

**THE FIELD OF APPLICATION OF THE NATIONAL CREDIT
ACT 34 OF 2005: A CRITICAL OVER VIEW OF THE
AGREEMENTS IT EFFECTS**

by

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Summary

The credit industry in South Africa has grown exponentially over the past two decades. Previously the industry was regulated by different Acts that had to be interpreted jointly, and while there was an overlap between them they also differed. The dual implementation made consumer credit an extremely difficult and confusing environment, especially for the consumer. Global movement towards socio-economic type legislation and in an effort to bring a solution to the eminent credit crisis resulted in new consumer protection law. Enacted on 10 March 2006 and phased in stages over a 12 month period from 1 June 2006 till 1 June 2007 the National Credit Act has a wider field of application than any of its predecessors, bringing with it a single platform for consumer credit regulation. The management of the credit relationship between the credit provider and the consumer is largely by agreement or in other words contract. The National Credit Act to a considerable extent codifies this relationship. The NCA applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic. This definition is subject to limitations and the exclusions. The way in which the NCA defines its field of application may differ from its predecessors and even common law. The Act defines three main types of credit agreements namely credit facilities, credit transactions and credit guarantees. Credit transactions also consist of eight subcategories. It is critical to distinguish between these different credit agreements and the manner in which the Act defines them must be scrutinised. This is not only important to determine if a certain agreement is a credit agreement in terms of the National Credit Act, but also if the Act applies, to what extent. Unfortunate grammatical construction and word choice by the legislator does not assist in this task. How the Act defines its field of application in relation to the types of agreement it applies to will be critically discussed and analysed.

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1 Introduction

1.1 Background Information

An increase in the role players (both credit providers and consumers) in the credit market between 2000 and 2005 combined with the reckless granting of credit by the credit industry competing for the biggest share in the market¹ — through aggressive marketing and low lending criteria — led to an economic crisis. The result of the crisis only became apparent during the latter part of 2008. In 2007 the Registrar of Banks, Errol Kruger, was quoted to say that bank loans and advances stood at R1, 721 trillion in December 2006 after the annual report on bank supervision.² This crisis still dominates our markets today as a “credit crunch” and the lending spree of 2007/2008 are being blamed for the current wave of indebtedness.³ The battle for customers became so intense that banks and credit retailers were giving customers pre-approved loans and credit limits. Credit providers sometimes gave credit to customers without them even requesting it.⁴

Clearly there was a problem. As early as 2001 the Department of Trade and Industry decided to start reviewing the credit legislation that existed at the time⁵ to eradicate the problems that were being experienced in the credit market.⁶ The findings of this in-depth legal-comparative project⁷ resulted in a policy framework for the granting of consumer credit.⁸ The Usury Act and the Credit Agreements Act were found to be

¹ The estimated value of the industry, in last the quarter of 2008, was R1.1 trillion (Ntingi “SA Credit Act a worldwide hit” *City Press Fin24* 2 Nov 2008).

² Nyamakanga “Credit law curbs soaring bank lending” *Business Day* 27 Jun 2007.

³ Kamhunga “Number of customers in distress still high” *Business Day* 26 Sept 2011. For the 12 months ended December 2011, the total value of new credit granted amounted to R372.34 billion. The total value of the debtors’ book as in December 2011 stood at R1.30 trillion comprising 38.30 million accounts. See the National Credit Regulator Annual Report 2011/2012 p 24.

⁴ Kamhunga “Chase for credit growth burnt banks” *Business Day* 01 Jun 2011.

⁵ The Usury Act 73 of 1968 (hereinafter the Usury Act) and The Credit Agreements Act 75 of 1980 (hereinafter the Credit Agreements Act). For an in-depth discussion on the history of South African consumer credit, see Otto “The History of Consumer Credit Legislation in South Africa” 2010 *Fundamina* 16(1) 257.

⁶ Kelly-Louw “The Prevention and Alleviation of Consumer Over-Indebtedness” 2008 20 *SA Merc LJ* 205.

⁷ Kelly-Louw 2008 20 *SA Merc LJ* 201.

⁸ Department of Trade and Industry South Africa (“the DTI”) *Consumer Credit Law Reform; Policy Framework for Consumer Credit* (2004) (hereinafter “Policy Framework (2004)”).

“outdated and largely ineffective”.⁹ The credit market was described as being a dysfunctional one “that under-serves the historically disadvantaged and is characterised by a lack of effective competition, inadequate transparency and the high cost of credit”.¹⁰ The need for legislative reform in the field of consumer credit law arose *inter alia* because of the ineffectiveness of previous consumer credit legislation to deal with the demands of a complex consumer market.¹¹ This was also the long-held belief of various market participants.¹² There was overlapping between the Usury Act and the Credit Agreements Act, but there were also critical differences, and the two Acts had to be applied jointly.¹³ The dual implementation made consumer credit an extremely difficult and confusing environment, especially for the consumer.¹⁴

To address this problem — as recommended by the DTI Policy Framework (2004) — the Government started to draft socio-economic type legislation to curb the problem, resulting in new consumer protection law. The first major Act in this line of consumer protection legislation was the National Credit Act 34 of 2005.¹⁵ Section 172(4) of the Act repealed its “ineffective” predecessors.¹⁶ The stated purpose of the NCA is “to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers”.¹⁷ Although the NCA only became fully effective on 1 June 2007,¹⁸ by November 2008 it was reported to have protected thousands of households, and the ultimate benefit to the financial sector was recognised.¹⁹ The fact that South Africa has not seen the same economic meltdown as in some first and other third-world countries is credited to the

⁹ Policy Framework (2004) Ch 2 par 2.10 and 2.11. See also Mould “Tacit responsibilities assigned to the drafter of a credit agreement by the National Credit Act 34 of 2005 with particular emphasis on contractual consensus: A critical analysis” 2008 *Journal for Juridical Science* 33(2) 111 (hereinafter “JJS”).

¹⁰ Policy Framework (2004) introduction to Ch 4. See also Mould 2008 *JJS* 33(2) 111.

¹¹ Renke, Roestoff & Haupt “The National Credit Act: New parameters for the granting of credit in South Africa” 2007 *Obiter* 230.

¹² Temkin “New law to help consumers avoid the debt trap” *Business Day* 2 May 2006.

¹³ See Otto in Scholtz (ed) “Commentary” *Guide to the National Credit Act* (2008) *et seq*, with updates (last update: 2013) 1-6.

¹⁴ Otto in Scholtz (ed) 1-6.

¹⁵ Hereinafter referred to as “the NCA” or “the Act”.

¹⁶ The Act replaced the Usury Act and the Credit Agreements Act with effect on 1 Jun 2006.

¹⁷ S 3.

¹⁸ The President assented to the NCA on 10 March 2006 and the Act was phased in over a 12 month period on 1 Jun 2006, 1 Sept 2006 and 1 Jun 2007.

¹⁹ Kloppers “Credit Act ‘saved house market’” *Sake24 Fin24* 18 Nov 2008.

Act.²⁰ The implementation of the Act brought sanity to the industry that was chasing numbers and even credit providers now agree that the Act prevented a much higher default rate due to stricter lending criteria.²¹ But as Otto²² remarks, the NCA is an ambitious, perhaps even idealistic, piece of legislation with pronounced socio-economic aims. In order to oversee the implementation of the Act throughout South Africa a new public independent juristic body was created, namely the National Credit Regulator.²³

The NCA not only seeks to govern the granting of credit in South Africa. The Act impacts the relationship between credit provider and consumer from marketing²⁴ to the final conclusion, due to performance or default, of the relationship.²⁵ Suffice to say that the Act also has strict prescriptions on how the contractual relationship between the credit provider and consumer during the relationship will be regulated.²⁶ This relationship in turn is governed by contracts. The Act therefore has an extensive impact on contract law. In order to determine the extent of this impact one must look at the NCA's definition of a contract and the parties it governs.

1 2 Research Statement and Objectives

The NCA applies to:

- a) every credit agreement;
- b) between parties dealing at arm's length;²⁷ and
- c) made within, or having an effect within, the Republic.²⁸

²⁰ Ntingi "SA Credit Act a worldwide hit" *City Press Fin24* 2 Nov 2008.

²¹ Kamhunga *Business Day* 01 Jun 2011.

²² In Scholtz (ed) par 2 3.

²³ S 12. For a full discussion of the duties and functions of the National Credit Regulator, see Vessio "What Does The National Credit Regulator Regulate" 2008 *SA Merc LJ* 233.

²⁴ Ch 4 Part C.

²⁵ Ch 5 Part F; Ch 6 and 7.

²⁶ Ch 4 Parts A ,B, D; Ch 5 Parts A, B, C, D and E.

²⁷ S 4(2)(b)(i)-(iv). See also *Southern African Music Rights Association Ltd v National Credit Regulator* unreported case number 31104/2008, 20 April 2011(GNP) par 10. *Beets v Swanepoel* 2010 JOL 2622 (NC) par 5-8.

²⁸ S 4(1). Van Zyl in Scholtz (ed) 4-3. The NCA confirms the common-law presumption that an Act does not have extraterritorial application.

This definition is subject to the limitations of section 5²⁹ and 6³⁰ of the Act³¹ and the exclusions as set out in sections 4(1)(a)-(d),³² 4(2)(c),³³ 4(5)(a) and (b),³⁴ 4(6)(a)³⁵ and (b)³⁶ and 8(2)³⁷ of the NCA.

²⁹ See discussion by Van Zyl in Scholtz (ed) par 4 4 1 regarding the limited application of the Act on incidental credit agreements and par 5 3 below.

³⁰ See discussion by Van Zyl in Scholtz (ed) par 4 4 2 regarding the limited application of the Act on juristic persons. See also *Standard Bank of South Africa Ltd v Hunkydory Investments and Another 194 (Pty) Ltd* 2010 (1) SA 627 (C) par 22-24 read with s 3 of the Act, “The purpose of the NCA”, why this limitation stood the constitutionality test. *Structured Mezzanine Investments (Pty) Ltd v Davids and Others* 2010 (6) SA 622 (WCC) par 17. In *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* 2011 3 All SA 345 (SCA) Ponnann JA held that if the Act does not apply, there is no statutory limitation on the interest payable in terms of an agreement. Kelly-Louw and Stoop *Consumer Credit Regulation in South Africa* (2012) 37.

³¹ The unfortunate grammatical construction of section 4(1) does not assist in the interpretation of the applicability of sections 5 and 6 to what seems to be the excluded agreements listed in section 4(1)(a) to (d). See Hannie and Quick “The National Credit Act: another example of slipshod drafting” Augustus 2007 *Without Prejudice* 4 for a solution to the interpretation of this section.

³² Read with s 4(2)(d). See discussion by Van Zyl in Scholtz (ed) par 4 3 regarding the exclusion of the application of the Act on certain juristic persons. See also *FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 (3) SA 384 (T) par 10; *Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others* 2010 (5) SA 523 (GSJ) paras 5, 7 and 9; *Structured Mezzanine Investments (Pty) Ltd v Davids and Others* 2010 (6) SA 622 (WCC) par 14; *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another* 2010 (1) SA 627 (C); *Silver Falcon Trading 333 (Pty) Ltd v Nedbank Ltd* 2012(3) SA 371 (KZN); and *Prisma Verpakking Norde (Pty) Ltd v Holtzhausen and Others* (unreported, GNP case no 43357/2010, 3 Feb 2012) par 33–36. See Lombard and Renke 2009 SA Merc LJ 492 fn 64 regarding the asset value of related juristic persons. In *FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* 2009 (3) SA 384 (T) the Court held that the NCA does not apply to a large agreement entered into by a juristic person as consumer, irrespective of the asset value or annual turnover of the juristic person at the time of entering in to the agreement. The asset value and annual turnover of related juristic persons would therefore be irrelevant. See also the case law as stated above in this n. If a credit provider wants to be excluded if located outside South Africa in terms of s 4(1)(d), Regulation 2 provides that an application by the consumer for this exemption must be submitted by completing Form 1. See Kelly-Louw *Consumer Credit* LAWSA vol 5(1) 2 ed (replacement volume) 2010 Faris & Joubert (eds) 15 fn 5 and GN R489 in GG 28864 of 31 May 2006.

³³ See discussion by Van Zyl in Scholtz (ed) par 4 4 3 regarding the limited application of the Act on credit guarantees and par 6 below.

³⁴ This is where a debt that is owed to the seller of goods or services resulted from: “(i) the refusal by a third party to make good the payment by cheque or similar instrument presented by the buyer, that was accepted by the seller for full payment of the seller’s goods or services; or (ii) the refusal of a charge by or on behalf of the buyer against a credit facility held at a third party as credit provider, that was accepted by the seller for full payment of the seller’s goods or services”. See Scholtz (ed) par 4 3 (i) the seller of the goods and services is presumed to not have the granting of credit in mind on conclusion of the agreement.

³⁵ See Van Zyl in Scholtz (ed) par 4 3 (j). See Otto and Otto *The National Credit Act Explained* (2013) 33. A consumer pays fully or partially for goods or services through a charge against a credit facility that is provided by a third party. The sale will not be a credit agreement.

³⁶ See Van Zyl in Scholtz (ed) par 4 3 (k). An agreement that provides that a supplier of a utility or other continuous service “(aa) will defer payment by the consumer until the supplier has provided a periodic statement of account for that utility or other continuous service; and (bb) will not impose any charge contemplated in section 103 in respect of any amount so deferred, unless the consumer fails to pay the full amount due within at least 30 days after the date on which the periodic statement is delivered to the consumer”. See *Nelson Mandela Bay Metropolitan Municipality v Nobumba* 2010 (1) SA 576 (ECG) 579 where the Court drew the distinction between municipal rates and taxes, levied pursuant to legislation, and other fees based on an agreement between the parties. See further the discussion of this judgement by Otto “Rekeninge vir munisipale dienste en die *National Credit Act*” 2011 *De Jure* 149 and his critique on the conclusion of the court that only the interest levied constitutes incidental credit in par 5. As Otto correctly states, on default it is not only the interest which

The way in which the NCA defines the above three criteria may differ from its predecessors³⁸ and even common law.³⁹ The purpose of this dissertation will be to examine how the Act defines its field of application only in relation to the types of agreement it applies to.

The NCA excludes certain transactions from its field of application⁴⁰ and limits its scope on certain agreements.⁴¹ The Act also excludes certain persons from the ambit of its regulation and cover of its protection.⁴² Reference is made in brief to the effect of these exclusions and limitations on the field of application of the NCA.

The object is thus to define the NCA's application with reference to the type of transaction. The Act will be critically analysed with reference to prior, existing legislation and court judgments, where applicable. As reference the interpretation of the courts and the opinion of writers will be used.

1 3 Definitions, Terms and Key References

In this study words and terms are defined in accordance with the definition attributed to them by the NCA⁴³ unless otherwise stipulated.

All reference to courts will, notwithstanding the Renaming of Courts Act,⁴⁴ follow the reference as set out in the relevant law report or as set out in relevant legislation or as quoted by an author.

should be treated as incidental credit to which the NCA applies, but the full outstanding debt constitutes incidental credit. See discussion in par 5 3 below.

³⁷ In section 8(2), the Act specifically excludes: "(a) a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance; (b) a lease of immovable property; or (c) a transaction between a stokvel and a member of that stokvel in accordance with the rules of that stokvel from the definition of a credit agreement."

³⁸ The Usury Act and the Credit Agreements Act.

³⁹ Otto in Scholtz (ed) 8-9 par 8 2 3 7.

⁴⁰ S 4(1).

⁴¹ S 5, 6 and 7.

⁴² S 4(1) and 6. See discussion by Van Zyl in Scholtz (ed) par 4 3 regarding the exclusion of the application of the Act on certain juristic persons.

⁴³ S 1.

⁴⁴ 30 of 2008.

1 4 Delineations and Limitations

The purpose of the study is not to explain all fields of law where the Act finds application. As set out above, the Act has a wide field of application. This dissertation will be limited to the determination of which credit agreements the Act applies to and how the NCA defines these agreements. The parties to whom the Act applies as well as the limitations and exclusions it places on its field of application will only be referred to in passing and will not be discussed in-depth. The “Altruistic” credit agreements,⁴⁵ developmental credit agreement⁴⁶ and public interest credit agreements⁴⁷ will not be discussed.⁴⁸

The NCA, to a large extent, finds application in the private law ambit of contractual, consumer protection and credit law. However, the Act also impacts civil procedure in the civil courts with several prescriptions on proceedings and debt enforcement. The Act furthermore creates a regulatory body with extensive functions to the effect of becoming a creature of administrative law and thus impacts public law.

All aspects regarding any regulatory body created by the Act and any procedures regarding the enforcement of debt falls outside the ambit of this study in so far as it does not relate to the content of any credit agreement or a party to such an agreement. No reference, except in passing, will be made to civil procedure or the debt review process which also falls within the field of application of the NCA.

This dissertation reflects the field of application of the Act delineated below as on 30 June 2013. Although an Amendment Bill⁴⁹ to the NCA was tabled on 29 May 2013, this has not been enacted on finalisation of this dissertation and no further reference will be made thereto.

⁴⁵ The description of these types of agreements as altruistic was used by Otto and Otto 30.

⁴⁶ See s 10.

⁴⁷ See s 11.

⁴⁸ See Otto in Scholtz (ed) 8-19 and 8-19.

⁴⁹ GN 575 in GG 36505 of 29 May 2013.

2 Overview of Paragraphs

In paragraph 3 the classification and rationale in the categorisation of credit agreements by the NCA are discussed and the credit agreements are listed. Thereafter the types of credit agreements are defined and deliberated in paragraphs 4 to 8. Paragraph 9 contains the conclusion and possible recommendations to clarify some of the problematic definitions in the Act.

3 Classification of Credit Agreements

It is imperative to distinguish into which class a credit agreement falls because the Act applies different rules depending on the type of credit agreement.⁵⁰ The specific credit agreements and how the NCA defines them, had a critical impact on the existing definitions of these agreements and our legal and economic understanding of these types of agreements.

3.1 The umbrella term⁵¹ credit agreement⁵² includes

- (a) a credit facility, as described in section 8(3);
- (b) a credit transaction, as described in section 8(4);
- (c) a credit guarantee, as described in section 8(5); or
- (d) any combination of the above.⁵³

⁵⁰ Otto "The Distinction Between a Credit Facility and an Incidental Credit Agreement" 2011 *TSAR* 547. See also *Voltex (Pty) Ltd v Chenleza CC* 2010 (5) SA 267 (KZP) par 26.

⁵¹ Otto and Otto 20.

⁵² S 1 defines 'credit agreement' to mean an agreement that meets all the criteria set out in s 8. The Act defines "credit" when used as a noun in s 1 as "a deferral of payment of money to a person, or a promise to defer such payment; or a promise to advance or pay money to or at the direction of another person." "Agreement" is defined in s 1 to include an arrangement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties. This is the ordinary meaning of "agreement" in terms of which two or more parties much reach consensus in such a way that a contract is formed. *Nelson Mandela Bay Metropolitan Municipality v Nobumba Bay* 2010 1 SA 579 (ECG) 589 B-C. See also Du Pisani "A Critical Analysis of the Transactions to which The National Credit Act 34 of 2005 Applies" LLM-dissertation UP (2011) (herein after Du Pisani LLM-dissertation). When these two terms are combined s 1 stipulates that a credit agreement means an agreement that meets all the criteria as set out in s 8.

⁵³ S 8(1)(d).

In section 8(2), the Act specifically excludes the following from the definition of a credit agreement:

- (a) a policy of insurance or credit extended by an insurer just to maintain the payment of premiums on a policy of insurance;⁵⁴
- (b) a lease of immovable property;⁵⁵ or
- (c) a transaction between a stokvel⁵⁶ and a member of that stokvel in accordance with the rules of that stokvel.⁵⁷

3 2 The classification in monetary thresholds that may exclude or limit the application of the NCA

The Act provides for thresholds⁵⁸ to exclude, limit and regulate the application of the NCA, by subdividing the consumer credit market by size.⁵⁹ It is important to keep these thresholds in mind when analysing the application of the Act on an agreement as different rules apply to each category⁶⁰ and the scope of application of the NCA may be limited and even excluded.

The Act provides for two types of monetary thresholds:⁶¹

- a) a monetary asset value or annual turnover threshold⁶² of not more than R1 million to be used in determining whether the NCA applies to a credit

⁵⁴ S 8(2)(a). The Act does not differentiate between long-term and short-term insurance regarding the exclusion.

⁵⁵ S 8(2)(b). This was confirmed in *Pareto Ltd and Others v Kalnisha Sigaban t/a KS Flowers N More* unreported case no. A3069/2009, 15 Apr 2010 (GSJ) par 9, 14-15 and 17, also cited as 2010 JDR 0444 (GSJ). The court further held that it is not only the landlord's claim for arrear rentals that falls outside the scope of the Act but that his claim for the payments made on behalf of the tenant, for utilities such as water and electricity supplied by a third party, is also not within the scope of the NCA.

⁵⁶ S 1 defines a stokvel as "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."

⁵⁷ S 8(2)(c).

⁵⁸ S 7(1)(a) read with s 4(1) and s 7(1) read with s 9.

⁵⁹ Kelly-Louw and Stoop *Consumer Credit Regulation in South Africa* (2012) 93.

⁶⁰ Otto and Otto (2013) 35.

⁶¹ S 7(1). See Van Zyl in Scholtz (ed) 4-10.

agreement with a juristic person⁶³ for the purposes set out in section 4(1);⁶⁴
and

- b) two further monetary thresholds⁶⁵ for the purposes of determining the three categories⁶⁶ of credit agreements contemplated in section 9.

The initial thresholds determined by the Minister⁶⁷ in terms of this section took effect on 1 June 2006, and each subsequent threshold was to take effect six months after the date on which it is published in the Government Gazette.⁶⁸ In terms of section 7(1), the Minister was to publish new thresholds at intervals of not more than five years. No new thresholds have been published at date hereof. Furthermore, the amount set on 1 June 2006 is already the maximum amount, as set out in s 7(1)(a)

⁶² Threshold determined as R1 000 000, 00 in GN 713 in GG 28893 of 1 June 2006. According to Van Zyl it is the juristic person as consumer's obligation to correctly supply the information regarding its annual turnover and asset value to the credit provider at the time it applies for the credit or date of entering into the agreement. If the credit provider acted on the strength of the information supplied to him by the juristic person the agreement will not be void, nor will the credit provider be guilty of an offence for failing to comply with the provisions of the Act. It is further stated that if the credit provider acted on incorrect information that he may even have the defence of estoppel available against a juristic person as consumer that supplied the false information, Van Zyl in Scholtz (ed) 4-4.

⁶³ Defined in s 1 to include "a partnership, association or other body of persons, corporate or unincorporated, or a trust if (a) there are three or more individual trustees; or (b) the trustee is itself a juristic person, but does not include a stokvel". The Act specifically excludes a stokvel, as defined in s 1, from the definition of a juristic person, and therefore a stokvel as a consumer enjoys the full protection of the Act as afforded to a natural person when they enter into a credit agreement with a third party. This full protection was probably afforded to a stokvel in line with Par(t) B s 3(a) where it is stated that one of the purposes of the Act is to promote the development of a credit market that is accessible to all South Africans, in particular those who have been historically unable to access credit, as it is believed a stokvel is one of the few means of access to saving and credit resources for the historically disadvantaged and low-income persons, Scholtz in Scholtz (ed) par 2.3. The definition of a juristic person in the NCA has come under severe criticism as it causes serious and unnecessary confusion; the Act includes persons as "juristic persons" that are not regarded, in terms of the general legal principal of South African law, as juristic persons at all. Kelly-Louw suggests that the legislature should have listed the type of businesses it wanted to refer to rather than create a definition of a "juristic person" that will only apply to the Act. See Kelly-Louw *LAWSA* vol 5(1) 2 4 n 4. Otto and Otto explain that the description of a juristic person is extended for the purpose of the Act, to treat bodies and associations as juristic persons that are not, in terms of general legal principal, juristic persons at all, Otto and Otto 17. If this, however, broadens the net of protection, as he points out is not so certain, the Act has only limited application (and therefore only offers limited protection) to a juristic person. It can, however, be stated that the Act does not only apply to natural persons but does afford some protection to juristic persons.

⁶⁴ S 7(1) (a).

⁶⁵ Thresholds determined as (a) lower R15 000; and (b) higher R250 000, in terms of GN 713 in GG 28893 of 1 June 2006.

⁶⁶ Small, intermediate and large credit agreements. See s 9(1). S 9(4) read with S 4(1)(a)(i) and GN 713 in GG 28893 of 1 June 2006 provides that a credit agreement is a large credit agreement if it is a mortgage agreement regardless of the amount involved or a credit transaction, other than a pawn transaction or credit guarantee, in terms of which the principal debt equals or exceeds R250 000. See Otto and Otto 31.

⁶⁷ Reference in the NCA to the Minister is defined in s 1 as the member of the Cabinet responsible for consumer credit matters. At the moment, this is the Minister of Trade and Industry.

⁶⁸ S 7(3).

regarding the monetary asset value or annual turnover threshold for juristic persons, and therefore the Act will have to be amended by Parliament before further increases can be permitted.⁶⁹

Small agreements are agreements concerning a principal debt of R15 000 or less, while intermediate agreements are agreements concerning a principal debt between R15 000 and R250 000, and large agreements concern a principal debt of R250 000 or more.⁷⁰

Section 9 places every type of credit agreement⁷¹ it applies to into one of these categories. A credit agreement is a small agreement if it is

- (a) a pawn transaction;
- (b) a credit facility, if the credit limit under that facility falls at or below the lower of the thresholds⁷² established in terms of section 7(1)(b) of the Act; or
- (c) any other credit transaction except a mortgage agreement or a credit guarantee, and the principal debt⁷³ under that transaction or guarantee falls at or below the lower of the thresholds established in terms of section 7(1)(b) of the Act.⁷⁴

A credit agreement is an intermediate agreement if it is

- (a) a credit facility, if the credit limit under that facility falls above the lower of the thresholds⁷⁵ established in terms of section 7(1)(b) of the Act; or
- (b) any credit transaction except a pawn transaction, a mortgage agreement or a credit guarantee, and the principal debt under that transaction or guarantee

⁶⁹ See Kelly-Louw *LAWSA* vol 5 (1) 18 n 10.

⁷⁰ Van Zyl in Scholtz (ed) 4-10.

⁷¹ For a discussion on the types of credit agreements, see par 4, 5, 6, 7 and 8 below.

⁷² R15 000 - GN 713 in GG 28893 of 1 June 2006.

⁷³ Defined in s 1 to mean the amount calculated in accordance with s 101(1)(a). It will also include the value of any item listed in s 102 and is the amount deferred in terms of the agreement. See Kelly-Louw and Stoop par 9 6 and 9 7.

⁷⁴ S 9(2) read with S 7(1) and GN 713 in GG 28893 of 1 June 2006 .

⁷⁵ R15 000 - GN 713 in GG 28893 of 1 June 2006.

falls between the thresholds⁷⁶ established in terms of section 7(1)(b) of the Act.⁷⁷

A credit agreement is a large agreement if it is

- (a) a mortgage agreement; or
- (b) any other credit transaction except a pawn transaction or a credit guarantee, and the principal debt under that transaction or guarantee falls at or above the higher of the thresholds⁷⁸ established in terms of section 7(1)(b) of the Act.⁷⁹

Otto⁸⁰ holds that, despite the clumsy wording of the Act, a pawn agreement is always a small agreement, a credit facility is always a small or intermediate agreement and a mortgage agreement is always a large agreement. For applying a monetary threshold determined in section 7(1)(b) of the NCA to a credit facility, the principal debt of the credit facility is the credit limit under that facility.⁸¹

The main reason for dividing credit agreements into the three categories are as follows:⁸²

- a) Different pre-agreement disclosure statement and quotations are required for small credit agreements than those for intermediate and large agreements.⁸³
- b) The format in which the credit agreement must be delivered to the consumer is different for a small credit agreement from that for intermediate and large agreements.⁸⁴

⁷⁶ Between R15 000 and R250 000 - GN 713 in GG 28893 of 1 June 2006.

⁷⁷ S 9(3) read with S 7(1) and GN 713 in GG 28893 of 1 June 2006.

⁷⁸ Above R 250 000 - GN 713 in GG 28893 of 1 June 2006.

⁷⁹ S 9(4) read with S 7(1) and GN 713 in GG 28893 of 1 June 2006.

⁸⁰ In Otto and Otto 35, see also Stoop "Kritiese evaluasie van die toepasingsveld van die 'National Credit Act' " 2008 *De Jure* 352 366.

⁸¹ S 7(2).

⁸² Kelly-Louw and Stoop 93.

⁸³ S 92 and reg 28 and 29 published in GN 489 in GG 28864 of 31 May 2006.

⁸⁴ S 93 and reg 30 and 31 published in GN 489 in GG 28864 of 31 May 2006.

- c) It excludes a juristic person — with an asset value or annual turnover of below R1 million at the time of the conclusion of a large credit agreement — from the application of the NCA.⁸⁵
- d) It provides for early termination charges that the credit provider can charge the consumer should the consumer want to settle a large credit agreement in advance.⁸⁶

According to Kelly-Louw and Stoop,⁸⁷ these are the only significant reasons for the types of categories of credit agreements in the Act.⁸⁸ The impact of the categorisation on each individual type of credit agreement⁸⁹ and the consequential application of the NCA will be discussed below.

4 Credit Facility

The first main type of agreement in the Act is the Credit Facility. An agreement⁹⁰ will constitute a credit facility, but not including an agreement contemplated in section 8(2)⁹¹ or section 4(6)(b)⁹² if, in terms of that agreement

⁸⁵ S 4(1)(b) read with S 7(1) and GN 713 in GG 28893 of 1 June 2006. See also *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 (3) SA 384 (T) par 10 and 11; *Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others* 2010 (5) SA 523 (GSJ) par 5 and 7; *Structured Mezzanine Investments (Pty) Ltd v Davids and Others* 2010 (6) SA 622 (WCC) par 15; *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another* 2010 (1) SA 627 (C); *Silver Falcon Trading 333 (Pty) Ltd v Nedbank Ltd* 2012 (3) SA 371 (KZN) ; and *Prisma Verpakking Norde (Pty) Ltd v Holtzhausen and Others* unreported, case no 43357/2010, 3 February 2012 (GNP) par 35.

⁸⁶ S 125(2)(c).

⁸⁷ Kelly-Louw and Stoop 94.

⁸⁸ The incorrect interpretation thereof can however have a significant impact on how the Act applies. Kelly-Louw and Stoop argue that a credit facility can never be a large agreement, as all credit facilities above R15 000 are classified as intermediate credit agreements. S 9(3)(a) read with s 7(1)(b) and GN 713 in GG 28893 of June 2006. Therefore, she states, Van der Merwe AJ in *Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others* 2010 (5) SA 523 (GSJ) par 6-8 incorrectly held that a credit facility (i.e. the juristic persons over-draft facility) that exceeded the R250 000 threshold was a large credit agreement. See Kelly-Louw and Stoop 33 n 51 and 94 n 611.

⁸⁹ S 8(1) read with s 8(3), 8(4) and 8(5).

⁹⁰ Irrespective of its form. According to Renke, Roestoff & Haupt this means that the agreement may be concluded orally or in writing in terms of the NCA, Renke, Roestoff & Haupt 2007 *Obiter* 229 n 13 231. See, however, Kelly-Louw and Stoop 52 n 235 where she states that the Act in terms of S 93 (1) requires all consumer credit agreements to be in writing and recorded on paper or electronically in a prescribed form. Therefore, irrespective of the form in which the agreement is concluded, the record thereof must be reduced to writing or a printable electronic form in a prescribed form. See s 93 read with reg 30 and 31 published in GN R489 in GG 28864 of 31 May 2006.

⁹¹ See the discussion of S 8(2) in par 3 1 above.

⁹² S 4(6)(b) states that despite any other provision of this Act if an agreement provides that a supplier of a utility or other continuous service (i) will defer payment by the consumer until the supplier has

- (a) a credit provider undertakes
- (i) to supply goods⁹³ or services⁹⁴ or to pay an amount or amounts,⁹⁵ as determined by the consumer from time to time, to the consumer or on behalf of,⁹⁶ or at the direction of,⁹⁷ the consumer; and
 - (ii) either to
 - (aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i);⁹⁸ or
 - (bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i);⁹⁹ and

provided a periodic statement of account for that utility or other continuous service; and (ii) will not impose any charge contemplated in s103 in respect of any amount so deferred, unless the consumer fails to pay the full amount due within at least 30 days after the date on which the periodic statement is delivered to the consumer, that agreement is not a credit facility within the meaning of s 8(3), but any overdue amount in terms of that agreement, as contemplated in subparagraph (ii), is incidental credit, to which this Act applies to the extent set out in s 5.

⁹³ This provides for the purchase and sale of movable goods on credit. There is an overlap between the definition of a credit facility and an instalment agreement, which also provides for the sale of movable goods on credit. The latter however provides per its definition in s 1 for the passing of ownership whilst the definition of a credit facility does not. See Renke, Roestoff and Haupt 2007 *Obiter* 231-232. The transfer of ownership if the agreement is a credit facility will be determined by the common law. See Stoop 2008 *De Jure* 352 356. If there is no provision in the agreement for transfer of ownership, ownership will pass on delivery. See Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005* LLD-thesis UP (2012) (herein after referred to as Renke LLD-thesis) 386. For a discussion of instalment agreements see par 5 2 below. See also *JMV Textiles (Pty) Ltd v De Chalain Spareinvestments 14 CC and Others* 2010 (6) SA 173 (KZD) par 14 for an apt description of the distinction between the working of an in-store card and a credit card, both as credit facilities, when purchasing goods, by Wallis J.

⁹⁴ See Du Pisani LLM-dissertation 5 for an example of the supplying of services that would fulfil the criteria of a credit facility. She describes how the rental of a car on an ongoing basis with the deferral of payment to the end of the month can fall within the definition. The consumer can decide what amount he wishes to pay, subject to a minimum amount, to settle the account. Interest may then be charged on the outstanding account if the full balance is not paid.

⁹⁵ If a money-lending transaction complies with all the other criteria of a credit facility, it can also be a credit facility. For instance, in respect of a credit card account the obligation to repay the amount borrowed is deferred and a fee, charge or interest is payable for the deferment. See *JMV Textiles (Pty) Ltd v De Chalain Spareinvestments 14 cc and Others* 2010 (6) SA 173 (KZD) 178C-G and 179B. See also Du Pisani LLM-dissertation 2011 6, Renke LLD-dissertation 386 n 27 and 28. For further examples see Otto in Scholtz (ed) 8-2.

⁹⁶ Typically this would constitute the undertaking by the credit provider in a credit card transaction to pay an amount as determined by the consumer to a third party. A credit card holder purchases goods at a supermarket with the credit card supplied by the bank under a credit facility. See Kelly-Louw *LAWSA* 5(1) n 4 par 13.

⁹⁷ See eg. in Kelly-Louw *LAWSA* n 5 par 13. The bank honours a cheque drawn on an overdraft facility by a consumer on his current account.

⁹⁸ Regarding this Wallis J in *JMV Textiles (Pty) Ltd v De Chalain Spareinvestments 14 CC and Others* 2010 (6) SA 173 (KZD) par 16 had the following to add: “[I]n the case of a credit facility it is a term of the facility that the consumer is entitled to defer payment in full and make lesser payments subject to paying interest. Thus, in the case of the credit facility described in s 8(3) part and parcel of the arrangement between the consumer and the credit provider is agreement that the consumer may take advantage of the offer of credit. Indeed the usual 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 largely how credit providers profit from the agreement.”

⁹⁹In *Voltex (Pty) Ltd v Chenleza CC* 2010 (5) SA 267 (KZP) par 34 and 35 the court stipulated periodical statements as an alternative requirement to s 8(3)(a)(ii)(aa) for the classification of a credit agreement as a credit facility.

- (b) a charge, fee or interest¹⁰⁰ is payable to the credit provider in respect of
- (i) any amount deferred as contemplated in paragraph (a) (ii) (aa); or
 - (ii) any amount billed as contemplated in paragraph (a) (ii) (bb) and not paid within the time provided in the agreement.

The exemption of the supplier of utilities¹⁰¹ or continuous services¹⁰² in section 4(6) (b) from the application of section 8(3), appears to be drafted for agreements between municipalities and consumers for the delivery of services.¹⁰³ It is, however, possible for the supplier of any continuous service, such as pool maintenance companies, gardening services and security services to structure their agreements in such a way as to fall within this exemption.¹⁰⁴ It is also possible that a municipality may fail to conclude agreements with its consumers that meet the requirements set

¹⁰⁰ The terms “charge”, “fee” and “interest” is not defined in the NCA, but are seen in *Evans v Smith* 2011 (4) SA 472 (WCC) par 16 to 19 to be of a wide import and to include any consideration payable in respect of the agreement irrespective of the description attached by the parties to such consideration. See Van Zyl in Scholtz (ed) 4-2 fn 7a. The term “charge” has even been interpreted so as to mean the costs of drafting the agreement. See *Carter Trading (Pty) Ltd v Blignaut* 2010 (2) SA 46 (ECP) par 16 and 17. The interpretation of these terms was, however, limited in some instances by the courts and do not include any fee, charge, interest or tax levied pursuant to late payment of obligations that arise from any other legislation. See *Mitchell v Beheerligaam van RNS Mansions* 2010 (5) SA 75 (GNP) par 20 where the court found that the levies and interest thereon was not payable in terms of any agreement but obligations imposed by the Sectional Titles Act 95 of 1984 and its regulations the Court referred to Mills “The applicability of the National Credit Act to sectional title levies” May 2010 *De Rebus* 61 and *TS Dhlamini v Body Corporate of Frenoleen* unreported case number AR 611/200911 March 2010 (KZNP). See also Maree “Sectional title levies and the National Credit Act: Assessing an uneasy relationship” December 2009 *De Rebus* 18. On a similar trend the court in *Nelson Mandela Bay Metropolitan Municipality v Nobumba* 2010 (1) SA 576 (ECG) par 32 found that s 2(1) of the Local Government: Municipality Property Rates Act 6 of 2004 empowers the municipality to levy rates on property and that the obligation of the property owner to pay arises from this Act and not an agreement. Therefore, the NCA does not apply. See also Otto “Rekeninge vir munisipale dienste en die National Credit Act” 2011 *De Jure* 10 for an in depth discussion of the judgement. The NCA would not govern the imposition of fees and taxes in those instances. See also Van Zyl in Scholtz (ed) 4-2 n 6.

¹⁰¹ “Utility” is defined in s 1 as “the supply to the public of an essential (a) commodity, such as electricity, water, or gas; or (b) service, such as waste removal, or access to sewage lines, telecommunication networks or any transportation infrastructure.”

¹⁰² “Continuous service” is defined in s 1 as “the supply for consideration of a utility or service, other than credit or access to credit, or the supply of such a utility or service combined with the supply of any goods that are essential for the utilisation of that utility or service by the consumer, with the intent that, so long as the agreement to supply that utility or service remains in force, the supplier will make the service continuously available to be used, accessed or drawn upon (a) from time to time as determined by the consumer; and (b) with any frequency or in any amount as determined, accessed, required, demanded or drawn upon by the consumer, subject only to any total use or cost limits set out in the agreement.”

¹⁰³ See *Nelson Mandela Bay Metropolitan Municipality v Nobumba* 2010 (1) SA 576 (ECG) 579 where the court drew the distinction between municipal rates and taxes, levied pursuant to legislation, and other fees based on an agreement between the parties.

¹⁰⁴ Van Zyl in Scholtz (ed) 4-7 and Du Pisani LLM-dissertation 13.

out in section 4(6)(b). In such an instance, the service agreement will not be exempted from the definition of a credit facility.¹⁰⁵

The reference in section 8(3) to ‘as determined by the consumer from time to time’ has led to diverse opinions as to what the exact meaning of the words is and if they carry any special significance.¹⁰⁶ Lombard and Renke¹⁰⁷ argue that these words mean that the legislature had revolving credit in mind when drafting the definition of a credit facility. Revolving credit is a type of credit where the payment by the consumer of a certain amount on his debt creates new credit under the same facility for the consumer. Kelly-Louw and Stoop defines revolving credit to mean that should the consumer pay or repay a certain amount in settlement of the debt that he or she owes, that amount that has been paid or repaid may then be used again in the future.¹⁰⁸

In *JMV Textiles (Pty) Ltd v De Chalain Spareinvestments 14 CC and Others*¹⁰⁹ Willis J held a similar view¹¹⁰ as that of Lombard and Renke, by saying that “[i]n my view s 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.” Renke¹¹¹ goes one step further and argues that transactions in terms of which payments by the consumer do not create new credit for the consumer are not credit facilities, but are covered by other definitions in the NCA. Therefore, he states that a fixed-sum credit transaction — be it a sale of goods on credit, the rendering of services on credit or a money lending transaction — where payment does not create new credit for the consumer, will not be a credit facility. Otto and Otto¹¹² do not make any special reference to the term ‘as determined by the consumer from time to time’ but when Otto¹¹³ gives a list of common examples of credit facilities he includes examples of revolving credit and fixed-sum credit. It seems Otto is of the opinion that section 8(3)

¹⁰⁵ See *Nelson Mandela Bay Metropolitan Municipality v Nobumba* 2010 (1) SA 576 (ECG) 593 E-F and Du Pisani LLM-dissertation 13.

¹⁰⁶ Kelly-Louw and Stoop 53 n 239.

¹⁰⁷ Lombard and Renke “The Impact of the National Credit Act on Specific Company Transactions” 2009 *SA Merc LJ* 486 488.

¹⁰⁸ Kelly-Louw and Stoop 53 n 239.

¹⁰⁹ 2010 (6) SA 173 (KZD).

¹¹⁰ 2010 (6) SA 173 (KZD) 179A-B.

¹¹¹ Renke LLD-thesis 385.

¹¹² Otto and Otto 20 par 9 2.

¹¹³ Otto in Scholtz (ed) 8-2 par 8 2 2.

covers both revolving and fixed-sum credit.¹¹⁴ Du Pisani submits that the definition of a credit facility exclusively provides for credit agreements in terms whereof revolving credit is provided.¹¹⁵ The writer agrees with this view as supported by the argument of Renke.

The Act defines deferral in relation to “deferred amount”, which means any amount payable in terms of a credit agreement where payment is deferred and upon which interest is calculated, or any fee, charge or increased price is payable by reason of the deferment. The deferred amount includes any obligation of the consumer that is deferred in terms of a credit facility.¹¹⁶ In *Bridgeway Ltd v Markam*¹¹⁷ Mathopo J somehow accredits the deferral requirement in a credit facility to the obligation of the credit provider to defer the payment of the credit to the consumer. It is, however, clear that the deferral referred to in the NCA is the deferral of the obligation of the consumer to repay the loan and the interest that the credit provider may charge on the deferred loan amount.¹¹⁸ The court, however, correctly found that the discounted sale of rights does not fall within the definition of a credit facility. In another matter the court¹¹⁹ correctly found the agreement in the case of *Voltex (Pty) Ltd v Chenleza*¹²⁰ to fall outside the definition of a credit facility,¹²¹ but it incorrectly inferred that the payment of the deferred amount cannot be paid in a fixed sum in full but that payment must be made in instalments.¹²²

¹¹⁴ See, however, Otto’s discussion in Otto “Verkoop van Regte teen ’n Diskonto en die Toepaslikheid van die *National Credit Act Bridgeway Ltd v Markam* 2008 (6) SA 123 (W)” 2009 TSAR 198 on 202 where he states that the definition of a credit facility does not seem to cover a fixed-sum once-off loan.

¹¹⁵ Du Pisani LLM-dissertation 8. She bases her opinion on the presumption that the legislation does not contain futile or nugatory provisions and that the term ‘as determined by the consumer from time to time’ must therefore be given meaning, and secondly that s 119 provides for the increase of the credit limit under a credit facility and that the consumer has the option to increase the limit from time to time. This is in line with the practice involving revolving credit and cannot be reconciled with fixed-sum credit transactions.

¹¹⁶ Reg 39(1) as published in GN R489 in GG 28864 of 31 May 2006.

¹¹⁷ 2008 (6) SA 123 (W) 126H-127B and 128B. See also *Rodel Financial Service (Pty) Ltd v Naidoo* 2013 SA 151 (KZN).

¹¹⁸ See Otto 2009 TSAR 198 for his discussion of the case and his critique on 202.

¹¹⁹ Per Madondo J.

¹²⁰ 2010 (5) SA 267 (KZP).

¹²¹ 2010 (5) SA 267 (KZP) par 35.

¹²² 2010 (5) SA 267 (KZP) par 33. See Kelly-Louw and Stoop 56 n 266 for their critique on this part of the judgment.

Section 8(3)(b) provides that the credit provider may recover a charge, fee or interest¹²³ regarding the amount deferred or on the amount billed by periodic statement but not paid within the agreed time.¹²⁴ The agreement must contain a provision for a charge, fee or interest¹²⁵ and if it does not, the agreement will probably not qualify as a credit facility.¹²⁶ *Mora* interest charged as damages due to the breach of contract on the deferred amount is not fixed by agreement but determined by operation of law.¹²⁷

From the discussion of credit transactions to follow, it will become clear that the definition of a credit facility overlaps with certain categories of credit transactions, for example incidental credit agreements, instalment sale agreements and leases and how the Act defines them.¹²⁸ Similarly, the definition of a credit facility may overlap with that of a mortgage agreement or a secured loan. In the last instance, the Act sets out provisions on how to deal with this overlap.¹²⁹ In all other instances, Otto has the following solution:

It is submitted that one must distinguish between generic and specific definitions in order to categorise the agreement when it is inappropriate to apply both definitions. When an agreement satisfies a specific definition, it should fall under that definition instead of under the generic definition. For example, when something is sold, the price is payable by means of instalments and the agreement contains a reservation-of-ownership clause, the transaction should be treated as an instalment agreement rather than a credit facility.¹³⁰

This overlap of definitions will be discussed when the specific credit transaction is defined below.

¹²³ See Ch 5 Part C s 100-106 regarding the consumer's liability for interest, charges and fees. The impact of these sections fall beyond the scope of this work. For a full discussion see Van Zyl in Scholtz (ed) par 10 and with specific reference to credit facilities see Du Pisani LLM-dissertation 9 and 10.

¹²⁴ Otto and Otto 20. See also n 13 and 14 on the same page for examples.

¹²⁵ *Voltex (Pty) Ltd v Chenleza CC* 2010 (5) SA 267 (KZP) Although the court was not drawn in to a discussion of s 8(3), the court made this observation regarding the similar provision in s 8(4)(f) par 35 read with pars 38 and 39.

¹²⁶ Kelly-Louw and Stoop 54.

¹²⁷ *Voltex (Pty) Ltd v Chenleza CC* 2010 (5) SA 267 (KZP) par 39.

¹²⁸ Kelly-Louw and Stoop 57.

¹²⁹ Otto in Scholtz (ed) 8-17 par 8 4 2. See s 8(6) which stipulates that, if, as contemplated in subs (1)(d), a particular credit agreement constitutes both a credit facility as described in subs (3) and a credit transaction in terms of subs (4)(d): "(a) subject to paragraph (b), that agreement is equally subject to any provision of this Act that applies specifically or exclusively to either (i) credit facilities; or (ii) mortgage agreements or secured loans, as the case may be, and (b) for the purpose of applying (i) s 108 regarding statements of account, that agreement must be regarded as a credit facility; or (ii) s 4(1)(b) read with s 9(4), that agreement must be regarded as a large agreement if it is a mortgage agreement." The agreement will therefore always be treated as a large agreement regardless of its size.

¹³⁰ Otto in Scholtz (ed) 8-18 par 8 4 3.

From the discussion of section 9 in paragraph 3 2 above it is clear that a credit facility can only be a small credit agreement or intermediate credit agreement, and never a large credit agreement.¹³¹ For applying a monetary threshold determined in section 7(1)(b) to a credit facility, the principal debt of the credit facility is the credit limit under that facility.¹³²

5 Credit Transactions

Credit transactions are the second main type of credit agreement set out in section 8(1)(b). The eight subcategories of credit transactions¹³³ are listed in section 8(4) and must be read with the definitions in section 1. An agreement, irrespective of its form¹³⁴ but not including an agreement contemplated in section 8(2),¹³⁵ constitutes a credit transaction if it is

- (a) a pawn transaction or discount transaction;
- (b) an incidental credit agreement, subject to section 5(2);
- (c) an instalment agreement;
- (d) a mortgage agreement or secured loan;
- (e) a lease; or
- (f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of
 - (i) the agreement; or
 - (ii) the amount that has been deferred.

The legislature only lists six subsections, but some of the subcategories of transactions — such as pawn transactions and discount transactions and a mortgage

¹³¹ Du Pisani LLM-dissertation 11. See also the argument of Kelly-Louw and Stoop that a credit facility can never be a large agreement, as all credit facilities above R15 000 are classified as intermediate credit agreements (S 9(3)(a) read with s 7(1)(b) and GN 713 in GG 28893 of June 2006) and that Van der Merwe AJ in *Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others* 2010 (5) SA 523 (GSJ) par 6-8 therefore incorrectly held that that a credit facility (the juristic persons over-draft facility) that exceeded the R250 000 threshold was a large credit agreement, Kelly-Louw and Stoop 33 n 51.

¹³² S 7(2).

¹³³ See Otto's critique of the legislature's apparent reasonless use of the different words "agreements" and "transactions" within s 8(4) when naming the eight subcategories of credit transactions. Otto "The Incidental Credit Agreement" 2010 *THRHR* 637 on 640.

¹³⁴ See par 4 above.

¹³⁵ In s 8(2) specifically excludes:(a) a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance; (b) a lease of immovable property; or (c) a transaction between a stokvel and a member of that stokvel in accordance with the rules of that stokvel from the definition of a credit agreement.

agreement and secured loan — are inexplicably referred to in the same subsection.¹³⁶ For ease of reference, the subcategories were placed together in the same fashion as the legislator did, but will be discussed separately below. The legislature uses different words (“agreements” and “transactions”) within s 8(4) when naming the eight subcategories of credit transactions, although there seems to be no reasoning behind the interchanging of these words.¹³⁷

5 1 Pawn Transaction¹³⁸

A pawn transaction is defined in section 1¹³⁹ to have the following meaning, an agreement, irrespective of its form,¹⁴⁰ in terms of which

- (a) one party advances money or grants credit to another, and at the time of doing so, takes possession of goods as security for the money advanced or credit granted; and
- (b) either
 - (i) the estimated resale value of the goods exceeds the value of the money provided or the credit granted; or
 - (ii) a charge, fee or interest is imposed in respect of the agreement, or in respect of the amount loaned or the credit granted; and
- (c) the party that advanced the money or granted the credit is entitled on expiry of a defined period to sell the goods and retain all the proceeds of the sale¹⁴¹ in settlement of the consumer's obligations under the agreement.

The NCA places certain specific obligations on a credit provider that enters into a pawn transaction with a consumer.¹⁴² The credit provider must specify in the credit agreement with the consumer a date on which the agreement ends.¹⁴³ The credit provider must then retain the property of the consumer until the end of the agreed date. The credit provider, at the credit provider's risk, holds the property that the consumer delivers to the credit provider as security.¹⁴⁴ If the consumer repays his

¹³⁶ Otto and Otto 20 n 17.

¹³⁷ Otto 2010 *THRHR* 637 on 640.

¹³⁸ For examples of pawn transactions see Du Pisani LLM-dissertation 15; Otto in Scholtz (ed) 8-3 par 8 2 3 1 and Kelly-Louw and Stoop 58.

¹³⁹ This definition may overlap with the common-law pledge. See Renke LLD-thesis 387 n 31.

¹⁴⁰ See par 4 above.

¹⁴¹ Du Pisani states that it is unclear why the credit provider is entitled to keep all the proceeds of the sale when selling the property upon default of the consumer, as this is contrary to the common law. In common law the surplus must be repaid to the debtor, and the creditor can only keep all the proceeds if the parties agree that the creditor will take over the property given as security at a specified price if the price is market-related at the time of the debtors default. See Du Pisani LLM-dissertation 16 n 70.

¹⁴² S 99.

¹⁴³ S 99(1)(a).

¹⁴⁴ S 99(1)(b).

debt or tenders the money required to pay the settlement value¹⁴⁵ under the agreement before or up to the date on which the agreement ends the credit provider must deliver or return the property handed to the credit provider as security.¹⁴⁶ If a credit provider as contemplated fails to deliver the property to the consumer, the consumer may apply to the National Consumer Tribunal for relief.¹⁴⁷ The Tribunal may order the credit provider to pay to the consumer an amount equal to

- (a) the fair market value of the property, less the settlement value at the time of failure to deliver that property to the consumer, as determined by the Tribunal, if the reason for the failure to return the property is that it has been damaged or destroyed by an intervening cause outside the control of the credit provider; or
- (b) double the fair market value of the property, less the settlement value at the time of failure to deliver that property, as determined by the Tribunal, if the reason for the failure to return the property is due to the credit providers culpability.¹⁴⁸

If the credit provider has sold the property as contemplated, evidence of the price at which that property was sold may be considered by the Tribunal, but is not conclusive in determining the fair market value of that property.¹⁴⁹

In terms of section 9, a pawn transaction is always a small agreement¹⁵⁰ and can never be an intermediate or large transaction. Pawn transactions are exempted from the provisions of the NCA dealing with reckless credit,¹⁵¹ unlawful agreements¹⁵² and periodic statements of account, including the form and content thereof.¹⁵³

¹⁴⁵ In terms of s 125 a consumer is entitled to settle the credit agreement at any time, with or without advance notice to the credit provider. S 125(2) states that the amount required to settle a credit agreement is the total of the following amounts: (a) The unpaid balance of the principal debt at that time; and (b) the unpaid interest charges and all other fees and charges payable by the consumer to the credit provider up to the settlement date.

¹⁴⁶ S 99(1)(c).

¹⁴⁷ Kelly-Louw and Stoop par 3 4. The Tribunal was established in terms of s 26. The function of the Tribunal falls beyond the scope of this work. See Kelly-Louw and Stoop par 3 4 for a discussion.

¹⁴⁸ S 99(2).

¹⁴⁹ S 99(3).

¹⁵⁰ S 9(2)(a).

¹⁵¹ In s 78(2)(d) pawn transactions are excluded from the application of ss 81-84. Reckless credit falls beyond the scope of this work. For a discussion see Kelly-Louw and Stoop par 12 2.

5 2 Discount Transaction¹⁵⁴

A discount transaction is defined in section 1 to mean an agreement, irrespective of its form,¹⁵⁵ in terms of which

- (a) goods or services are to be provided to a consumer over a period of time;¹⁵⁶ and
- (b) more than one price is quoted for the goods or service, the lower price being applicable if the account is paid on or before a determined date, and a higher price or prices being applicable if the price is paid after that date, or is paid periodically during the period.

Payment on or before a determined date, and a discount that is given with respect to the prepayment, are essential elements of such a transaction.¹⁵⁷

It is not clear how the giving of two prices the one for payment on a specific date and the other for deferment of payment is not a contravention of section 100(2). The section states that a credit provider must not charge a consumer a higher price for any goods or services than the price charged by that credit provider for the same or substantially similar goods or services in the ordinary course of business based on a cash transaction. The fact that the definition of a discount transaction does not contain the requirement of a fee, charge or interest to be levied by the credit provider may explain this. When the higher of the two prices becomes applicable, the difference in the two prices quoted contains the element of a fee, charge or interest

¹⁵² S 89(1). Unlawful agreements falls beyond the scope of this work. For a discussion see Kelly-Louw and Stoop par 8 2 1.

¹⁵³ In s 107(2)(a) pawn transactions are excluded from the application of ss 108-110 that deal with statement of accounts.

¹⁵⁴ For examples of discount transactions see Otto in Scholtz (ed) 8-4 par 8 2 3 2, Du Pisani LLM-dissertation 16 and Kelly-Louw and Stoop 59 par 2 4 3 2. See also Stoop "The Impact of the National Credit Act 34 of 2005 on School Fees Charged by Public Schools" 2010 *THRHR* 451 where he argues on 455 that the arrangement where a discount is given by the school if the school fees are paid before a certain date may in certain circumstances be deemed a discount transaction for purposes of the Act.

¹⁵⁵ See par 4 above.

¹⁵⁶ Renke argues that the words 'over a period of time' is not properly defined, but that the words may indicate that only transactions that take place on a continuous basis (eg. transactions between suppliers of merchandise and their outlets or agreements between cleaning companies and their clients) and with the understanding then that a discount is granted if the credit provider receives his money sooner rather than later, should qualify as discount transactions. See Renke LLD-thesis 388 n 32.

¹⁵⁷ See Renke LLD-thesis 388 n 32.

component.¹⁵⁸ Section 107(2)(b) provides that sections 108 to 110¹⁵⁹ do not apply to a discount transaction until interest is charged for the first time on the principal debt. As stated above, the definition of a discount transaction does not contain any reference to the charging of interest. Nothing in the Act, however, prevents the credit provider from levying a fee, interest or charge in a discount transaction and from the wording of section 107(2)(b) this would seem permissible.¹⁶⁰ There are no other exclusions in the Act and all the provisions of the NCA will apply fully to discount transactions.¹⁶¹

Although the legislature grouped pawn transactions and discount transactions in one subparagraph of the Act,¹⁶² there is a certain amount of overlap between the definition of a discount transaction and a different category of credit transaction, the incidental credit agreement.¹⁶³ The overlap and the differences in the definitions of these two credit transactions will be discussed after the incidental credit agreement is defined in 5.3 below.

Not every discount sale agreement will, however, be a discount transaction in terms of the Act. This was clearly illustrated in *Bridgeway Ltd v Markam*¹⁶⁴ where the respondent sold his land to a third party and subsequently ceded his rights relating to the purchase price to the applicant. The respondent gets a portion of the purchase price from the sale of land (discounted) immediately and the applicant later receives the full purchase price from the third party in terms of the deed of sale of the land. The Court found that this was a true discount sale agreement and the parties had no periodic payment or deferment of payment against the payment of a fee in mind as required in section 8 of the Act. The applicant stepped into the shoes of the respondent as seller and no money was borrowed. There was no money lending and

¹⁵⁸ Kelly-Louw and Stoop 59.

¹⁵⁹ These sections deal with sending of periodic statements of account, their form and content.

¹⁶⁰ See Kelly-Louw and Stoop 60. Provided it is in line with the maximums set out in the Act and its Regulations. This falls beyond the scope of this work. For a full discussion, see Kelly-Louw and Stoop Ch 9 on ss 100-106 and r 39-49.

¹⁶¹ See Kelly-Louw and Stoop 60.

¹⁶² S 8(4)(a).

¹⁶³ Otto 2010 *THRHR* 637 on 640 and Stoop 2008 *DJ* 357-358.

¹⁶⁴ 2008 (6) SA 123 (W) 126H-127B and 128B. For a full discussion and some critique of the judgment, see Otto 2009 *TSAR* 198. See also *Renier Nel Inc. v Cash on Demand (KZN) (Pty) Ltd* 2011 (5) SA 239 (GSJ).

the applicant, as discounter, was purchasing and not lending. Therefore no credit transaction took place, but rather a discount transaction.

5 3 Incidental Credit Agreement¹⁶⁵

This is a new term introduced by the NCA to the South African legal vocabulary and has been described as a “meaningless expression”¹⁶⁶ and as an “unhappy one”.¹⁶⁷ Otto refers to it as a statutory incidental credit agreement and a strange creature.¹⁶⁸ The Act also introduces the provider of goods or services that did not necessarily intend to be a credit provider at the time of conclusion of the agreement, but becomes one when the agreement falls within the definition of an incidental credit agreement.¹⁶⁹ An incidental credit agreement has some unique characteristics which are not included in the other credit agreements,¹⁷⁰ but the definition unfortunately also seems to overlap with some of the other agreements.¹⁷¹ These unique characteristics, and how the incidental credit agreement is different from other credit agreements, are discussed below.

Although the term may be relatively new and is only referred to in the NCA for the first time, the type of contracts covered by the definition of the incidental credit agreement are all well-known in the legal and economic landscape.¹⁷² They are the typical sale of services and goods contracts with a future date for payment. The provider of the service or goods does not have the provision of credit in mind but the

¹⁶⁵ For examples of incidental credit agreements see Otto 2010 *THRHR* 637 641. See also Du Pisani LLM-dissertation 18, De Kock “Attorney Accounts and the Nature of an Incidental Credit Agreement” Apr 2010 *De Rebus* 26 and Kelly-Louw and Stoop 64. See Stoop 2010 *THRHR* 451 where he argues on 457 that the arrangement where interest is only charged if school fees are paid after a certain date or a discount is given by the school if the school fees are paid before a certain date may in certain circumstances be deemed an incidental credit agreement for purposes of the Act.

¹⁶⁶ Otto and Otto 22.

¹⁶⁷ Wallis J in *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and Others* 2010(6) 173 (KZD) 180F. See however the critique of Tennant on the judgement regarding the finding that an incidental credit agreement is not a credit agreement in Tennant “The Incorrect Understanding of an Incidental Credit Agreement Leads to Undesirable Consequences: *JMV Textiles Ltd v De Chalain Spareinvest*” 2011 *SA Merc LJ* 123 126.

¹⁶⁸ Otto 2011 *TSAR* 547 548 par 3.

¹⁶⁹ De Kock Apr 2010 *De Rebus* 26. The agreement must, however, on conclusion contain certain provisions contained in the definition of an incidental credit agreement to qualify as one.

¹⁷⁰ Du Pisani LLM-dissertation 18.

¹⁷¹ Otto 2010 *THRHR* 637 640; Otto and Otto 21 22. Otto and Otto refer to the overlap in the definitions of “discount transaction” and a “credit facility” with that of an incidental credit agreement.

¹⁷² Du Pisani LLM-dissertation 18.

agreement contains a penalty or default provision in the event of non-payment or should payment be late.¹⁷³

An incidental credit agreement as defined in section 1 of the NCA means:

an agreement, irrespective of its form,¹⁷⁴ in terms of which an account was tendered¹⁷⁵ for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time¹⁷⁶ and either or both of the following conditions apply:

(a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or

(b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date.

As stated above, the definition of an incidental credit agreement is in essence nothing else but the ordinary sale and services contract.¹⁷⁷ It has also been stated that it was not the legislator's intention that the NCA should govern all transactions for the sale and purchase of goods and services.¹⁷⁸ Due to the specific nature of this type of agreement, the legislature has built in a time-delay in the activation of the incidental credit agreement.

Therefore, the parties to an incidental credit agreement are only deemed to have made that agreement on the date that is twenty business days after

(a) the supplier of the goods or services that are the subject of that account, first charges a late payment fee or interest in respect of that account; or

¹⁷³ Otto 2010 *THRHR* 638 649.

¹⁷⁴ See par 4 above.

¹⁷⁵ The use of the word tendered in this context seems to be a mistake by the legislature. A provider of services or goods will never tender an account after the delivery of the services or goods as the consumer may, if the word is interpreted according to its general principal, then reject the account. Otto correctly argues in Scholtz (ed) 8-5 n 21 that in practice the original agreement between the parties would normally provide for the rendering of accounts that will imply that the consumer must receive the account and act thereon, and that the consumer would not have the option to reject the account. The intended word the legislature should have used is "rendered" and not "tendered".

¹⁷⁶ The goods or services are to be provided in the future over a period. The provider of the service or goods gives an undertaking to deliver it. The account was however already "tendered" (my indentation). Renke "Aspects of Incidental Credit in terms of the National Credit Act 34 of 2005" 2011 *THRHR* 464 says that this creates the impression that the credit provider may tender an account before the periodic delivery of the service or goods.

¹⁷⁷ Kelly-Louw and Stoop 64.

¹⁷⁸ Kelly-Louw and Stoop 64 referring to Van Zyl in Scholtz (ed) 4-8 par 4 4 1.

- (b) a pre-determined higher price for full settlement of the account first becomes applicable, unless the consumer has fully paid the settlement value before that date.¹⁷⁹

For example, the supplier of the goods deliver on 1 June and the parties agree payment must take place before or on the 30th of June, thereafter the supplier may charge interest, or the higher price may be applied, as the case may be. If the consumer does not pay before or on the 30th of June, the supplier begins to charge interest, or the higher price will be applied. If after twenty business days the consumer has still not made the payment, the provisions of the Act relating to incidental credit will apply to the agreement and the supplier will become a credit provider in terms of the NCA.

As stated by Otto, there is no clear reason for this “gestation” period,¹⁸⁰ but the reason may be, as argued by Kelly-Louw, that the legislator wants to exclude the operation of the NCA from these types of transactions for as long as possible.¹⁸¹ This becomes clear when it is kept in mind that the parties did not intend to contract the sale and purchase of goods or services on a credit basis, and that it was not the intention of the supplier to make money from the extension of credit to the consumer.¹⁸² There is, however, no other clear reason why the incidental credit agreement cannot come into existence as soon as the credit provider charges interest for the first time or as soon as the higher price becomes applicable.¹⁸³

The question arises as to what the agreement is, if anything, pending the expiry of the twenty business-day period. Otto argues that although the incidental credit agreement is only born in its legislative form after twenty business days, there is a valid and binding credit contract between the parties: namely a contract for the sale of goods or delivery of services. He also states that not too much must be read into the wording “the parties are deemed to have made the agreement after the twenty

¹⁷⁹ S 5(2).

¹⁸⁰ Otto 2010 *THRHR* 638 647.

¹⁸¹ Kelly-Louw and Stoop 65.

¹⁸² *JMV Textiles (Pty) Ltd v De Chalain Spareinvestments 14 CC and Others* 2010 (6) SA 173 (KZD) par 17.

¹⁸³ Renke 2011 *THRHR* 464 472.

days” instead of “that the agreement itself is deemed to be concluded after the twenty days”.¹⁸⁴

The “credit agreement” has two characteristics at this stage: payment is deferred and interest is levied. This may lead to the conclusion that, in the interim period, it is a section 8(4)(f) credit transaction.¹⁸⁵ As discussed below, the Act only applies in a limited way to an incidental credit agreement but fully to a section 8(4)(f) credit transaction. This would lead to the absurd position that for the twenty-day “gestation” period the NCA has full application¹⁸⁶ and thereafter the application is limited again.¹⁸⁷ If only for this reason, the argument that the credit agreement must be treated as a section 8(4)(f) credit transaction in this interim period, must be rejected.¹⁸⁸

Renke¹⁸⁹ argues, and the writer agrees, that the incidental credit agreement must be treated as such from the start. As soon as the agreement between the parties complies with the definition of an incidental credit agreement, there exists a tie between the parties. The NCA makes provision that certain sections¹⁹⁰ apply to the agreement while in the interim period. The Act therefore applies to the agreement even before the incidental credit agreement is deemed to be made.¹⁹¹ This is proof, Renke¹⁹² argues, that the Act recognises the relationship between the parties, as such, before the twenty-day period has lapsed, as an incidental credit agreement. Furthermore, the NCA specifically notes in the same section¹⁹³ that certain provisions¹⁹⁴ will only come into effect after the twenty-day period has lapsed.

Only the following provisions of the Act apply with respect to an incidental credit agreement:

¹⁸⁴ Otto 2010 *THRHR* 638 647. Otto states that this is probably just another example of untidy drafting by the legislature.

¹⁸⁵ The “catch all” s 8(4)(f) “other” agreement to be discussed in par 5.8 below.

¹⁸⁶ Most notably the sections regarding mandatory registration as a credit provider (s 40-42) and those relating to reckless credit (s 80-84).

¹⁸⁷ Otto 2010 *THRHR* 637 647. Renke 2011 *THRHR* 464 465.

¹⁸⁸ Otto 2010 *THRHR* 647. Renke 2011 *THRHR* 464 472.

¹⁸⁹ Renke 2011 *THRHR* 464 472.

¹⁹⁰ Set out in s 5(1)(a)-(e) and (g).

¹⁹¹ As per s 5(2).

¹⁹² Renke 2011 *THRHR* 464 466.

¹⁹³ S 5.

¹⁹⁴ Set out in s 5(1)(f).

- (a) Chapters as a whole: Chapter 1 relating to the interpretation, purpose and application of the Act (ss 1-11); Chapter 2 that deals with consumer credit institutions (ss 12-38); Chapter 7 regarding dispute settlement other than debt enforcement (ss 134-152); Chapter 8 setting out enforcement of the NCA and Chapter 9 stating the general provisions (ss 171-173);
- (b) Chapter 3 regarding the regulation of the consumer credit industry, but only sections 54 and 59;
- (c) Chapter 4 dealing with consumer credit policy, but only Parts A Consumer rights (ss 60-66) and B Confidentiality, personal information and consumer credit records (ss 67-73) and Part D Over-indebtedness and reckless credit (ss 78-88), except to the extent that part D deals with reckless credit (ss 80-84);
- (d) Chapter 5 regarding consumer credit agreements, but only Part C that deals with the consumer's liability, interest, charges and fees (ss 100-106), subject to section 5(3)(a);
- (e) In Chapter 5 regarding consumer credit agreements, Part D regarding Statements of account (ss 107-115) and Part E setting out the alteration of credit agreement (ss 116-120) will only be applicable once the incidental credit agreement is deemed to have been made in terms of subsection (2); and
- (f) Chapter 6 dealing with collection, repayment, surrender and debt enforcement, but only regarding Parts A Collection and repayment practices (ss 124-126a) and C Debt enforcement by repossession or judgment (ss 129-133).¹⁹⁵ The rest of the Act does not apply to an incidental credit agreement.¹⁹⁶

This is mainly because it would be impractical in some instances, and in other too burdensome, for the supplier of goods or services to comply with all the provisions of the NCA. Therefore the supplier is exempt from the provisions not listed in section 5(1).¹⁹⁷ The observation of Wallis J¹⁹⁸ that the credit provider did not intend to profit

¹⁹⁵ S 5(1)(a)-(f).

¹⁹⁶ Du Pisani LLM-dissertation 20 and Otto 2010 *THRHR* 637 642.

¹⁹⁷ See Du Pisani LLM-dissertation 20 for exclusions from the NCA and Renke 2011 *THRHR* 464 466-469 for a discussion on the application of the Act on incidental credit agreements.

¹⁹⁸ *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and Others* 2010(6) 173 (KZD) par 17.

from interest can further explain why the Act only has limited application to the incidental credit agreement, as credit was not the focus of the parties.

A credit provider of incidental credit may only recover a fee, charge or interest in respect of the deferred amount¹⁹⁹ under an incidental credit agreement for interest,²⁰⁰ default administration charges²⁰¹ and collection costs²⁰² and subject to any maximum rates of interest or fees imposed in terms of section 105.²⁰³ Other costs such as monthly service fees and initiation fees may not be charged.²⁰⁴

A credit provider may only charge or recover a fee, charge or interest in respect of an unpaid amount if the credit provider has disclosed, and the consumer has accepted, the amount of such a fee, charge or interest, or the basis on which it may become payable, on or before the date on which the relevant goods or services were supplied.²⁰⁵ The credit provider may not recover any charge, fee or interest if there is not an agreement on or before the delivery of the goods or services.²⁰⁶

The payment of interest, fee or a charge in respect of an account or a pre-determined higher price for full settlement is a prerequisite in the definition of incidental credit. The provisions of the Act will not come into operation in an agreement where the credit provider, notwithstanding an agreement that allows him to do so, does not charge the fee, charge, interest, or higher price.²⁰⁷

“Incidental credit agreements” and “discount transactions” have two things in common that create an overlap between them: namely, an agreement that makes

¹⁹⁹ As defined in reg 39(1) as published in GN R489 in GG 28864 of 31 May 2006.

²⁰⁰ S 101(1)(d) of the Act. For the maximum rate see reg 42(1)(Table A) as published in GN R489 in GG 28864 of 31 May 2006. Currently it is 2% and must be disclosed as a monthly rate.

²⁰¹ S 101(1)(f).

²⁰² S 101(1)(g).

²⁰³ S 5(3)(a).

²⁰⁴ The cost of credit falls beyond the scope of this work. For a full discussion see Kelly-Louw and Stoop Ch 9.

²⁰⁵ S 5(3)(b) of the Act.

²⁰⁶ See De Kock Apr 2010 *De Rebus* 26. See also Renke 2011 *THRHR* 464 467-468. Renke notes that this provision in s 5(3)(b) only refers to par (a) in the definition of an incidental credit agreement and therefore it seems that a credit provider need not specifically disclose to the consumer, and the consumer need not accept, that a higher price will be applicable if the account is not paid on or before a certain date stipulated in the account, for the credit provider to be able to claim the higher price.

²⁰⁷ S 1. See De Kock Apr 2010 *De Rebus* 26 27. See also Renke 2011 *THRHR* 464 465 and Renke, Roestoff & Haupt 2007 *Obiter* 229 235.

provision for the supply of goods and services over a period of time; and the possibility of a lower price that becomes applicable should an account be paid on or before a certain date.²⁰⁸ According to Otto and Otto the only (and they concede, rather dubious) difference is that in the instance of an incidental credit agreement an account is tendered.²⁰⁹ Du Pisani, however, correctly points out that even this is not a true distinction. In section 108, the Act requires that the credit provider delivers a statement of account as soon as the higher amount of the two amounts quoted becomes applicable. Furthermore, the delivery of an account is provided for in the definition of a discount agreement.²¹⁰ She does agree with Otto that the only other possible distinction is that the definition of a discount transaction does not require a fee, charge or interest to be levied.²¹¹ Because a large number of the provisions of the NCA do not apply to incidental credit agreements, it becomes very important to distinguish between this and other credit agreements.²¹² The Act does not assist in this distinction and it will fall to the Courts to decide on the facts before it determines what type of credit agreement was concluded.²¹³

Both “incidental credit agreements” and “credit facilities” provide for the delivery of goods or services against the granting of credit and the payment of a charge, fee or interest.²¹⁴ However, the main difference between the two is that a fee, charge or interest is levied in a credit facility from the start, while in the case of an incidental credit agreement the fee, charge or interest only becomes payable should the consumer fail to pay his debt on or before an agreed date.²¹⁵ The Court in *Sea World Frozen Foods (Pty) Ltd v Butcher’s Block* has referred to another two possible differences, namely that in the definition of a credit facility, it is mentioned that only part of the payment is deferred, and there is no decrease in the purchase price if payment is made in time.²¹⁶ Otto further states²¹⁷ that the Act refers to the tender of a

²⁰⁸ Otto in Scholtz (ed) 8-4; Otto and Otto 21 and Du Pisani LLM-dissertation 24.

²⁰⁹ Otto and Otto 21.

²¹⁰ Du Pisani LLM-dissertation 25.

²¹¹ Du Pisani LLM-dissertation 25, see also Otto 2010 *THRHR* 637 640.

²¹² Otto 2010 *THRHR* 637 640, see also Du Pisani LLM-dissertation 25.

²¹³ Renke LLD-thesis 387.

²¹⁴ Du Pisani LLM-dissertation 25.

²¹⁵ *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and Others* 2010(6) 173 (KZD) par 17; *Sea World Frozen Foods (Pty) Ltd v Butcher’s Block* 2011 JDR 1614 (ECG).

²¹⁶ 2011 JDR 1614 (ECG) par 16.

²¹⁷ Otto 2010 *THRHR* 637 640-641.

single account when dealing with incidental credit agreements, but that periodic bills are sent when defining credit facilities.²¹⁸

The Act²¹⁹ specifically brings an agreement whereby the supplier of a utility²²⁰ or other continuous service:²²¹

- (a) will defer payment by the consumer until the supplier has provided a periodic statement of account for that utility or other continuous service; and
- (b) will not impose any charge contemplated in section 103²²² in respect of any amount so deferred, unless the consumer fails to pay the full amount due within at least 30 days after the date on which the periodic statement is delivered to the consumer, under the definition of an incidental credit agreement, to which the Act applies to the extent set out in section 5.

An agreement as set out in s 4(6)(b) will not be a credit facility. Any overdue amount in terms of that agreement will be incidental credit.²²³

This will typically²²⁴ be the services rendered by a municipality.²²⁵ The Act did not exclude the rendering of utilities and services by municipalities from the application of the NCA, but if a municipality²²⁶ correctly words its agreements with its clients in terms of section 4(6)(b), that agreement will only be an incidental credit agreement. The provisions of section 4(6)(b) must be applied cumulative in the service

²¹⁸ S 8(3). See also *Nelson Mandela Bay Metropolitan Municipality v Nobumba* 2010 (1) SA 576 (ECG).

²¹⁹ S 4(6)(b).

²²⁰ See s 1 and par 4 above for a definition.

²²¹ See s 1 and par 4 above for a definition.

²²² S 103 relates to the charging of interest and specifically interest on late payment. See *Otto* 2011 *De Jure* 149 157.

²²³ See, however, *Nelson Mandela Bay Metropolitan Municipality v Nobumba* 2010 (1) SA 576 (ECG) 579 par 40 the conclusion of the Court that only the interest levied constitute incidental credit cannot be agreed with. See discussion of this judgment by *Otto* 2011 *De Jure* 149 157-158 and his critique on the conclusion of the Court that only the interest levied constitutes incidental credit. *Otto* correctly states that on default it is not only the interest which should be treated as incidental credit to which the NCA applies, but that the full outstanding debt constitutes incidental credit.

²²⁴ But not exclusively as stated above in par 4 in the discussion of credit facilities.

²²⁵ See *Nelson Mandela Bay Metropolitan Municipality v Nobumba* 2010 (1) SA 576 (ECG) 579 where the court drew the distinction between municipal rates and taxes, levied pursuant to legislation, and other fees based on an agreement between the parties.

²²⁶ Or any other provider of an utility or continuous service.

agreements.²²⁷ If not correctly worded, the agreement may be regarded as another form of credit agreement such as a credit facility to which the whole Act will apply.²²⁸

5 4 Instalment agreement²²⁹

The Act²³⁰ defines this type of credit transaction as a sale of movable property in terms of which

- (a) all or part of the price is deferred and is to be paid by periodic payments;
- (b) possession and use of the property is transferred to the consumer;
- (c) ownership of the property either
 - (i) passes to the consumer only when the agreement is fully complied with; or
 - (ii) passes to the consumer immediately subject to a right of the credit provider to re-possess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and
- (d) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred.

Repayment of the cost or part of the cost of the goods must take place by virtue of periodic payments.²³¹

The immediate passing of possession and use is what makes this a very popular instrument for the majority of the public that cannot afford to pay large lump sums of cash for goods.²³² Deferral of payment and interest payable on the deferred amount by the consumer of the purchase price or part thereof, is a requirement for a transaction to fall within the definition.²³³

²²⁷ *Nelson Mandela Bay Metropolitan Municipality v Nobumba* 2010 (1) SA 576 (ECG) 579 par 40.

²²⁸ *Nelson Mandela Bay Metropolitan Municipality v Nobumba* 2010 (1) SA 576 (ECG) 579 par 46. The effect of this can be arduous for the provider of utilities and continuous services. See *Otto De Jure* 149 159.

²²⁹ For examples of instalment agreements see *Otto* in Scholtz (ed) 8-6(1) and 8-7.

²³⁰ S1.

²³¹ The instalments need not be equal in size, but must be periodic. This is a clear distinction from the instalment sale transaction in the Credit Agreements Act. The courts interpreted the definition in the Credit Agreements Act to include lump sum payments. See *Sandoz Products (Pty) Ltd v Van Zyl NO* 1996 3 SA 726 (C) and *Ukubona 2000 Electrical CC v City Power Johannesburg (Pty) Ltd* 2004 6 SA 323 (SCA). See further *Otto* and *Otto* 24 and the effect this will have on the hypothec of the creditor in case of insolvency.

²³² Du Pisani LLM-dissertation 28.

²³³ Renke, Roestof and Haupt 2007 *Obiter* 235.

The contract must contain a clause that deals with the passing of ownership. This differentiates this type of agreement from a credit facility that also provides for the sale of goods on credit.²³⁴ In the last instance, the common-law rules will apply and ownership of the goods will pass to the consumer immediately.²³⁵ In an instalment, in agreement under the NCA, the credit provider has to make the choice to reserve ownership until the contract is fully complied with, or pass ownership immediately to the consumer. If ownership passes immediately to the consumer, the credit provider reserves the right to repossess the goods in the event of breach of contract.²³⁶

According to Otto,²³⁷ the right of the credit provider to repossess is limited to a breach by the consumer of his financial obligations,²³⁸ such as non-payment of instalments or keeping the goods insured. This will prevent repossession for trivial breaches such as failure to notify the credit provider of a change of address. The problem with the placement of this provision in the definition of the Act without further substantive provisions, is that a credit transaction on instalment that provides for repossession in all instances of breach, will henceforth not be an instalment agreement in terms of the NCA.²³⁹

Should the agreement be concluded at a premise other than that of the credit provider's registered business premise, the consumer has five business days to withdraw from the agreement.²⁴⁰ A consumer may also unilaterally terminate an

²³⁴ It was argued above, in par 4 under the heading of credit facilities, that credit facilities involve revolving credit. In the case of instalment agreements, fixed-sum credit is granted. Du Pisani LLM-dissertation 31-32 states that this is another difference between a credit facility and an instalment agreement.

²³⁵ Renke, Roestof and Haupt 2007 *Obiter* 231-232. See par 4 above.

²³⁶ See Renke and Pillay "The National Credit Act 34 of 2005: The Passing of Ownership of the Thing Sold in terms of an Instalment Agreement" 2008 *THRHR* 641 for a full discussion on the different implications this choice may hold for the credit provider, and why he may choose to forfeit ownership. The writers also give a history of this type of transaction under previous legislation. Regarding the transfer of ownership, see also Du Pisani LLM-dissertation 29-31 for a summary.

²³⁷ Otto in Scholtz 8-7 and 8-8. He does, however, criticize the legislature for only dealing with this issue in the definitions of the Act without any substantive forbidding provisions in the NCA.

²³⁸ See definition in S 1 par (c) (ii) thereof.

²³⁹ See Otto in Scholtz 8-8. Otto correctly points out that in practice this will not really be an issue as most instalment sale agreements do have a reservation of ownership clause. He further points out that in these rare cases the agreement will in any event be regulated by S 8(4)(f). See also Otto "Afbetalingskoop- en Huurkontrakte van Roerende Goed, Vanmelewe en Nou: Die Nasionale Krediet Wet Bied Interessante Leesstof" 2011 *THRHR* 120-128.

²⁴⁰ The so-called "s 121 cooling off right". The detail of the operation of this section fall beyond the scope of this work. See Kelly-Louw and Stoop par 8 5 2 for a discussion.

instalment agreement by surrendering the movable goods that is the subject of the agreement to the credit provider.²⁴¹

5 5 Mortgage Agreement²⁴²

The NCA²⁴³ defines “mortgage agreement” as a credit agreement that is secured by a pledge of immovable property and that “mortgage” means a pledge of immovable property that serves as security for a mortgage agreement.²⁴⁴ Any credit agreement that is secured by a “pledge”²⁴⁵ of immovable property becomes a mortgage agreement.

The Act does not require the payment of fees, interest, or charges for a mortgage agreement to be a credit agreement in terms of the NCA. The interest-free loan between two acquaintances with a bond as security will therefore fall within this definition.²⁴⁶ A mortgage agreement, irrespective of the size of the amount deferred, will always be a large agreement.²⁴⁷

5 6 Secured Loan²⁴⁸

As defined in the Act²⁴⁹ an agreement, irrespective of its form²⁵⁰ excluding an instalment agreement, will be a secured loan if in terms of that agreement a person:

²⁴¹ S 127. The detail of the operation of this section fall beyond the scope of this work. See Kelly-Louw and Stoop par 11 5 1 for a discussion.

²⁴² A typical example would be the financing of the purchase price to purchase a house. The so-called home loan is secured by a mortgage over the object of the sale, the immovable property.

²⁴³ S 1.

²⁴⁴ Otto and Otto 25 call this definition a monstrosity as immovable property cannot be pledged in law. This leads to the situation that one is forced to interpret “pledge of immovable property” to mean “registration of a bond over immovable property”.

²⁴⁵ Renke, Roestof and Haupt 2007 *Obiter* 234 n 38, have also criticised the use of the word “pledge”. They suggested the use of the word “hypothecation” of immovable property instead of “pledge” calling the choice of words by the legislature as “unfortunate”.

²⁴⁶ Otto in Scholtz (ed) 8-9. Renke LLD-thesis 390 n 46 comments that this is in contradiction with other credit transactions except for discount transactions and incidental credit agreements that provide for prepayment of debt and a discount.

²⁴⁷ Stoop 2008 *De Jure* 352 366. S 9(4) read with GN 713 in GG 28893 of 1 June 2006.

²⁴⁸ Eg. the typical notarial bond over movable property. See *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D).

²⁴⁹ S 1.

²⁵⁰ See par 4 above.

- (a) advances money or grants credit to another, and
- (b) retains, or receives a pledge or cession of the title to any movable property or other thing of value as security for all amounts due under that agreement.

As with mortgage agreements, payment of a fee, charge or interest is not a requirement for a secured loan to be a credit agreement in terms of the NCA.²⁵¹

Due to the strained meaning that has to be ascribed to the definition in the Act to understand its application, this definition has come under severe criticism.²⁵² According to Otto²⁵³ the words “retains, or receives a pledge or cession of the title” creates a legal theory problem. The word “title” can only mean ownership and in law, it is impossible to pledge or cede ownership. The intended meaning of the words was probably the pledge of the movable thing itself and not the ownership thereof.²⁵⁴

It is, of course, possible to retain title or ownership as security, for example the instalment sale agreement with a reservation of ownership clause, but this type of agreement is expressly excluded from the definition.²⁵⁵ Another example would be the lease but the Act provides separately for this type of agreement.²⁵⁶

The definition of a secured loan overlaps with a pawn transaction. It is important to differentiate between the two as only some of the Act’s provisions apply to a pawn transaction.²⁵⁷ In a pawn transaction, the credit provider will be allowed to retain all the proceeds from the resultant sale.²⁵⁸

According to Kelly-Louw and Stoop, the consumer will also be able to utilize the provisions of section 127 and unilaterally terminate a secured loan by surrendering the goods that are the subject of the agreement to the credit provider.²⁵⁹

²⁵¹ Otto and Otto 25.

²⁵² Otto and Otto 25. Otto and Otto awards the definition with the “booby prize”. See Du Pisani LLM-dissertation 35 to 37, Otto in Scholtz (ed) 8-9 to 8-10 and Kelly-Louw and Stoop 73-75.

²⁵³ Otto in Scholtz (ed) 8-9.

²⁵⁴ Otto in Scholtz (ed) 8-10.

²⁵⁵ Otto in Scholtz (ed) 8-10.

²⁵⁶ See discussion in par 5 7 below.

²⁵⁷ Du Pisani LLM-dissertation 36. In s 78(2)(d) pawn transactions are excluded from the application of ss 81-84. Reckless credit falls beyond the scope of this work. For a discussion see Kelly-Louw and Stoop par 12 2.

²⁵⁸ Otto in Scholtz (ed) 8-10.

²⁵⁹ Kelly-Louw and Stoop 75. See also Du Pisani LLM-dissertation 37.

The definition puts the focus on movable goods but then includes wording such as “... or other thing of value as security ...”. This creates the impression that the “pledge” of immovable property will also be covered by the definition of a secured loan. However, the NCA provides separately for the “pledge” of immovable property under mortgage agreements.²⁶⁰ The wide meaning that can be attributed to the definition: the phrase “... cession ... other thing of value as security ...” can be further illustrated in that it may include a right, and this will cause a cession *in securitatem in debiti* to fall within the definition of a secured loan and under the application of the Act.²⁶¹ In *Essa v Asmal*²⁶² the Court found that a cheque is not an “... other thing of value ...”, as this would materially alter the common law on provisional sentence, and there is a presumption against the altering of the common law by the legislature.²⁶³ A cheque is a promise to pay and not a “pledge” or “cession”. If the cheque is dishonoured the drawer must compensate the holder.²⁶⁴ The cheque is also not “retained” by the drawer as per the definition of a secured loan.²⁶⁵ A further argument against the use of a cheque as a secured loan was that as the Act²⁶⁶ expressly excludes a dishonoured cheque from the application of the NCA when goods and services are involved: it would be “incongruous”²⁶⁷ to include a cheque when it is intended as full payment of an advance of money.²⁶⁸

²⁶⁰ Otto in Scholtz (ed) 8-10. See par 5 5 above.

²⁶¹ Otto in Scholtz (ed) 8-10.

²⁶² 2012 (2) SA 576 (KZP). This case followed the *dictum* of *SA Timber (Welkom) (Edms) Bpk v Lezmin 2815 BK* unreported, case no 2607/2008, 14 August 2008 (O), also cited as 2009 JDR 0406 (FB), where the court held that if a cheque is dishonoured the seller has a choice. He can sue on the original cause of action (i.e. the rendering of services or goods) or on the independent cause of action created by the agreement to accept the cheque as payment. If the plaintiff sues on the dishonoured cheque, the Act does not apply. See paras 6 to 14 of the judgment and the full discussion of the case by Otto “Onteerde Tjeks, Wanbetaling uit ’n Kredietfasiliteit en die *National Credit Act*” 2009 *THRHR* 653.

²⁶³ As discussed in Otto and Otto 26.

²⁶⁴ *Essa v Asmal* 2012 (2) SA 576 (KZP) as discussed in Otto and Otto 26.

²⁶⁵ *Essa v Asmal* 2012 (2) SA 576 (KZP) as discussed in Otto and Otto 26.

²⁶⁶ See s 4(5)(a).

²⁶⁷ *Essa v Asmal* 2012 (2) SA 576 (KZP) par 24.1. See, however, *Philip Claasen t/a Mostly Media v Andre Delport t/a AD Industrial Chemicals* 2009 JOL 23885 (WCC) par 18. A cheque that was presented in payment of an amount owing in respect of a credit agreement and subsequently dishonoured, will be subject to the Act.

²⁶⁸ Otto and Otto 26.

5 7 Lease²⁶⁹

Lease is defined in section 1 to mean an agreement in terms of which

- (a) temporary possession²⁷⁰ of any movable property²⁷¹ is delivered to or at the direction of the consumer, or the right to use any such property is granted to or at the direction of the consumer;
- (b) payment for the possession or use of that property is
 - (i) made on an agreed or determined periodic basis during the life of the agreement; or
 - (ii) deferred in whole or in part for any period during the life of the agreement;
- (c) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred; and
- (d) at the end of the term of the agreement, ownership of that property either-
 - (i) passes to the consumer absolutely; or
 - (ii) passes to the consumer upon satisfaction of specific conditions set out in the agreement.

If ever a competition existed for misnomers in legislation, the naming of the credit agreement described in the above definition as a lease would get top honours. In terms of the definition, provision is specifically made for the transfer of ownership.²⁷² In terms of our common law, “the letting also disappears *ipso iure* as soon as the hirer has obtained ownership of the property hired.”²⁷³ Subsequently, the Court in *Absa Technology Finance Solutions Ltd v Pabi’s Guest House CC*²⁷⁴ expressed the view that the definition of a lease in the NCA is nothing but the sale of movable property.²⁷⁵

A lease that does not require the payment of any fees, interest or charges, with the only payments being towards the monthly instalments and ownership remaining with

²⁶⁹ For examples see Kelly-Louw and Stoop 75 to 76.

²⁷⁰ The inclusion of this term in the definition has been described as a “farce” and an attempt to keep a simulation of a lease agreement. See Otto 2011 *THRHR* 120 128 to 129, and Otto and Otto 27.

²⁷¹ S 8(2)(b) also excludes the lease of immovable property from the application of the Act.

²⁷² Kelly-Louw and Stoop 77.

²⁷³ Otto and Otto 27 referring to Voet *Commentarius ad Pandectas* 19 2 4 (Gane’s translation). The legislature may have had a lease in mind that transforms into a sale at the end of the contract term. The contract, however, as stated by Otto in Otto 2011 *THRHR* 120 129, has the transfer of ownership *ab initio* in mind. This is an *essentialia* of a sale agreement.

²⁷⁴ 2011 (6) SA 606 (FB) par 15. At par 20 the Court said that residual rental contracts of motor vehicles and cellular phone rentals are examples of “rental” contracts that will fall in the definition of “lease” in the NCA.

²⁷⁵ See the critique by Otto on the definition of lease in the NCA in Otto 2011 *THRHR* 120 129 to 131. He raises the question as to what *naturalia* must be applied to the lease in terms of the Act and speculates that the courts may have to apply the common law rules regarding deeds of sale.

the lessor, will be a common law lease and not subject to the NCA.²⁷⁶ If the lessor retains ownership but requires the payment of any fees, interest or charges in any form the agreement will not be a lease in terms of the NCA. The agreement may, however, still be a credit agreement as defined in section 8(4)(f).²⁷⁷ The amortisation of the purchase price in a flat rental agreement with no interest levied may, on the face of it, be excluded from the Act. The Court will, however, always be led by the substance of the agreement and not its form, and an analysis of the financial realities of the contract will reveal its true form.²⁷⁸

There is an overlap between the definitions of “lease”, “instalment agreement” and “credit facility” as all provide for the provision of goods on credit.²⁷⁹ The definition of lease, however, leaves the possibility open for lump-sum payments while instalment agreements require periodic payments and there is the possibility of the transfer of ownership on delivery.²⁸⁰ The lease definition does not create the possibility for revolving credit as required in a credit facility.²⁸¹

Should the agreement be concluded at a premise other than that of the credit provider’s registered business premise, the consumer has five business days to withdraw from the agreement.²⁸² A consumer may also unilaterally terminate an instalment agreement by surrendering the movable goods that is the subject of the agreement to the credit provider.²⁸³

²⁷⁶ *Absa Technology Finance Solutions Ltd v Pabi’s Guest House* CC 2011 (6) SA 606 (FB). See also *Otto and Otto* 27. *Absa Technology Finance Solutions Ltd v Michael’s Bid a House* CC 2013 (3) SA 426 (SCA).

²⁷⁷ *Otto* 2011 *THRHR* 130 to 131. See, however, *Absa Technology Finance Solutions Ltd v Viljoen t/a Wonderhoek Enterprises* 2012 (6) SA 149 (GNP). In this judgment the view was expressed that a common-law lease should never be subject to the NCA even if it provides for the payment of interest, fees or charges. See *Otto* “Interest Free Rentals, S 8(4)(f) of the National Credit Act and the Meaning of “Deferred” Payments *Absa Technology Finance Solutions Ltd v Pabi’s Guest House* CC 2011 (6) SA 606 (FB)” 2012 *THRHR* 492 for an interesting discussion of these two cases and their different verdicts.

²⁷⁸ *Otto* in Scholtz (ed) 8-11 to 8-12.

²⁷⁹ Renke, Roestoff & Haupt 2007 *Obiter* 229 231.

²⁸⁰ *Otto* 2011 *THRHR* 120 130.

²⁸¹ Renke LLD-thesis 385.

²⁸² Du Pisani LLM-dissertation 38 to 39 and *Otto* 2011 *THRHR* 120 131. The so-called “s121 cooling-off right” the detail of the operation of this section falls beyond the scope of this work. See Kelly-Louw and Stoop par 8 5 2 for a discussion.

²⁸³ Du Pisani LLM-dissertation 39 and *Otto* 2011 *THRHR* 120 131 tot 132. S 127 the detail of the operation of this section falls beyond the scope of this work. See Kelly-Louw and Stoop par 11 5 1 for a discussion.

5 8 Any other credit agreement section 8(4)(f)

An agreement, irrespective of its form²⁸⁴ excluding the agreements contemplated in subsection 8(2)²⁸⁵, constitutes a credit transaction if it is:

any other agreement, other than a credit facility²⁸⁶ or credit guarantee,²⁸⁷ in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of

- (i) the agreement;²⁸⁸ or
- (ii) the amount that has been deferred.

This is the so-called catch-all category that makes provision for all those credit agreements that do not fit neatly in the definitions as set out above.²⁸⁹ Otto also calls this the extended credit agreement that caters for all agreements that defers payment and makes provision for the payment of a fee, interest or charge.²⁹⁰

The application of this type of credit transaction is best described through examples. For instance, fixed-sum money-lending transactions that would include almost all personal loans or money loans in the ordinary sense that defers repayment²⁹¹ with the additional payment of a fee, interest or charge, constitute a section 8(4)(f) agreement. The words fee, interest or charge are not defined in the Act and should be interpreted in the ordinary meaning of the words as they were used in the context of the NCA.²⁹² The sale of land with the deferral of the payment of the purchase price and where interest is payable on the deferral²⁹³ or a home improvement contract

²⁸⁴ See par 4 above.

²⁸⁵ 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 that stokvel in accordance with the rules of that stokvel.

²⁸⁶ See s 8(3) and the discussion in par 4 above.

²⁸⁷ See s 8(5) and the discussion in par 6 below.

²⁸⁸ For example an initiation fee or contract fee.

²⁸⁹ Otto and Otto 28.

²⁹⁰ Otto and Otto 28.

²⁹¹ Renke LLD-thesis 392. See also n 52 on the same page, where he notes that if the money loan agreement extends revolving credit it will be a credit facility.

²⁹² *Evans v Smith* 2011 (4) SA 472 (WCC) par 16 to 19. The Court interpreted what was the true nature of the consideration, fee or charge and not what it was called in the contract. *In casu* the parties referred to the credit provider's interest as "profit sharing". But see also *Essa v Asmal* 2012 (2) SA 576 (KZP) par 16 where the Court determined that for a "charge" to be a "charge" in terms of the Act it must be known as such and to what extent it will be calculated before the contract is entered into. A "participating profit share" unilaterally determined by the borrower cannot be interpreted as a "charge" in terms of the NCA.

²⁹³ Renke LLD-thesis 392. He continues to say that should the land be used for residential purposes and the repayment of the purchase price take place in three or more instalments over a period that exceeds a year, Ch 2 of the Alienation of Land Act 68 of 1981 will also apply. If the provisions of the

where the building contractor is paid over a period of time and the agreement adds interest to the contract amount,²⁹⁴ will also fall under section 8(4)(f).

As Otto states,²⁹⁵ the broadly used acknowledgement of debt can become a section 8(4)(f) other agreement, only if it is not a mere novation of an existing agreement, and the consumer must pay a fee or charge, or interest is levied on the deferred amount.²⁹⁶

A lease of movable goods that provides for an interest, charge or fee component in the payment of the lease instalments, but not for the passing of ownership at the end of the lease, may be excluded from the definition of lease in the Act, but will fall within the ambit of the section 8(4)(f) other agreement.²⁹⁷

The sale of rights at a discount does not constitute a credit agreement and will not fall within the broad definition of section 8(4)(f).²⁹⁸

6 Credit Guarantee

An agreement, irrespective of its form²⁹⁹ but not including an agreement contemplated in subsection 8(2),³⁰⁰ constitutes a credit guarantee if, in terms of that

Alienation of Land Act's provisions are conflicting with those of the NCA, those of the latter will prevail. See S 1 to the Act and the discussion of the two Acts by Otto 2009 "Aanmanings by afbetalingsverkoopkontrakte van grond en die *National Credit Act*" *De Jure* 166. Kelly-Louw and Stoop 79.

²⁹⁴ Otto and Otto 28 and Otto 2009 *De Jure* 166 171.

²⁹⁵ Otto and Otto 28. Authority for this view was found in *Carter Trading (Pty) Ltd v Blignaut* 2010 (2) SA 46 (ECP). See Rossouw August 2010 "Written acknowledgment of debt – is it a credit agreement in terms of the National Credit Act?" August 2010 *De Rebus* 45 for a discussion on the judgment.

²⁹⁶ See also *Grainco (Pty) Ltd v Broodryk NO* 2012 (4) SA 517 (VB). In this matter the underlying cause of action of the acknowledgement of debt was a damages claim and not a money-lending transaction and therefore Cillie J found the acknowledgement of debt was not subject to the NCA. See Van Heerden "Impact of the National Credit Act 34 of 2005 on standard acknowledgements of debt" 2011 *THRHR* 644 for an overview of the impact of the NCA on the acknowledgement of debt as well as a critical evaluation on how the courts have dealt with the question.

²⁹⁷ Otto and Otto 27.

²⁹⁸ Otto and Otto 28. See Otto 2009 *THRHR* 198 and the judgment in *Renier Nel Inc. v Cash on Demand (KZN) (Pty) Ltd* 2011 (5) SA 239 (GSJ).

²⁹⁹ See par 4 above.

³⁰⁰ 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 that stokvel in accordance with the rules of that stokvel.

agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the Act applies. The Act applies to a credit guarantee only to the extent that the Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted.³⁰¹

The definition of a credit guarantee in the NCA is problematic and vague with the result that different views have been expressed whether the definition includes accessory guarantees³⁰² or whether it refers to primary guarantees,³⁰³ which create primary obligations that are not dependant on the existence of the principal debt.³⁰⁴

Mostert³⁰⁵ is of the view that the definition in the Act applies to primary guarantees only. He bases his argument on the words “upon demand” and that the liability of a surety does not arise from a mere demand, but can arise only when the principal debtor is in default.³⁰⁶ These words are normally used in the context of primary guarantees and not suretyship agreements. According to his argument, the legislature intended to exclude ordinary suretyship agreements from the scope of the NCA. Otto³⁰⁷ agrees that Mostert’s view is not without merit but, if the purpose of the Act³⁰⁸ is taken into consideration, it seems unlikely that the legislature only intended to protect consumers in the rare cases where they stand in for another consumer’s debt by virtue of a primary guarantee, while excluding the very common suretyship agreement.

Stoop and Kelly-Louw³⁰⁹ also argue against this interpretation and state that Mostert has over-emphasised the words “upon demand”. The Act’s definitions are not always

³⁰¹ S 4(2)(c). See also Stoop and Kelly-Louw “The National Credit Act Regarding Suretyship and Reckless Lending” 2011 *PELJ* 67 80. This is due to the accessory nature of a credit guarantee.

³⁰² Such as suretyship agreements. For a discussion of the characteristics of a suretyship agreement see Forsyth CF (2010).

³⁰³ Such as demand guarantees and letters of credit.

³⁰⁴ Kelly-Louw and Stoop 83.

³⁰⁵ Mostert “Must suretyship agreements comply with the NCA?” Jun 2009 *De Rebus* 53.

³⁰⁶ Mostert Jun 2009 *De Rebus* 53.

³⁰⁷ Otto and Otto 29.

³⁰⁸ S 3.

³⁰⁹ Stoop and Kelly-Louw 2011 *PELJ* 67 79-80. They state that the words “upon demand” refers to the situation where the principle debtor has defaulted and the credit provider now demands performance from the surety.

reconcilable with our basic principles of law.³¹⁰ Stoop and Kelly-Louw point out that one must not lose sight of the accessory nature of the credit guarantee, which clearly points to suretyship agreements.³¹¹ They are, in fact, of the view that the definition of a credit guarantee excludes primary guarantees due to the words “any obligation of another consumer in terms of a credit facility or a credit transaction to which the Act applies”. These words in section 8(5) as confirmed in section 4(2)(c) requires the existence of a principle debt and therefore excludes primary guarantees from the application of the NCA.³¹²

As can be expected, a whole series of court cases calling on the interpretation of the definition of a credit guarantee followed the promulgation of the Act. Suretyship agreements is a valuable tool in limiting the risk of providing credit and if the Act applies to these agreements, it can have dire consequences for credit providers should they not comply with the provisions of the NCA.³¹³ The majority of the decisions confirm the view held above that a general contract of suretyship in terms of which a surety provides personal security for the debts of another person, is a credit guarantee if the principal credit agreement falls within the scope of the Act.³¹⁴

The Act applies to a credit guarantee only to the extent that the NCA applies to the underlying credit facility³¹⁵ or credit transaction³¹⁶ in respect of which the credit guarantee is granted.³¹⁷ Therefore, if the primary debt, the underlying credit agreement secured by the credit guarantee is not subject to the Act, the NCA will not

³¹⁰ See Otto and Otto's critique on the NCA's definitions in Otto and Otto 29 and n 86 on 29.

³¹¹ Stoop and Kelly-Louw 2011 *PELJ* 67 79-80. See s 8(5) and s 4(2)(c).

³¹² See the full discussion in Stoop and Kelly-Louw 2011 *PELJ* 67. Otto and Otto does not agree with this view and includes both surety agreements and primary guarantees under the application of the Act. See Otto and Otto 29.

³¹³ Kelly-Louw and Stoop 82 83.

³¹⁴ Kelly-Louw and Stoop 87. See *Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others* 2010 (5) SA 523 (GSJ); *Structured Mezzanine Investments (Pty) Ltd v Davids and Others* 2010 (6) SA 622 (WCC); *Reibeiro and Another v Slip Knot Investments 777 (Pty) Ltd* 2011 (1) SA 575 (SCA); *Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another* 2011 (2) SA 266 (SCA) and *Geodis Wilson South Africa (PTY) Ltd v ACA (Pty) Ltd* unreported case no. 41609/2008 (SGJ) par 20.

³¹⁵ Defined in s 8(3) discussed in par 4 above.

³¹⁶ Defined in s 8(4) discussed in par 5 above.

³¹⁷ S 4(2)(c). See also *Prisma Verpakking Norde (Pty) Ltd v Holtzhausen and Others* unreported, case no 43357/2010 , 3 February 2012 (GNP) paras 33-36; *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 (3) SA 384 (T) 390A-D; *Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others* 2010 (5) SA 523 (GSJ) par 9 and 10; *Structured Mezzanine Investments (Pty) Ltd v Davids and Others* 2010 (6) SA 622 (WCC) par 15.

apply to the guarantee. The suretyship will then fall under the common law and the surety will not be able to raise any of the defences or seek the protection of the provisions of the Act.³¹⁸

However, if the surety agreement falls in the ambit of the Act, the credit provider will have to comply with the relevant provisions of the NCA. The surety will be entitled to the various protection mechanisms of the Act before conclusion of the contract, during conclusion of the contract and when the credit provider holds the surety liable and requests the surety to perform.³¹⁹ Some provisions of the NCA only impact the duties of the credit provider once he calls on the guarantor to satisfy an obligation in terms of the guarantee, for example the duty to submit periodic statements of account to the guarantor³²⁰ and others contained in Chapter 5 Part D of the Act.³²¹

It must be noted that although the Act does not prescribe any formalities to be complied with for a credit guarantee to be valid, section 6 of the General Law Amendment Act³²² requires that a contract of surety must be written and signed by, or on behalf of, the surety, in order to be valid and enforceable.³²³

An interesting anomaly arises in the classification of a credit guarantee as small, intermediate or large.³²⁴ Section 9(1) prescribes that for all purposes of this Act, every credit agreement is characterised as a small agreement, an intermediate agreement, or a large agreement. However, when Otto and Otto³²⁵ interpret section 9 they exclude credit guarantees from all three categories. This view cannot be supported, as every agreement must be categorised according to section 9. Mostert³²⁶ argues that the legislature excluded credit guarantees from large agreements but that a credit guarantee can be small or intermediate. Both Kelly-Louw³²⁷ and Du Pisani³²⁸ blame poor use of punctuation as the source of the

³¹⁸ Kelly-Louw and Stoop 42.

³¹⁹ Kelly-Louw and Stoop 88. For a discussion on the protection mechanisms see Stoop and Kelly-Louw 2011 *PELJ* 67 par 2 4.

³²⁰ S 107(1) of the NCA.

³²¹ Kelly-Louw (2012) 42.

³²² 50 of 1956.

³²³ Kelly-Louw and Stoop 88.

³²⁴ See par 3 2 above.

³²⁵ Otto and Otto 35.

³²⁶ Mostert Jun 2009 *De Rebus* 55.

³²⁷ Kelly-Louw and Stoop 98.

confusion.³²⁹ According to their interpretation of how the section should read, a credit guarantee can be classified as small, intermediate or large.

Kelly-Louw and Stoop seem to suggest that the credit guarantee can only be classified into small, intermediate or large once the settlement value is determined. They make this suggestion when discussing unlimited suretyship. This argument does make sense when the final settlement value is undetermined when contracting. But as Du Pisani argues, due to the accessory nature³³⁰ of the credit guarantee, the underlying credit agreement that the credit guarantee serves as security, will determine if the credit guarantee is large, intermediate or small.³³¹

7 Combination of Transactions³³²

The Act can apply to any combination of a credit facility, credit transaction or a credit guarantee.³³³ If a particular credit agreement constitutes both a credit facility and a credit transaction, that agreement is equally subject to any provision of this Act that applies specifically or exclusively to that credit facility or credit transaction, as the case may be.

For applying section 108, that agreement must be regarded as a credit facility and for the purpose of applying section 4(1)(b) read with section 9(4), that agreement must be regarded as a large agreement if it is a mortgage agreement.³³⁴

³²⁸ Du Pisani LLM-dissertation 48.

³²⁹ For an outline on how the punctuation should have been set out, see discussion in Kelly-Louw and Stoop 94 to 98.

³³⁰ Due to the wording of s 4(2)(c).

³³¹ Du Pisani LLM-dissertation 50.

³³² An example of such a combination would be an instalment sale of movable goods in respect of which payments are effected by means of an credit card over a period of time "on budget". See Otto and Otto 30. The instalment sale is a credit transaction and the credit card a credit facility. Otto and Otto do not state that the same credit provider must provide the credit card facility and the movable goods, but that would be essential. Eg. so-called in-store credit cards.

³³³ S 8(1)(d).

³³⁴ S 8(6).

8 Conclusion on Credit Agreements

The NCA seeks to regulate almost every aspect of credit in South Africa, and therefore as defined, it regulates a wide spectrum of credit agreements.³³⁵ The Act has a much broader scope and application than any of its predecessors.³³⁶

From the definitions discussed in paragraphs 3 to 7 it seems that an agreement would constitute a credit agreement if deferment of payment is present. This however is too broad an assumption. The mere fact that payment is deferred does not bring an agreement automatically within the ambit of the Act, and barring the exceptions of credit guarantees and mortgage agreements,³³⁷ the absence of an agreement that a charge, fee or interest is payable on deferment of payment, will cause the agreement to fall outside the scope of the Act.³³⁸

Furthermore, if the deferral of payment does not have an agreement that falls within the purpose and application of the Act,³³⁹ the obligation between the parties will not be a credit agreement and therefore not governed by the NCA. For example, the obligation to pay levies in terms of the Sectional Titles Act³⁴⁰ or to pay taxes in terms of the Local Government: Municipality Property Rates Act³⁴¹ does not arise from any agreement but from that respective act.³⁴² It must also be noted that if an agreement for deferral of payment does not have a *causa* that falls in the purpose and application of the NCA,³⁴³ the obligation will likewise not be a credit agreement and not be governed by the Act. Such an agreement was identified in *Grainco (Pty) Ltd v Broodryk*³⁴⁴ by Cillie J where it was decided that the deferral of payment of damages in terms of an acknowledgement of debt did not fall in the money-lending or credit-

³³⁵ See Part C ss. 8, 9, 10 and 11 of the Act. See also Van Zyl in Scholtz (ed) par 4-1.

³³⁶ For a brief discussion on the history of consumer credit in South Africa, see Otto and Otto 2 and Kelly-Louw and Stoop 28.

³³⁷ See definition and discussion in par 5 5 and 5. These two types of credit agreements do not require the payment of a charge fee or interest for the Act to apply.

³³⁸ *Voltex (Pty) Ltd v Chenleza CC* 2010 (5) SA 267 (KZP) par 39 and the discussion of this case by Otto "Die Toepaslikheid (al dan nie) van die Nasionale Kredietwet op rentevrye kontrakte" 2012 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 161.

³³⁹ Part B s 3.

³⁴⁰ 86 of 1986.

³⁴¹ 6 of 2004.

³⁴² *TS Dhlamini v Body Corporate of Frenoleen* (unreported case number AR 611/2009 11 March 2010 (KZNP)); *Nelson Mandela Bay Metropolitan Municipality v Nobumba* 2010 (1) SA 576 (ECG).

³⁴³ Part B s 3 of the Act.

³⁴⁴ 2012 (4) SA 517 (VB) par 7.

granting business sphere, and after analysing the Preamble to the Act that it was not the legislature's aim to govern such an agreement.

9 Final Conclusion and Recommendations

The Act defines its scope in section 4(1) as having application to:

- (a) every credit agreement;
- (b) between parties dealing at arm's length;
- (c) when made within or having an effect within the Republic; and
- (d) this definition is subject to the limitations of section 5 and 6 of the Act and the exceptions as set out in sections 4(1)(a)-(d), 4(2)(c), 4(5)(a) and (b), 4(6)(a) and (b) and 8(2) of the NCA.

In determining whether the Act applies it is useful to dissect Section 4(1) of the Act into separate questions,³⁴⁵ of which the first question is whether the contract under consideration is “a credit agreement” as defined in the NCA.

The reader of the Act is forced to wade through ineloquently drafted phrases and definitions that may deviate completely from the principles of South African law to define a credit agreement.³⁴⁶ The legislature's use of the different words “agreements” and “transactions” within section 8(4) when naming the eight subcategories of credit transactions does not assist in the matter.³⁴⁷ Some of the subcategories of transactions are inexplicably referred to in the same subsection.³⁴⁸ The definitions of credit agreements overlap to such an extent that a specific section was created to deal with these scenarios but the section does not deal with all the possible situations.³⁴⁹ A new term introduced by the NCA to the South African legal vocabulary, “incidental credit agreement”, has been described as a “meaningless

³⁴⁵ Kelly-Louw *LAWSA* vol 5(1) par 6 14; Stoop 2008 *De Jure* 352 353 364 to 365 369.

³⁴⁶ Du Pisani LLM-dissertation 53 54.

³⁴⁷ See par 5 above.

³⁴⁸ See par 5 above.

³⁴⁹ See par 4 above.

expression” and as an “unhappy one” and a strange creature.³⁵⁰ The definition of a mortgage bond is such a monstrosity that it leads to forced interpretations.³⁵¹ The strained meaning that has to be ascribed to the definition of “secured loan” to understand its application has led to severe criticism.³⁵² “Lease” as defined in the Act was interpreted by the courts to actually mean the sale of movable property, and described elsewhere as a farce.³⁵³

There are, furthermore, three very important questions left in section 4(1) that must be analysed before an agreement can fall within the field of application of the NCA. These are as follows:

- (a) Is this a credit agreement “between parties as defined by the Act dealing at arm’s length”?
- (b) Was the credit agreement concluded in South Africa or does it have an effect in South Africa?
- (c) Are any of the exemptions, as set out in the Act, applicable to the agreement?

It is thus clear that, although a credit agreement may fall neatly into the definitions set out in paragraphs 3 to 7, the questions posed above may prove that it falls beyond the application of the NCA.

Notwithstanding the untidy drafting by the legislature³⁵⁴ and the introduction of new terms and definitions³⁵⁵ — some even foreign and contrary to our legal system³⁵⁶ — the NCA is a step in the right direction in regulating this complex industry.

The legislature may assist in the interpretation of the Act by clarifying some of the problem areas through amendments, but in the mean time it is left to practitioners,

³⁵⁰ See par 5 3 above.

³⁵¹ See par 5 5 above.

³⁵² See par 5 6 above.

³⁵³ See par 5 7 above.

³⁵⁴ See par 5 3 and par 1 2 n 31.

³⁵⁵ See par 6 n 310.

³⁵⁶ Du Pisani LLM-dissertation 54.

the courts and legal writers to interpret and subsequently attempt to implement the NCA.

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