

Can the National Credit Act by agreement be made applicable to (excluded) juristic persons?

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OPSOMMING

Kan die National Credit Act 34 van 2005 deur ooreenkoms tussen die partye van toepassing gemaak word op 'n kredietooreenkoms wat buite die toepassingsgebied van die Wet val?

Die artikel handel oor die vraag of die National Credit Act 34 van 2005 (die Wet) by wyse van wilsooreenstemming deur die partye tot 'n kredietooreenkoms op hulle ooreenkoms van toepassing gemaak kan word onder omstandighede waar die Wet, volgens die bepalinge daarvan, nie op die ooreenkoms van toepassing is nie. Die vraag is tersaaklik in die lig van teenstrydige hofbeslissings in dié verband. Die vraag word ondersoek aan die hand van die toepassing van die Wet op borgooreenkoms, die uitsluiting van sommige regs-persoon-verbruikers van die toepassingsveld van die Wet, die doelstellings van die Wet en die belang van laasgenoemde wanneer die Wet uitgelê word, asook 'n opsomming en bespreking van gemelde beslissings. Daar word tot die gevolgtrekking gekom dat die onderhawige vraag bevestigend beantwoord moet word onderhewig daaraan dat daar van die beginsels van inlywing deur inkorporasie gebruik gemaak word.

1 INTRODUCTION

The field of application of consumer credit legislation¹ is a matter of crucial importance. The reason is simple; the scope of the Act also immediately determines the extent of its protection.² The National Credit Act³ determines its own scope of application. It applies to credit agreements between parties dealing at arm's length and made within or having an effect within the Republic, unless one of the exclusions from the ambit of the Act applies.⁴

1 Legislation that protects consumers who buy or lease goods, acquire services or borrow money in terms of a credit agreement in respect of the contractual and financial aspects of such agreements.

2 Otto "Belgiese verbruikerskrediet: 'n Vergelykende studie (deel i)" 1995 *TSAR* 381 384.

3 34 of 2005, hereafter "The National Credit Act", "the NCA" or "the Act".

4 S 4(1). For a comprehensive discussion of the Act's field of application, see Stoop "Kritiese evaluasie van die toepassingsveld van die 'National Credit Act'" 2008 *De Jure* 352ff; Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 27ff; Van Zyl and Otto "Commentary" in Scholtz (ed) *Guide to the National Credit Act* (2008) (last update 2013) ch 4 and 8 respectively; and Otto and Otto *The National Credit Act explained* (2013) 19ff.

The question arises whether it is permissible for the parties to a credit agreement⁵ to render the National Credit Act applicable to their agreement under circumstances where the Act, in terms of its own provisions, does not apply to the agreement. This question is relevant in light of the judgments in *RMB Private Bank (a division of Firstrand Bank Ltd) v Kaydeez Therapies CC (in liquidation)*⁶ and *First National Bank, a division of Firstrand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd*,⁷ where conflicting decisions were reached in this respect. The purpose of the article is to evaluate and compare these judgments and in the process answer the abovementioned question. In this regard, although an analysis of the field of application of the National Credit Act falls outside the scope of this discussion, due to its significance, an overview of the application of the NCA to credit guarantees, including suretyship agreements,⁸ and of the transactions or persons excluded from the Act's ambit, with the focus on juristic person consumers, is provided.⁹ Also, due to its significance, the objectives of the Act and the relevance thereof when interpreting the Act are addressed briefly.¹⁰ Thereafter a summary of the parts of the *Kaydeez Therapies CC* and *Clear Creek Trading* judgments relevant to the question under discussion is provided,¹¹ followed by a discussion of the cases¹² and our final conclusions and recommendations.¹³

2 APPLICATION OF THE NCA TO CREDIT GUARANTEES (INCLUDING SURETYSHIP AGREEMENTS)

Credit agreements in terms of the National Credit Act can be divided into three categories. Section 8(1) provides that an agreement¹⁴ constitutes a credit agreement¹⁵ for the purposes of the Act if it qualifies as a credit facility, credit transaction, credit guarantee or a combination thereof.¹⁶ An agreement¹⁷ constitutes a credit guarantee if a person in terms thereof undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the Act applies.¹⁸ Two aspects are of importance. Firstly, the Act therefore applies to suretyship agreements as well.¹⁹

The same protection that is afforded to the main consumer-debtor to a credit agreement, consequently, is also afforded to the guarantor-surety who is a party to a credit guarantee concluded in respect of that credit agreement.²⁰ Secondly,

5 The credit provider and the consumer, both defined in s 1 of the Act.

6 2013 6 SA 308 (GSJ).

7 2014 1 SA 23 (GNP).

8 Para 2.

9 Para 3.

10 Para 4.

11 Paras 5 and 6 respectively.

12 Para 7.

13 Para 8.

14 Including an arrangement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties – s 1.

15 That is, an agreement that meets all the criteria set out in s 8 – see s 1.

16 For a discussion of the agreements that are subject to the NCA, see the authorities mentioned in fn 4 above.

17 Irrespective of its form. S 8(2) agreements (see para 3 3 below) are excluded.

18 S 8(5).

19 See Stoop and Kelly-Louw “The National Credit Act regarding suretyships and reckless lending” 2011 *PELJ* 67/226ff and Otto in Scholtz (ed) para 8.2.4.

20 Stoop and Kelly-Louw 2011 *PELJ* 83/226.

section 8(5) requires that the credit guarantee applies to the obligations of another consumer in terms of a credit agreement to which the NCA applies.²¹ Section 4(2)(c) makes it clear that the Act applies to a credit guarantee only to the extent that it applies to a credit facility or a credit transaction in respect of which the credit guarantee is granted. The converse of the abovementioned is therefore also true: if the Act does not apply to the specific agreement (credit facility or credit transaction), for instance due to the fact that the consumer is a juristic person to whom the Act does not apply,²² the Act will not apply to the accessory suretyship contract (credit guarantee).²³

3 EXCLUSIONS FROM THE AMBIT OF THE NATIONAL CREDIT ACT

3.1 General

As was mentioned above,²⁴ the National Credit Act applies only to credit agreements between parties dealing at arm's length.²⁵ These "at arm's length" cases, although perhaps not exclusions in the real sense of the word, exclude credit agreements concluded under certain circumstances from the Act's scope of application.²⁶ In what follows the proper exclusions in terms of the Act, with the focus on the exclusion of certain juristic persons, are dealt with. However, due to its relevance, this is preceded by a brief discussion of the classification of credit agreements as either small, intermediate or large agreements.

3.2 Small, intermediate and large agreements

All credit agreements²⁷ are characterised²⁸ as either small,²⁹ intermediate³⁰ or large agreements.³¹ When considering these different classifications it is

21 See *FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 3 SA 384 (T).

22 See para 3.3 below.

23 See also *Nedbank Ltd v Wizard Holdings (Pty) Ltd* 2010 5 SA 523 (GSJ) 526 para 9.

24 Para 1.

25 S 4(1).

26 For a discussion of at arm's length exclusions, see the authorities cited in fn 4 above.

27 For a discussion of the question whether credit guarantees are also classified as small, intermediate or large agreements, see Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005* (LLD thesis UP 2012) 396. See also Kelly-Louw "Categorising credit agreements, particularly credit guarantees, as small, intermediate or large agreements under the National Credit Act 34 of 2005" 2012 *SA Merc LJ* 211ff and Renke and Kinnear "Die formaliteitsvoorskrifte (of gebrek daaraan) ingevolge die Nasionale Kredietwet 34 van 2005" 2013 *THRHR* 665 672–673. Cf Otto in Scholtz (ed) para 8.7 who is of the opinion that credit guarantees are excluded from the classification into small, intermediate or large agreements.

28 Ss 7(1)(b) and 9 read with GN 713 in *GG* 28893 of 1 June 2006 – the "Threshold Regulations, 2006".

29 A credit agreement is a small agreement if it is a pawn transaction, a credit facility with a credit limit of R15 000 or below, any other credit transaction (except a mortgage agreement) with a principal debt of R15 000 or below or a credit guarantee with respect to any such agreement – s 9(2). "Principal debt" means the amount calculated in accordance with s 101(1)(a) and is the amount being deferred in terms of the agreement – s 1. See also GN R 489 in *GG* 28864 of 31 May 2006 (hereafter "National Credit Regulations, 2006") reg 39 for the definition of "deferred amount", namely, "any amount payable in terms of a credit agreement the payment of which is deferred and upon which interest is calculated, or any fee, charge or increased price is payable by reason of the deferment".

30 A credit agreement is an intermediate agreement if it is a credit facility with a credit limit above R15 000 or any credit transaction (except a pawn transaction or a mortgage agreement) with a principal debt above R15 000 and below R250 000 or a credit guarantee with respect to any such agreement – s 9(3).

important to note that pawn transactions are always small agreements, credit facilities are either small or intermediate (never large) agreements, and mortgages are always large agreements.³² The purpose of this classification is to facilitate effective regulation of the credit industry.³³ The classification has an influence on the Act's field of application in that all the provisions of the Act do not apply to all-sized agreements.³⁴ The classification also has an effect on the Act's field of application regarding the exceptions thereto.³⁵

3 3 Exclusions

Credit agreements in terms of which the consumer is the state³⁶ or an organ of state³⁷ are not subject to the provisions of the Act. The same applies to credit agreements in terms of which the credit provider is the Reserve Bank of South Africa,³⁸ or in respect of which the credit provider is located outside the Republic.³⁹

Where the consumer is a juristic person⁴⁰ whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons,⁴¹ at the time the agreement is made,⁴² equals or exceeds R1 million, the credit agreement is excluded from the ambit of the Act.⁴³ A large agreement⁴⁴ in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below R1 million, is likewise excluded.⁴⁵ In *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd*⁴⁶ and *Standard Bank of South Africa Ltd v Hunkydory*

31 Mortgage agreements or any other credit transaction (except a pawn transaction) with a principal debt of R250 000 or above or a credit guarantee with respect to any such agreement constitute large agreements – s 9(4).

32 See also Kelly-Louw 2012 *SA Merc LJ* 213–214 and Otto in Scholtz (ed) para 8.7.

33 Different pre-agreement disclosure requirements (s 92) apply to different-sized agreements. See also the National Credit Regulations, 2006 regs 28 and 29. The same holds true for post-contractual disclosure by means of statements of account – s 107 read with reg 35 of the National Credit Regulations, 2006.

34 Eg, the provisions of the Act relating to reckless credit and unlawful credit agreements do not apply to pawn transactions – see ss 78(2) and 89(1) respectively.

35 See para 3 3 below.

36 S 4(1)(a)(ii).

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

38 S 4(1)(c).

39 This exemption from the provisions of the Act will only be applicable if applied for by the consumer in the prescribed manner and form and approved by the Minister – s 4(1)(d) read with reg 2 of the National Credit Regulations, 2006. The Act would otherwise be applicable in terms of s 4(3)(a). See also Van Zyl in Scholtz (ed) para 4.2.

40 As defined in s 1. See para 2 2 above.

41 A juristic person is related to another juristic person if one of them has direct or indirect control over the whole or part of the business of the other or if a person has direct or indirect control over both of them – s 4(2)(d).

42 In other words the value stated as such by that juristic person at the time it applies for or enters into that agreement – s 4(2)(a).

43 S 4(1)(a)(i) read with the Threshold Regulations, 2006.

44 See para 2 3 above.

45 S 4(1)(b) read with the Threshold Regulations, 2006. In this instance no mention is made that the combined asset value or annual turnover of related juristic persons has to be taken into consideration as well. It is not clear whether this was a mere oversight by the legislature.

46 2010 1 SA 627 (C).

Investments 188 (Pty) Ltd,⁴⁷ the constitutionality of the exclusion of juristic persons from the ambit of the Act was challenged without any success.⁴⁸

It has been mentioned above⁴⁹ that where the NCA does not apply to a credit facility or credit transaction due to the fact that the consumer is a juristic person that is excluded from the ambit of the Act, an accessory suretyship contract signed in relation to such a facility or transaction is likewise excluded from the field of application of the Act. In *Investec Bank Limited v Louw*⁵⁰ it was averred that section 4(2)(c) of the NCA, as well as the words “to which this Act applies” in section 8(5),⁵¹ are inconsistent with section 9(1) of the Constitution⁵² and therefore invalid.⁵³ It was argued that the indirect exclusion of the protection of natural person debtors who sign as sureties on behalf of “high value juristic persons”, as opposed to where such debtors sign as sureties on behalf of natural persons, is arbitrary.⁵⁴ However, with reference to the effect and purpose of the challenged provisions it was held that the provisions do not amount to unfair discrimination.⁵⁵

In instances where the Act applies to (proposed) credit agreements in terms of which the consumer is a juristic person (in summary, where the consumer is a juristic person with an asset value or annual turnover of less than R1 million and it concludes a small or an intermediate agreement),⁵⁶ it has only limited application.⁵⁷ It is particularly important to note that the provisions in the Act dealing with credit marketing practices,⁵⁸ over-indebtedness and reckless lending,⁵⁹ and

47 2010 1 SA 634 (WCC).

48 Both the Supreme Court of Appeal and the Constitutional Court refused leave to appeal against the decision in the former case. See Van Zyl in Scholtz (ed) para 4.3.

49 Para 2.

50 *Investec Bank Ltd v Louw, Louw v Minister of Trade and Industry* (21145/2011, 21143/2011, 21144/2011 [2012] ZAWCHC 170 (12 Sep 2012).

51 Discussed in para 2 above.

52 Providing that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law”.

53 Para 44.

54 Para 46.

55 Para 64.

56 See also Van Zyl in Scholtz (ed) para 4.3. See para 2 3 above regarding small and intermediate agreements.

57 S 6.

58 Ch 4 Part C.

59 Ch 4 Part D. “Juristic persons” are exempted from the provisions of Part D of Ch 4 to “relieve these constraints from business lending” (Goodwin-Groen (with input from M Kelly-Louw) *Report prepared for FinMark Trust, South Africa* The National Credit Act and its regulations in the context of access to finance in South Africa (Nov 2006) 34, available at http://www.finmark.org.za/wp-content/uploads/NCA_regulations.pdf accessed on 31 March 2014) and to “insur[e] that the legislation did not inhibit the flexibility and innovation of small-and-medium-enterprise finance” – Kelly-Louw “The prevention and alleviation of consumer over-indebtedness” 2008 *SA Merc LJ* 200 206, with reference to a recommendation by the Technical Committee that was set up to do the credit law review. Reference can also be made to the court’s remark in *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd* 2010 1 SA 627 (C) para 20 that “[i]n essence, the Act attempts to prevent the reckless provision of credit by institutions to people who cannot afford credit”. The court, which *inter alia* had to decide whether the exclusion of certain juristic persons from the ambit of the National Credit Act is unconstitutional (see above), made the statement with reference to the Act’s purposes, as set out in s 3. However,

continued on next page

the measures in the Act protecting the consumer against the financial implications of credit agreements,⁶⁰ do not apply where the consumer is a juristic person.⁶¹ In other words, even where the Act applies to a juristic person consumer (which has an asset value or annual turnover of less than R1 million and that concludes a small or an intermediate agreement),⁶² such a consumer enjoys no protection under the Act in respect of the mentioned aspects, with the result that natural persons are accordingly the only consumers receiving protection under the Act in this regard.⁶³

For the sake of completeness it has to be mentioned that the following agreements do not constitute credit agreements and therefore the Act does not apply to such agreements:

- (a) A policy of insurance.⁶⁴
- (b) A lease of immovable property.⁶⁵
- (c) A transaction between a *stokvel*⁶⁶ and a member of that *stokvel* in accordance with the rules of that *stokvel*.⁶⁷

4 OBJECTIVES OF THE NCA AND THEIR RELEVANCE IN INTERPRETATION

The *Clear Creek Trading* case⁶⁸ was decided *inter alia* by reference to the objectives of the NCA and the relevance thereof in the interpretation of the Act. It is therefore necessary to address these aspects briefly.

Section 3 of the NCA sets out the purposes of the Act, clearly illustrating its socio-economic aims.⁶⁹ It provides that “[t]he purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a

Vessio “Beware the provider of reckless credit” 2009 *TSAR* 274 277 raises the concern that the exemption of juristic person consumers from Part D of Ch 4 can be abused by a non-juristic person who is unable to obtain credit as a result of the reckless credit provisions to sidestep such provisions. A natural person may, for example, incorporate a company for this purpose.

⁶⁰ Ch 5 Part C.

⁶¹ S 6(a) and (d). See also s 78(1). Ss 6(b) and (c) exclude juristic persons from the ambit of s 89(2)(b) (providing that a credit agreement is unlawful if it results from a negative option marketing offer prohibited in terms of s 74(1)) and s 90(2)(o) (providing that a provision of a credit agreement is unlawful if it states or implies that the rate of interest is variable, except to the extent permitted by s 103(4)) respectively.

⁶² See above.

⁶³ See also Van Heerden in Scholtz (ed) para 11.2.

⁶⁴ Or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance – s 8(2)(a).

⁶⁵ S 8(2)(b).

⁶⁶ Defined in s 1 as a formal or informal rotating financial scheme with entertainment, social or economic functions. It consists of two or more persons in a voluntary association each of whom has pledged mutual support to the others towards the attainment of specific objectives. It also establishes a continuous pool of capital by raising funds by means of the subscription of its members, grants credit to and on behalf of members, provides for members to share in profits from, and to nominate management of the scheme and relies on self-imposed regulation to protect the interest of its members.

⁶⁷ S 8(2)(c).

⁶⁸ See para 6 below.

⁶⁹ See, in general, Scholtz in Scholtz (ed) para 2.3. See also Kelly-Louw and Stoop 19.

fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers”.⁷⁰

In striving to attain these main objectives, sub-goals are listed in section 3(a)–(i), *inter alia* the promotion of equity in the credit market by “balancing the respective rights and responsibilities of credit providers and consumers”.⁷¹

Section 2(1) provides guidance in respect of the interpretation of the NCA by, *inter alia*, stating that the Act must be interpreted in a manner that gives effect to the purposes set out in section 3.⁷² The Constitutional Court in *Sebola v Standard Bank of South Africa*⁷³ referred to the purposes of the Act as set out in the preamble and to the means by which the Act’s purposes provided for in section 3 are to be achieved. The court held that such goals and the means by which they are to be accomplished are intimately connected to the Constitution’s commitment to attaining equality.⁷⁴

Finally, relating to the purposes of the NCA in the current context, the emphasis that is placed on the protection of the consumer needs to be pointed out. However, in *Nedbank v The National Credit Regulator*⁷⁵ the Supreme Court of Appeal held that the Act calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider.

5 KAYDEEZ THERAPIES

In casu, the applicant entered into a credit facility with the first respondent, Kaydeez Therapies CC.⁷⁶ Both the second and third respondents bound themselves as surety and co-principal debtor for and on behalf of Kaydeez Therapies CC.⁷⁷ Upon Kaydeez’s liquidation the applicant applied for judgment against the second and third respondents jointly and severally.⁷⁸ Both sureties insisted that they were entitled to certain rights as contained in the NCA as both contracting parties erroneously thought that the NCA was applicable to the suretyship agreements on the date that the agreements were signed.⁷⁹

In her judgment Satchwell J first discussed the applicability of the NCA.⁸⁰ She pointed out that the principal agreement is exempted from the provisions of the

⁷⁰ In *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D) para 12, it was held that s 3 and other relevant sections of the Act are intended to provide a backdrop against which a court must exercise its discretion under the NCA.

⁷¹ S 3 (d).

⁷² See in this regard *Nedbank Ltd v The National Credit Regulator* 2011 3 SA 581 (SCA) para 2. See also Kelly-Louw and Stoop 23 and the authorities cited. Regarding a purposive approach in general, see Botha *Statutory interpretation* (2012) 97–99 and Du Plessis *Re-interpretation of statutes* (2002) 118–119.

⁷³ 2012 5 SA 142 (CC) para 36.

⁷⁴ Para 36.

⁷⁵ 2011 3 SA 581 (SCA) para 2. See also in this regard *inter alia* *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) para 36; *Desert Star Trading 145 (Pty) Ltd v No 11 Flamboyant Edleen CC* 2011 2 SA 266 (SCA) para 2 and *Collett v Firstrand Bank Ltd* 2011 4 SA 508 (SCA) para 10.

⁷⁶ Para 3.

⁷⁷ Para 4.

⁷⁸ Paras 3 and 4.

⁷⁹ Para 1.

⁸⁰ Paras 6–9.

NCA in accordance with section 4(1)(b), which provides that the NCA is not applicable to a large agreement where the consumer is a juristic person with an asset value or annual turnover of less than the prescribed threshold.⁸¹ This was not in dispute. The court held that the sureties are excluded from the ambit of the NCA by virtue of the provisions of sections 8(1)(c) and 8(5).⁸²

Next, the court considered the wording of the suretyships.⁸³ It referred to the misunderstanding by the creditor and its legal representative as to the applicability of the NCA on the basis of which the creditor attached a document to the suretyship agreements advising the sureties that the NCA provides them with a number of rights. The applicant went even further and claimed compliance with the provisions of the NCA in its founding affidavit.⁸⁴ However, it is to be noted that there was no evidence that this document contained terms which the parties had agreed to.⁸⁵ The court, therefore, concluded that the document came down to a mere notice or announcement of existing facts. The issue thus revolved around the possible impact of this notice on the applicability of the NCA.⁸⁶

Satchwell J stressed that a statute is passed by the legislature which determines its application. Specifically, it is the task of the legislature to determine to whom, in respect of which agreements, to what extent and with what results a piece of legislation would be applicable.⁸⁷ The court remarked that the NCA is very detailed and careful to specifically set out the requirements for an agreement to constitute a credit agreement as well as to specifically regulate when the NCA does not find application.⁸⁸ The Act also indicates when the NCA will be of full or limited application. On this basis, the court inferred that the legislature was determined to ensure that there is no doubt as to the scope of the NCA's applicability and consequently the parties' certainty in this regard.⁸⁹ With reference to section 44 of the Constitution of the Republic of South Africa, 1996⁹⁰ the court stated that no individual or entity other than Parliament can determine when and where legislation will find application. It confirmed that legislation applies *ex lege* through Parliamentary enactment and decree by the President. The court consequently concluded that legislation obtains its force through the legislature and not through the decision or will of individuals or entities, and accordingly decided that the notice was inappropriate as the legislature did not determine that the NCA would be applicable to the suretyship agreements *in casu*.⁹¹

The sureties, however, insisted that the NCA was applicable to their agreements on the basis of the annexure thereto.⁹² Satchwell J therefore turned to a discussion of the question whether parties can incorporate legislative terms into their agreements.⁹³ The court stated that parties are entitled to include anything

81 Para 7. See also para 3 3 above.

82 Para 8. The court referred to *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 3 SA 384 (T).

83 Paras 10–12.

84 Para 10.

85 Para 11.

86 Para 12.

87 Para 13.

88 By setting out exceptions and further elaborating thereon.

89 Para 14.

90 "The Constitution".

91 Paras 14–16.

92 Para 17.

93 Paras 18–26.

that is not *contra bonos mores* in their contracts.⁹⁴ They are therefore free to include certain rights and obligations, as are found in the NCA, into their agreements, even though the NCA factually does not find application. The court held that such rights and obligations would then constitute terms and conditions of the suretyship agreements and would be binding on the parties.⁹⁵ However, Satchwell J warned that contracting parties cannot bind statutorily created third parties, for instance the National Credit Regulator, by means of incorporation by reference and can therefore not utilise its services. The reason is that such statutory institutions do not have jurisdiction over the agreement between the parties or a dispute arising from it.⁹⁶

The court continued by stating that if the parties had reached an agreement that certain terms, akin to those which are found in the NCA, would be applicable to their agreement, one would have regard thereto.⁹⁷ However, *in casu* it was clear that the annexure envisioned that the NCA was factually applicable – which was not the case.⁹⁸ This then begged the question as to what the parties intended and understood the notice to be.⁹⁹ The court reiterated that the creditor was incorrect in explicitly stating that the NCA was applicable and that it could not so determine.¹⁰⁰ Further, even though it is possible that the rights contained in the annexure can implicitly be incorporated into the agreement, the rights which the sureties claim were not referred to in the said addendum.¹⁰¹ It could therefore not be said that the rights that the sureties claimed were implicitly incorporated into the agreement.¹⁰² On these grounds the court concluded that the sureties did not succeed in their argument that they were entitled to claim certain rights as contained in the NCA.¹⁰³

In conclusion, Satchwell J found that the NCA was not applicable to the suretyship agreements and that the NCA cannot be rendered applicable by agreement between contracting parties where that is not factually the situation. The judge also held that the parties had not expressly agreed to include certain terms which are akin to provisions contained in the NCA in their agreements and that they had not tacitly agreed to such rights.¹⁰⁴

6 CLEAR CREEK TRADING

In *Clear Creek Trading*¹⁰⁵ the relief sought by the plaintiff (the bank) arose out of a home loan agreement entered into between the plaintiff and the first defendant (the customer). The second defendant bound himself as surety and co-principal debtor for the obligations of the first defendant.¹⁰⁶ The home loan agreement provided in clause 1 thereof that “[t]his agreement is governed by the National Credit Act 34 of 2005 (the Act)” and on page 13 that the plaintiff shall

94 In this regard, the court referred to *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9.

95 Para 18.

96 Para 19.

97 Para 20.

98 Para 21.

99 Para 22.

100 Para 23.

101 Para 24.

102 Para 25.

103 Para 26.

104 Para 37.

105 Para 1 above.

106 Paras 1 and 4.

be bound by the terms and conditions of the agreement on receipt by the bank of the agreement duly initialled and signed by the customer.¹⁰⁷ In resisting the action of the plaintiff and in their plea to the plaintiffs' declaration, the defendants *inter alia* pleaded that the plaintiff failed to assess the defendants' general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of the defendants under the agreement (in terms of section 81(2) and (3) of the Act). These defences are located exclusively within the Act.¹⁰⁸ The parties agreed at the commencement of the trial that the preliminary question for determination was whether the National Credit Act was applicable to the agreement.¹⁰⁹ They also agreed to argue the matter of applicability on the pleadings and, *inter alia*, on the common-cause facts that¹¹⁰

- (a) it was a provision of the home loan agreement that the National Credit Act would apply to it; and
- (b) attorneys for the plaintiff dispatched a letter in terms of section 129(1)(a) read with section 130 of the National Credit Act to the first defendant.

In reliance on the provisions of sections 4(1)(b) read with section 9(4)¹¹¹ the plaintiff contended that the National Credit Act was not applicable to the home loan agreement, notwithstanding the reference to the Act in the agreement.¹¹² According to the court, if regard is had exclusively to the provisions of the said sections, then the agreement entered into between the plaintiff and the first defendant is of the kind excluded from the scope of the Act.¹¹³ In response to questions by the court, counsel for the plaintiff suggested that the reference in the agreement to the applicability of the Act as well as the dispatch of the letter in terms of section 129 were probably mistakes and should be ignored by the court.¹¹⁴

Counsel for the defendants took the stance that, notwithstanding the provisions of the Act, in particular sections 4(1)(b) and 9 thereof, parties to a private contract enjoyed contractual freedom and as a general principle courts were obliged to uphold agreements entered into between the parties. It was further argued that, where the parties by their specific agreement made the Act applicable to their contract – notwithstanding that the Act may not have been applicable if regard be had objectively to the provisions of the Act – then a court should, ordinarily speaking, uphold such an agreement unless there were compelling reasons not to do so.¹¹⁵

Kollapen J¹¹⁶ remarked that

“if one has regard to both the philosophy underpinning contractual freedom, as well as the *dicta* by our courts over more than a hundred years, then there can be little

107 Para 4.

108 Para 5.

109 Para 6.

110 Paras 6 and 7.

111 See paras 2 3 and 2 4 above.

112 Para 8.

113 Para 8. It was not disputed that the first defendant was a juristic person that concluded a large agreement, *viz* a mortgage.

114 Para 9.

115 Para 11.

116 With reference to Christie and Bradfield *Christie's The law of contract in South Africa* (2011), *Rood v Wallach* 1904 TS 187 201 and *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 57 87.

argument that, in the absence of any weighty considerations that would suggest otherwise, contracting parties should be bound to the agreements they enter into freely and voluntarily”.¹¹⁷

And further:

“*In casu*, and in the absence of any serious argument that the inclusion in the home loan agreement of a clause making the Credit Act applicable was a mistake, the court should accordingly hold the parties to the agreement that they voluntarily concluded”.¹¹⁸

The court then discussed the fact that the defendants relied on and based their defences on the provisions of the National Credit Act and said that such reliance could hardly have been said to be misplaced.¹¹⁹ The court came to the crux of the matter by saying that

“[a]rising from the above is the issue whether the parties may by their agreement contract to have their agreement covered by the provisions of a legislative enactment under circumstances where the legislative enactment itself excludes that kind of agreement from its scope”.¹²⁰

According to the court there is no doubt that the legislature specifically defined the scope and extent of the Act’s applicability. And, in addition, “the architecture of our constitutional order vests with the legislature the law-making function, and no other organ of state or a private entity can intrude upon the legislative competency of parliament”.¹²¹ In the absence of any principle in law that opposes the ordinary right of contracting parties to reach agreement on the terms and conditions of their contract and “to invoke for their mutual benefit the protection of a statute”, an agreement so concluded should be binding.¹²² However, in doing so it should not be permitted that the parties intrude upon the legislative authority of parliament or undermine the letter or spirit of the legislation. In order to determine whether this is the case, or whether there are compelling reasons not to uphold the agreement, a number of factors have to be considered.¹²³ The starting point should be the recognition of the parties’ freedom to contract.¹²⁴ Other factors include¹²⁵

- (a) the nature, purpose and objectives of the Act in question that the parties seek to incorporate and make applicable to their agreement;
- (b) the question whether the parties’ agreement seeks to advance the objectives of such an Act or, conversely, detracts from or undermines such objectives;
- (c) whether the agreement purports to create obligations for other entities who are not parties to the agreement, where such entities may have obligations provided for by the Act that the parties wish to make applicable to the agreement;
- (d) whether the agreement offends the imperatives of public policy or whether the dictates of public policy require that the agreement be enforced;

117 Para 15.

118 Para 16.

119 Para 17.

120 Para 19.

121 Para 20.

122 Para 21.

123 Para 21.

124 Para 21.

125 Para 21.

- (e) whether giving effect to the agreement is likely to be offensive to the principle of separation of powers and/or to undermine the legislative authority of parliament; and
- (f) the facts and circumstances of the particular case.

After discussing the objectives of the National Credit Act in terms of section 3, *inter alia* the objective to protect the consumer, and with reference to the Constitutional Court's conclusion in *Sebola v Standard Bank of South Africa*¹²⁶ "that the goals of the Act and the means by which they are pursued are 'intimately connected to the Constitution's commitment to achieving equality'", the court found that the National Credit Act, in seeking to protect consumers, advances the constitutional imperative of equality. The parties *in casu* were therefore by their agreement seeking to advance the objectives of the Constitution, even if it was not their stated intention to do so. That could hardly be objectionable.¹²⁷ The agreement entered into between the plaintiff and the first defendant advanced the objectives of the Act, "by extending the mutual and reciprocal protections the Act contains, both for consumers and credit givers, to the specific agreement between the parties". Again, this could hardly be objectionable.¹²⁸

The next factor considered by the court was whether the agreement entered into between the plaintiff and the first defendant purported to create obligations for other entities who were not parties to the agreement, such as third parties or regulatory bodies that have general duties in terms of the Act. This consideration, according to the court, is important because "it could hardly be argued that contracting parties can bind third parties who are not parties to their agreement simply because they choose to do so". To take such a stance would militate against the dictates of fairness. It would also potentially undermine the very objective of the Act in question where a regulatory body, whose scope, authority and obligations are clearly defined by the piece of legislation, were tasked with additional obligations hardly contemplated by the legislature. The court found that although *in casu* no third party or regulatory body had been called upon to perform any function outside of its mandated scope, to avoid unintended consequences for third parties, each case would have to be considered on its merits in the determination as to whether or not to uphold the particular agreement. Even where such unintended consequences were to arise, it does not mean that the result will always be not to uphold the agreement. The reciprocal obligations and duties that the Act creates between the parties can, at the very least, still exist independently and be incorporated in the parties' agreement.¹²⁹

The agreement entered into between the plaintiff and the first defendant did not offend the imperatives or public policy and should therefore be honoured. It may be argued that the dictates of public policy recognise a wide and generous approach to contractual freedom and may require such an agreement to be given effect to in accordance with the intention of the contracting parties, in particular where the effect thereof "is consistent with the scope and spirit of the law-maker".¹³⁰

126 2012 5 SA 142 (CC).

127 Para 22.

128 Para 23.

129 Para 24.

130 Para 25.

In casu it was hardly the case of a juristic person with an independent identity and presence of its own seeking to benefit from the Act. If the facts are considered, namely, that a loan of R750 000 was advanced by the plaintiff to the first defendant to purchase a property that was worth only R100 000 and that there was a very nominal difference between the first and the second defendant, by all accounts the same entity at the time of entering into the agreement, “then this is precisely the kind of context and underlying factual matrix” the Act was intended for. The second defendant faced the greatest risk and exposure from the agreement, given the position of the first defendant and the value of the property. According to the court these factors had to weigh considerably in favour of upholding the agreement.¹³¹

The court finally stated that there was nothing to suggest that the principle of the separation of powers of parliament’s legislative authority would be undermined by upholding the agreement. Parliament, in creating a list of exceptions to the application of the Act, “did not go so far as to create prohibitions with regard to any extended scope of the Act. The exceptions may have been motivated by common sense and a general sense of fairness which is not undermined by the agreement is question”.¹³²

Based on considerations of contractual freedom, the *pacta sunt servanda* principle and, to the extent that they were relevant, considerations of public policy that pointed strongly in the direction that the agreement should be enforced as agreed to by the parties,¹³³ Kollapen J consequently made an order that “[t]he provisions of the National Credit Act 34 of 2005 are applicable in respect of the home loan agreement entered into between the plaintiff and the first defendant”.¹³⁴

7 KAYDEEZ THERAPIES AND CLEAR CREEK TRADING CONSIDERED

To the misfortune of the sureties in *Kaydeez Therapies*, Satchwell J incorrectly classified the credit facility *in casu* as a large agreement.¹³⁵ Due to the fact that the credit facility was extended to a juristic person that had, at the time of entering into the agreement, neither asset value nor turnover, this mistake caused the court to find that the facility fell outside the ambit of the NCA in terms of section 4(1)(b).¹³⁶ The court subsequently found the NCA also not to be applicable to the suretyship agreements signed in respect of the credit facility.¹³⁷ This mistake had the further consequence that Satchwell J considered principles relevant to the question under discussion in this article, namely, whether parties to a credit agreement may agree to render the NCA applicable to their agreement where the Act does not apply out of own force. Of course, as was seen above,¹³⁸ in *Kaydeez Therapies* the contracting parties “erroneously” thought their agreements were

131 Para 26.

132 Para 27.

133 Para 28.

134 Para 29.

135 See also Kelly-Louw 2012 *SA Merc LJ* 214. It has been mentioned in para 3 2 above that a credit facility can never be classified as a large agreement.

136 *Kaydeez Therapies* para 7.

137 Paras 8 and 9.

138 Para 5.

subject to the NCA and never specifically agreed to make the Act applicable to their agreements. In what follows the principles laid down by the court in *Kaydeez Therapies* are discussed as if the court were correct in deciding that the credit facility and the suretyship agreements fell outside the ambit of the NCA.

It is submitted that Satchwell J is correct in saying that the legislature determines to which contracts the NCA applies,¹³⁹ and “was determined to ensure that there was no uncertainty as to the purview of the Act”,¹⁴⁰ “that it is not available for any individual or entity other than parliament to determine when and where legislation shall apply”,¹⁴¹ “[l]egislation obtains its force by reason of the will and decision of the legislature, not because individuals or entities elect to be subject thereto”¹⁴² and, therefore, that the creditor *in casu* was incorrect “in explicitly announcing that the NCA was of application” and “could not so determine”.¹⁴³ In terms of section 44(1)(a)(ii) of the Constitution, the “national legislative authority as vested in Parliament confers on the National Assembly the power to pass legislation with regard to any matter”.

It is not uncommon for consumer credit legislation to stipulate the ambit of its field of application. To mention a few examples: as far as the National Credit Act’s predecessors are concerned, the first-generation credit laws that were in force in the former South African colonies applied to moneylending transactions only. The same held true for the Usury Act,¹⁴⁴ a second-generation Act that applied on national level.¹⁴⁵ The Credit Agreements Act,¹⁴⁶ a second-generation Act which immediately preceded the NCA, applied to credit transactions – including instalment sale transactions – and leasing transactions pertaining to certain movable goods only. In addition, this Act applied only where the cash price of such goods did not exceed the amount of R500 000 and where the duration of the agreement exceeded six months.¹⁴⁷

In respect of the NCA’s application to juristic persons (as consumers), it is submitted that a balanced approach is followed by the legislature in this regard. The exclusion of the larger and/or financially stronger – in contrast with the smaller and/or financially weaker – juristic persons from the ambit of the Act’s provisions makes sense. These juristic persons should be in a position to look after their own interests.¹⁴⁸ The scope of the field of application of consumer credit legislation is therefore a matter of policy.¹⁴⁹

Turning to the court’s remarks that the parties can incorporate certain terms into their agreement:¹⁵⁰ the majority of cases dealing with the doctrine or principle

139 Paras 13–15.

140 Para 14.

141 Para 15.

142 Para 15.

143 Para 23.

144 37 of 1926.

145 See Renke *Thesis* (2012) paras 6 2, 6 3 and 6 4 1 respectively.

146 75 of 1980.

147 Renke *Thesis* (2012) para 6 7 1.

148 It is interesting to note that in terms of, for example, the consumer credit legislation in force in Belgium at present, *Wet van 12 juni 1991 op het consumentenkrediet*, as amended, only a natural person qualifies to be protected as consumer – *idem* para 3 2 3.

149 See also the reasons for the exclusion of all juristic persons as consumers from the provisions in the NCA dealing with over-indebtedness and reckless lending – para 3 3 above.

150 *Kaydeez Therapies* paras 18–26.

of incorporation by reference deal with the question whether the parties to a contract of suretyship or sale of land can agree to incorporate the contents or terms of another document into their agreement, for instance to establish the name of the principal debtor where it was omitted from the suretyship contract.¹⁵¹ In *Industrial Development Corporation of SA*,¹⁵² Scott JA said that “[i]ncorporation by reference, as the name implies, occurs when one document supplements its terms by embodying the terms of another”. Case law dealing with the incorporation by reference of the provisions of legislation into contracts is not easy to find. However, in a case where a tender contract was expressly made subject to regulations,¹⁵³ the court¹⁵⁴ remarked that “[a]ll that happened, in my view, is that the provisions of the Regulations . . . became part of the [tender] contract through incorporation by reference”.¹⁵⁵

Cornelius¹⁵⁶ states that the express terms of a written contract “may also consist of terms in other documents that are incorporated into the contract by reference”. Terms in another document or notice that were incorporated into a contract must be read as if they had been written out in full in the particular contract.¹⁵⁷ A United Kingdom textbook on the interpretation of contracts,¹⁵⁸ under the heading “EXPRESSLY INCORPORATED TERMS”, first of all states in general that

“[w]here parties expressly incorporate terms into a contract, the incorporated terms must be construed as if they had been written out in full in the contract, and, accordingly, must be construed in the context of the contract into which they have been incorporated”.¹⁵⁹

Later on, and more to the point under the subheading “Incorporation of statutory provisions”, Lewison¹⁶⁰ remarks that

“[t]he starting point is that if the terms of a statute are incorporated into a contract by reference, the contract has to be read as if the words of the statute are written out in the contract and construed, *as a matter of contract*,¹⁶¹ in their contractual context”.

However, where a statutory definition is incorporated into a contract, the same meaning as it bears in the statute will usually be given to the word in the contract.¹⁶²

151 See *inter alia* *Fourlamel (Pty) Ltd v Maddison* [1977] 1 All SA 513 (A); *FJ Mitrie (Pty) Ltd v Madgwick* 1979 1 SA 232 (D); *Heathcote v Finwood Papers (Pty) Ltd* 1997 JDR 0198 (E); *Hartland Implemente (Edms) Bpk v Enal Eienomme BK* 2002 3 SA 653 (NC); *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 1 SA 365 (SCA) and *Structured Mezzanine Investments (Pty) Limited v Basson* [2013] JOL 30350 (WCC).

152 2003 1 SA 365 (SCA) 369.

153 *Government of the RSA v Thabiso Chemicals* [2009] 1 All SA 349 (SCA).

154 354–355.

155 *R v Folkus* 1954 3 SA 442 (SWA) and *Benator v Worcester Court (Pty) Ltd* 1983 4 SA 126 (C) concerned the incorporation by reference of the provisions of legislation into legislation.

156 *Principles of the interpretation of contracts in South Africa* (2007) 156.

157 *Ibid.*

158 Lewison *The interpretation of contracts* (2011).

159 *Idem* 105.

160 110.

161 Our emphasis.

162 Lewison 110.

It is submitted that the remarks by Satchwell J¹⁶³ that the parties to an agreement are entitled to include in their contract anything provided that it is *not contra bonos mores* and that the parties *in casu* could have stated in their agreement that particular rights shall be enjoyed and obligations observed (and then set out all or some of the rights and obligations which are found in the NCA), are in accordance with the abovementioned authorities and therefore cannot be faulted. We submit that the parties to a credit agreement are even entitled, by means of incorporation by reference, to “contract into”, for instance, the over-indebtedness and reckless credit lending provisions, provisions that were determined by the legislature not to be applicable to any juristic person as a consumer.¹⁶⁴ However, the further submission is made that Satchwell J correctly held that it would have been possible for the parties *in casu* to implicitly incorporate the rights set out in the addendum to the surety agreements into their agreements, with the exclusion of rights not referred to in the addendum.¹⁶⁵

Further, it is submitted that the court’s decision that statutorily-created third parties could not be bound by contracting parties when the latter make use of the principles of incorporation by reference,¹⁶⁶ should be endorsed. The doctrine of privity of contract, referred to in Hutchison and Pretorius¹⁶⁷ as one of the cornerstones of the law of contract¹⁶⁸ and as a “hallowed principle [of the law of contract]”,¹⁶⁹ entails that “a contract generally creates personal rights and duties only for the parties to the contract, and for nobody else”.¹⁷⁰ Kuschke and Hutchison¹⁷¹ further state that

“[t]here are no qualifications to this fundamental principle as regards the imposition of duties on third parties; it would be manifestly unfair if two parties, by their own private act, could impose an obligation on a third without the latter’s consent.”

The further implication is that only a party to a contract can commit a breach of that contract and that only a party to a contract could in general make use of his/her remedies to seek redress for breach of that contract.¹⁷²

Finally, in accordance with Lewison’s remark above that the terms of a statute, after its incorporation into a contract by reference, should be construed “as a matter of contract”, the submission is made that Satchwell J¹⁷³ was correct in holding that if the parties to a credit agreement had incorporated terms of the NCA into their agreement, “then one would have regard to those provisions which had been included in their agreement [*ex contractu*]”.

163 *Kaydeez Therapies* para 18.

164 See para 3 3 above.

165 *Kaydeez Therapies* para 24.

166 Para 19.

167 Hutchison and Pretorius (eds) *The law of contract in South Africa* (2013).

168 Hutchison in Hutchison and Pretorius (eds) 21.

169 Kuschke and Hutchison in Hutchison and Pretorius (eds) 222.

170 *Idem* 223. See also *inter alia* *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Bpk* 1972 1 SA 761 (A) 770D–H; *Wynland Construction (Pty) Ltd v Ashley-Smith* 1985 3 SA 798 (A) 817Hf; *Pfeiffer v First National Bank of SA Ltd* 1998 3 SA 1018 (SCA) 1025E–H and *Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd* 1999 1 SA 796 (A) 800E.

171 In Hutchison and Pretorius (eds) 223.

172 *Sweets from Heaven* 800F.

173 *Kaydeez Therapies* para 20.

Turning to *Clear Creek Trading*: although Kollapen J never referred to *Kaydeez Therapies*,¹⁷⁴ he seems to be in agreement with Satchwell J as far as the doctrine of privity of contract is concerned.¹⁷⁵ The same pertains to the court's remark that the lawmaking function rests with the legislature and cannot be intruded upon by, for instance, a private entity.¹⁷⁶ The provisions of section 44(1)(a)(ii) of the Constitution have already been referred to above. It is further submitted that the fact that the considerations of contractual freedom and of public policy as well as the *pacta sunt servanda* principle were considered by Kollapen J in reaching his decision,¹⁷⁷ cannot be faulted. These are cornerstone principles of the law of contract¹⁷⁸ that require no further elaboration.

However, it is submitted that Kollapen J erred when holding that, based on these principles and considerations, "the agreement should be enforced as agreed to by the parties"¹⁷⁹ and also by making an order that "[t]he provisions of the National Credit Act 34 of 2005 are applicable in respect of the home loan agreement entered into between the plaintiff and the first defendant".¹⁸⁰ We are of the opinion that rendering (some of, or even all) the provisions of a legislative enactment applicable to an agreement through incorporation by reference (provided that the principle of privity of contract is not infringed) and permitting individuals or entities, the parties to a contract, to elect to be subject to an enactment under circumstances where that is not factually the case, should be distinguished. In the former case reliance is placed on the incorporated provisions of the enactment as "a matter of contract" and in the latter case on the particular Act itself. In the former case non-compliance with an incorporated legislative provision in the contract constitutes breach of contract and in the latter case mere non-compliance with a legislative provision. Finally, in contrast to the latter, the legislative authority of Parliament is not intruded upon or undermined in the former instance. We are accordingly of the opinion that, if and to the extent that Kollapen J endorsed the latter of the abovementioned approaches,¹⁸¹ he was wrong. This is submitted to be the case in spite of the fact that the court

- (a) might have been correct in saying that "the National Credit Act, in seeking to protect consumers, advances the constitutional imperative of equality", the parties *in casu* therefore sought to advance the objectives of the Constitution by their agreement¹⁸² and that the agreement entered into between the parties advances the objectives of the Act, "by extending the mutual and reciprocal protections the Act contains . . . to the specific agreement between the parties".¹⁸³ The legislature decided not to render the NCA applicable to

174 See para 6 above.

175 *Clear Creek Trading* para 24.

176 Para 6 above and *Clear Creek Trading* para 20.

177 *Clear Creek Trading* paras 13–16 25.

178 See, in general, *inter alia* Christie and Bradfield 12 17–19; Van Der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract general principles* (2012) 9 13 14 131 132 205 and Hutchison and Pretorius (eds) 21–26 30–31.

179 *Clear Creek Trading* para 28.

180 Para 29.

181 This seems to be the case. *Clear Creek Trading* is interspersed with indications that the court found the latter approach to be in order. See eg paras 15 16 19 21 23 26 28–29. See also para 6 above.

182 Even though it might not have been their intention to do so –*Clear Creek Trading* para 22.

183 *Idem* para 23.

all credit agreements¹⁸⁴ and, in addition, the exclusion of certain juristic persons – and as a result the exclusion of suretyship agreements signed in respect of the credit agreements concluded by such juristic persons – were found not to be unconstitutional.¹⁸⁵ Perhaps the issue at hand had not so much to do with the separation of powers¹⁸⁶ than with the fact that the Constitution confers the exclusive legislative authority on Parliament. The mere fact that the NCA does not expressly prohibit the extension of its field of application¹⁸⁷ does not authorise the parties to a credit agreement to decide *inter partes* to render the Act applicable, even though such an extension may be in line with the objectives of the NCA. It is our submission that if Parliament intended for the parties to a credit contract to have such powers, it could have done so by the use of an express provision to that effect.

- (b) The same reasoning applies to Kollapen J's statement that from a public policy perspective there can be no objection to extend the NCA's application to the excluded agreements and that, on the contrary, the dictates of public policy may require that agreements such as the agreements *in casu* be given effect to.¹⁸⁸ The court remarked¹⁸⁹ that there is a "very nominal difference between the first and the second defendant, who by all accounts were substantially the same entity" and that it is "precisely the kind of context and underlying factual matrix for which the Act was intended. It is hardly the case of a juristic person with an independent identity and presence of its own seeking to benefit from the Act".¹⁹⁰ Once again, the legislature was at pains to exclude certain juristic persons from the ambit of the NCA, a fact that was found not to be unconstitutional.¹⁹¹ In our opinion the considerations of public policy cannot be used in such an instance to license the parties to an agreement to render the Act applicable to their agreement where the Act is not applicable. Should it happen, as Vessio pointed out,¹⁹² that the exemption of juristic person consumers can be abused by a non-juristic person who is, for instance, unable to obtain credit as a result of the reckless credit provisions to sidestep such provisions, it is that consumer's choice to do so. Such a consumer indirectly chooses not to take advantage of the protection afforded by the NCA and, in accordance with the principle of *pacta sunt servanda*, his choice should be honoured. Finally, such a consumer should also be prepared to accept the less favourable consequences resulting from his choice.

8 FINAL CONCLUSIONS AND RECOMMENDATIONS

It is, therefore, permissible for the parties to a credit agreement to render the National Credit Act applicable to their agreement under circumstances where the Act, in terms of its own provisions, does not apply to that agreement. However,

184 Para 3 3.

185 Para 3 3.

186 See *Clear Creek Trading* paras 21 26.

187 Para 27.

188 Para 25.

189 *Inter alia* with reference to the fact that the plaintiff advanced a loan of R750 000 to buy a property that was worth no more than R100 000.

190 *Clear Creek Trading* para 26.

191 Para 3 3 above.

192 See para 3 3 above.

this should be done in accordance with the principles that were laid down in *Kaydeez Therapies*. By utilising the principles of incorporation by reference the parties are free to incorporate provisions of the Act in their agreement with the result that

- (a) the incorporated provisions form part of the contract;
- (b) the incorporated provisions only find application *inter partes*, to the exclusion of third parties; and
- (c) legal certainty is improved.

The remark by the court in *Clear Creek*¹⁹³ that “[i]t must be arguable that . . . the reciprocal obligations and duties that the Act creates between the parties can . . . be incorporated into any agreement that parties may enter” in any event confirms the conclusion that it is not necessary to allow the parties to a contract to decide *inter partes* to render the Act itself applicable.

Finally, it is suggested that credit providers could safeguard themselves against unnecessary litigation by, for instance, inserting phrases such as “if, and to the extent that the NCA applies” in standard agreements when referring to situations that could be regulated by the Act.

193 Para 24.