitchell v Beheerliggaam RNS Mansions 2010 5 SA 75 (GNP)</th>
<th>Mitchell v Beheerliggaam RNS Mansions 2010 5 SA 75 (GNP)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Nedbank v van Zyl 1990 2 SA 469 (A)</strong></td>
<td><strong>Nedbank v van Zyl 1990 2 SA 469 (A)</strong></td>
</tr>
<tr>
<td><strong>Nedbank Ltd v Wizard Holdings 2010 5 SA 523 (GSJ)</strong></td>
<td><strong>Nedbank Ltd v Wizard Holdings 2010 5 SA 523 (GSJ)</strong></td>
</tr>
<tr>
<td><strong>Nelson Mandela Bay Metropolitan Municipality v Nobumba 2010 1 SA 579 (ECG)</strong></td>
<td><strong>Nelson Mandela Bay Metropolitan Municipality v Nobumba 2010 1 SA 579 (ECG)</strong></td>
</tr>
<tr>
<td><strong>Sandoz Products (Pty) Ltd v Van Zyl NO 1996 3 SA 726 (C)</strong></td>
<td><strong>Sandoz Products (Pty) Ltd v Van Zyl NO 1996 3 SA 726 (C)</strong></td>
</tr>
<tr>
<td><strong>Standard Bank of SA Ltd Hunkydory Investments 194 (Pty) Ltd 2010 1 SA 627 (C)</strong></td>
<td><strong>Standard Bank of SA Ltd Hunkydory Investments 194 (Pty) Ltd 2010 1 SA 627 (C)</strong></td>
</tr>
<tr>
<td><strong>Structured Mezzanine Investments (Pty) Ltd v Davids 2010 6 SA 622 (WCC)</strong></td>
<td><strong>Structured Mezzanine Investments (Pty) Ltd v Davids 2010 6 SA 622 (WCC)</strong></td>
</tr>
<tr>
<td>Trust Bank of Africa Ltd v Frysch 1977 3 SA 562 (A)</td>
<td>Trust Bank of Africa Ltd v Frysch 1977 3 SA 562 (A)</td>
</tr>
<tr>
<td>--------------------------------------------------</td>
<td>--------------------------------------------------</td>
</tr>
<tr>
<td><strong>TS Dlamini v Body Corporate of Frenoleen no AR611/09 (KZNP)</strong></td>
<td><strong>TS Dlamini v Body Corporate of Frenoleen no AR611/09 (KZNP)</strong></td>
</tr>
</tbody>
</table>