

**THE INTERPRETATION OF THE ARM'S LENGTH PRINCIPLE  
IN TERMS OF THE NATIONAL CREDIT ACT**

by

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## TABLE OF CONTENTS

<b>SUMMARY</b>	<b>6</b>
<b>CHAPTER 1: INTRODUCTION</b>	<b>7</b>
1.1 GENERAL BACKGROUND AND OVERVIEW	7
1.2 RESEARCH STATEMENT AND OBJECTIVES	10
1.3 DELINEATION AND LIMITATIONS	11
1.4 KEY REFERENCES, TERMS AND DEFINITIONS	11
<b>CHAPTER 2: INTERPRETATION AND FIELD OF APPLICATION OF THE ACT</b>	<b>13</b>
2.1 INTERPRETATION	13
2.2 GENERAL APPLICATION	14
2.2.1 Credit Agreements in terms of the National Credit Act	14
2.2.2 Credit agreements excluded from the ambit of the Act	17
2.2.3 Limited application of the Act in certain instances	20
<b>CHAPTER 3: A CLOSER LOOK AT THE ARM’S LENGTH REQUIREMENT</b>	<b>21</b>
3.1 SECTION 4 (2)(b) OF THE NATIONAL CREDIT ACT	21
3.2 SECTION 4(2)(b)(i) and (ii)	21
3.2.1 “Juristic person”	21
3.2.1.1 The distinction between “consumer” and “juristic person as consumer” in comparative jurisdictions	24
3.2.2 “Related Parties” and “Controlling Interest”	27
3.2.2.1 Relevant Legislation and Interpretation	28
3.2.2.1.1 The Diamonds Act	28
3.2.2.1.2 The Competition Act	29
3.2.2.1.3 The Companies Act	29
3.2.2.1.4 The National Credit Act	31
3.2.3 Practical Application	32
3.2.3.1 An interpretation of “related parties” in terms of the National Credit Act: <i>Bester and Others v Coral Lagoon Investments 232 (Pty) Ltd</i>	32
3.2.3.2 Specific types of company loans and the application of sections 4(2)(b)(i) and (ii) of the National Credit Act	34
3.2.3.2.1 Loans or security provided by a subsidiary to or in favour of its holding company or a fellow subsidiary	34
3.2.3.2.2 Loans, security or a guarantee to a shareholder relating to the subscription of shares	35
3.2.3.2.3 Loans or security in connection with transactions to directors or prescribed officers	37
3.2.3.2.4 Debt Instruments	39
3.3 SECTION 4(2)(b)(iii)	40
3.3.1 Familial relationship in terms of legislation:	41
3.3.1.1 The Companies Act 71 of 2008	41
3.3.1.2 The Income Tax Act	41
3.3.2 PRACTICAL APPLICATION WITH REFERENCE TO CASE LAW	44
3.3.2.1 <i>Claasen t/a Mostly Media</i>	44
3.3.2.2 <i>Dayan v Dayan</i>	45
3.3.2.3 <i>Beets v Swanepoel</i>	45
3.3.2.4 <i>Hattingh v Hattingh</i>	46



3.3.3	Conclusion	47
3.4	SECTION 4(2)(b)(iv)	47
3.4.1	An arrangement where each party is not independent and does therefore not strive to obtain the utmost possible advantage out of the transaction	47
3.4.1.1	Practical application:	49
3.4.1.1.1	<i>Eden Court Holdings (Pty) Ltd V Khan</i>	50
3.4.1.1.2	<i>Friend V Sendal</i>	50
3.4.1.2	Conclusion:	51
3.4.2	Any other arrangement that is of a type that has been held in law to be between parties dealing at arm's length	52
CHAPTER 4: CONCLUSION		54
BIBLIOGRAPHY		56
ANNEXURE "A": SARS INTERPRETATION NOTE 67		63

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## Thank you

My sincere gratitude to my family, friends and colleagues for supporting me and for breathing in my neck to finish

### With a special mention

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and also to Marjorie and John, my colleagues,

for unconditionally supporting me in everything I do.

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*Unless you try to do something beyond what you have already mastered, you will never grow.*

*Ralph Waldo Emerson*

*(1803-1882, American essayist, lecturer and poet)*

## SUMMARY

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Arm's length is an idiomatic English phrase which refers to a metaphor that uses the human body as a measure. The hand is not directly joined to the body, it maintains an undeniable distance from the body, equivalent to the length of an arm. In this sense, the metaphorical meaning of being at arm's length means to be at a certain distance, not too close and not too far away. The expression is often used in contract law, and a contract concluded between parties at arm's length will ensure that the parties are independent and on equal footing when concluding the agreement.

The National Credit Act applies to "every credit agreement between parties dealing at arm's length". Arm's length is a novel concept in the South African credit vocabulary and not defined in the Act. This mini-dissertation therefore discusses the theoretical and practical application thereof in terms of the National Credit Act.

## CHAPTER 1: INTRODUCTION

### 1.1 GENERAL BACKGROUND AND OVERVIEW

The laws of a country are dictated by the needs, circumstances, resources, political agenda, economic policy and history of the specific country.<sup>1</sup> South African credit legislation prior to the National Credit Act 34 of 2005 (“the Act”) was fragmented and outdated and have been subjected to widespread criticism.<sup>2</sup> The Credit Agreements Act,<sup>3</sup> Usury Act<sup>4</sup> and the Usury Act Exemption Notice<sup>5</sup> was drafted primarily around the needs of the white middleclass during the 1970’s and 1980’s and offered different protection measures to consumers in respect of the different types of credit agreements regulated by them,<sup>6</sup> even though the consumers’ obligations were significantly similar in terms of the different types of credit agreements.<sup>7</sup> The fact that there was no uniformity created considerable scope for misinterpretation and for circumventing the law. This, aggravated by the fact that the legislation was outdated, considerably undermined consumer protection.<sup>8</sup>

Credit active consumers significantly increased after the establishment of the Democracy in 1994<sup>9</sup> when previously disadvantaged consumers with limited involvement and experience in the financial market obtained access to credit related products.<sup>10</sup> This, coupled with the unscrupulous extension of credit to consumers who could not really afford it,<sup>11</sup> caused a dysfunctional credit market with inadequate protection measures, and called for a need to review consumer credit legislation.<sup>12</sup>

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<sup>1</sup> Otto and Otto (2013) 1.

<sup>2</sup> Kelly-Louw (2008) *SA Merc LJ* par 1. Also see par 2 for the reasons why the previous legislation became outdated.

<sup>3</sup> Act 75 of 1980.

<sup>4</sup> Act 73 of 1968.

<sup>5</sup> Regulation passed in terms of the Usury Act 75 of 1980.

<sup>6</sup> DTI Credit Law Review (2003) 10.

<sup>7</sup> DTI Credit Law Review (2003) 10 at fn 2.

<sup>8</sup> DTI Credit Law Review (2003) 10.

<sup>9</sup> Goldman Sachs Report (2013) 40.

<sup>10</sup> Kelly-Louw and Stoop (2012) 13.

<sup>11</sup> Otto and Otto (2013) 2.

<sup>12</sup> Kelly-Louw and Stoop (2012) 14 to 17.

During 2002, the Department of Trade and Industry instructed the Micro Finance Regulatory Council (MFRC) to co-ordinate a review of consumer credit legislation and to make proposals for a new regulatory framework. A committee was established to investigate. The committee considered the regulatory arrangements and legislation of a number of jurisdictions and delivered a report consistent with international best practice.<sup>13</sup> Jurisdictions considered included the European Union, Australia, New Zealand, the UK and the USA.<sup>14</sup>

The 2004 Policy Framework for Consumer Credit<sup>15</sup> laid the foundation for a uniform and regulated credit market in South Africa. The policy framework recognised the need for reform<sup>16</sup> and to replace the outdated, fragmented legislation with a single piece of legislation equally applying to all consumer credit transactions irrespective of their form, and to all credit providers.<sup>17</sup>

The Act was assented to by the President on 10 March 2006<sup>18</sup> and repealed the Credit Agreements Act and Usury Act. It provided South Africans with a single, comprehensive piece of credit legislation bearing little resemblance to its forerunners<sup>19</sup> and effectively serving as a complete replacement of the legislation that has regulated consumer credit for more than a quarter of a century.<sup>20</sup> The Act came into operation in three different stages<sup>21</sup> thereby affording creditors the opportunity to get their documentation and processes in order and to attend to their registration as credit providers.<sup>22</sup>

The Act changed the legislative landscape after coming into full effect on 1 June 2007.<sup>23</sup> A myriad of new concepts were introduced to the South African credit vocabulary, causing problems with interpretation and giving rise to countless court cases mainly driven by credit

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<sup>13</sup> DTI Credit Law Review (2003) 7.

<sup>14</sup> DTI Credit Law Review (2003) 7.

<sup>15</sup> DTI Policy Framework (2004).

<sup>16</sup> Chapter 2 of the DTI Policy Framework (2004).

<sup>17</sup> Chapter 4 of the DTI Policy Framework (2004).

<sup>18</sup> The Act became operative in three phases with full commencement on 1 June 2007. For comprehensive reference regarding the implementation see Scholtz in Scholtz ed (2008) par 2.2. See also Kelly-Louw and Stoop (2012) 18 to 19.

<sup>19</sup> Otto in Scholtz ed (2008) par 1.3.6.

<sup>20</sup> Scholtz in Scholtz ed (2008) par 2.1. Naidu AJ described the National Credit Act as a “bold and no doubt timely effort to make a clean break from the past” in *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 521 (D), this quotation is a clear indication of how different the Act is from its predecessors.

<sup>21</sup> Proc 22 in GG 28824 of 9 May 2006.

<sup>22</sup> Otto and Otto (2013) 3 and 8.

<sup>23</sup> Scholtz in Scholtz ed (2008) par 2.1. Also see the remark by Naidu AJ in fn 20 above.



providers trying to avoid the application of the Act.<sup>24</sup> One of these new, and to my knowledge largely unexplored concepts that stands central to the application of the Act, is the arm's length principle: the Act only applies to credit agreements between parties dealing at arm's length and made within, or having an effect within the Republic.<sup>25</sup>

The Act does not define the concept of arm's length, but merely provides specific examples of arrangements where parties are not dealing at arm's length<sup>26</sup> in aid of interpretation. The list of exceptions is not exhaustive and *inter alia* states that parties are not dealing at arm's length in:

“any other arrangement –

(aa) in which each party is not independent of the other and consequently does not necessarily

strive to obtain the utmost possible advantage out of the transaction; or

(bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length”.<sup>27</sup>

The inclusion of these “open lists” seems to be a trend in consumer regulation, an indication that the legislator is endeavouring to cast its net as wide as possible. The downside is that it gives rise to grey areas, and that it will possibly take several years and numerous decisions by the court to provide legal certainty.

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<sup>24</sup> *Wesbank v Papier* par 14 the court said that it was “ironic that a piece of legislation was passed with such laudable intentions has become, within a few months after its promulgation, a ‘fertile ground for litigation’, as it was described in one of the plethora of cases in which its provisions were considered by the court”.

<sup>25</sup> S 4(1).

<sup>26</sup> S 4(2)(b).

<sup>27</sup> S 4(2)(b)(iv).

## 1.2 RESEARCH STATEMENT AND OBJECTIVES

Persons who conduct activities regulated in terms of the Act may only do so if registered,<sup>28</sup> but registration and compliance are burdensome and ignorance can be expensive and lead to monetary and reputational damage for credit providers. It is therefore vital that credit providers understand the general application of the Act and the applicable exclusions, not only to comply with its obligations, but also to have a bit of commercial wriggle room when needed thereby contributing to economic growth. One of the applicable exclusions that has not been comprehensively researched is the arm's length principle. An agreement not at arm's length is not subject to the Act and a credit provider will therefore not have to burden himself with costly compliance.

I am investigating the concept of arm's length in our law generally in a bid to elucidate the vagueness of this undefined and somewhat abstract idea, and will attempt to give a framework for the interpretation of the concept in terms of the National Credit Act.

Pertinent research objectives have been formulated with reference to the abovementioned research statement in order to define and restrict the scope of this dissertation. The 4 chapters are structured to meet the objective of analysing and investigating the interpretation of agreements at arm's length in terms of the Act and are set out as follows:

Chapter 1 is introductory and consists of a general introduction, the delineation and limitations and a general overview of the research objective.

Chapter 2 deals with the special rules for interpreting the Act and shortly sets out the principles applicable to the general application of the Act.

Chapter 3 deals with the arm's length and its interpretation in terms of the Act by referencing to other legislation containing the same or similar terminology.

Chapter 4 contains the general conclusion and recommendations.

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<sup>28</sup> S 40.

### 1.3 DELINEATION AND LIMITATIONS

The research conducted will refer to distinct national legislation, national and international policy papers and specific court cases in terms of the National Credit Act and other legislation. The concept of arm's length is also relevant in tax legislation, economic policies and insolvency law. These disciplines, however, fall outside the scope of this dissertation and reference will only be made to the extent deemed necessary.

This dissertation does not attempt to discuss international and foreign legislation further than what is referenced to and therefore does not deal with the application of national legislation outside of the research objectives.

The examples cited in this dissertation are not exhaustive and it is not the writer's intention to discuss all exceptions to the Act's field of application.

It should be noted that this dissertation reflects the relevant developments in the law as at 22 September 2015.

### 1.4 KEY REFERENCES, TERMS AND DEFINITIONS

The following terms will be used throughout the dissertation and are defined for the sake of clarity:

**"agreement"** includes an arrangement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties;

**"consumer"** in respect of a credit agreement to which this Act applies, means –

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

**“credit”** when used as a noun, means-

- (a) a deferral of payment of money owed to a person, or a promise to defer such a payment; or
- (b) a promise to advance or pay money to or at the direction of another person;

**“credit agreement”** means an agreement that meets all the criteria set out in section 8(3).

**“credit provider”** in respect of a credit agreement to which this act applies, means –

- (a) *the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement;*
- (b) *the party who advances money or credit under a pawn transaction;*
- (c) *the party who extends credit under a credit facility;*
- (d) *the mortgagee under a mortgage agreement;*
- (e) *the lender under a secured loan;*
- (f) *the lessor under a lease;*
- (g) *the party to whom an assurance or promise is made under a credit guarantee;*
- (h) *the party who advances money or credit to another under any other credit agreement; or*
- (i) *any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into.*

**“credit regulator”** or **“regulator”** means a provincial credit regulator or the National Credit Regulator established by section 12;

**“juristic person”** includes 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”** or **“National Credit Act”** refers to the National Credit Act, 34 of 2005<sup>29</sup>

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<sup>29</sup> The definition of “this Act” in S 1 of the Act states that the Act includes all schedules thereto and regulation made or notices issued in terms thereof.

## CHAPTER 2: INTERPRETATION AND FIELD OF APPLICATION OF THE ACT

### 2.1 INTERPRETATION

The Act must be interpreted in a manner that gives effect to the purposes of the Act set out in section 3.<sup>30</sup> The stated purposes of the Act are 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”.<sup>31</sup> These purposes are to be attained by promoting the development of a credit market accessible to all South Africans, particularly the previously disadvantaged,<sup>32</sup> by promoting responsibility in the credit market,<sup>33</sup> by implementing measures to correct the imbalances in the negotiating power between consumers and credit providers<sup>34</sup> and other measures aimed at preventing and addressing over-indebtedness and dispute resolution.<sup>35</sup>

These special rules of interpretation<sup>36</sup> plays a pivotal role in the interpretation of a specific provision and can influence the court to look at the social history of a consumer when making a specific order.<sup>37</sup> The intention is not to protect the consumer’s rights at the expense of the credit provider,<sup>38</sup> but calls for a purposive interpretation and the careful balancing of rights and responsibilities of the parties involved.<sup>39</sup> Interpretation will not necessarily favour the consumer.<sup>40</sup> The court in *Standard Bank SA Ltd v Hales* held that section 3(a) to (i) is not a

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<sup>30</sup> S 2(1).

<sup>31</sup> S 3.

<sup>32</sup> S 3(a).

<sup>33</sup> S 3(c).

<sup>34</sup> S 3(e).

<sup>35</sup> S 3(f)-(i).

<sup>36</sup> Comprehensively set out in s 2.

<sup>37</sup> *Firststrand Bank Ltd v Maleke*. See also Kelly-Louw (2012) 415 to 416: “this case clearly shows that where a credit provider applies for a default judgment and an order to declare the immovable property of a historically disadvantaged or poor consumer executable, the court may refuse to grant the application if the default amount is relatively trivial and the probability of serious prejudice to the consumer is high”.

<sup>38</sup> Pillay J’s in *FRB v Mvelase* par 20: the NCA strikes a balance between the interests of consumers and those of credit providers “through a push-pull tension which ensures that whenever sections of the NCA tip the scales in favour of the consumer, countervailing rights of the credit provider in other sections sway the balance in favour of the latter and vice versa”.

<sup>39</sup> *Rossouw and Another v Firststrand Bank*, par 17.

<sup>40</sup> *SA Taxi Securitisation v Mbatha*, paras 32 and 37.

*numerus clausus* of factors applicable in every situation, and that these, and other sections, provide a backdrop for the interpretation and application of the Act.<sup>41</sup>

Another interesting and somewhat vague rule of interpretation is that any person, court or tribunal may consider appropriate foreign and international law when interpreting or applying the Act.<sup>42</sup> This is an understandable inclusion when the review committee's consideration of foreign legislation and the draughtsmen of the Act's particular regard to extraterritorial legislation is taken into account.<sup>43</sup> Similar provisions are found in the Constitution,<sup>44</sup> the Companies Act<sup>45</sup> and the Consumer Protection Act.<sup>46</sup> Otto submits that although it is not unusual for our courts to consider other legal systems when they have to develop the common law, it is not common practice where legislation needs to be interpreted.<sup>47</sup> Scholtz also cautions that foreign law must be considered and followed with the necessary caution for the fear that the trend of incorporating definitions foreign to or inconsistent with our legal system be continued.<sup>48</sup>

## 2.2 GENERAL APPLICATION

### 2.2.1 Credit Agreements in terms of the National Credit Act

The Act generally applies to every credit agreement<sup>49</sup> between a consumer and a credit

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<sup>41</sup> Par 12.

<sup>42</sup> S 2(2).

<sup>43</sup> DTI Credit Law Review (2003) 7. Also see Scholtz in Scholtz ed (2008) par 2.4.

<sup>44</sup> S 39 of the Constitution of the Republic of South Africa, 1996, states that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, must consider international law; and may consider foreign law".

<sup>45</sup> S 5(2) of Act 71 of 2008: "To the extent appropriate, a court interpreting or applying this Act may consider foreign company law."

<sup>46</sup> S 2 of the Consumer Protection Act 68 of 2008: "When interpreting or applying this Act, a person, court or tribunal or the Commission may consider appropriate foreign and international law, appropriate international conventions, declarations or protocols relating to consumer protection; and any decision of a consumer court..."

<sup>47</sup> Otto and Otto (2013) 9 at fn 39.

<sup>48</sup> Scholtz in Scholtz ed (2015) par 2.4. See also the tongue in the cheek article by Neville Melville: Snatching a bargain at straws, available at [https://www.academia.edu/21012912/Snatching\\_a\\_bargain\\_at\\_straws](https://www.academia.edu/21012912/Snatching_a_bargain_at_straws).

<sup>49</sup> See definition of credit agreement in s 1 read with s 8 and the discussion below.

provider<sup>50</sup> dealing at arm's length and made within, or having an effect within, the Republic,<sup>51</sup> subject thereto that the agreement is not excluded.

In determining whether the Act applies one must therefore first answer the following questions:

- a) Is it a credit agreement as defined in the Act?
- b) Does the transaction relate to a credit agreement that was concluded at arm's length?
- c) Was the credit agreement concluded in South Africa or does it have an effect within South Africa?
- d) Do any of the exemptions as set out in the Act apply?<sup>52</sup>

“Credit Agreement” is the umbrella term in the act and can broadly be described as an agreement where credit is extended and a fee, charge or interest is payable on the deferred amount.<sup>53</sup> A credit Agreement to which the Act applies must meet all the criteria set out in section 8.<sup>54</sup> For purposes of the Act a credit agreement consists of a credit facility, a credit transaction, a credit guarantee or any combination of the above.<sup>55</sup> The departure point when considering whether the Act applies is therefore to establish if the agreement meets the criteria set for a credit facility,<sup>56</sup> a credit transaction,<sup>57</sup> a credit guarantee<sup>58</sup> or any combination of the aforesaid. Mention must also be made of two special kind of credit agreements: developmental credit agreements<sup>59</sup> and public interest credit agreements<sup>60</sup>.

The National Credit Act's scope of application to various types of agreements may graphically and schematically be illustrated as follows:<sup>61</sup>

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<sup>50</sup> See the definitions in s 1 of the Act.

<sup>51</sup> S 4(1).

<sup>52</sup> Joubert, Faris and Kanjan (2014) par 6.

<sup>53</sup> Otto in Scholtz ed (2008) par 8.1 states that exceptions include credit guarantees and mortgage agreements where the payment of a fee, charge or interest is not an essential requirement for the Act to apply.

<sup>54</sup> See definition of “credit agreement” in s 1.

<sup>55</sup> S 8(1).

<sup>56</sup> Defined in s 8(3).

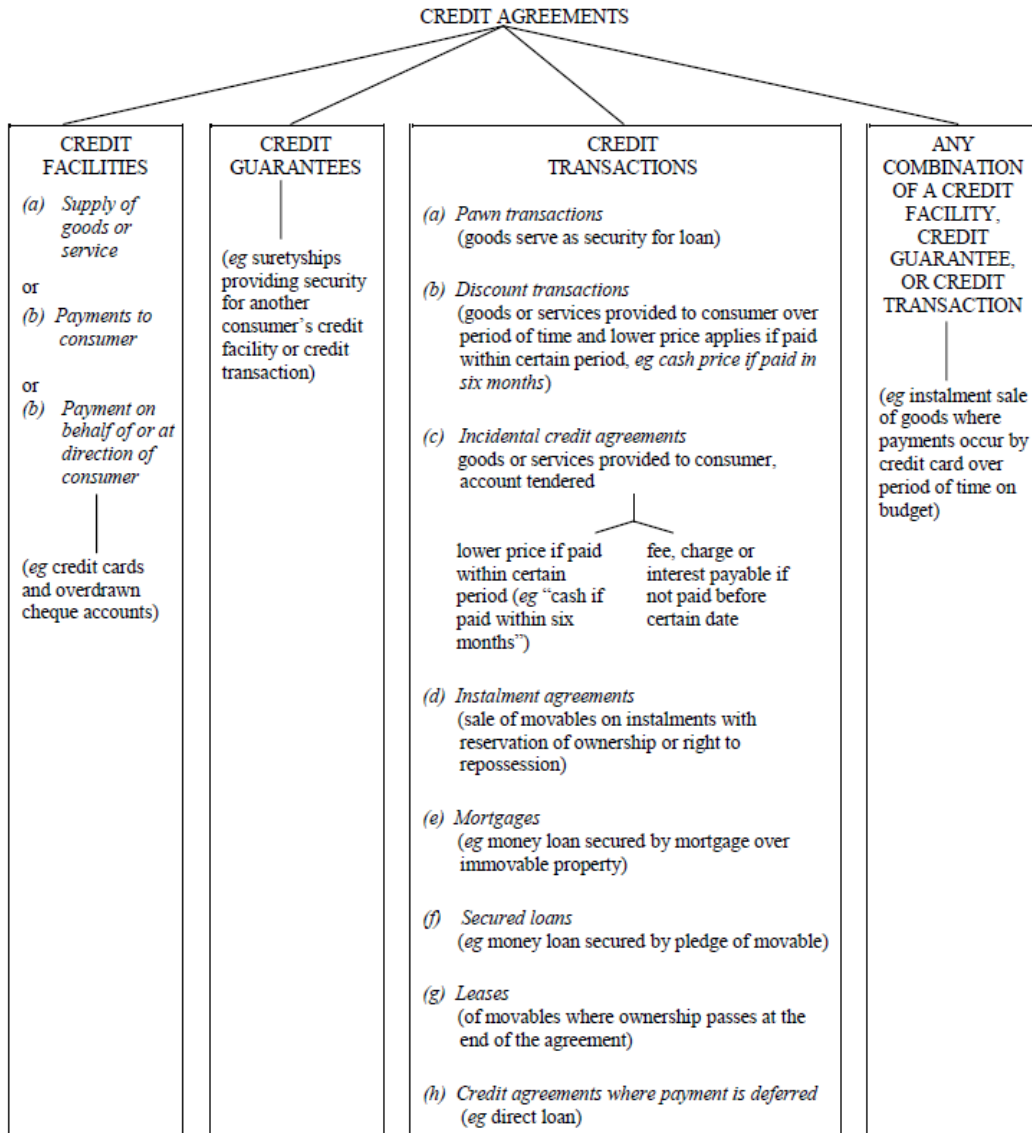
<sup>57</sup> Defined in in s 8(4).

<sup>58</sup> Defined in s 8(5).

<sup>59</sup> S 10.

<sup>60</sup> S 11.

<sup>61</sup> Otto in Scholtz ed (2008) par 8.3.



The next step after determining that the agreement falls within the criteria set out in section 8 is to determine if the parties are dealing at arm's length. The interpretation of arm's length will be dealt with comprehensively in chapter 3 and it will for now suffice to say that agreements at arm's length to which none of the other exclusions<sup>62</sup> apply will generally fall within the ambit of the Act.<sup>63</sup>

<sup>62</sup> See par 2.2.2 below.

<sup>63</sup> It is submitted that the exclusions applicable to juristic persons must be the first consideration when dealing with a juristic person.



The last part of section 4(1), and the last hurdle, is that the agreement must be concluded within South Africa or that it must have effect within South Africa. The common law presumption that statutes do not have extraterritorial application can therefore not be relied on, and the Act will be applicable to arm's length credit agreements entered into in foreign jurisdictions, provided that the agreement has an effect within South Africa, accordingly preventing credit providers from evading the application of the Act by concluding their agreements offshore.<sup>64</sup>

## 2.2.2 Credit agreements excluded from the ambit of the Act

The Act specifically excludes the following agreements from its ambit:<sup>65</sup>

- a) A credit agreement in terms of which the consumer is a juristic person<sup>66</sup> with an asset value or annual turnover of R1 million or more.<sup>67</sup> For purposes of the exclusion the juristic person's asset value or turnover must be added to the asset value or annual turnover of all other juristic persons it is related to at the time of conclusion of the agreement.<sup>68</sup> The asset value or annual turnover of a juristic person at the time of the agreement is the value stated by the juristic person at the time it applies for or enters into the agreement<sup>69</sup> and it is therefore imperative that a credit provider includes a field requesting this information in his agreement to establish whether the Act is applicable to the transaction or not.

Section 9(1) of the Act further provides for the characterization of agreements into small-, intermediate- and large agreements,<sup>70</sup> depending on the thresholds determined by regulation.<sup>71</sup> The distinction is made to divide the consumer credit

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<sup>64</sup> Guide to the NCA (2015) 4-5.

<sup>65</sup> Guide to the NCA (2015) 4-6 to 4-9.

<sup>66</sup> See par 3.2.1 below for a discussion of who is regarded a juristic person for purposes of the Act.

<sup>67</sup> S 4(1)(a)(i) read with S7(1) and GG 28893 of 1 June 2006.

<sup>68</sup> See s 4(d) for guidance on when juristic persons are deemed to be related. See also *Bester NNO v Coral Lagoon Investments (Pty) Ltd* 2013 (6) SA 295.

<sup>69</sup> S 4(2)(a).

<sup>70</sup> See Kelly-Louw and Stoop (2012) 94 or GenN 7123 in GG 28893 for the thresholds.

<sup>71</sup> Kelly-Louw and Stoop (2012) 92 to 93. S 7(1)(b) read with s 7(3): the Minister must at intervals of not more than five years determine the applicable threshold. New thresholds will take effect six months after the date

market into different segments to facilitate efficient regulation.<sup>72</sup> Special caution must be taken when dealing with a juristic person as the threshold exclusions<sup>73</sup> might find application. Careless drafting or the use of standard form agreements can unintentionally burden the relationship by making the Act applicable where, according to its own rules, it would not otherwise be applicable.<sup>74</sup>

- b) A large agreement<sup>75</sup> with a juristic person with an annual turnover or asset value of less than R1 million.

In *FNB v Clear Creek Trading*, the court had to decide whether a specific agreement fell outside of the application of the Act. Clear Creek was a juristic person for purposes of the Act, and the between the parties constituted a large agreement. The Act accordingly did not apply.<sup>76</sup> The agreement, however, stated that it was “governed by the National Credit Act” and also stipulated that “the bank shall be bound by the terms and conditions” of the agreement. The court found that considerations of contractual freedom, the *pacta sunt servanda* principle and public policy commanded that the Court should enforce the agreement between the parties, and *held* that the Act applied to the agreement.<sup>77</sup>

- c) A credit agreement in terms of which the consumer of credit is the state<sup>78</sup> or an organ of state;<sup>79</sup>
- d) A credit agreement in terms of which the credit provider is the Reserve Bank of South Africa;<sup>80</sup>
- e) A credit agreement in respect of which the credit provider is located outside of the Republic, approved by the Minister on application by the consumer;<sup>81</sup>

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of publication in the *Government Gazette*. The current thresholds were published in GenN 713 in the GG 28893 of 1 June 2006 and consideration of new threshold amounts are long overdue.

<sup>72</sup> Kelly-Louw and Stoop (2012) 93.

<sup>73</sup> S 4(1)(a)(i) read with s 7(1) and GG 28893 of 1 June 2006 and s 4(2)(a) and (d).

<sup>74</sup> See discussion of *Huntydory Investments 194* and *Huntydory Investments 188* and *Paulsen and another in* par 3.2.1 below.

<sup>75</sup> A credit transaction other than a pawn transaction or a credit guarantee in terms of which the principal debt is R250 000 or more, or a mortgage agreement. S 9(4) read with GenN 713 in the GG 28893 of 1 June 2006.

<sup>76</sup> S 4(1)(b).

<sup>77</sup> *FNB v Clear Creek* par 28.

<sup>78</sup> S 4(1)(a)(ii).

<sup>79</sup> S 4(1)(a)(iii).

<sup>80</sup> S 4(1)(c).

<sup>81</sup> S 4(1)(d) read with reg 2 of the Regulations made in terms of the Act and GenN R489, GG 28864 of 31 May 2006 (hereafter the National Credit Regulations).

- f) A debt due to the seller of goods or services: -
  - i) who accepted a cheque or similar instrument as payment and where it was dishonoured;<sup>82</sup> or
  - ii) where the consumer paid by making use of a credit facility and where the third party credit provider refuses the charge;<sup>83</sup>
- g) The sale of goods or services if payment is made through a charge against a credit facility (such as a credit card) provided by a third party (such as a bank). The credit agreement in these circumstances is between the consumer and the third party with whom he has the credit facility;<sup>84</sup>
- h) A policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance;<sup>85</sup>
- i) A lease of immovable property;<sup>86</sup>
- j) A transaction between a stokvel<sup>87</sup> and a member of that stokvel in accordance with the rules of the stokvel;<sup>88</sup>
- k) An agreement where the supplier of a utility<sup>89</sup> or other continuous service defers payment until such time as the supplier provides a statement<sup>90</sup>, and where it does not impose any charge as contemplated in section 103 in respect of the amount so deferred unless the consumer fails to pay the full amount within 30 days of delivery of

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<sup>82</sup> S 4(5)(a).

<sup>83</sup> S 4(5)(b). An example of this is where a consumer purchases goods on a credit card, and where the credit provider subsequently refuses the transaction. The goods were never intended to be sold on credit in any of these two scenarios in s 4(5).

<sup>84</sup> S 4(6)(a).

<sup>85</sup> S 8(2)(a).

<sup>86</sup> S 8(2)(b).

<sup>87</sup> See definition in s 1 of the National Credit Act. Also see Kelly-Louw and Stoop (2012) 13 at fn 87: "In Havenga *et al General Principles of Commercial Law* 6 ed (2007) at 206 a stokvel is defined as a type of informal, indigenous credit-rotating association in which a group of persons enters into an agreement to contribute a fixed amount of money to a common pool on a weekly or monthly basis, or as frequently as members may agree upon. For a full discussion of stokvels, see Schulze (1997) 9 SA *Merc LJ* 18 and (1997) 9 SA *Merc LJ* 153".

<sup>88</sup> S 8(2)(c).

<sup>89</sup> S 1 of the National Credit Act: a utility means: "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".

<sup>90</sup> S 4(6)(b)(i).

the statement.<sup>91</sup> Any amount not paid within this period is incidental credit to which the Act applies.<sup>92</sup>

### 2.2.3 Limited application of the Act in certain instances

Lastly, the Act in some instances has limited application. Examples are where the consumer is a juristic person<sup>93</sup> which is not excluded from the Act,<sup>94</sup> incidental credit agreements,<sup>95</sup> sections 81 to 84 and the provisions relating to reckless credit does not apply to a school or student loan, an emergency loan, a public interest agreement, a pawn transaction, an incidental credit agreement or a temporary increase in the credit limit under a credit facility provided that the agreement is reported to the National Credit Regulator in the prescribed manner and form, and further provided that in respect of an emergency loan, reasonable proof of the existence of the emergency is obtained and retained by the credit provider.<sup>96</sup> The criteria to conduct affordability assessments<sup>97</sup> do not apply to credit agreements in terms whereof the consumer is a juristic person<sup>98</sup> and further not to a developmental credit agreement, a school loan or student loan, a public interest credit agreement, a pawn transaction, an incidental credit agreement, an emergency loan, a temporary increase in the credit limit under a credit facility, a unilateral credit limit increase in terms of sections 119(1)(c), 119(4) and 119(5) of the Act under a credit facility, a pre-existing credit agreement in terms of schedule 3, item 4(2) of the Act, any change to a credit agreement and / or any deferral or waiver of an amount under an existing credit agreement in accordance with section 95 of the Act, and mortgage credit agreements that qualify for the finance linked subsidy programs developed by the Department of Human Settlements and credit advanced for housing that falls within the threshold set from time to time.<sup>99</sup>

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<sup>91</sup> S 4(6)(b)(ii).

<sup>92</sup> S 4(6)(b). The Act will apply to the extent set out in s 5.

<sup>93</sup> S 6.

<sup>94</sup> See par 2.2.2 above.

<sup>95</sup> S 5.

<sup>96</sup> S 78 (1) and (2) and also Regulation 23.

<sup>97</sup> Regulation 23A.

<sup>98</sup> Seemingly regardless of asset value or turnover.

<sup>99</sup> Regulation 23A (a) to (k).

## CHAPTER 3: A CLOSER LOOK AT THE ARM'S LENGTH REQUIREMENT

### 3.1 SECTION 4 (2)(b) OF THE NATIONAL CREDIT ACT

It has already been mentioned that the National Credit Act only applies to credit agreements where the parties are dealing at arm's length.<sup>100</sup> The Act does not define the term "dealing at arm's length" but merely gives interpretational guidelines in Section 4(2)(b):

*For greater certainty in applying subsection (1) –*

- (a) ...
- (b) *in any of the following arrangements, the parties are not dealing at arm's length:*
  - (i) *a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider;*
  - (ii) *a loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer;*
  - (iii) *a credit agreement between natural persons who are in a familial relationship and –*
    - (aa) *are co-dependant on each other; or*
    - (bb) *one is dependent upon the other; and*
    - (iv) *any other arrangement –*
      - (aa) *in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or*
      - (bb) *that is of a type that has been held in law to be between parties who are not dealing at arm's length.*

### 3.2 SECTION 4(2)(b)(i) and (ii)

I will first attempt to give meaning to a couple of key concepts contained in section 4(2)(b)(i) and (ii) before attempting to apply the subsections practically.

#### 3.2.1 "Juristic person"

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<sup>100</sup> Par 1.1 above. See also s 4(1).

A natural person is a living, breathing human being (“person”) whereas a juristic person is a “juristic conception to which legal personality is artificially attributed by either the common law or statute”.<sup>101</sup>

The National Credit Act provides us with a statutory definition of a juristic person that deviates from the common law definition. For purposes of the sphere of application of the Act, a “juristic person” includes:<sup>102</sup>

- a) a partnership;
- b) a trusts,<sup>103</sup> provided that it has more than three trustees or that one of the trustee is itself a juristic person; or
- c) an association or other body of persons, incorporated or unincorporated.

It does not include a stokvel.<sup>104</sup>

The qualifying criteria to establish whether a juristic person qualifies as a consumer for purposes of the Act is its asset value or annual turnover. It is fairly simple where you have one, unrelated juristic person, but where the juristic person as consumer is related to other juristic persons, the sum of their respective asset values or annual turnovers must be taken into account to establish whether they are included or excluded from the ambit of the Act. This could get complicated, and the juristic person as consumer is under an obligation to calculate and correctly state its asset value or turnover and a credit provider is entitled to rely on the information given. The relevant time for calculating the asset value or annual turnover of the juristic person is when the agreement is entered into.<sup>105</sup> It is common practise to insert a field in a credit agreement where the juristic person as consumer must declare his asset value or turnover.<sup>106</sup> The agreement will not be void and the credit provider will not sit with an unlawful agreement or be guilty of an offence for non-compliance should it have acted on

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<sup>101</sup> *ABP 4 X 4 Motor Dealers* at par 929 (6).

<sup>102</sup> As defined in s 1 of the Act. Common law juristic persons such as companies and closed corporations also constitutes juristic persons for purposes of the Act.

<sup>103</sup> The inclusion of a trust as a juristic person tallies with the definition of juristic persons in the Companies Act 71 of 2008, the Firearms Control Act 60 of 2000 and the Deeds Registries Act 47 of 1973.

<sup>104</sup> Stokvels are excluded from the ambit of the Act, see s 8(2).

<sup>105</sup> S 4(1)(a)(i): see the phrase “at the time the agreement is made”.

<sup>106</sup> The clause must be phrased in such a way that the juristic person as consumer is reminded of his obligation to take the turnover or asset value of related parties into consideration when stating the greater of his turnover or asset value.

the strength of the information furnished by the consumer juristic person.<sup>107</sup> The credit provider may in certain circumstances also be able to raise a defence of estoppel against a consumer who provided the incorrect information.<sup>108</sup>

The threshold value determined by the Minister currently stands at R1 million.<sup>109</sup> A juristic person (or related juristic persons)<sup>110</sup> with an asset value or turnover of R1 million or more is excluded from the ambit of the Act while smaller juristic persons, falling below the threshold, will enjoy limited protection.<sup>111</sup>

The constitutionality of the distinction between small and large juristic persons on the one hand, and natural persons and juristic persons on the other, were challenged in our courts: The Constitutional Court in *Paulsen and Another* held that the exclusion of larger juristic persons “evinces a conscious legislative choice not to protect this type of consumer”.<sup>112</sup>

The applicants in *Hunky Dory Investments 194 (Pty) Ltd* and *Hunkydory Investments 188 (Pty) Ltd* claimed that the distinction between natural persons and juristic persons amounted to unfair discrimination,<sup>113</sup> the Court, however, disagreed and in both cases refused the defendants’ leave to appeal.<sup>114</sup>

Qualifying juristic persons as consumers will, however, enjoy far less protection than a natural person as consumer, perhaps indicative thereof that the legislator after all expected a measure of responsibility or perhaps just plain good business judgment.

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<sup>107</sup> A consumer juristic person giving the incorrect information could therefore possibly also contract out of the protection the Act offered to smaller juristic persons as consumers.

<sup>108</sup> Van Zyl in Scholtz ed (2008) par 4.3.

<sup>109</sup> S 4(1)(a)(i) read with s 7(1) and GG 28893 of 1 June 2006 and GenN 713 GG 28893 of 1 June 2006.

<sup>110</sup> See discussion in par 3.2.2 below.

<sup>111</sup> S 6.

<sup>112</sup> At par 37.

<sup>113</sup> That it violated a juristic person’s right to equality.

<sup>114</sup> Steyn J in the application for leave to appeal: “After very extensive argument on behalf of the defendants the Court is not persuaded that the defendants have a prospect of success on appeal. I am not convinced that another Court will come to a different conclusion in this matter and accordingly the APPLICATION FOR LEAVE TO APPEAL IS REFUSED”.

The following provisions of the Act do not apply to credit agreements where a juristic person qualifies as consumer:<sup>115</sup>

- a) Chapter 4 – Parts C and D: credit marketing practices and over-indebtedness and reckless credit, including debt review as a remedy;
- b) Chapter 5 – Part A - section 89 (2)(b): an agreement resulting from negative option marketing will not be unlawful;<sup>116</sup>
- c) Chapter 5 – Part A – section 90(2)(o): an agreement containing a clause stating or implying that the interest rate will vary outside of the permitted guidelines of section 103(4) will not be unlawful;
- d) Chapter 5 – Part C: consumer’s liability, interest, charges and fees will not be limited in accordance with this part.

Section 8(2) excludes ‘stokvels’<sup>117</sup>, a stokvel will therefore always enjoy the full protection of the Act.

### ***3.2.1.1 The distinction between “consumer” and “juristic person as consumer” in comparative jurisdictions***

The Department of Trade and Industry considered international precedents during the course of their credit review.<sup>118</sup> The governing legislation and regulatory arrangements of a number of jurisdictions were considered, including the European Union, New Zealand, the United Kingdom and the United States of America, and it is therefore fitting to look at these jurisdictions in an attempt to see what reasoning the legislator followed in making the distinction between small and larger consumers.

The New Zealand Ministry of Consumer Affairs addressed the question of inappropriate regulation of commercial transactions in 2000<sup>119</sup> and drew a clear distinction between consumer credit which is mainly concerned with consumption, and commercial credit which

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<sup>115</sup> S 6.

<sup>116</sup> S 89(2)(b) read with s 74(1)

<sup>117</sup> See fn 87 above.

<sup>118</sup> DTI Credit Law Review (2003) 7.

<sup>119</sup> NZ Consumer Credit Law Review (2000).



is concerned with production and underpins business activity.<sup>120</sup> It addressed several of the policy considerations applicable to the National Credit Act, such as the imbalance in knowledge between the lender and borrower and unequal bargaining power<sup>121</sup> and recognised that it was not fit for larger commercial enterprises (as consumers) to be regulated by consumer credit regulation. They investigated how to best exclude larger enterprises while still protecting the smaller vulnerable ones, and the “natural person” and “purpose” tests were considered.

They eventually opted for the purpose test, which aims to restrict credit regulation to consumer transactions by only covering transactions where credit is to be used by “a natural person wholly or primarily for personal, domestic or household purposes”.<sup>122</sup> This is in line with other jurisdictions for instance Canada and Australia which also opted for the purpose test with minor wording differences. The European Union<sup>123</sup> also in effect uses a purpose test in that it limits the application of the directive to “a natural person who ... is acting for purposes which can be regarded as outside his trade or profession”.

The Ministry of Consumer Affairs<sup>124</sup> considered the natural persons test, even though it did not accept it as the best solution for New Zealand. It is, however, relevant for purpose of this dissertation.

The natural persons test would treat the extension of credit to all natural persons as consumer credit. It would automatically exclude commercial loans, but would still include sole traders and unincorporated business who are often regarded as vulnerable. However, the distinction between incorporated and unincorporated makes little sense in economic terms and can easily result in anomalies since many unincorporated bodies are businesses of considerable size and stature who do not need consumer protection,<sup>125</sup> an example for instance is a legal- or chartered accountant partnerships. Small incorporated businesses such as start-ups would on the other hand be excluded merely due to the fact that they were incorporated, even though they might need protection due to their level of sophistication.

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<sup>120</sup> NZ Consumer Credit Law Review (2000) par 3.2.1.

<sup>121</sup> NZ Consumer Credit Law Review (2000) par 3.2.2.

<sup>122</sup> S 11(1)(a) and (b) of the New Zealand Credit Contracts and Consumer Finance Act, 2003.

<sup>123</sup> Directive 87/102/EEC.

<sup>124</sup> New Zealand.

<sup>125</sup> NZ Consumer Credit Law Review (2000) 22.

A test to include small businesses was therefore explored, with the main justification to extend protection to smaller, possibly vulnerable businesses. The test would need to define a small business and it was suggested that the definition could include limits on financial size and the number of employees.<sup>126</sup> The main disadvantages for this would be that it would be difficult for the creditor to establish the status of business of the borrower, and that it would require small businesses to make “good faith” declarations. The monetary ceiling would also get outdated, and would therefore have to be reviewed regularly.

The test in the National Credit Act is clearly a manifestation of the “natural persons” test with an inclusion of a measure to include small businesses. The question arises as to exactly why the legislator decided to go against the trend in using the purpose test as favoured in other jurisdictions, especially after Australia’s Ministerial Council of Consumer Affairs considered whether they should enact a test to include small businesses and decided against it, finding that it would be problematic.<sup>127</sup>

Be that as it may, I believe that the legislator acted competently, especially in an economy such as ours where opportunities are sometimes scarce and innovation is rife.<sup>128</sup> It is, however, a pity that regulation compelling regular review of the threshold was not provided for, perhaps something similar to section 42(1) of the National Credit Act prior to its amendment by the National Credit Amendment Act 19 of 2014.<sup>129</sup> The monetary threshold of R1 million dates back to 2006 and has become outdated, this being one of the major disadvantages of a model providing for monetary thresholds.

For purposes of section 4(2)(b), and when dealing with a juristic person in general, it is therefore necessary to first establish whether the juristic person in question is not excluded

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<sup>126</sup> NZ Consumer Credit Law Review (2000) 23.

<sup>127</sup> NZ Consumer Credit Law Review (2000) 6, the Commission found that the natural persons test would be arbitrary in its treatment of commercial borrowers and that without a monetary ceiling it would end up regulating many commercial contracts. They felt that including a test for small businesses would complicate matters, and opted for the internationally favoured ‘purpose test’, restricting credit regulation to natural persons borrowing for personal, domestic or household use.

<sup>128</sup> South Africa has a lot of small start-ups. Entrepreneurs driving these businesses often don’t possess over the sophistication and resources larger business entities have, i.e. a legal or risk department, astute business acumen etc. . These smaller businesses, often driven by only the entrepreneur.

<sup>129</sup> S 42(1), prior to amendment, provided that the Minister had to review the threshold determination to determine whether a credit provider had to register at intervals of not more than 5 years, thereby ensuring that the threshold does not get outdated.

from the ambit of the Act.

### 3.2.2 “Related Parties” and “Controlling Interest”

Section 4(2)(b)(i) states that a shareholder loan or other credit agreement between a juristic person as consumer and person who has a controlling interest in that juristic person as credit provider, is not an arm’s length agreement. Section 4(2)(b)(ii) on the other hand, states that a loan to a shareholder or other credit agreement between a credit provider as juristic persona and a consumer who has a controlling interest in that juristic person is also not an arm’s length agreement.

“Controlling interest” or “control” is not defined in the Act and a person should therefore ascribe meaning to the term in the context that it appears. Van Zyl submits that, for the purposes of section 4(2)(b)(i) and (ii), a person can have a “controlling interest” in a juristic person regardless of the actual measure of control exercised by that person.<sup>130</sup>

A simple majority shareholding will apparently confer control to the shareholder, but this may not always be the case: the Memorandum of Incorporation may for instance require a special resolution for important decisions relating to control of the company, thereby effectively taking the control away from a shareholder with a simple majority. A majority shareholder with less than 50% of the voting rights may on the other hand still exercise some kind of control over a company due to special rights, for instance veto rights or the right to appoint the directors, in its shareholders agreement.<sup>131</sup> “Controlling interest” in a company should consequently not be simplified and interpreted as a simple majority shareholding in the company, making it very difficult to establish what measure of control there is without having insider information.

The concepts of “related parties” and “control” is extremely relevant to each other. The principle is that related parties are not independent, and that they can therefore act together, effectively controlling a company without it being evident at first glance.

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<sup>130</sup> Van Zyl in Scholtz ed (2008) at par 4.2 and fn 20.

<sup>131</sup> Van Zyl in Scholtz ed (2008) fn 34 at par 5.2.2.1.

The method of looking at other legislation when interpreting a word or phrase has been confirmed by our courts in various decisions.<sup>132</sup> The concept of “control”, “related parties” and / or “controlling interest” can be found in various other pieces of legislation,<sup>133</sup> and these definitions and case law flowing from disputes regarding the interpretation thereof can be used as an aid of interpretation of “controlling interest” in the National Credit Act, depending on the context in which it appears.

### 3.2.2.1 Relevant Legislation and Interpretation

#### 3.2.2.1.1 The Diamonds Act

The Diamonds Act<sup>134</sup> defines “controlling interest” as:

*“in relation to—*

*(a) a company, means—*

*(i) more than 50 per cent of the issued share capital of the company;*

*(ii) more than half of the voting rights in respect of the issued shares of the company;*

*or*

*(iii) the power, either directly or indirectly, to appoint or remove the majority of the directors in the Company”*

Different kinds of control are envisaged and must be considered: for instance, a shareholder have a majority of voting rights, or the entitlement or ability to appoint the majority of directors,<sup>135</sup> thereby effectively steering the company in the direction it wants it to move.

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<sup>132</sup> Confirmed in *Bester and Others* at par 32. Also see *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others 1985 (4) SA 773 (A)* at 805G to 806A, *Willows v National Industrial Commercial Workers’ Union 1991 (3) SA 546 (D)* at 548 F to H and *Sandoz Products (Pty) Ltd v Van Zyl NO 1996 (3) SA 726 (C)* at 731 to 732B.

<sup>133</sup> See discussion of Acts containing this or similar terminology in 3.2.2.1 below.

<sup>134</sup> Act 56 of 1986.

<sup>135</sup> As contended by the applicant in *Mogale Alloys v Nuco* par 19.

### 3.2.2.1.2 The Competition Act

The Competition Act<sup>136</sup> defines “control” in the context of a merger:<sup>137</sup>

*A person controls a firm if that person—*

- (a) beneficially owns more than one half of the issued share capital of the firm;*
- (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;*
- (c) is able to appoint or to veto the appointment of a majority of the directors of the firm;*
- (d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1 (3) (a) of the Companies Act, 1973 (Act No. 61 of 1973)<sup>138</sup>;*
- (e) in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;*
- (f) in the case of a close corporation, owns the majority of members’ interest or controls directly or has the right to control the majority of members’ votes in the close corporation; or*
- (g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).*

The concept of control is very important in Competition Law as it determines when a merger between companies must be reported to the competition authorities. Subsection (g) adds an extra tier of control that will not necessarily be evident on the face of it, this subsection is mirrored in section 2(2)(d) of the Companies Act 71 of 2008.

### 3.2.2.1.3 The Companies Act

Section 2 of the Companies Act<sup>139</sup> defines “Related and inter-related persons and control” as:

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<sup>136</sup> Act 89 of 1998.

<sup>137</sup> S 12(2).

<sup>138</sup> Schedule 6 of the Companies Act 2008 neglected to amend this subsection of the Competition Act and the Competition Act therefore still refers to the 1973 Act.

<sup>139</sup> Act 71 Of 2008.

- (1) *For all purposes of this Act*
- (a) *an individual is related to another individual if they -*
    - (i) *are married, or live together in a relationship similar to marriage;*
    - or*
    - (ii) *are separated by no more than two degrees of natural or adopted consanguinity of affinity;*
  - (b) *an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2); and*
  - (c) *a juristic person is related to another juristic person if -*
    - (i) *either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);*
    - (ii) *either is a subsidiary of the other; or*
    - (iii) *a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2)*
- (2) *For the purpose of subsection (1), a person controls a juristic person, or its business if -*
- (a) *in the case of a juristic person that is a company -*
    - (i) *that juristic person is a subsidiary of that first person, as determined in accordance with section (3)(1)(a); or*
    - (ii) *that first person together with any related or inter-related person is -*
      - (aa) *directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or*
      - (bb) *has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;*
  - (b) *in the case of a juristic person that is a close corporation, that first person owns the majority of the members' interest, or controls directly, or has the right to control, the majority of the members' interest, or controls directly, or has the right to control, the majority of members' votes in a close corporation;*
  - (c) *in the case of a juristic person who is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; or (d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary Commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c).*

Related parties are in theory not independent.<sup>140</sup> Section 2 of the Companies Act 71 of 2008 as quoted above defines “related persons” as a rebuttable presumption and distinguishes between related parties where the parties involved are natural persons, where one party is an individual, and where both parties are juristic persons. It also re-introduces the concept

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<sup>140</sup> Delpoort ed 2011) 29.

of “control” into South African company law through a section that is clearly based on section 12 of the Competition Act 89 of 1998.<sup>141</sup>

The Companies Act 71 of 2008 expressly recognises the relationship between a holding company and its subsidiary<sup>142</sup> and provides that juristic persons are related if there are “control”, or if one juristic person is a subsidiary of the other.<sup>143</sup> The concept of control can be as a result of majority votes or as a result of an interest in a juristic person. A person will have control over a close corporation if he owns the majority of the members’ interest, or directly or indirectly controls the majority of the members’ votes in the close corporation<sup>144</sup> and a person will control a trust if that person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust.<sup>145</sup>

The inclusion of the additional level of control in sub-section (2)(d) takes “control” beyond the ordinary corporate law principles of voting control and whether a person has control under these circumstances will depend on the facts. Delpont submits that many hitherto standard terms in financing contracts and shareholders agreements like first refusals, come along or tag along clauses or veto rights may fall within this definition, and that it might even include a minority *de facto* control due to, for instance, the apathy of shareholders.<sup>146</sup>

#### **3.2.2.1.4 The National Credit Act**

Section 4(2)(b)(i) excludes a shareholder loan or other credit agreement between a juristic person as consumer and a person who has a controlling interest in that juristic person as credit provider. Section 4(2)(b)(ii) excludes a loan to a shareholder or other credit agreement

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<sup>141</sup> Delpont ed (2011) 28(5), commentary under S 2 General Note.

<sup>142</sup> S 3 of the Companies Act 71 of 2008.

<sup>143</sup> S 2(c) of the Companies Act 71 of 2008.

<sup>144</sup> S 2(2)(b) of the Companies Act 71 of 2008.

<sup>145</sup> S 2(2)(c) of the Companies Act 71 of 2008.

<sup>146</sup> Delpont ed (2011) 28(5).

between a juristic person as credit provider, and a person who has a controlling interest in that juristic person as consumer.

Section 4(2)(d) of the Act deals with the relationship between juristic persons and is similar to section 2(1)(c) of the Companies Act 71 of 2008. It is submitted that the definitions of “control” and “related parties”, as contained in the Companies Act, can be used in aid of interpretation of the above sub-sections in the National Credit Act.

Another helpful aid, although not legislation, is the South African Revenue Service’s interpretation note 67 of 14 February 2014, which comprehensively cites examples of “connected persons” in terms of the Income Tax Act 58 of 1962.

### **3.2.3 Practical Application**

#### **3.2.3.1 An interpretation of “related parties” in terms of the National Credit**

##### **Act: *Bester and Others v Coral Lagoon Investments 232 (Pty) Ltd***

The interpretation of “controlling interest” in terms of section 4(2)(b) of the National Credit Act became an issue for determination in the matter of *Bester and Others v Coral Lagoon Investments 232 (Pty) Ltd*. facts are shortly summarised as follows: The liquidators of one of the Respondent’s shareholders, Ekosto 1901 (Pty) Ltd, applied for liquidation. The application was opposed by the intervening creditors, also shareholders in Coral Lagoon Investments (the respondent). The shareholders, which included the applicant, loaned money to the respondent as part finance for a seaside development that went pear shaped. The applicant was eventually placed in liquidation and the liquidators demanded payment of the loan amount from the respondent. The respondent raised various grounds of opposition, *inter alia* that the applicant was not registered as a credit provider in terms of the National Credit Act, and that the agreement was therefore unlawful. If the argument held up in court, the respondent would not owe anything and it would therefore not be necessary to liquidate. The first step was to establish whether the parties were indeed related. Section 4(2)(d) of the



Act stipulates that one juristic person is related to another if one 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. The definition of “controlling interest” and “control” thus became central to the dispute.

Ekosto at all times held 25% shares in Coral Lagoon Investments, shares were in actual fact at all times held in equal 25% by the four shareholders and it was therefore contended that it was for that reason an impossibility for one of the parties to have control over the respondent.<sup>147</sup>

Henny J referred to the judgment in the matter of *Mogale Alloys v Nuco*, where the court had to interpret the meaning of “controlling interest” in terms of the Mineral and Petroleum Resources Development Act 28 of 2002.<sup>148</sup> The court favoured the contextual approach and Copin J held that context does not only refer to the language of the remainder of the statute, but also to the scope, purpose and background to the statute.<sup>149</sup> The meaning of “controlling interest” or “direct or indirect control” in the National Credit Act, is therefore dependent on the context in which it appears. The court<sup>150</sup> referred to the *Guide to the National Credit Act* in support of its argument that a controlling person does not necessarily have to be the majority shareholder in a company<sup>151</sup> and concluded that an expanded meaning should be given to “controlling interest” and “direct or indirect control”,<sup>152</sup> and that a minority shareholder could therefore exercise control over the company. The explanation in the *Guide to the National Credit Act*<sup>153</sup> also resonates with the definition of control in the Competition Act<sup>154</sup> and the Companies Act<sup>155</sup>.

The court, after considering the facts, came to the conclusion that the National Credit Act did not apply: “This is not only due to their limited shareholding, but also to the fact that Ekosto

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<sup>147</sup> *Bester and Others* at paras 19 and 20.

<sup>148</sup> *Bester and Others* at par 34.

<sup>149</sup> *Mogale Alloys* at par 23.

<sup>150</sup> Henny J in *Bester and Others*.

<sup>151</sup> *Bester and Others* par 31.

<sup>152</sup> *Bester and Others* at paras 31 and 39.

<sup>153</sup> Van Zyl in Scholtz ed (2008) par 5.2.2.1 at footnote 34.

<sup>154</sup> S 12(2) of Act 89 of 1998.

<sup>155</sup> S 2(2) of Act 71 of 2008.

had no power either directly or indirectly to control or influence the respondent – it had no controlling interest in the respondent”.<sup>156</sup>

### ***3.2.3.2 Specific types of company loans and the application of sections 4(2)(b)(i) and (ii) of the National Credit Act***

The Act only applies to credit agreements between parties dealing at arm’s length. Agreements not at arm’s length will therefore be excluded from the ambit of the Act. Section 4(2)(b)(i) and (ii) refers to instances in which certain company loans will be excluded from the ambit of the Act. A few practical examples will now be considered:

#### ***3.2.3.2.1 Loans or security provided by a subsidiary to or in favour of its holding company or a fellow subsidiary***

One type of credit agreement to which a company may be a party and which is specifically regulated in terms of the Companies Act 71 of 2008, is where a subsidiary grants a loan to or provides security in favour of its holding company or fellow subsidiary.<sup>157</sup>

The Companies Act acknowledges the relationship between a holding company and its subsidiary in Section 3. A company is a subsidiary of another juristic person if:

- a) the one (parent company) is able to exercise or control the exercise of a majority of the general voting rights associated with the securities in the subsidiary, whether in terms of a shareholders agreement or otherwise; or
- b) The company (parent company) has the right to appoint or elect or control the appointment or election of directors holding a majority of the voting rights at meetings of the board of directors of the subsidiary.

This recognition is further supported by section 2,<sup>158</sup> dealing with “related and inter-related persons and control”. This definition is similar to the definition in the National Credit Act as discussed above, both insinuate direct or indirect control.

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<sup>156</sup> *Bester and Others* at par 44.

<sup>157</sup> Lombard and Renke (2009) *SA Merc LJ* 499.

<sup>158</sup> Companies Act 2008.

Section 45 of the Companies Act 71 of 2008 is titled “Loans or other financial assistance to directors”, but notwithstanding the ambit in the short title, regulates financial assistance to directors and prescribed officers of the company or of related or inter-related companies and also to related or inter-related companies and corporations and to members of that corporation or to anybody related or inter-related to any of the above.<sup>159</sup> The legislator spanned its net wider than with the 1973 Act<sup>160</sup> and Delport<sup>161</sup> is of the opinion that it was never intended for the ambit of the section to be this wide. However, this was countered by the non-binding opinion of the Companies and Intellectual Property Commission in terms of section 188(2)(b) of 1 July 2011 where they stated the interpretation of section 45 of the Companies Act 71 of 2008, in relation to the Provision of Financial Assistance by a Company to another Company that is related or inter-related.

In conclusion, an agreement between a subsidiary and its holding company or fellow subsidiaries will be excluded from the ambit of the National Credit Act as it will not be seen as an arm’s length agreement for purposes of the Act. This is due to the definition of “control” in section 2 of the Companies Act 71 of 2008, read with the explanation of a related person<sup>162</sup> and the exclusion in section 4(2)(b)(i)<sup>163</sup> of the National Credit Act.

### **3.2.3.2.2 Loans, security or a guarantee to a shareholder relating to the subscription of shares**

Section 44 of the Companies Act 71 of 2008 deals with financial assistance for the subscription of securities.<sup>164</sup> It provides that the board of a company may authorise the company to provide financial assistance by way of loan, guarantee, the provision of security or otherwise to any person for the purpose of, or in connection with, the subscription of any option, or any securities, issued or to be issued by the company or a related or inter-related company, or for the purchase of any securities of the company or a related or inter-related company, subject

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<sup>159</sup> Delport ed (2011) 192 to 193.

<sup>160</sup> Companies Act 1973.

<sup>161</sup> Delport ed (2011) s 45 commentary general note, 192 and 193.

<sup>162</sup> S 4(2)(d).

<sup>163</sup> National Credit Act 34 of 2005.

<sup>164</sup> Lombard and Renke (2009) *SA Merc LJ* 502.

to subsections (3) and (4).<sup>165</sup> This is, however, one of the alterable provisions in the Companies Act 71 of 2008<sup>166</sup> and the board's authority to take the resolution is therefore subject to any contradictory provision in the Memorandum of Incorporation.

Section 44 will apply to every company having a share capital, whether public or private and the loan must specifically be for the purchase of securities.

Section 4(2)(b)(ii) of the National Credit Act can be seen as ambiguous and will probably at some stage be interpreted creatively. The word "or" in the middle of the sentence creates a grey area in that it can be argued that the subsection provides for two different scenarios to be excluded:

- a) a loan to a shareholder; and
- b) any other credit agreement between a juristic person as consumer and a person who has a controlling interest in that juristic person, as credit provider.

Whether it will succeed is will have to be seen.

In conclusion, it would then appear that a loan to a shareholder to obtain a company's own securities will be excluded from the ambit of the National Credit Act, due to it not being an arm's length transaction, but that financial assistance to a consumer (as prospective shareholder) by a parent company, for the subscription of shares of a subsidiary company, will be included in the ambit of the Act and that all the provisions, including the affordability assessment criteria<sup>167</sup> and registration as a credit provider will therefore be applicable. This is, as always, subject to the exclusions.

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<sup>165</sup> Sub-section 3 provides that the financial assistance must either be pursuant to an employee share scheme satisfying the requirements of the Act, alternatively be pursuant to a special resolution approving the financial assistance, adopted within the previous two years. Sub-section 4 provides that the liquidity and solvency test must be applied and that the financial assistance must be on fair and reasonable terms to the company.

<sup>166</sup> S 1 - an alterable provision is defined as: "a provision of this Act in which it is expressly contemplated that its effect on a particular company may be neglected, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company's Memorandum of Incorporation".

<sup>167</sup> As set out in Regulation 23A.

### 3.2.3.2.3 Loans or security in connection with transactions to directors or prescribed officers

The board of a company may authorise the company to provide direct or indirect financial assistance to a director, prescribed officer<sup>168</sup> or member of the company, or to a person related to the company or any of its related companies, its directors, prescribed officers or members, unless the Memorandum of Incorporation provides otherwise.<sup>169</sup> The decision is further subject to the fiduciary duties of the directors, irrespective of whether the statutory provisions of section 45 have been complied with.<sup>170</sup> Financial assistance for the purposes of section 45 of the Companies Act 71 of 2008 includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation.<sup>171</sup> It specifically excludes a loan where a company's primary business is the lending of money and the loan that is made in the ordinary course of business,<sup>172</sup> an accountable advance to meet legal expenses in relation to a matter concerning the company,<sup>173</sup> anticipated expenses to be incurred by the person on behalf of the company,<sup>174</sup> or an amount to defray the person's expenses for removal at the company's request.

Financial assistance will be permissible, provided that the requirements of section 45 are met. This includes the passing of a special resolution to approve such assistance within the previous two years, either for a specific recipient, or generally for a category of potential recipients.<sup>175</sup> Financial assistance pursuant to an employee share scheme can be sanctioned without the

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<sup>168</sup> S 1 of the Companies Act 71 of 2008 defines "prescribed officer" as: "a person who, within a company, performs any function that has been designated by the Minister in terms of section 66(10)". Unfortunately the Minister did not designate any functions in the ordinary sense when exercised his powers in terms of s 66(10). Regulation 38 describes a prescribed officer in the following terms: "Despite not being a director of a particular company, a person is a 'prescribed officer' of the company for all purposes of the Act if that person- (a) exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or (b) regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company".

<sup>169</sup> S 45(2).

<sup>170</sup> Delpoort ed (2011) 193.

<sup>171</sup> S 45(1)(a).

<sup>172</sup> S 45(1)(b)(i).

<sup>173</sup> S 45(1)(b)(ii)(aa).

<sup>174</sup> S 45(1)(b)(ii)(bb).

<sup>175</sup> S 45(3)(a)(ii).

passing of a special resolution authorising it on condition that the scheme satisfies the requirements of section 97.<sup>176</sup>

In conclusion, the borrower (consumer) in this type of agreement will typically be a natural person. Depending on the terms, the agreement can easily fall within one of the classes of credit agreements contained in section 8 of the National Credit Act. As an illustration: director A wanted to borrow R100 000 from company B for a personal matter. The shareholders approved the financial assistance by sanctioning it by special resolution at a general meeting, and the parties agreed that the capital amount would be paid over 12 months and at an interest rate of prime plus 3%. The board satisfied themselves that the terms of the loan were fair and reasonable to the company,<sup>177</sup> and that the company would be liquid and solvent directly after providing the financial assistance.<sup>178</sup> This agreement is not excluded in terms of section 4(2)(b)(ii) of the National Credit Act. Credit in this scenario is extended to a Director. The agreement seemingly complies with the definition of an agreement in terms of section 8(4)(f), and will be within the ambit of the Act. The National Credit Amendment Act<sup>179</sup> recently amended section 42 and all credit providers, with debt as small as R100, are theoretically now required to register as credit providers in terms of section 40 of the Act. Besides registration, the company in this scenario will further be laboured with compliance with the National Credit Act's provisions relating to pre-agreement quotations and the stringent new affordability assessment criteria.<sup>180</sup> The director on the other hand will be able to rely on the remedies in the Act, including debt review.<sup>181</sup> This situation would definitely not have been anticipated by the board or the shareholders, and could lead to a situation where the debt repayment plan is neither fair nor reasonable to the company.

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<sup>176</sup> Companies Act 71 of 2008.

<sup>177</sup> S 45(3)(b)(ii).

<sup>178</sup> S 45(3)(b)(i).

<sup>179</sup> Act 19 of 2014.

<sup>180</sup> Regulation 23A, commencement was postponed to 15 September 2015 by notice in the GG No. 39127 of 21 August 2015.

<sup>181</sup> In terms of ss 85 or 86.

One could however argue that the transaction is an arrangement in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction.<sup>182</sup> Whether this will succeed depends on the circumstances. Lombard and Renke's contentions<sup>183</sup> that the fact that this type of transaction is dealt with in the same section of the Companies Act 71 of 2008 as loans or other financial assistance between subsidiary and holding companies or fellow subsidiaries, which are not seen as transactions at arm's length, could provide support for this argument. I do not think too much must be read into the fact that this is regulated in terms of the same provision, and that each individual case must be carefully considered.

#### 3.2.3.2.4 Debt Instruments

One of the ways in which a Company can raise capital from outsiders is through the issue of debt instruments. Section 43 of the Companies Act 71 of 2008 provides for the issue of securities other than shares, and states that a "debt instrument" can:

- “(i) include[s] any securities other than the shares of a company, irrespective of whether or not issued in terms of a security document, such as a trust deed; but
- (ii) does not include promissory notes and loans, whether constituting an encumbrance on the assets of the company or not;”

Delport<sup>184</sup> submits that because the word "debenture" is not defined in the Companies Act 71 of 2008, that a debenture, as defined in the common law, may be issued by a company in addition to a "debt instrument". The holder of a debt instrument is a creditor of the company for the amount of the loan together with the interest agreed on, whose rights are defined by the terms of issue.<sup>185</sup>

A debenture, in conclusion, does not neatly fit into the exclusions provided for in section

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<sup>182</sup> S 4(2)(b)(iv)(aa).

<sup>183</sup> Lombard and Renke (2009) *SA Merc LJ* 505.

<sup>184</sup> Delport ed (2011) 184(1).

<sup>185</sup> Delport ed (2011) 184(1).

4(2)(b) of the National Credit Act. A debenture holder could not previously<sup>186</sup> enjoy the rights traditionally associated with shareholders, but the 2008 Companies Act<sup>187</sup> changed that with the inclusion of section 43(3). A debt instrument can now grant special privileges regarding attending and voting at general meetings and the appointment of directors, or allotment of securities, redemption by the company, or the substitution of the debt instrument for shares of the company, provided that the securities to be allotted or substituted in terms of any such privilege are authorised by the Memorandum of Incorporation. This does not seem to be too different from the rights of a traditional shareholder relationship to which section 4(2)(b)(i) would apply. Due to the fact that the list is not closed and taking the special rule for interpretation contained in 2(1) of the National Credit Act into account, I am of the opinion that this kind of relationship could also be excluded based on the fact that it is not an arm's length transaction. That said, it is highly unlikely that a company issuing a debt instrument would fall below the threshold in section 7(1) of the National Credit Act.

### 3.3 SECTION 4(2)(b)(iii)

Section 4(2)(b)(iii) of the National Credit Act provides that credit agreements between natural persons who are in a familial relationship and who are co-dependant on each other or where the one is dependent upon the other are within arm's length and therefore excluded from the Act. This tallies with the *"Memorandum on the Objects of the National Credit Bill 2005"* that accompanied the proposal to Parliament for the adoption of the National Credit Act and that which proposed that the Act would not apply to or regulate "loans between family members, partners and friends on an informal basis"<sup>188</sup> and the purpose as set out in section 3 of the Act. The Act was promulgated to protect and regulate commercial lending and the granting of credit in the course of business, it was not the intention to intrude on personal or family relationships, which may involve once-off or interim financial assistance.<sup>189</sup>

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<sup>186</sup> In terms of the 1973 Companies Act.

<sup>187</sup> Act 71 of 2008.

<sup>188</sup> Opperman and Boonzaaier at par 28.

<sup>189</sup> Simpson (2013) 9.



A “familial relationship” is once again not defined in the National Credit Act and we can look at the Companies Act 71 of 2008 and the Income Tax Act 58 of 1962 (specifically Interpretation Note 67 issued by SARS) in aid of interpretation.

The wording of the subsection suggests that both the familial relationship as well as the factor of dependency needs to be present, whether it be co-dependency or one family member being dependent on the other. Dependency is a relative concept and is clarified below.<sup>190</sup>

### **3.3.1 Familial relationship in terms of legislation:**

#### **3.3.1.1 *The Companies Act 71 of 2008***

Section 2(1) of the Companies Act 71 of 2008 provides as follows:

*“(1) For all purposes of this Act –*

- (a) an individual is related to another individual if they -*
  - (i) are married, or live together in a relationship similar to marriage; or*
  - (ii) are separated by no more than two degrees of natural or adopted consanguinity of affinity”*

The wording of the section is simple, and does not merit comment other than to note how broad the wording “*or live together in a relationship similar to marriage*” is. The seriousness of the relationship is subjective and the onus of proof will be on the person averring it and each case will have to be decided on the merits.

It is submitted that the illustration<sup>191</sup> in paragraph 3.3.1.2 below can be used to establish the two degrees of consanguinity in subsection (ii).

#### **3.3.1.2 *The Income Tax Act 58 of 1962***

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<sup>190</sup> Par 3.4.1.

<sup>191</sup> Taken from SARS Interpretation Note 67.

The Income Tax Act<sup>192</sup> contains a definition for “connected persons”. The definition is central to specific anti-avoidance provisions which regulate the tax consequences of transactions entered into between related taxpayers, as they are more likely to be open to manipulation in order to secure a monetary advantage than transactions entered into between unconnected parties.<sup>193</sup>

“Connected person” means<sup>194</sup> –

- (a) *In relation to a natural person –*
- (i) *Any relative; and*
  - (ii) *Any trust (other than a portfolio of a collective investment scheme in securities or a portfolio of a collective investment scheme in property) of which such natural person or such relative is a beneficiary”*

A “relative” is a connected person in relation to that person and is defined as:<sup>195</sup>

*in relation to any person, means the spouse of such person or anybody related to him or his spouse within the third degree of consanguinity, or any spouse of anybody so related, and for the purpose of determining the relationship between any child referred to in the definition of “child” in this section and any other person, such child shall be deemed to be related to its adoptive parent within the first degree of consanguinity*

A “spouse” is defined as:<sup>196</sup>

*in relation to any person, means a person who is the partner of such person –*

- (a) *in a marriage or customary union recognised in terms of the laws of the Republic;*
- (b) *in a union recognised as marriage in accordance with the tenets of any religion, or*
- (c) *in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent,*

*And “married”, “husband” or “wife” shall be construed accordingly*

Sub-paragraph (c) under the definition of “spouse” is similar to section 2(1)(a)(i) of the Companies Act 71 of 2008 as quoted in paragraph 3.3.1 above, and the Commissioner will have to evaluate and decide for himself if he is satisfied that the relationship is permanent.

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<sup>192</sup> Act 58 of 1962.

<sup>193</sup> SARS Interpretation Note 67.

<sup>194</sup> S 1.

<sup>195</sup> S 1.

<sup>196</sup> S 1.

The decision will have to be based on a review of the facts and circumstances applicable to the particular case.

The Lectric Law Library<sup>197</sup> defines the word “consanguinity” as:

*the relation subsisting among all the different persons descending from the same stock or common ancestor. Some portion of the blood of the common ancestor flows through the veins of all his descendants, and though mixed with the blood flowing from many other families, yet it constitutes the kindred or alliance by blood between any two of the individuals.*

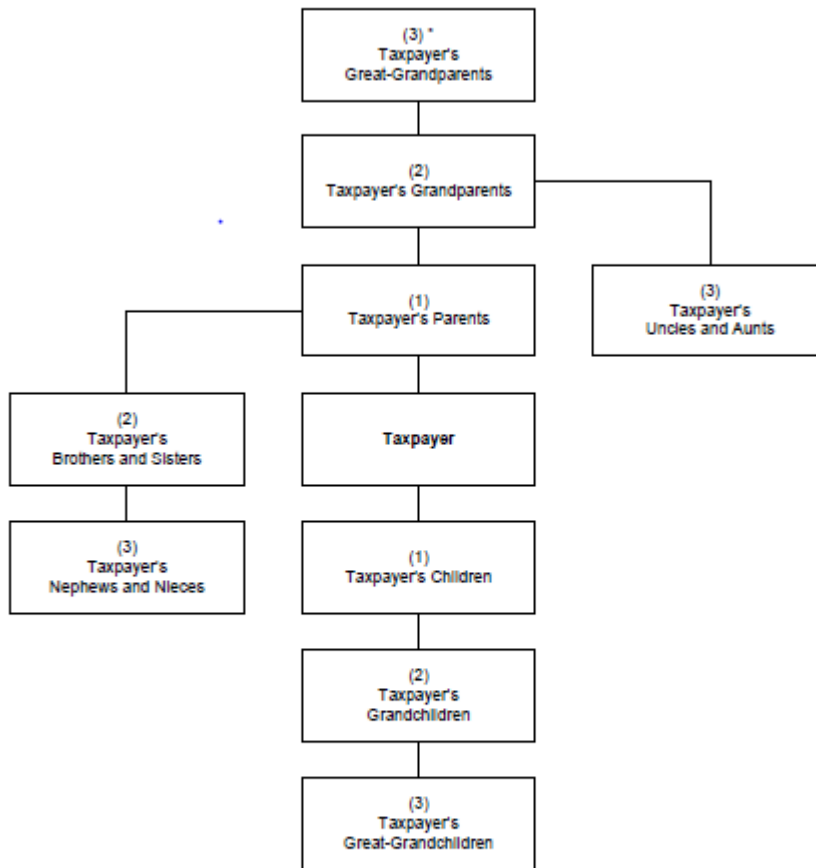
There are different degrees of consanguinity relevant for the purpose of interpretation of the definition of relative – the first, the second and the third degree. It can schematically be illustrated as follows:<sup>198</sup>

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<sup>197</sup> <http://www.lectlaw.com/def/c285.htm>.

<sup>198</sup> SARS Interpretation note 67 34.

**Annexure – Diagram illustrating the rule for determining persons who are related within the third degree of consanguinity**



\* Figures in brackets indicate the degree of consanguinity

The SARS Interpretation Note 67 cites numerous examples of familial relationships, a copy of the interpretation note is attached to this dissertation, marked Annexure “A”.

### 3.3.2 PRACTICAL APPLICATION WITH REFERENCE TO CASE LAW

#### 3.3.2.1 *Clasen t/a Mostly Media*

The plaintiff sought judgment against the defendant in respect of two cheques in the amount of R129 578 each, both drawn by the defendant in favour of the plaintiff and dishonoured upon presentation. The cheques formed part of several loans made by the plaintiff to the defendant.

The parties were friends who mixed socially and who were doing business together. The plaintiff contended that their relationship was akin to a familial relationship in which the defendant was dependant on him for financial assistance and that the transaction was therefore not at arm's length. The defendant on the other hand contended that despite their friendship, they were independent of each other in their dealings.<sup>199</sup>

Moosa J considered the facts before him and concluded that the parties were independent.<sup>200</sup> The judge held that the agreement was concluded at arm's length and that the National Credit Act applied to the transaction.

### 3.3.2.2 *Dayan v Dayan*

Although the loan in this matter was found not to be a credit agreement due to no interest being payable, the question arose whether the transaction would be an arm's length transaction if it was a credit agreement.

The parties were half-brothers who had a close relationship and who concluded a number of transactions over a period. They were therefore related in terms of the Act<sup>201</sup> and the agreement was consequently not at arm's length.

### 3.3.2.3 *Beets v Swanepoel*

The plaintiff lent the defendant, her daughter a sum of money. The daughter did not honour her obligations in terms of the agreement and the mother instituted action. The agreement was a *prima facie* credit agreement to which the Act applied. The daughter's attorneys filed an exception premised on the facts that the particulars of claim did not disclose the cause of action by making the necessary averments in respect of the agreement being a credit agreement and that it did not aver compliance with sections 129 and 130 of the Act.

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<sup>199</sup> At par 7.

<sup>200</sup> For purposes of s 4(2)(3) and (4)(2)(b)(iv)(aa). The parties were not in a familial relationship and the basis of the debt was an IOU with penalty clause on arrears, calculated daily, thereby also disposing of a possible defence in terms of section 4(2)(b)(iv)(aa).

<sup>201</sup> At par 9.

The parties were in a familial relationship, but since no co-dependence on each other or dependence of the one on the other could be discerned from the pleadings, the court was satisfied that the agreement was at arm's length to which the provisions of the Act applies, and the plaintiff therefore needed to comply with the Act.

I am of the opinion that the transaction was not at arm's length, and that it should have been excluded in terms of Section 4(2)(b)(iv)(aa) due to the fact that the mother did not strive to obtain the utmost possible advantage out of the transaction.<sup>202</sup>

#### 3.3.2.4 *Hattingh v Hattingh*

The court had to decide whether the National Credit Act applied to a specific agreement concluded between two brothers. The brothers conducted business together for some time and had decided to terminate their commercial relationship and common business interest by way of written agreement in terms whereof one brother (the debtor) would pay the other brother (the creditor) an amount by way of annual instalments. The agreement contained an acceleration clause in terms whereof the full amount, together with interest, would become payable on default. The debtor brother defaulted and the creditor applied for judgment against the debtor. The debtor contended that the agreement amounted to an acknowledgement of debt which is subject to section 8(4)(f) of the National Credit Act, but the court held that the agreement was not a credit agreement in terms of the Act as there was no consumer / credit provider relationship and the agreement was accordingly not subject to the Act.<sup>203</sup> The creditor did not raise section (4)(2)(b)(iii) as a possible reason why the Act was not applicable, but might have succeeded, as long as he could overcome the hurdle of dependence.

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<sup>202</sup> Interest at the very generous rate of 4% was agreed on between mother and daughter, see par 3 of judgment. Also see Van Zyl in Scholtz ed (2011) par 4.2: Our courts, in the unreported case of *Cloete v Van Den Heever NO 2013 JDR 1075 (GNP)* held that an agreement between close acquaintances, at an interest rate charged to the credit provider by his bank, was not at arm's length.

<sup>203</sup> At par 25.

### 3.3.3 Conclusion

The Act does not give guidance as to how many degrees of consanguinity would be interpreted as a “familial relationship” and I am of the opinion that 3 degrees, as provided for in the Income Tax Act 58 of 1962, is reasonable. The inclusion of the dependency is reasonable and even well thought through. Omission thereof could have led to a situation where an unscrupulous child could for instance lend money to an elderly parent knowing that they can access pension funds and therefore charging exorbitant interest leaving the parent without remedy. Section 4(2)(b)(iv)(aa), discussed hereafter, is also available in the event that dependency cannot be proved and where the credit provider did not strive to benefit commercially from the transaction.

### 3.4 SECTION 4(2)(b)(iv)

This section consists of two parts, section 4(2)(b)(iv)(aa) and (bb). The former will be dealt with first.

#### 3.4.1 An arrangement where each party is not independent and does therefore not strive to obtain the utmost possible advantage out of the transaction

An agreement, in order to qualify as a credit agreement in terms of the National Credit Act, must defer payment and further also attract some kind of monetary advantage in the form of charges, fees or interest.<sup>204</sup> A theoretical commercial arm’s length credit agreement is an open market transaction between a willing lender and a willing borrower who is able to repay the loan and with both parties aiming to get the best deal for themselves. For example: The credit provider attempts to get as much as possible commercial gain from an independent borrower who is striving to get the loan at the best possible price. Both parties probably know what the market related credit charges are and the credit provider is attempting to close the deal at a price that is as close as possible to that what competitors will offer, the consumer is attempting to get the most favourable package possible.

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<sup>204</sup> See the definitions of the different credit agreements subject to the Act in ss 1 and 8 thereof.

Section 4(2)(b)(iv)(aa) provides that an arrangement where the parties are not independent from another and do therefore not strive to obtain the utmost possible advantage from the transaction, is not a transaction at arm's length. This can be broken down into two elements, namely that each party is not independent of the other secondly that they *consequently*<sup>205</sup> do not necessarily strive to obtain the utmost possible advantage out of the transaction.

The wording of this section is seemingly a codification of a statement by Trollip JA in the Supreme Court of Appeal matter of *Hicklin v Secretary for Inland Revenue*. The Appeal Court was faced with the interpretation of section 103 of the Income Tax Act 58 of 1962 and the judge made the following observation:

*For "dealing at arm's length" is a useful and often easily determinable premise from which to start the inquiry. It connotes that each party is independent of the other and, in so dealing, will strive to get the utmost possible advantage out of the transaction for himself, indeed, in the Afrikaans text the corresponding phrase is "die uiterste voorwaardes beding".<sup>206</sup>*

The concept of independence is not defined in the National Credit Act. The online Oxford Dictionary,<sup>207</sup> however, defines it as:

- (1) *“Free from outside control; not subject to another's authority;*
- (2) *Not depending on another for livelihood or subsistence;*
- (3) *Capable of thinking or acting for oneself;*
- (4) *Not connected with another or with each other”.*<sup>208</sup>

This definition of independent is wide and envisages control, financial dependency, emotional or intellectual dependency and some other form of dependency which might perhaps as

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<sup>205</sup> My emphasis.

<sup>206</sup> At 494H – 495D.

<sup>207</sup> Web address: <http://www.oxforddictionaries.com/definition/english/independent?q=independent> (15 November 2015).

<sup>208</sup> For example, the legislature and judicature are independent of one another.



result of a contractual relationship, for instance where a person is an independent consultant (thus not an employee).

It is perhaps also necessary to look at the antonym in order to get greater clarity:

“Dependent” is defined as:<sup>209</sup>

- (1) *contingent on or determined by: i.e. the various benefits will be dependent on length of service*
- (2) *requiring someone or something for financial or other support: i.e. households with dependent children, or unable to do without i.e. people dependent on drugs*

These definitions tie in really well with the definitions and interpretations given to “related parties”, “control” and “familial relationship” in this dissertation, and I submit that these concepts can be used in aid of interpretation, but it might also be something more: for instance, a relationship between employer and employee, or perhaps between a small startup and a financier with an interest in seeing the startup succeed.

Loans between related parties or or a loan between parties where one party has a great measure of influence or control over the other are not independent. Once it is established that the parties are not related, the second hurdle needs to be overcome being that the credit provider consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction. Flemming submits that this standard is so high that most transactions with a friendly party will be regulated in terms of the National Credit Act.<sup>210</sup>

#### **3.4.1.1 Practical application:**

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<sup>209</sup> Web address: <http://www.oxforddictionaries.com/definition/english/dependent> (15 November 2015).

<sup>210</sup> S 4(2)(b)(iv) – Flemming (2009)

#### 3.4.1.1.1 *Eden Court Holdings (Pty) Ltd V Khan*

The plaintiff borrowed the defendant a sum of money. They agreed that no interest was to be charged on the outstanding amount, subject thereto that the defendant would not terminate his employment prior to settling the loan amount. In the event that the defendant resigned prior to settling the amount, the plaintiff could charge interest at a rate of prime less 5%.

The defendant resigned and the plaintiff applied for summary judgment based on an acknowledgement of debt containing the aforesaid terms. The court had to decide whether the agreement was subject to the National Credit Act and the plaintiff argued that the agreement was excluded by virtue of the provisions of section 4(1) read with section 4(2)(iv)(aa) since the parties were not independent from each other and consequently did not strive to obtain the utmost possible advantage out of the transaction.

Dolamo AJ held as follows:<sup>211</sup>

*[I]t is a normal consequence of a loan agreement that the lender, for the risk he assumes, will charge interest as compensation. It is abnormal for a lender to put R1 828 826 at risk without a corresponding benefit of interest, satisfying himself only with a contingent arrangement for the payment thereof. I am in the circumstances of the view that the transaction between the Plaintiff and the Defendant displays elements of parties who were not dealing with each other at arm's length. The charging of interest was made contingent on the Defendant leaving the employment of the Plaintiff before payment in full of the loan amount. As such the Plaintiff appears to have not been focused on striving to get the utmost possible advantage out of the transaction for itself and therefore not dealing with each other at arm's length. But in my view these are issues which need to be ventilated in full through evidence and be adjudicated and determined at the trial.*

#### 3.4.1.1.2 *Friend V Sendal*

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<sup>211</sup> At par 15.

The appellant, Friend, signed an acknowledgement of debt in terms whereof he undertook to pay the respondent, Sendal, an amount of R1,2 million rand in instalments over a period of 12 months, and at the applicable interest rate levied by Standard bank from time to time on an unsecured overdraft facility. Friend defaulted on the agreement and Sendal instituted proceedings for the recovery of the outstanding amount together with interest. Friend contended that the National Credit Act found application and that the Sendal therefore had to comply with the requirements of sections 129 and 130, and secondly, that the Sendal's failure to register as credit provider rendered the agreement unlawful and therefore void.

The court *a quo* found that although the acknowledgement of debt complied with the definition as set out in section 8(4)(f), the parties were not dealing at arm's length<sup>212</sup> and the Act therefore did not apply. Sendal succeeded with his claim.

The matter was taken on appeal and Friend argued that the Sendal had to comply with the registration requirement in the Act due to the acknowledgement of debt complying with the definition in section 8 (4)(f). The appeal did not succeed.

Interesting for the interpretation of section 4(2)(b)(iv)(aa) is the explanation that follows: The parties were in a familial relationship and the emotional emails between them insinuated a measure of dependence. The respondent made several concessions to accommodate the appellant with the payment of the outstanding debt, and did therefore not strive to obtain the utmost possible advantage out of the transaction at the expense of the appellant.<sup>213</sup> The court in this instance merged the two separate exclusions in sections 4(2)(b)(iii) and 4(2)(b)(iv)(aa).<sup>214</sup>

### **3.4.1.2 Conclusion:**

Dalamo AJ in *Eden Court Holdings (Pty) Ltd v Khan* extended the definition of "not independent" to an employer – employee relationship after considering the interpretation

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<sup>212</sup> Par 10: "The court *a quo* also found that the acknowledgement of debt was not a 'credit agreement between parties dealing at arm's length' to which the Act applies."

<sup>213</sup> Par 36.

<sup>214</sup> Par 34: "one can say the respondent and appellant were in a familial relationship with each other". It is unfortunately not known in what degree they were related.

rules and purpose of the National Credit Act.<sup>215</sup> He further also referred to the matter of *ABSA Bank Ltd v De Villiers*<sup>216</sup> where the court held that the purposive interpretation must be followed in order to try and discern the legislator's true intention.<sup>217</sup> In the instance the court found that the parties were firstly not independent and secondly did not strive to get the utmost possible advantage out of the transaction. The question of whether parties are independent will be factual.

Friend and Sendal were in a familial relationship. It further appeared as if Friend were dependent on Sendal. This alone complied with the exclusion in section 4(2)(b)(iii). However, the court chose to make reference to section 4(2)(b)(iv)(aa) on the basis that Sendal made several concessions to accommodate Friend with payment, therefore not necessarily striving to obtain the utmost possible advantage out of the transaction.<sup>218</sup>

Kelly-Louw<sup>219</sup> observes that it is still debatable whether or not this<sup>220</sup> will include a loan, for example a special employee scheme, between employer as credit provider and employee as consumer. It can be argued that the parties are not independent and that they are not necessarily striving to obtain the utmost possible advantage and therefore not dealing at arm's length. *Eden Court Holdings v Khan* did, however, shed light on the matter.

### **3.4.2 Any other arrangement that is of a type that has been held in law to be between parties dealing at arm's length**

The list of examples of transactions not at arm's length contained in section 4(2)(b) is not exhaustive. Section 4(2)(b)(iv)(bb) provides that any other arrangement that has been held in law to be between parties not dealing at arm's length will be excluded from the ambit of the Act. The Act and the common law relating thereto is still in its baby shoes, which unfortunately causes a great deal of legal uncertainty and the merits will have to be

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<sup>215</sup> Ss 2 and 3 of the National Credit Act.

<sup>216</sup> 2010 (2) All SA 99 (SCA).

<sup>217</sup> Par 14.

<sup>218</sup> This reiterates the importance of a well written non-waiver clause from a consumer's side (as consumer protection measure).

<sup>219</sup> Kelly-Louw and Stoop (2012) 30 at fn 30.

<sup>220</sup> S 4(2)(b)(iv)(aa).

considered from case to case.<sup>221</sup>

The Act must be interpreted in a manner that gives effect to its purpose in section 3<sup>222</sup> and besides applying the common law, a person, court or tribunal interpreting or applying the Act may consider appropriate foreign and international law.<sup>223</sup> The purpose of the Act must always be taken into consideration, but consideration of “appropriate foreign and international law” is permissive. The consideration of international or foreign law by a South African court does not make such law binding in South Africa. The statement of the Constitutional Court, in *State v Makwanyane* that “we can derive assistance from public international law and foreign case law, but we are in no way bound to follow it”, is also applicable in the instance. However, an international instrument ratified nationally would be binding whether or not considered by our courts.<sup>224</sup>

The court cases cited above indicate the courts’ current stance on arm’s length, but there is unquestionably a whole lot more, waiting to be produced in the correct circumstances. Some of the cases in my opinion also need further clarification. Our courts have, for instance, held that an agreement between close acquaintances, at an interest rate charged to the credit provider by its bank was not at arm’s length.<sup>225</sup> This finding (in the unreported case of *Cloete v van den Heever NO*<sup>226</sup> is in conflict with *Beets v Swanepoel*<sup>227</sup>. The common law is still developing and litigants will for the foreseeable future surely have to pursue arguments about the interpretation of arm’s length.

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<sup>221</sup> *Moosa J in Claasen t/a Mostly Media* at par 8: “the question of “dealing at arm’s length” is a factual inquiry and falls to be decided on the facts and circumstances of each particular case. In order to determine whether the transactions in question were conducted at “arm’s length” or not, we need to examine the relationship between the parties, the substance and nature of the transactions and the surrounding circumstances”.

<sup>222</sup> S 2(1) of the National Credit Act.

<sup>223</sup> Refer to par 2.1 above.

<sup>224</sup> *The impact of foreign law on domestic judgments* par II.

<sup>225</sup> Van Zyl in Scholtz ed (2008) par 4.2 and at fn 25.

<sup>226</sup> 2013 JDR 1075 (GNP).

<sup>227</sup> Discussed in par 3.3.2.3 above.

## CHAPTER 4: CONCLUSION

The exclusion of agreements not at arm's length is consistent with the purpose of the Act as set out in section 3 which clearly illustrates the Act's socio-economic goals. The concept forms a critical part of the application test and it is vital to give meaning to it to determine risk and to contribute to legal certainty.

When concluding an agreement it is consequently essential to consider whether the agreement is concluded at arm's length or not. Failure to do so or careless consideration can give rise to a situation where parties can unknowingly burden the relationship by contracting into the application of the National Credit Act, by, for instance, making use of a standard loan agreement containing standard National Credit Act clauses. Parties can on the other hand unknowingly enter into an unlawful credit agreement, which can prove to be embarrassing in the event that the loan is granted by a juristic person credit provider to a consumer as fiduciary duty and accountability to shareholders would come into play.

The common law is still developing and this, paired with the problem that the merits of each case will have to be considered, contribute to uncertainty. The fact that the list contained in section 4(2)(b) is not closed and the courts' ability to consider foreign and international law further contributes to an uncertain position and parties are cautioned to consider the purpose of the Act as well as any relevant definition in order to protect their themselves or their clients. The definitions and interpretations from other legislation containing similar terminology and the legislator's intention must not be overlooked. I agree with Kelly-Louw's contention that although the intention is to govern nearly all consumer credit agreements, plain logic should not be totally discarded when a determination is made regarding whether a transaction falls within the ambit of the Act, and that the nature and substance of the transaction and the intention of the parties as gathered from their conduct must be taken into consideration.<sup>228</sup>

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<sup>228</sup> Kelly-Louw and Stoop (2012) 49.





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