

**SURETIES IN TERMS OF THE NATIONAL CREDIT
ACT 34 OF 2005**

By

LOUISE ETCHELL

21221538

Submitted in partial fulfilment of the requirements for the degree

MASTERS DEGREE IN CONSUMER CREDIT LAW

at the

UNIVERSITY OF PRETORIA

SUPERVISOR: PROF HERMIE COETZEE

OCTOBER 2017

SUMMARY

The purpose of this dissertation is to examine sureties in terms of the National Credit Act 34 of 2005 (hereafter "NCA"). The main research question contemplated in this dissertation is whether the full protection of the NCA should be extended to all natural persons standing surety for the debts of individuals or entities by way of entering into suretyship agreements. It further identifies problem areas within the provisions of the NCA in this regard, and ultimately aims to offer some prospective solutions thereto.

Suretyship agreements are critical to credit providers in order to restrict risks when granting credit. The NCA introduces new forms of protection for consumers in South Africa, setting out the purpose of the NCA in the preamble and section 3 thereof. In view of the aims of the NCA it is submitted that the major objective of consumer credit legislation is to minimise malpractices, establish equal bargaining power between parties to a credit agreement and most importantly the protection of private individual consumers.

However, not all agreements are governed by the NCA, and only certain specified credit agreements fall within the ambit of the Act. Therefore, the NCA's field of application is extremely important to consumer legislation, because it defines the extent of protection that consumers are entitled to.

This dissertation investigates the definition and characteristics of a suretyship, and examine whether the definition of a suretyship is compatible with the definition of a credit guarantee in terms of the NCA. Furthermore, this dissertation investigates whether all natural person sureties are being treated equally by the law, amongst others, arguing that the present situation is unconstitutional as it unreasonably and unfairly discriminate against this group of natural person sureties in particular.

Finally, two sets of conclusions are drawn together in this dissertation. Firstly, the analysis of the ordinary suretyship compared to a credit guarantee envisaged in section 8(5) of the Act. Thus, ascertaining whether a suretyship agreement is a credit agreement in terms of the NCA. Secondly, the question of whether the Act's full protection should be extended to all natural person sureties.

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CHAPTER 1: INTRODUCTION

Do not be a man who strikes hands in pledge or puts up security for debts; if you lack the means to pay, your very bed will be snatched from under you.¹

1.1 Background information

The National Credit Act² is a complex piece of legislation and detailed in nature.³ The forerunners to the NCA, namely the Usury Act⁴ and Credit Agreement Act⁵ have cumulatively regulated the field of consumer credit in the Republic of South Africa for more than two decades.⁶ One of the legislature's main objectives with the NCA was to substitute both Act's with one piece of legislation.⁷ Therefore, South Africa's commercial and legal landscape have been profoundly impacted by the promulgation of the NCA.⁸ In comparison to legislation such as the Magistrates' Courts Act,⁹ the NCA can be described as a relatively new Act.

The commencement of the NCA meant that a more regulated credit market was established - protecting a broad spectrum of consumers, including natural persons.¹⁰ The demand for a regulated credit industry originated from the need to address the disparity between the negotiation power of credit providers and consumers.¹¹ It is important to note that credit providers and consumers are not always on equal standing.¹² According to Stoop the imbalance of power between credit providers and consumers is a result of

[l]ow education levels, poorly informed consumers, weak disclosure and deceptive marketing practises, many South African consumers have concluded unaffordable credit contracts, and their over-indebtedness has led to many social problems.¹³

¹ Proverbs 22:26.

² 34 of 2005 (hereafter "the NCA" or "the Act").

³ Otto and Otto *The National Credit Act explained* (2016) 4th edition par 9.4. See also *RMB Private Bank (a Division of Firstrand Bank Ltd) v Kaydeez Therapies CC (in Liquidation)* 2013 (6) SA 308 (GSJ) 311.

⁴ Act 73 of 1968.

⁵ Act 75 of 1980.

⁶ Otto and Otto *The National Credit Act explained* (2016) 4th edition 2-3.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Act 32 of 1944.

¹⁰ Stoop *South African consumer credit policy: measures indirectly aimed at preventing consumer over-indebtedness* (2009) 21 SA Merc LJ 366.

¹¹ *Idem* 365.

¹² *Idem* 366.

¹³ *Ibid.*

Arguments made by some writers, merchants and financiers that consumer protection and credit legislation should be discontinued will not prevail, despite the notion that the credit industry should be regulated by freedom of contract based on supply and demand.¹⁴ In contrast, the key objectives of consumer credit legislation is to curb malpractices, establish equal bargaining power between parties to a credit agreement and most importantly, the protection of private individual consumers.¹⁵

The review of previous consumer legislation indicated that natural person consumers were subjected to a dilapidated consumer-credit market. Research showed that credit was extended to individuals recklessly with no regard to the consumers' repayment ability.¹⁶ During the late 1990s and early 2000s high levels of over-indebtedness was present under natural person consumers and they were unable to service their debts.¹⁷ The procedures that had to impede reckless credit and over-indebtedness were insufficient and unsubstantial. Thus, lack of proper structures and need for better consumer protection were some of the reasons why the NCA was established.¹⁸ Great effort has gone into the Act in order to provide natural persons with consumer protection.¹⁹

Kelly-Louw submitted that the full protection of the NCA should be offered to all natural person sureties and that failure to provide individual sureties with protection will result in over-indebted individuals and the consequential impairment of the entire credit market.²⁰ Therefore, a study on natural person sureties and whether all suretyship agreements fall under the ambit of the NCA are essential to the main objective of this dissertation.

1.2 Problem statement and research objective

The NCA contains intricate forms of protection to some natural person sureties. The question is whether all sureties should be protected regardless of whether the principal

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Kelly-Louw *Should all natural persons standing surety be protected by the National Credit Act 34 of 2005* (2012) 24 SA Merc LJ 317.

¹⁷ Kelly-Louw *The prevention and alienation of consumer over-indebtedness* (2008) 20 SA Merc LJ 204.

¹⁸ Kelly-Louw (2012) 24 SA Merc LJ 317.

¹⁹ *Ibid.*

²⁰ *Idem* 320.

debt falls within the ambit of the NCA.²¹ Commercial banks may argue that full protection to all natural person sureties will meddle with the competitive nature of the commercial credit market.²² However, the lack of consumer protection and the money making objective by credit providers led to the need for legislation such as the NCA and it is unclear why some natural person consumers receive full protection whilst others receive limited protection and others no protection at all.²³

Suretyship agreements are crucial to credit providers to restrict risks when granting credit.²⁴ An analysis of the common-law suretyship compared to a credit guarantee envisaged in section 8(5) of the Act is of pivotal importance to ascertain whether a common law suretyship agreement is a credit agreement in terms of the NCA.²⁵

Thus, the research objective of this dissertation is to examine how common law suretyship agreements find application in terms of the NCA with specific focus on natural person sureties.

In summary the objectives of the study are therefore:

- (a) to examine the purpose of the Act and its application, limitation and exceptions to credit agreements with the primary focus on suretyship agreements;
- (b) to determine the definition and nature of suretyship agreements stemming from the common law;
- (c) to address the question as to whether suretyship agreements form part of what the NCA refers to as a credit guarantee;
- (d) to address the question as to whether the Act's full protection should be extended to all natural person sureties by means of a Constitutional analysis; and
- (e) to make recommendations for law reform.

²¹ Kelly-Louw (2012) 24 SA Merc LJ 320.

²² *Idem* 319.

²³ *Ibid.*

²⁴ Stoop and Kelly-Louw *The National Credit Act regarding suretyships and reckless lending* (2011) 14(2) PELJ 88.

²⁵ *Ibid.*

1.3 Delineation and limitations

A comprehensive analysis of the field of application of the NCA falls outside the ambit of this dissertation. A limited overview of the application of the NCA to credit guarantees, suretyship agreements, its limited application to some credit agreements and persons excluded from the scope of the Act are provided.²⁶

Reckless credit provisions and reckless credit assessments also fall outside the scope of this dissertation. Reckless credit provisions will only be referred to in passing where applicable and will not be discussed in depth.

No reference will be made to alternative debt relief measures, such as the debt review process²⁷ which also finds application under the Act. Despite the vast application of the NCA,²⁸ the focus of this dissertation will be suretyship agreements in terms of the NCA.

1.4 Significance of the study

The study aims to provide a complete examination of the types of suretyship agreements under the provisions of the NCA with emphasises on natural person sureties and any distinctions that might be deemed unconstitutional.

1.5 Structure of dissertation

This dissertation consists of 6 chapters. The chapters are as follow:

- (a) Chapter 1 consists of a general introduction into the background information of this dissertation. It also includes the research objective and problem statement.
- (b) Chapter 2 is an in depth and comprehensive study of the purpose and application of the NCA.

²⁶ Renke and Coetzee *Can the National Credit Act by agreement be made applicable to (excluded) juristic persons?* (2014) 77 *THRHR* 568.

²⁷ Coetzee *The impact of the National Credit Act on civil procedural aspects relating to debt enforcement* LLM Dissertation University of Pretoria (2009) 2.

²⁸ Myburg *The field of application of the National Credit Act 34 of 2005: a critical overview of the agreements it effects* LLM Dissertation University of Pretoria (2013) 6.

- (c) Chapter 3 investigates the origin of sureties in the Roman times and contains a critical and detailed analysis to establish the definition and nature of suretyship agreements.
- (d) Chapter 4 consists of determining whether common law suretyships form part of what the NCA refers to as a credit guarantee.
- (e) Chapter 5 deals with the question of whether sureties excluded from the NCA should enjoy the same protection as other natural persons. Constitutional imperatives form part of the discussion.
- (f) Chapter 6 contains the overall conclusion and recommendations.

1.6 Definitions, basic concepts, terms and key references

It is imperative for purposes of this dissertation to have an in depth understanding of the following basic concepts, terms and key references-

“accessory guarantee” the fact that the surety’s obligation is an accessory obligation simply means that in order to constitute a valid suretyship between surety and creditor, there has to be a valid principal obligation between the debtor and the creditor. The suretyship is said to be accessory to the transaction that creates the obligation of the principal debtor.²⁹

“suretyship” means an accessory contract by which a person (the surety) undertakes to the creditor of another (the principal debtor), that the principal debtor, who remains bound, will perform his obligation to the creditor and that if and so far as the principal debtor fails to do so, the surety will perform it or, failing that, indemnify the creditor.³⁰

“suretyship requirements” no contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this

²⁹ Stoop and Kelly-Louw (2011) 14(2) *PELJ* 72. *Desert Star Trading 145 (Pty) Ltd v No 11 Flamboyant Edleen CC* 2011 (2) SA 266 (SCA) 268.

³⁰ Forsyth and Pretorius *Caney’s Law of Suretyship in South Africa* 6th edition (2010) 29.

section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments.³¹

The following definitions in the NCA is of pivotal importance.

“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 agreement; 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.

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

“credit guarantee” means an agreement that meets all the criteria set out in section 8(5).

“credit provider” in respect of a credit agreement to which this Act applies, means-

³¹ S 6 of the General Law Amendment Act 50 of 1956. See also *Moller v Barloworld Equipment a Division of Barloworld SA (Pty) Ltd t/a the Cat Rental Store* (312/11) [2013] ZAGPPHC 137 par 3.

- (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 transaction” means an agreement that meets the criteria set out in section 8(4).

“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 stokvel.

“mortgage agreement” means a credit agreement that is secured by a pledge of immovable property.

“principal debt” means the amount calculated in accordance with the section 101(1)(a).

“reckless credit” means the credit granted to a consumer under a credit agreement concluded in circumstances described in section 80.

“secured loan” means an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person-

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

“stokvel” means a formal or informal rotating financial scheme with entertainment, social or economic functions, which –

- (a) consist of two or more persons in a voluntary association, each of whom has pledged mutual support to the others towards the attainment of specific objectives;

- (b) establishes a continuous pool of capital by raising funds by means of the subscriptions of the members;
- (c) grants credit to and on behalf of members;
- (d) provides for members to share in profits from, and to nominate management of, the scheme; and
- (e) relies on self-imposed regulation to protect the interest of its members.

“this Act”

includes a Schedule to this Act, a regulation made or a notice issued under this Act.

“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.

CHAPTER 2: PURPOSE AND APPLICATION OF THE NCA

2.1 Introduction

The National Credit Act³² regulates its own scope of application.³³ The field of application is very important to consumer credit legislation, because it defines the consumers who will be protected by the Act and extent of protection that such consumers will be entitled to.³⁴ Not all agreements are governed by the NCA, only certain specified agreements fall within the ambit of the Act.³⁵ Further, even where agreements fall within the definition of a specific type of credit agreement, it be specifically excluded from the application of the NCA.³⁶ In other instances, the Act's application will be limited.³⁷ Therefore, credit agreements falling within the confines as defined in the NCA, would not necessarily signify that the Act is applicable.³⁸ Various pre-requisites come into play before the Act can find application to a specific credit agreement.³⁹

Indebtedness towards credit providers can be secured by means of a natural person standing surety for individuals or entities by way of entering into a suretyship agreement.⁴⁰ It is of key importance to investigate the NCA's scope of application to suretyship agreements with emphasis on the provisions regulating the application of the Act, as some sureties will not be able to obtain the relief provided by the NCA.⁴¹

In this chapter I will examine the purpose of the Act and its application, limitations and exceptions with a primary focus on suretyship agreements.

³² Act 34 of 2005 (hereafter "the NCA" or "the Act").

³³ Renke and Coetzee *Can the National Credit Act by agreement be made applicable to (excluded) juristic persons?* (2014) 77 THRHR 567.

³⁴ *Ibid.*

³⁵ Coetzee *A comparative reappraisal for debt relief measures for natural person debtors in South Africa* LLD Thesis University of Pretoria (2015) 189.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 29.

³⁹ *Ibid.*

⁴⁰ Kelly-Louw *Should all natural persons standing surety be protected by the National Credit Act 34 of 2005* (2012) 24 SA Merc LJ 298.

⁴¹ Coetzee *The impact of the National Credit Act on civil procedural aspects relating to debt enforcement* LLM Dissertation University of Pretoria (2009) 6.

2.2 Preamble and purpose of the NCA

When interpreting the purpose of the NCA, it is clear at first glance that the primary intent of the Act is to protect consumers meticulously.⁴² Many may argue that the NCA's grandiose approach to social and economic welfare in South Africa is very inspiring, but in reality the piece of legislation leaves behind unrealistic and unattainable aims.⁴³

To commence an understanding of the NCA, section 2(1) of the Act, unambiguously state, that effect must be given to the purposes set-out in section 3⁴⁴ of the Act.⁴⁵ Section 3 of the NCA clearly sets-out the purpose of the Act. Read together with the preamble to the Act and section 2(1) it is apparent that it explicitly imply that consumers should have access to fair and non-discriminatory consumer credit. Also, for the purpose of interpretation by any person, court or tribunal, international law and appropriate foreign law may be considered.⁴⁶

The preamble⁴⁷ of the NCA reads as follow:

To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black

⁴² In the case of *Nedan (Pty) Ltd v Selbourne Food Manufacturers CC* 2014 ZAGPPHC 979 par 22 the Court clearly states that protection of consumers is the main objective of the NCA.

⁴³ Scholtz *Guide to the National Credit Act* (2008) par 2.3. See also Aucamp *The incidental credit agreement: a theoretical and practical perspective* (2013) 76 THRHR 379, where Aucamp states that:

"The Act has been described as bold and no doubt timely effort to make a clean break from the past. The Act and its regulations are by no means a concise piece of legislation, nor are they user-friendly for consumers or credit providers".

ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors 2009 (2) SA 513 (D) par 15.

⁴⁴ Aucamp (2013) 76 THRHR 379.

⁴⁵ See Scholtz *Guide to the National Credit Act* (2008) par 2.4. *ABSA Bank Ltd v De Villiers* 2009 (5) SA 40 par 18. In *Nedan (Pty) Ltd v Selbourne Food Manufacturers CC* 2014 ZAGPPHC 979 par 21 the Court affirms that the objectives of the NCA is found in s 3 of the Act. *Standard Bank of South Africa Ltd v Kruger; Standard Bank of South Africa Ltd v Pretorius* 2010 (4) SA 635 (GSJ) in par 10 and 11, says to interpret legislation effectively, the purpose and objectives must be measured against the Act as a whole, by making use of s 3 of the NCA. The case of *Asmal v Essa* 2014 (3) ALL SA 115 (SCA) par 10 confirms the importance of the s 3. However the learned judge states that it is not only profoundly important, but also one of the underlining objectives of the NCA to make sure that the parties to a credit agreement and more specifically the consumer must be made aware of the liabilities and risks attached to any future ventures when entering into a credit agreement. *FirstRand Bank Ltd v Dhlamini* 2010 (4) SA 531 (GNP) par 35 emphasises and endorse that the purpose of the Act is found in s 3 of the NCA, but goes further to stress the importance of historically disadvantaged persons envisaged in s 2(6) of the Act. The same views are expressed by Binns-Ward AJ in the case of *Ex parte Ford* 2009 (3) SA 376 (WCC) par 20 that a duty is bestowed on the courts to give effect to public policy as set out in the NCA.

⁴⁶ S 2(2). *Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581 (SCA) par 2.

⁴⁷ See also Van Heerden and Borraine *The money or the box: perspective on reckless credit in terms of the National Credit Act 34 of 2005* (2011) *De Jure* 392.

economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt re-organisation in cases of over-indebtedness; to regulate credit information; to provide for registration of credit bureaux, credit providers and debt counselling services; to establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit; to establish the National Credit Regulator and the National Consumer Tribunal; to repeal the Usury Act, 1968, and the Credit Agreements Act, 1980; and to provide for related incidental matters.

Tasked with the enormous responsibility of making the credit market accessible to the historically disadvantaged and balancing the act of preventing consumer over-indebtedness,⁴⁸ the purposes of the Act are put together in section 3 of the NCA. Section 3⁴⁹ of the NCA accordingly states:

Purpose of the Act. – The purposes of this 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, by –

- (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;⁵⁰
- (b) ensuring consistent treatment of different credit products and different credit providers;⁵¹
- (c) promoting responsibility in the credit market by –
 - (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers;⁵² and
 - (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;⁵³
- (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;⁵⁴

⁴⁸ For a full discussion on over-indebtedness in terms of s 85, see Van Heerden *Section 85 of the National Credit Act 34 of 2005: thoughts on its scope and nature* (2013) *De Jure* 968-997.

⁴⁹ See also Boraine and Van Heerden *To sequester or not to sequester in the view of the National Credit Act 34 of 2005* 2010 13(3) *PELJ* 84 and Maghembe *The appellate division has spoken – sequestration proceedings do not qualify as proceedings to enforce a credit agreement under the National Credit Act 34 of 2005: Naidoo v Absa Bank 2010 4 SA 597 2011 14(2) PELJ* 171.

⁵⁰ S 3(a). S 2(6) of the Act gives a complete breakdown of historically disadvantage persons.

⁵¹ S 3(b).

⁵² S 3(c)(i). See also Renke *Measures in South African consumer credit legislation aimed at the prevention of reckless lending and over-indebtedness: An overview against the background of recent developments in the European Union* (2011) *THRHR* 209.

⁵³ S 3(c)(ii). See also Boraine and Van Heerden *Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005* (2010) 73 *THRHR* 650, reckless credit is discouraged the NCA and states that it is one of the Acts purposes.

⁵⁴ S 3(d). Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 21. In the case of *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 (5) SA 618 (KZD) par 16 Wallis J expresses his view that a balance

- (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by⁵⁵ –
 - (i) providing consumers with education about credit and consumer rights;⁵⁶
 - (ii) providing consumers with adequate disclosure of standardised Information in order to make informed choices;⁵⁷ and
 - (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;⁵⁸
- (f) improving consumer credit information and reporting and regulation of credit bureaux;⁵⁹
- (g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;⁶⁰
- (h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements;⁶¹ and
- (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.⁶²

The judgment of *Firstrand Bank Ltd v Maleke*⁶³ are very unique and bold. It is of significant importance to portray how the purpose of the Act is protected and upheld by our courts. Claasen J makes the submission that the NCA is a new form of consumer protection in South Africa, for both rich and poor. It is clear from the learned judge's judgment that he has a well found understanding of the purpose of the Act. He probes into the preamble⁶⁴ and section 3 of the Act and comes to the conclusion

should exist between the interests of the consumer and the credit provider. See also *Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581 (SCA) par 2 and *Collett v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA) par 10, which highlights that the interests of all parties involved should be balanced and not just those of the consumer.

⁵⁵ S 3(e). In *Rossouw v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) par 57 the protection of consumers in terms of s 3 is reiterated and the obligation of a credit provider to inform consumers of their rights is put across. In terms of s 16(1)(a) of the NCA, it is the responsibility of the National Credit Regulator to educate the South African public and its consumers about the consumer-credit industry dynamics, see Kelly-Louw *The prevention and alienation of consumer over-indebtedness* (2008) 20 SA Merc LJ 200 at 210.)

⁵⁶ S 3(e)(i).

⁵⁷ S 3(e)(ii).

⁵⁸ S 3(e)(iii).

⁵⁹ S 3(f).

⁶⁰ S 3(g).

⁶¹ S 3(h). In the case of *Firstrand Bank Ltd v Olivier* 2009 (3) SA 353 (SE) par 18 the court confirms that the NCA is accessible to the general public in that they have the remedy to approach a debt counsellor for debt relief before a credit provider proceed to take enforcement steps against a consumer. Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 22.

⁶² S 3(i).

⁶³ 2010 (1) SA 143 (GSJ).

⁶⁴ Act 34 of 2005.

that a balance is struck to prevent unequal bargaining power between the inexperienced consumer and the prudent credit provider in order to limit financial harm. The decision of the Court is noteworthy, because it was decided that the application before the court should be dismissed due to the fact that the merits of the case was contrary to the aims and aspirations of the NCA.⁶⁵

Consumer protection is the primary purpose⁶⁶ of the NCA. The Act would never have come into operation without the need for protection of consumers in the credit market.⁶⁷ On the other side of the coin, it is also important to note that the interests of credit providers should also be taken into consideration.⁶⁸ Kelly-Louw⁶⁹ states that:

Although the Act, in essence, aims to improve the protection offered to the consumers of credit, it is not the Act's predominant purpose.

In *Standard Bank SA Ltd v Hales*⁷⁰ Gorven J concluded that:

Since section 3 lists a number of purposes, it cannot be that the protection of consumers is the sole purpose. Neither can it be said that this is the chief purpose. No prioritisation is provided. A number of the listed means by which the purpose are to be achieved include the protection of consumers but not all do so. Others include a balancing of rights and responsibility of consumers and credit providers as well as enforcement of debt. Whilst consumer protection is a clear objective, it is one factor, albeit a very important one, in the purpose of the Act.

In the notable judgment by Willis J in the case of *Firstrand Bank Ltd t/a First National Bank v Seyffert*⁷¹ it was stated that:

⁶⁵ Otto and Otto *The National Credit Act explained* (2016) 4th edition 8. In *Standard Bank of South Africa Ltd v Rockhill* 2010 (5) SA 252 (GSJ) par 13 the court held that neither the intention of the legislator nor the Acts objection would be compromised if more time is extended to a consumer as the primary purpose of the Act is to protect consumers. See also *Firstrand Bank Ltd v Mvelase* 2011 (1) SA 470 (KZP) par 56 where the court was of the view that the Act should be interpreted correctly to maintain the essential purpose, namely consumer protection. Kruger J stated in *Absa Technology Finance Solutions Ltd v Pabi's Guest House CC* 2011 (6) SA 606 (FB) par 17 that reduction of a consumer's rights has never been the intent of the legislature.

⁶⁶ Epstein AJ in *Standard Bank of South Africa Ltd v Rockhill* 2010 (5) SA 252 (GSJ) par 13 is of the view that consumer protection is the primary purpose of the NCA.

⁶⁷ Chapter 1 par 1.1. In *African Bank v Myambo* 2010 (6) SA 298 (GNP) 309 E-F Du Plessis J confirmed that the Act should also promote and advance the social and economic welfare of South Africans, aiming for a transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market.

⁶⁸ In *Rossouw v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) par 17 the Supreme Court of Appeal affirmed that consumer protection is the main objective of the NCA, but the Court also emphasises that the interest of credit providers cannot be ignored.

⁶⁹ Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 22.

⁷⁰ 2009 (3) SA 315 (D) par 13.

⁷¹ 2010 (6) SA 429 (GSJ) par 10.

It is clear from reading section 3 of the NCA, which sets out the purpose of the Act, that it pursues varied objective which must be held in balance. Certainly, the NCA is designed to protect consumers, but it was not intended to make of South Africa a 'debtors' paradise'. Indeed a 'debtors' paradise' will not last for long. Very soon, credit would not be available to ordinary people. Sight must not be lost of the fact that among the purposes of the Act is the 'development of a credit market that is accessible to all South Africans'.

Therefore, it could be argued that one of the NCA's purposes are that the rights of consumers and credit providers should be balanced.⁷²

2.3 The NCA's field of application

2.3.1 Introduction

A brief explanation of the Act's, field of application is necessary for a meaningful discussion of suretyship agreements in terms of the NCA.⁷³

2.3.2 General application

The general application of the NCA is governed by section 4 of the Act.⁷⁴ The NCA is awe-inspiring in comparison to its predecessors.⁷⁵ What sets the NCA apart from the Usury Act⁷⁶ and the Credit Agreements Act⁷⁷, is its sheer ability to avoid the financial limitations⁷⁸ of the Usury Act and the application of the Credit Agreements Act to only certain goods or services.⁷⁹

⁷² *Rossouw v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) par 17 confirms that the rights of consumers and credit providers should be balanced. In *Desert Star Trading 145 (Pty) Ltd v No 11 Flamboyant Edleen CC* 2011 (2) SA 266 (SCA) 268 Ponna JA held that the relationship between a credit grantor and consumer is regulated by means of credit legislation. Levenberg AJ held in *SA Taxi Securitisation (Pty) Ltd v Mbatha* 2011 (1) SA 310 (GSJ) par 32 that it is not the intention of the legislature to shift the balance of power by providing the consumer with all the power. There should always be a balance between the parties to insure an effective and just credit market.

⁷³ *Otto Die toepaslikheid (al dan nie) van die Nasionale Kredietwet op rentevrye kontrakte* (2012) *De Jure* 162. For a complete discussion on the field of application in terms of the NCA, see Scholtz *Guide to the National Credit Act* (2008) par 4.2. Otto and Otto *The National Credit Act explained* (2016) 4th edition chapter 3 and Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) chapter 2.

⁷⁴ Coetzee LLD Thesis University of Pretoria (2015) 190. Coetzee LLM Dissertation University of Pretoria (2009) 14.

⁷⁵ Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 28.

⁷⁶ Act 73 of 1968. Aucamp (2013) 76 *THRHR* 377.

⁷⁷ Act 75 of 1980. See Boraine and Renke *Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005* (part 1) (2007) *De Jure* 224.

⁷⁸ Van Heerden *The impact of the National Credit Act 34 of 2005 on standard acknowledgements of debt* (2011) 74 *THRHR* 644.

⁷⁹ Scholtz *Guide to the National Credit Act* (2008) par 4.1.

The NCA applies to consumer credit agreements between parties dealing at arm's length⁸⁰ and made within or having an effect within the Republic of South Africa, except if one of the exclusions from the provisions of the Act applies.⁸¹ Three general requirements exist before the Act can find application to a credit agreements.⁸² They can be defined as follow⁸³:

The agreement should (i) be classified as a credit agreement; (ii) the parties should be dealing at arm's length; and (iii) the agreement must have been concluded or at least have an effect within the Republic.

The discussion will now focus on credit agreements to which the NCA applies.

2.3.3 Credit agreements

It is imperative for this discussion to distinguish between the different types of credit agreements in order to ascertain if the Act applies to suretyship agreements.⁸⁴ The main reason why it is essential to investigate the types of credit agreements is because different rules apply to different credit agreements.⁸⁵

⁸⁰ S 4(1). In the case of *Hicklin v Secretary for Inland Revenue* 1980 (1) SA 481 (A) 481, the Court emphasises the importance to first establish if the transaction was concluded at arm's length. Also see the case of *Cooper v Merchant Trade Finance Limited* 2000 (3) SA 1009 (SCA) 1011, where the Court is of the opinion that it is a requirement for a debtor to exercise free choice in any transaction.

⁸¹ S 4(1). See also Renke and Coetzee (2014) 77 *THRHR* 567, Kelly-Louw (2012) 24 *SA Merc LJ* 300. Kelly-Louw (2008) 20 *SA Merc LJ* 208. Aucamp (2013) 76 *THRHR* 380 and Renke, Roestoff and Haupt *The National Credit Act: new parameters for the granting of credit in South Africa* (2007) *Obiter* 230. Van Heerden (2011) 74 *THRHR* 645, states that the NCA will not be applicable to agreements that were not concluded at arm's length. Coetzee LLM Dissertation University of Pretoria (2009) 10. In the case of *Philip Claasen t/a Mostly Media v Andre Delpont t/a AD Industrial Chemicals* (2009) JOL 23885 (WCC) 4, Moosa J stated that the question relating to whether parties are dealing at arm's length is a factual inquiry, that should be decided on the unique and individual circumstances of every party involved to an agreement. The relevant factors are the substance and nature of the agreement between the parties and emphasis should not be drawn to the relationship of the parties involved. See also *Zandberg v Van Zyl* 1910 AD 302 at 309, where the Court held that effect can only be given to the true transaction between parties and not what parties purport it to be. In *Stoop Kritiese evaluasie van die toepassings veld van die National Credit Act* (2008) 41 *De Jure* 352 he draws focus to the relationship and dependency between employer and employees. However, the view presented in *Leppan Do loans to employees fall within the ambit of the National Credit Act* (2007 August) *Without prejudice* 6 that the employer might extent a loan to its employee out of a sense of social responsibility the motivation would not be profit based. See also *Beets v Swanepoel* (2150/09) 2010 ZANHC 55 par 7.

⁸² S 4. See also Coetzee LLD Thesis University of Pretoria (2015) 190.

⁸³ See Coetzee LLD Thesis University of Pretoria (2015) 190.

⁸⁴ *Voltex (Pty) Ltd v SWP Projects CC* 2012 (6) SA 60 (GSJ) 62.

⁸⁵ *Otto The distinction between a credit facility and an incidental credit agreement in terms of the National Credit Act, and an afterthought on credit guarantees and registration* (2011) *TSAR* 547.

A credit agreement is the umbrella term for:⁸⁶

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

2.3.3.1 Credit facility

A credit facility, regardless of its form, excluding an agreement as defined in section 8(2) or section 4(6)(b), is described as where⁸⁷

- (a) a credit provider undertakes –
 - (i) to supply goods⁸⁸ or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the discretion of, the consumer; and
 - (ii) either to –
 - (aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or
 - (bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and
- (b) any charge, fee or interest is payable to the credit provider in respect of –
 - (i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or
 - (ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided in the agreement.

2.3.3.2 Credit transaction

A credit transaction is defined in section 8(4) of the Act as consisting of the following eight categories:⁸⁹

- (a) pawn transaction;
- (b) discount transaction;
- (c) incidental credit agreement;

⁸⁶ Otto and Otto *The National Credit Act explained* (2016) 4th edition 21.

⁸⁷ S 8(3). Otto (2012) *De Jure* 163. Renke, Roestoff and Haupt (2007) *Obiter* 231. Aucamp (2013) 76 *THRHR* 381. See also *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC 2010 (6) SA 173 (KZD) 179B*, where the court held that credit cards is an example of a credit facility. In *Bridgeway v Markam* 2008 (6) SA 123 (W) the Court was of the opinion that a discount sale is not a credit facility as envisaged by the Act. See also Du Pisane *A critical analysis of the transactions to which the National Credit Act 34 of 2005 applies* LLM Dissertation University of Pretoria (2011) 3–14.

⁸⁸ Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005* LLM Thesis 386.

⁸⁹ S 8(4). See also Van Heerden (2011) 74 *THRHR* 647–648 and Coetzee LLM Dissertation University of Pretoria (2009) 11–13.

- (d) instalment agreement;⁹⁰
- (e) mortgage agreement;
- (f) secured loan agreement;
- (g) lease agreement; and
- (h) an agreement where credit is granted and a fee, charge or interest is payable.⁹¹

2.3.3.3 Credit guarantee

Section 8(5) of the NCA sets out to describe a credit guarantee as follow:⁹²

An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.

Satchwell J, in the case of *Firstrand Bank Ltd v Carl Beck Estate*⁹³ was of the view that a surety's obligation did fall within the definition of a credit agreement and more specifically a credit guarantee.⁹⁴

2.3.3.4 Combination of transactions

A combination of transactions consists of any credit facility, credit transaction or credit guarantees to which the Act applies. Credit card payments in instalments are an example of a combination of transactions, where payments are made by means of a credit card over a period of time "on budget".⁹⁵

2.3.3.5 Small, intermediate and large agreements

It needs to be pointed out that every credit agreement is characterised as either a small, intermediate or a large agreement.

⁹⁰ See Renke and Pillay *The National Credit Act 34 of 2005: the passing of ownership of the thing sold in terms of an instalment agreement* 2008 (71) THRHR 641.

⁹¹ In *Voltex (Pty) Ltd v Chenleza* CC 2010 (5) SA 267 (KZP) 267-274, the second and third defendants undertook to satisfy the obligations of the first defendant. However, the court concluded that the sale agreements were not a credit facility or credit transaction to which the Act applies.

⁹² S 8(5). See also Renke and Coetzee (2014) 77 THRHR 568 and Otto and Otto *The National Credit Act explained* (2016) 4th edition 32.

⁹³ 2009 (3) SA 384 (T) 390.

⁹⁴ S 8(1)(c) states that a credit agreement for the purpose of the Act is a credit guarantee as described in S 8(5).

⁹⁵ Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 89.

Also, the threshold for small,⁹⁶ an intermediate⁹⁷ or a large agreements⁹⁸ are laid down by regulation.⁹⁹

According to Renke and Coetzee:¹⁰⁰

The purpose of this classification is to facilitate effective regulation of the credit industry. The classification has an influence on the Act's field of application in that all the provisions of the Act do not apply to all-sized agreements. The classification also has an effect on the Act's field of application regarding the exceptions thereto.

It is important to note that not all credit agreements are regulated by the NCA as some are explicitly excluded from the Act's application.¹⁰¹ Therefore, it is imperative to examine the exempt agreements, as will be done in the discussion below.

2.4 Exempt agreements and limited application of the NCA

2.4.1 Exempt agreements

Not all credit agreements are governed by the NCA. As stated above, certain agreements are specifically excluded from the ambit of the Act. For instance, the Act does not apply under the following circumstances:¹⁰²

- (a) Where the consumer is a juristic person with an asset value or annual turnover that equals or exceeds R1 million.¹⁰³
- (b) Large agreements concluded with juristic consumers. A large agreement consists of a mortgage agreement, notwithstanding the amount of the property and credit transactions with an outstanding balance equal to or exceeding R1 million.¹⁰⁴

⁹⁶ S 9(2). A pawn transaction, credit facility or a credit transaction, where the credit limit or principal debt do not exceed R15,000.00 is considered to be a small credit agreement. Mortgage agreement and a credit guarantee thereto, is specifically excluded.

⁹⁷ S 9(3). A credit facility or a credit transaction, where the credit limit or principal debt falls between R15,000 and R250,000 is considered to be an intermediate credit agreement. A pawn transaction, mortgage agreement and credit guarantee is specifically excluded.

⁹⁸ S 9(4). A mortgage agreement or a credit transaction, where the principal debt equals or exceeds R500,000 Pawn transactions a credit guarantees are excluded.

⁹⁹ See also Scholtz *Guide to the National Credit Act* (2008) par 8.7.

¹⁰⁰ Renke and Coetzee (2014) 77 *THRHR* 570. See also Renke, Roestoff and Haupt (2007) *Obiter* 236.

¹⁰¹ Coetzee LLM Dissertation University of Pretoria (2009) 16.

¹⁰² Kelly-Louw (2012) 24 *SA Merc LJ* 302. Van Heerden (2011) 74 *THRHR* 650. Renke, Roestoff and Haupt (2007) *Obiter* 236. Aucamp (2013) 76 *THRHR* 381. Renke and Coetzee (2014) 77 *THRHR* 570. Otto and Otto *The National Credit Act explained* (2016) 4th edition 34.

¹⁰³ S 4(1)(a)(i). Also see Otto and Otto *The National Credit Act explained* (2016) 4th edition 34.

¹⁰⁴ S 4(1)(b).

- (c) Where the State or an organ of state consumer.¹⁰⁵
- (d) Where the Reserve Bank acts as a credit provider.¹⁰⁶
- (e) Where credit providers are located outside of South Africa with Ministerial approval.¹⁰⁷
- (f) Insurance policies.¹⁰⁸
- (g) Lease of immovable property.¹⁰⁹
- (h) *Stokvel* transactions and those of its members.¹¹⁰
- (i) A dishonoured cheque presented for payment for goods and services or refusal by a third party to accept a credit facility in the form of a credit card account.¹¹¹
- (j) No credit agreement is concluded between the user of a credit facility and the person selling goods or services.¹¹²
- (k) The supplier of a utility or continuous service. Where payment is deferred a periodic statement of account is presented to the consumer on the condition that no interest is levied should payment be made timeously.¹¹³

In conclusion, it is clear that the NCA applies to all credit agreements concluded at arm's length, except for the specific exclusions as set out in the Act.¹¹⁴ The limited application of the NCA will now be considered.

2.4.2 Limited application

The NCA awards limited application to credit guarantees, incidental and pre-existing credit agreement as well as agreements concluded by juristic persons acting in the capacity of a consumer.¹¹⁵

¹⁰⁵ S 4(1)(a)(ii) and (iii). Also see Otto and Otto *The National Credit Act explained* (2016) 4th edition 34.

¹⁰⁶ S 4(1)(c). See Scholtz *Guide to the National Credit Act* (2008) par 4.3.

¹⁰⁷ S 4(1)(d).

¹⁰⁸ S 8(2)(a).

¹⁰⁹ S 8(2)(b). See Otto and Otto *The National Credit Act explained* (2016) 4th edition 36. In the case of *Pareto Ltd v Kalnisha Sigaban t/a KS Flowers N More* unreported case 3069/09 (GSJ) par 13 Mathopo J takes on the view of Professor Otto in his book "The National Credit Act Explained", that s 8(2) clearly states that rental claims are do not form part of immovable property.

¹¹⁰ S 8(2)(c).

¹¹¹ S 4(5).

¹¹² See Scholtz *Guide to the National Credit Act* (2008) par 4.3.

¹¹³ S 4(6).

¹¹⁴ See Renke, Roestoff and Haupt (2007) *Obiter* 238.

¹¹⁵ See Coetzee LLM Dissertation University of Pretoria (2009) 21.

In terms of section 6, the NCA's application is limited when the consumer is a juristic person and the following provisions of the Act do not apply to such a credit agreement:¹¹⁶

- (a) Chapter 4¹¹⁷ – Parts C¹¹⁸ and D;¹¹⁹
- (b) Chapter 5¹²⁰ – Part A¹²¹ – section 89(2)(b);¹²²
- (c) Chapter 5 – Part A – section 90(2)(o);¹²³ and
- (d) Chapter 5 – Part C.¹²⁴

The Act's limited application to credit guarantees is set out in section 4(2)(c) of the NCA, and it determines that¹²⁵

[t]his Act applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted.

In essence, a credit guarantee granted under a credit agreement that falls outside the scope of the Act's application will not be governed by the NCA.¹²⁶ Therefore, the surety will not receive any protection as provided for by the provisions of the NCA,¹²⁷ because credit guarantees follows the principal debt.¹²⁸ Also, where the Act does apply to the principle agreement but only to a limited extend, the surety will also only receive limited protection.

The consequences of limited application of the Act is that credit providers do not have to abide by all the vigorous requirements brought forth by the NCA.¹²⁹ Provisions such as over-indebtedness and reckless credit lending is amongst many of the requirements that does not apply to limited applications, such as credit guarantees in some instances.¹³⁰

¹¹⁶ See Van Heerden (2011) 74 *THRHR* 651.

¹¹⁷ Consumer credit policy.

¹¹⁸ Credit marketing practices.

¹¹⁹ Over-indebtedness and reckless credit.

¹²⁰ Consumer credit agreements.

¹²¹ Unlawful agreements and provisions.

¹²² Unlawful credit agreements.

¹²³ Unlawful provisions of credit agreements.

¹²⁴ Consumer's liability, interest, charges and fees.

¹²⁵ See Kelly-Louw (2012) 24 *SA Merc LJ* 308 and Renke and Coetzee (2014) 77 *THRHR* 569.

¹²⁶ See Van Heerden (2011) 74 *THRHR* 651.

¹²⁷ *Ibid.*

¹²⁸ See Coetzee LLM Dissertation University of Pretoria (2009) 21.

¹²⁹ See Otto and Otto *The National Credit Act explained* (2016) 4th edition 37.

¹³⁰ See Scholtz *Guide to the National Credit Act* (2008) par 4.4.2.

2.5 Conclusion

The purposes of the Act are clearly set out in the preamble and section 3 of the NCA.¹³¹ The Act is a piece of consumer legislation that introduces new forms of consumer protection for debtors in South Africa, both rich and poor.¹³² As stated by Claasen J in the case of *Firstrand Bank Ltd v Maleke*¹³³ it is the Act's intention to level the playing field between the inexperienced consumer and knowledgeable credit provider,¹³⁴ with the aim to limit financial harm to the consumer when entering into a credit agreement.¹³⁵

The NCA applies to consumer credit agreements concluded between parties dealing at arm's length.¹³⁶ In certain instances the Act's applications to credit agreements to which the Act applies may be specifically excluded or limited.¹³⁷ The Act's limited or excluded application to credit agreements is important because it would ultimately determine the extent of protection that consumers would be entitled to.¹³⁸ A credit guarantee is one of the main types of credit agreement to which the NCA applies.¹³⁹ A credit guarantee is described as an agreement where one person undertakes to satisfy upon demand any obligations of another consumer in terms of a credit facility or a credit transaction applicable to the Act.¹⁴⁰ The NCA will only apply to credit guarantees to the extent that it applies to the underlying credit facility or credit transaction in terms of which the credit guarantee is granted.¹⁴¹ Thus, a surety to the principal debt of a credit facility or credit transaction falling outside the application of the NCA will not be able to rely on the provisions of the NCA for protection.¹⁴² Similarly, where the Act finds limited application to the principal credit facility or credit transaction, the surety also only enjoys limited protection.

¹³¹ Par 2.2.

¹³² *Ibid.*

¹³³ 2010 (1) SA 143 (GSJ).

¹³⁴ Par 2.2.

¹³⁵ *Ibid.*

¹³⁶ Par 2.3.2.

¹³⁷ Par 2.4.

¹³⁸ *Ibid.*

¹³⁹ Par 2.3.3.3.

¹⁴⁰ *Ibid.*

¹⁴¹ Par 2.4.2.

¹⁴² Par 2.4.1.

The applicability and purpose of the Act has been investigated, as well as the concept of a credit guarantee in terms of the NCA. Chapter 3 will focus on the common-law contract of suretyship.

CHAPTER 3: DEFINITION AND NATURE OF SURETYSHIP

He who puts up security for another will surely suffer, but whoever refuses to strike hands in pledge is safe.¹⁴³

3.1 Introduction

The South African law of sureties developed from ancient Roman law.¹⁴⁴ The Roman law principles fundamentally defined suretyship agreements as we know them in our modern law.¹⁴⁵ Therefore, those profoundly Roman principles remain the foundation of sureties in our law today.¹⁴⁶ Roman-Dutch law further had a great impact on the development of the law of suretyships.¹⁴⁷ According to Forsyth and Pretorius “The Roman roots of the modern law¹⁴⁸ are gnarled and complex”, that is why it is important to investigate the historic origin of sureties¹⁴⁹ in the Roman times.¹⁵⁰ In this chapter, a critical and detailed analysis will be done to determine the definition and nature of suretyship agreements. It is important to make this determination in later chapters to determine the extent to which the National Credit Act’s¹⁵¹ definition of a ‘credit guarantee’ overlaps with the common law surety agreement.

3.2 Roman origins of suretyship

The notion that one person is responsible for the obligations of another derived from the complex *legis action* procedure that led to the inauguration of the three ancient forms of suretyships, namely, *vindex*, *vades* and *praedes*.¹⁵² They are described as follows:

- (a) When summoned before a *praetor*¹⁵³ the *vindex* could attend the proceedings on behalf of the defendant, thus relieving him of his obligation to

¹⁴³ *Proverbs* 11:15.

¹⁴⁴ Forsyth and Pretorius *Caney’s the law of suretyship* (2010) 6th edition 3.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ In the case of *Rand Bank Ltd v De Jager* 1982 (3) SA 418 (C) 421–423 the interpretation of Roman law in conjunction with the modern suretyship is discussed.

¹⁴⁹ See *Otto Verskuijle borgstellings in standaardkontrakte en iustus error* 2005 TSAR 805, where signatories of suretyship agreements are cautioned to be wary of signing as a surety.

¹⁵⁰ Forsyth and Pretorius *Caney’s the law of suretyship* (2010) 6th edition 4. For a historical discussion of the law of suretyship, see *Millman v Masterbond Participation Bond Trust* 1997 (1) SA 113 (W) 116–118.

¹⁵¹ 34 of 2005 (hereafter “the NCA” or “the Act”).

¹⁵² *Ibid.*

¹⁵³ A title granted by the government of ancient Rome to men acting in one of two official capacities, namely one of the commander of an army, or an elected magistrate.

face his opponent. The *vindex* merely stood surety for the appearance of the defendant.¹⁵⁴

- (b) Where proceedings before the *praetor* were adjourned (postponed) the *vades* promised to pay a penalty in the event that the defendant failed to appear on the date to which the proceedings was postponed.¹⁵⁵
- (c) *Praedes* was a surety of ancient date.¹⁵⁶ It entailed that where more than one party laid claim to an object, the object or a symbol thereof was brought before the *praetor*.¹⁵⁷ The *praetor* would then instruct both parties to release the object and each party had to swear a religious oath that the object was his.¹⁵⁸ The oath was secured by an undertaking to pay a fixed amount of money in the event that the judgment was unfavourable.¹⁵⁹ Consequently, the matter was sent to a judge to determine which of the oaths was justified.¹⁶⁰ The interim possession of the object was determined by the *praetor* pending the final judgment in the case.¹⁶¹

Forsyth and Pretorius explain the origin of modern surety as a concept that developed from *stipulation*. They provide as follow:¹⁶²

The surety was thus born as a hostage and perhaps *stipulatio* itself was born of the composition agreement. Certainly the earliest form of *stipulatio* was 'sponsio' (the stipulator asked the promissor 'Do you undertake ...?' 'spondes' and the promissor replied 'I do undertake ...' *spondeo*). And the term 'sponsor' from the earliest times down even to the latter days of Roman law meant 'surety'. There are therefore many who see the birth of *stipulatio* linked with early suretyship.

The Roman law evolved from the concept of only stepping into the shoes of the defendant when sued to an acknowledgement that a surety could by means of

¹⁵⁴ Forsyth and Pretorius *Caney's the law of suretyship* (2010) 6th edition 4.

¹⁵⁵ This is not really a form of suretyship in modern law, but the *vades* substitution capacity of the principal debtor was a step towards the birth of the true suretyship as defined today; see Forsyth and Pretorius *Caney's the law of suretyship* (2010) 6th edition 4.

¹⁵⁶ *Idem* 5.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Idem* 6.

*stipulatio*¹⁶³ aid and abet a debtor to pay his obligations towards his creditors.¹⁶⁴ The above emanated the idea of suretyship as accessory to the principal obligation.¹⁶⁵

Securing debts by way of a stipulatory suretyship was of the utmost importance and the practise had become a legal and social custom at the end of the Republican period.¹⁶⁶ The three kinds of stipulatory suretyships were *sponsio*, *fidepromissio* and *fideiussio*. These may be explained as follow:¹⁶⁷

- (a) *Sponsio* was one of the oldest forms of suretyship and could only be entered into between Roman citizens.¹⁶⁸ In terms of *sponsio*, the surety took responsibility for the principal debtor's obligation by entering into a *stipulatio* with the creditor. However, this form of an undertaking could only secure debts of a civil nature.¹⁶⁹
- (b) *Fidepromissio* was a form of suretyship that was not limited to Roman citizens. In his respect, the suretyship was concluded between the surety and the creditor by way of *stipulatio* (question and corresponding answer).¹⁷⁰ Like the *sponsio*, only civil principal obligations could be secured.¹⁷¹
- (c) *Fideiussio* was a new form of surety with the main objective to sidestep the restrictions of the past.¹⁷² Classical jurists acknowledged that an undertaking of *fideiussio* could secure all kinds of principal obligations, civil or natural.¹⁷³ The classical jurists concluded that¹⁷⁴

[i]t could validly be undertaken after and even before the principal obligation was undertaken. It had, however, to be undertaken to the

¹⁶³ Formal Roman contract that was concluded orally by question and answer.

¹⁶⁴ Forsyth and Pretorius *Caney's the law of suretyship* (2010) 6th edition 7.

¹⁶⁵ *Ibid.*

¹⁶⁶ The era of ancient Roman civilization also known as the Roman Republic, which stretched from 509 BC to 27 BC with the establishment of the Roman Empire; Forsyth and Pretorius *Caney's the law of suretyship* (2010) 6th edition 7.

¹⁶⁷ *Ibid.*

¹⁶⁸ The formal terms are known as 'quirital law', meaning 'law of citizens'. Regulating mutual relations amongst the Romans themselves; See Budziszewski *Commentary on Thomas Aquina's treatise on law* (2014) 334.

¹⁶⁹ Forsyth and Pretorius *Caney's the law of suretyship* (2010) 6th edition 7.

¹⁷⁰ *Idem* 8. This form of surety could be entered into between all parties and was not restricted to Roman citizens, unlike the *sponsio*.

¹⁷¹ *Ibid.*

¹⁷² Forsyth and Pretorius *Caney's the law of suretyship* (2010) 6th edition 11. The restrictions were as follow:

This restrictive legislation, designed to lighten the burden cast upon sureties, overshot its mark by reducing too greatly the value of the surety to the creditor. He could only proceed against each surety for his proportionate share, even though the value of other sureties might prove illusory.

¹⁷³ *Idem* 12.

¹⁷⁴ *Ibid.*

same creditor, and had to relate to the very obligation undertaken by the principal debtor.

In light of the *fideiussio*, a surety's obligations in relation to the principal debt are accessory in nature. Therefore, the obligations of a surety could never supersede that of the principal debtor, since a surety's obligations was intended to only be accessory and not principal.¹⁷⁵ This means that a surety could not be afforded with more obligations than the principal obligation, though it could embrace less.¹⁷⁶ In the event that a surety receive more obligations than the principal obligation, the suretyship loses its accessory nature.¹⁷⁷

The discussion now turns to the modern day common law definition of suretyships.

3.3 Modern day contract of suretyship defined

The old authorities such as the early and classical jurists did not define the contract of suretyship.¹⁷⁸ Forsyth and Pretorius state that "the old authorities did not distinguish themselves in defining the contract of suretyship".¹⁷⁹ However, the Roman-Dutch jurists did highlight the key components of a suretyship as "an accessory obligation, ie that a valid principal obligation is essential for suretyship; the suretyship has no independent existence".¹⁸⁰

In the case of *Corrans v Transvaal Government and Coull's Trustee*¹⁸¹ Innes CJ considered the definitions of the old authorities.¹⁸² The court considered the position of sureties, but pointed out that:¹⁸³

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ Stoop and Kelly-Louw *The National Credit Act regarding suretyships and reckless lending* 2011 14(2) *PELJ* 71. See also Forsyth and Pretorius *Caney's the law of suretyship* (2010) 6th edition 27.

¹⁷⁹ Forsyth and Pretorius *Caney's the law of suretyship* (2010) 6th edition 27.

¹⁸⁰ *Ibid.*

¹⁸¹ 1909 TS 606 612–613. See also Forsyth and Pretorius *Caney's the law of suretyship* (2016) 6th edition 27 and Stoop and Kelly-Louw 2011 14(2) *PELJ* 72. In the case of *Hutchinson v Hylton Holdings* 1993 (2) SA 405 (T) 411–412 the court endorsed the definition of Innes CJ.

¹⁸² These were explained in the case of *Corrans v Transvaal Government and Coull's Trustee* 1909 TS 606 612. The judgment referred to Voet in "that is, he is one who takes upon himself the obligation of another, that other still remain liable" and Pothier "the engagement of a surety is a contract, by which a person obliges himself, on behalf of a debtor to a creditor, for the payment of the whole or part of what is due from such debtor, and by way of accession to his obligation".

¹⁸³ *Corrans v Transvaal Government and Coull's Trustee* 1909 TS 606 612.

Upon this point no direct authority has been quoted, but I think we can determine it by applying the general principles of our law.

Innes CJ stated that he understands the authorities to result in the following definition of a suretyship¹⁸⁴

[T]hat the undertaking of the surety is accessory to the main contract, the liability under which he does not disturb, but is an undertaking that the obligation of the principal debtor will be discharged, and, if not, that the creditor will be indemnified.

The lack of a proper legislative definition of the suretyship has resulted in controversy amongst various South African jurists.¹⁸⁵ Based on the above, Forsyth and Pretorius put forward this definition of suretyship:¹⁸⁶

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

The definition of Forsyth and Pretorius has received approval by the Appellate Division on three occasions.¹⁸⁷

3.4 Suretyship and the contract of guarantee

3.4.1 General

According to Forsyth and Pretorius the concepts of “suretyship” and “guarantee” are not interchangeable.¹⁸⁸ However, in South African law, both legal writers and the courts have incorrectly used the words “guarantee” and “suretyship” as synonyms of one another.¹⁸⁹ Unfortunately, this practice is entrenched in the South African law

¹⁸⁴ *Ibid.*

¹⁸⁵ Stoop and Kelly-Louw 2011 14(2) *PELJ* 72.

¹⁸⁶ Forsyth and Pretorius *Caney's the law of suretyship* (2010) 6th edition 28–29. Stoop and Kelly-Louw states that the definition by Forsyth and Pretorius is a well-drafted definition of the suretyship; Stoop and Kelly-Louw 2011 14(2) *PELJ* 72.

¹⁸⁷ In *Trust Bank of Africa Ltd v Frysich* 1977 (3) SA 562 (A) 584, *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) 11 and *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A) 473. See also *Basil Read (Pty) Ltd v Beta Hotels (Pty) Ltd* 2001 (2) SA 760 (C) 766. It is important to note that the word “primarily” and “secondarily” appeared in the version of the definition at that point.

¹⁸⁸ Forsyth and Pretorius *Caney's the law of suretyship* (2010) 6th edition 28.

¹⁸⁹ In the case of *Hutchinson v Hylton Holdings* 1993 (2) SA 405 (T) 410–411 Van Dijkhorst J said that the word guarantee and suretyship are frequently synonymously used together. However, the word guarantee can have a number of denotations. Van Dijkhorst J states that “The meaning of that word when used in a specific document is dependent upon the context in which it is used”; See *Mouton v Die Mynwerkersunie* 1977 (1) SA

reports and will consequently be difficult to eliminate.¹⁹⁰ Therefore, it is of the utmost importance to determine the meaning and contexts of the words “suretyship” and “guarantee” when used in a contract, as there is a distinction between the two.¹⁹¹

The general term “guarantee” consists of two very different devices, namely:¹⁹²

- (a) The primary guarantee (ie, the demand guarantee, which is also known as the performance guarantee/bond or the independent guarantee) or letter of credit, and
- (b) The secondary (or accessory) guarantee (ie, the suretyship guarantee or the traditional guarantee).

It is important for the discussion below to distinguish whether a contract is an accessory (secondary) guarantee (eg, suretyship) or a primary guarantee (eg, a demand guarantee or letter of credit).¹⁹³

3.4.2 Primary guarantee¹⁹⁴ (demand guarantee or commercial letters of credit)

Demand guarantees, for instance commercial letters of credit, have a primary duty that is not material nor dependent on the breach or failure of the primary debtor to a transaction.¹⁹⁵

Kelly-Louw describes a demand guarantee as follows:¹⁹⁶

A ‘demand guarantee’ is generally a short and simple instrument issued by a bank (or other financial institution) under which the obligation to pay a stated or maximum sum of money arises merely upon the making of a demand for payment in the prescribed form and sometimes also the presentation of documents as stipulated in the guarantee within the period of validity of the guarantee. Many demand guarantees are payable on first demand without any

119 (A) at 136B, *Hazis v Transvaal and Delagoa Bay Investment Co Ltd* 1939 AD 372 at 384 and *Hermes Ship Chandlers (Pty) Ltd v Caltex Oil (SA) Ltd* 1973 (3) SA 263 (D) 266–267. In the case of *Walker’s Fruit Farms Ltd v Sumner* 1930 TPD 394 at 398 Greenberg J viewed a guarantee as an assurance to receive something. In *Dempster v Addington Football Club (Pty) Ltd* 1967 (3) SA 262 (D) at 267 the view was expressed that it means ‘pay’.

¹⁹⁰ Forsyth and Pretorius *Caney’s the law of suretyship* (2010) 6th edition 28. See also Stoop and Kelly-Louw 2011 14(2) PELJ 70.

¹⁹¹ See *List v Jungers* 1979 (3) SA 106 (A) 110 where the court held that a suretyship agreement is an accessory obligation, if the principal debtor fails to pay the surety will become bound to pay. A primary undertaking to pay is distinct from the accessory obligation of the suretyship agreement.

¹⁹² Stoop and Kelly-Louw 2011 14(2) PELJ 70.

¹⁹³ *Idem* 71.

¹⁹⁴ Stoop and Kelly-Louw 2011 14(2) PELJ 70 states that

[t]he primary guarantee (ie, the demand guarantee, which is also known as the performance guarantee/bond or independent guarantee) or letter of credit.

¹⁹⁵ *Idem* 75.

¹⁹⁶ Kelly-Louw *Selective legal aspects of bank demand guarantees* LLD Thesis UNISA (2008) 17.

additional documents, which reflects their origin in replacing cash deposits, although increasingly guarantees require at least a statement indicating that the principal is in breach. Therefore, a demand guarantee is like a substitute for cash and must be honoured on presentation of a written demand that complies with the provisions of the guarantee. Demand guarantees are particularly common in construction and project contracts, and are frequently required by Middle Eastern customers.

The commercial letter of credit¹⁹⁷ is defined by Kelly-Louw as:¹⁹⁸

It is said that the demand guarantee (performance guarantee) is on a similar footing to a commercial letter of credit. In *Edward Owen Engineering Ltd v Barclays Bank International Ltd*¹⁹⁹ Lord Denning MR stated the following:²⁰⁰

A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit.

Therefore, the obligations and performance of the guarantor are not dependent on the underlying contract, nor is it related to any form of default.²⁰¹

3.4.3 Accessory guarantee (suretyship guarantee)²⁰²

According to Forsyth and Pretorius the accessory nature of the surety's obligations are as follow:²⁰³

It means simply that for there to be a valid suretyship there has to be a valid principal obligation, between the debtor and the creditor. The suretyship is said to be accessory to the transaction which creates the obligation of the principal debtor. Put another way, every suretyship is conditional upon the existence of a principal obligation.

¹⁹⁷ Stoop and Kelly-Louw 2011 14(2) *PELJ* 71 is of the view that:

the commercial letter of credit (where the undertaking to pay is primary both in form and intent), in the sense that, it is secondary in intent but primary in form (ie, the guarantor has a secondary intent to pay, but the payment obligation is primary in form).

¹⁹⁸ Kelly-Louw LLD Thesis UNISA (2008) 73.

¹⁹⁹ 1978 QB 159 (CA) 169.

²⁰⁰ *Ibid.*

²⁰¹ Stoop and Kelly-Louw 2011 14(2) *PELJ* 76. See also Kelly-Louw *The documentary nature of demand guarantees and the doctrine of strict compliance* (Part 1) (2009) 306 *SA Merc JL* 310.

²⁰² Stoop and Kelly-Louw 2011 14(2) *PELJ* 69 are of the view that

[i]t may be argued that the definition of a credit guarantee is not reconcilable with the definition and characteristics of a common-law suretyship (ie an accessory guarantee).

²⁰³ Forsyth and Pretorius *Caney's the law of suretyship* (2010) 6th edition 29-30.

In the absence of a valid principal obligation the surety is not bound, Forsyth and Pretorius are of the view that the surety can raise any defence which the principal debtor can raise. They provide that²⁰⁴

[t]he surety only takes upon himself the risk of a breach of contract by the principal debtor for the surety is not liable for any non-performance based upon the invalidity or extinction of the obligation in question. This marries well with the idea of a surety as one who promises that the principal debtor will perform, not simply one who will indemnify the creditor for losses caused by non-performance.

Therefore, it is clear from the above that there is a fundamental difference between an accessory guarantee and primary guarantee. The major differences being that the latter is not dependant on the underlying contract and that the accessory guarantee's liability is secondary, directly contradicting the primary nature of the primary guarantee.²⁰⁵

Before the implementation of the General Law Amendment Act²⁰⁶ the common law did not prescribe any formalities for entering into valid suretyship agreement.²⁰⁷ However, with the commencement on 22 June 1956 of the General Law Amendment Act, section 6 of this Act introduced the requirement that suretyship agreements should be expressed in a written document, which should be signed by or on behalf of the surety. The failure to comply with this requirement renders the contract void.²⁰⁸

3.5 Conclusion

The purpose of this chapter is to provide a basic layout of the origins of suretyships and attempt to define and examine the definition and nature of both the suretyship and guarantee contract.

²⁰⁴ *Ibid.*

²⁰⁵ Stoop and Kelly-Louw 2011 14(2) *PELJ* 77.

²⁰⁶ Act 50 of 1956, as amended (retrospectively to 22 June 1956) by section 34 of Act 80 of 1964, (hereafter "the General Law Amendment Act").

²⁰⁷ Forsyth and Pretorius *Caney's the law of suretyship* (2010) 6th edition 67.

²⁰⁸ Dos Santos *The lazy man's suretyship: Are unlimited debts of limited application?* (2015) September *De Rebus* 26. See also *Fourelamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) 345, *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) 11 and *Nedbank Ltd v Wizard Holdings (Pty) Ltd* 2010 (5) SA 523 (GSJ) 527. See Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 88.

The contract of suretyship and the principles of the modern South African law of sureties substantially developed from Roman law.²⁰⁹ These profoundly Roman concepts still provide a firm foundation in the judgments of the leading South African cases, such as *Corrans v Transvaal Government and Coull's Trustee*,²¹⁰ *Rand Bank Ltd v De Jager*²¹¹ and *Millman v Masterbond Participation Bond Trust*,²¹² relating to the consideration of the old authorities and attempting to define a suretyship.²¹³ Innes CJ in the case of *Corrans v Transvaal Government and Coull's Trustee*,²¹⁴ considered the position of sureties.²¹⁵ The court rightfully points out that no authority at the time has been quoted.²¹⁶ Furthermore, Forsyth and Pretorius make the submission that the old authorities did not distinguish themselves in defining the contract of suretyship.²¹⁷ However, legal writes and courts alike have endeavoured to define a suretyship contract.²¹⁸ The leading definition of a suretyship was given by Forsyth and Pretorius where they stated that a contract of suretyship is accessory in nature and that the surety undertake to the creditor of the principal debtor that the principal debtor will perform his obligations towards the creditor, failing which the surety will perform.²¹⁹ This definition was incorporated into our law by the Supreme Court of Appeal's decision in *Trust Bank of Africa Ltd v Frysch*,²²⁰ *Sapirstein v Anglo African Shipping Co (SA) Ltd*²²¹ and *Nedbank Ltd v Van Zyl*.²²²

It is apparent from the discussion above that the difference between an accessory guarantee and primary guarantee is vast.²²³ The liability of a surety of an accessory guarantee (suretyship agreement) is secondary,²²⁴ whilst the liability of the guarantor of a primary guarantee (demand guarantee or letter of credit) is primary.²²⁵ To

²⁰⁹ Par 3.1.

²¹⁰ 1909 TS 606 612.

²¹¹ 1982 (3) SA 418 (C). See par 3.1.

²¹² 1997 (1) SA 113 (W). See par 3.1.

²¹³ Par 3.3.

²¹⁴ 1909 TS 606 612.

²¹⁵ Par 3.3.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ 1977 (3) SA 562 (A) 584. See par 3.3.

²²¹ 1978 (4) SA 1 (A) 11. See par 3.3.

²²² 1990 (2) SA 469 (A) 473. See par 3.3.

²²³ Par 3.4.3.

²²⁴ *Ibid.*

²²⁵ Par 3.4.2.

conclude, it is submitted that a surety's obligations in terms of an accessory guarantee is directly subjected to the principle agreement and performance dependent on default by the principal debtor.²²⁶ The statement above is not applicable to the guarantor of a primary guarantee.²²⁷ Finally, before the commencement of section 6 of the General Law of Amendment Act,²²⁸ common law regulated suretyship agreements *in toto* and therefore a suretyship could be concluded orally.²²⁹ However, section 6 determine specific formalities that a contract of suretyship must adhere to for the suretyship to be valid, namely a written document signed by or on behalf of the surety.²³⁰

One of the most important questions that needs to be addressed in this dissertation, is whether a contract of suretyship falls within the definition of a credit agreement in terms of the NCA. This is as one of the types of credit agreements in terms of the NCA is a 'credit guarantee'. A conclusion is simply drawn by some South African authors²³¹ on the NCA, without any critical or detailed analysis, that the suretyship meets the benchmark of being a credit agreement. Their argument is based on the resolution that a credit guarantee is acknowledged in the NCA under the definition of a credit agreement, assuming that a suretyship is a credit guarantee. It is submitted that the answer to the above is not that simple. The chapter that follows will attempt to address this issue.

²²⁶ Par 3.4.3.

²²⁷ Par 3.4.2.

²²⁸ Act 50 of 1956.

²²⁹ Par 3.4.3.

²³⁰ *Ibid.*

²³¹ Mostert (2009) June *De Rebus* 53 is of the view that:

Some South African authors on the NCA accept that the suretyship meets the criteria of being a credit agreement, without any critical or detailed analysis (see JW Scholtz et al *Guide to the National Credit Act* (2008 LexisNexis, issue 1 at para 8.2.4) and also Stephen Logan *The National Credit Act 34 of 2005 A Basic Guide for Attorneys* (Electronic publication, LSSA, Jan 2008 at 33)).

CHAPTER 4: SURETYSHIP IN TERMS OF THE NCA

4.1 Introduction

It may be argued that the definition and characteristics of a suretyship are not compatible with the definition of a credit guarantee in terms of the National Credit Act.²³² In fact, Mostert draws the conclusion that the NCA does not apply to suretyship agreements at all.²³³

In the conclusion to the previous chapter the question of whether a suretyship agreement falls within the definition of a credit agreement and thus under the scope and application of the Act is raised. This is as, amongst others, Mostert is of the opinion that²³⁴

[s]ome South African authors on the NCA accept that the suretyship meets the criteria of being a credit agreement, without any critical or detailed analysis.

In the discussion below, a suretyship, as is contemplated in chapter three, is compared to and analysed within the auspices of the definition of a credit agreement.²³⁵ Consequently, the ultimate aim of this discussion is to determine whether a suretyship may be classified as, what the NCA refers to, a credit guarantee.²³⁶ An attempt is made to address and analyse the conflicting opinions of South African authors on whether a suretyship agreement must comply with the NCA. Further, if a surety does resort under the auspices of the NCA, the question of the instances in which it will apply, will be answered with reference to case law.

4.2 Suretyship under the definition of a credit agreement

4.2.1 General

A suretyship agreement is an important mechanism used by credit providers to limit the risk of granting credit.²³⁷ In essence, a surety acts as a third party to the principal agreement and commits to pay where the principal debtor fails to pay.²³⁸ In what

²³² 34 of 2005 (hereafter “the NCA” or “the Act”). See also Stoop and Kelly-Louw *The National Credit Act regarding suretyships and reckless lending* 2011 14(2) *PELJ* 69.

²³³ Mostert *Must suretyship agreement comply with the NCA* (2009) June *De Rebus* 53.

²³⁴ *Ibid.*

²³⁵ See chapter 2 par 2.3.3.

²³⁶ See chapter 2 par 2.3.3.3.

²³⁷ See also Stoop and Kelly-Louw 2011 14(2) *PELJ* 68.

²³⁸ See chapter 3 par 3.3.

follows suretyships are evaluated from various perspectives within the context of the NCA.

4.2.2 Mostert's argument

According to Mostert, Innes CJ in *Corrans v Transvaal Government and Coull's Trustee*²³⁹ provides the leading definition²⁴⁰ of a surety undertaking. Mostert states that²⁴¹

[t]he suretyship has one conspicuous element that distinguishes it from other agreements, namely the element of accessoriness. This means that the surety can never be liable if the principal debtor is not liable. The surety's fate depends on the principal liability. Whatever defence the principal debtor can raise on the principal obligation, the surety can also raise.

Section 8(5) of the NCA determines that²⁴²

[a]n agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.

It is clear that it specifically state that a person who undertake the obligations of another consumer will do so 'upon demand'.²⁴³ Mostert is of the view that a surety can never satisfy the obligation of a third party by payment or performance of the principal obligation *on demand*, and therefore cannot be equated with a credit guarantee in terms of the NCA.²⁴⁴

In addition to the above, Mostert further rejects that a suretyship agreement can find application in the definition of a credit agreement under section 8(5) of the Act for the following reasons:²⁴⁵

- (a) The wording of section 8(5) of the NCA referring to the liability of the debtor "upon demand" is better suited to the definition of the contract of guarantee.²⁴⁶

²³⁹ 1909 TS 606 612–613.

²⁴⁰ See chapter 3 par 3.3.

²⁴¹ Mostert (2009) June *De Rebus* 53.

²⁴² See chapter 2 par 2.3.3.3.

²⁴³ *Ibid.*

²⁴⁴ Mostert (2009) June *De Rebus* 53.

²⁴⁵ *Ibid.*

²⁴⁶ See chapter 3 par 3.4.

The guarantor stands surety for future events, should the event not take place the guarantor will be indemnified.²⁴⁷ The event is not linked to the obligations of a third party, but rather exempt.²⁴⁸ Thus, the intention of the legislator by the language used in section 8(5) of the NCA referring to the liability of the debtor “on demand”, was to include the more certain liability of the guarantor under a contract of guarantee.²⁴⁹

- (b) It is Mostert’s contention that “the definition of credit in the NCA indicates against the common law uncertain liability of a surety”.²⁵⁰ Credit²⁵¹ is defined in section 1 of the NCA. However, section 1(b) of the Act states that “a promise to advance or pay money to or at the direction of another person” directly contradicts the true standing of a surety in that the purpose of a suretyship is not to be liable for payments owed to the creditor, but rather to pay if the principal debtor does not. According to Mostert²⁵²

[i]t is difficult to see how the undertaking of the surety means the acceptance by the surety of ‘credit’ as envisaged by the NCA.

- (c) In the event that a suretyship do fall under the definition of a credit guarantee to which the Act applies, the agreement will have to be categorised as either a small, or an intermediate or a large credit agreement under the provision of section 9²⁵³ of the NCA.²⁵⁴ Mostert holds the view that unlimited suretyships²⁵⁵ or suretyship agreements that have no limit will not be able to find application under section 9 of the Act. This is because the legislator explicitly included the credit guarantee as a small and intermediate credit agreement whilst expressly excluding it as a large agreement.²⁵⁶ Mostert submits that section 9 of the NCA is problematic by making the following argument:²⁵⁷

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ It seems that Otto and Otto *The National Credit Act explained* (2016) 4th edition 32 shares Mostert’s view that primary guarantees do find application under a credit agreement in terms of s 8(5) of the NCA. However, Otto and Otto do not agree that suretyships are excluded. See also Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 84 fn 518.

²⁵⁰ *Ibid.*

²⁵¹ See chapter 1 par 1.6.

²⁵² Mostert (2009) June *De Rebus* 53.

²⁵³ See chapter 2 par 2.3.3.5.

²⁵⁴ Mostert (2009) June *De Rebus* 53.

²⁵⁵ Dos Santos *The lazy man’s suretyship: are unlimited debts of limited application?* (2015) September *De Rebus* 27. See Pretorius *Unlimited suretyships* 2012 (75) *THRHR* 185 for a detailed discussion on unlimited suretyships.

²⁵⁶ Mostert (2009) June *De Rebus* 53.

²⁵⁷ *Ibid.*

How must the suretyship be classified in the case of an expressly unlimited suretyship or where the suretyship itself is silent as to its limits? Must regard then be had to the provisions of the principal obligation? By its very nature the surety can never be liable for more than the principle debt.

Consequently, Mostert contend that, if section 8(5) is properly interpreted, a suretyship agreement does not resort under the definition of a credit agreement in terms of the NCA.²⁵⁸ It is Mostert's view that the intended interpretation of section 8(5) of the NCA by the legislature is as²⁵⁹

[t]o include agreements where the creditor has a choice to claim from the third-party debtor consumer, as well as the credit guarantor.

Therefore, the creditor does not have to wait for the principal debtor to fail to perform because the creditor can claim performance from the credit guarantor at any time.²⁶⁰ Consequently, the basis of Mostert's submission, that the nature of a credit guarantee in terms of the NCA is in contrast with that of a surety, is that the liability of a surety only arise if the principal debtor is in default.

In conclusion, Mostert states that the legislature would have unequivocally included a suretyship in the definition of a credit agreement or credit guarantee if it was its intention to do so.²⁶¹

4.2.3 Mostert considered by Otto

Otto²⁶² is of the opinion that Mostert's²⁶³ arguments are not without merit. Mostert is of the view that the current definition of a credit guarantee does not support the accessory nature of an ordinary suretyship but rather refers to the liability of the guarantor under a primary guarantee.²⁶⁴ It would seem that Satchwell J, in *Firstrand*

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² Otto and Otto *The National Credit Act explained* (2016) 4th edition 32. Boraine and Renke *Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005* (part 1) (2007) *De Jure* 233.

²⁶³ (2009) June *De Rebus* 53.

²⁶⁴ Scholtz *Guide to the National Credit Act* (2008) par 8.2.4 and Otto and Otto *The National Credit Act explained* (2016) 4th edition 32. See also Chapter 3 par 3.4.

Bank Ltd v Carl Beck Estates (Pty) Ltd,²⁶⁵ was not presented with arguments along the lines of what Mostert is suggesting.²⁶⁶ However, the court unequivocally ruled that there is no doubt that the obligations of a suretyship theoretically fall within the definition of a credit agreement.²⁶⁷ According to Otto, it is widely accepted by academic writers²⁶⁸ and case law²⁶⁹ that the ordinary suretyship falls squarely within the definition of a credit guarantee.²⁷⁰ Nevertheless, Otto notes that Mostert's argument has never been tested in a court.²⁷¹ However, Otto firmly holds the view that suretyships do form part of credit guarantees for purposes of the NCA, by stating as follows:²⁷²

If the purpose of the Act are taken into consideration it seems unlikely that the legislature intended to protect consumers standing in for another's debt in only the relatively rare case of a guarantee while leaving the very common case of suretyship out in the cold. It is submitted that it would be in accordance with the purposes of the Act as a whole for both suretyships and guarantees to be covered by the definition of a credit guarantee.

Nevertheless, Otto is of the opinion that the uncertainty is too important to disregard because multiple suretyship agreements are concluded daily whilst primary guarantees are relatively rare.²⁷³ According to him it would thus be sensible if the legislature clarify the matter beyond doubt by unambiguously including suretyship agreements in the definition of a credit guarantee.²⁷⁴ Otto states that this can be done by²⁷⁵

[s]imply adding the following words to the definition of a credit guarantee: "For greater certainty, a contract of suretyship is regarded as a credit guarantee". The definition in paragraph (g) of "consumer" in section 1 of the Act should also be amended to read, "a guarantor or surety under a credit guarantee".

²⁶⁵ 2009 (3) SA 384 (T).

²⁶⁶ Scholtz *Guide to the National Credit Act* (2008) par 8.2.4 and Otto and Otto *The National Credit Act explained* (2016) 4th edition 32.

²⁶⁷ *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 (3) SA 384 (T) 390.

²⁶⁸ Otto and Otto *The National Credit Act explained* (2016) 4th edition 32.

²⁶⁹ *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 (3) SA 384 (T) and *Geodis Wilson South Africa (Pty) Ltd v ACA (Pty) Ltd* Unreported, case no 41609/2008, 30 August 2010 (GSJ), also cited as [2010] JOL 25956 (GSJ).

²⁷⁰ Otto *Onagsame wetsopstelling – die Nasionale Kredietwet op die operasietafel* (2013) TSAR 228.

²⁷¹ Otto *National Credit Act. Vanwaar Gehási? Quo vadit lex? And some reflections on the National Credit Amendment Act 2014 (part1)* (2015) TSAR 592.

²⁷² Otto and Otto *The National Credit Act explained* (2016) 4th edition 32.

²⁷³ Otto (2015) TSAR 592

²⁷⁴ *Ibid.*

²⁷⁵ Otto (2013) TSAR 228.

4.2.4 Mostert considered by Kelly-Louw and Stoop

Kelly-Louw and Stoop are of the view that Mostert lost sight of the accessory nature of the credit guarantee as envisaged in section 8(5) of the NCA. They also indicate that a large part of Mostert's argument is based on the words 'to "satisfy upon demand", resulting in the unnecessary over-emphasis of the phrase "upon demand".²⁷⁶ Stoop and Kelly-Louw had to consider whether a surety can originate merely upon a demand to satisfy an obligation (discussed below)²⁷⁷ and refers to the definition of Forsyth and Pretorius which clearly states that the two most prominent characteristics of a suretyship are that²⁷⁸

- (a) suretyship agreements are accessory in nature; and
- (b) suretyship agreements commence once the principal debtor is in default.

Thus, enforcement by a creditor can only take place once the principal debtor commits breach of contract and not simply upon demand.²⁷⁹ Consequently, Stoop and Kelly-Louw argue as follow:²⁸⁰

The words "upon demand" used in the definition of a credit guarantee must, however, not be read too literally, be over-emphasised or given any special meaning. In our view, these words in the Act simply mean that in terms of this type of agreement the person (surety) undertakes/promises to satisfy (pay) any obligation of another person (the principal debtor) when the credit provider asks (calls upon) him to do so – in other words when the credit provider has informed him that the principal debtor has defaulted and payment is now *demanded* from him. This is in accord with how traditional suretyship guarantees work in practice – sureties become liable to perform or indemnify the creditor only where the principal debtor has defaulted and the surety is then called upon/request by the credit provider (eg, bank) to perform on the principal debtor's behalf. So until a creditor demands/requests from the surety to perform in terms of the suretyship, the surety might not even be aware of the default of the principle debtor and that his obligation to perform or indemnify has now arisen. The words "upon demand" used in section 8(5) do not, in our view, carry the same meaning as they would when dealing with primary guarantees, such as demand guarantees.

²⁷⁶ Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 84.

²⁷⁷ Stoop and Kelly-Louw 2011 14(2) *PELJ* 78.

²⁷⁸ *Idem* 79.

²⁷⁹ *Ibid.*

²⁸⁰ Stoop and Kelly-Louw 2011 14(2) *PELJ* 79 and Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 84.

The authors also note that due consideration must be given to section 4(2)(c)²⁸¹ of the NCA, confirming that the Act will only apply to a credit guarantee where the primary debt, resulting from a credit facility or credit transaction in respect of which the credit guarantee is granted, falls within the auspices of the Act.²⁸² This, according to Kelly-Louw and Stoop, affirms the accessory nature referred to in section 8(5) of the NCA.²⁸³

Therefore, the definition of the credit guarantee does make provision for the accessory nature of a contract of suretyship in that it refers to the obligations of another person.²⁸⁴ The authors are consequently of the opinion that the common-law surety is embodied by the definition of a credit guarantee.²⁸⁵

Stoop and Kelly-Louw have formidably and decisively “argued that suretyships are included in the definition of a credit guarantee and that the definition does not include primary guarantees”.²⁸⁶

4.3 Case law

(a) *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd*²⁸⁷

In this case, a summary judgment application was sought by the applicant (bank) for the arrears of the first respondent (principal debtor) on a mortgage bond, against the first and second respondents, jointly and severally.²⁸⁸ The first respondent is a juristic person and the second respondent a natural person, entered into a suretyship agreement as a surety and co-principal debtor for the debts of the first respondent.²⁸⁹ The court had to consider whether a surety and co-principle debtor (second respondent) was a consumer to whom a notice in terms of section 129 of the NCA should have been delivered.²⁹⁰

²⁸¹ Chapter 2 par 2.4.2.

²⁸² Stoop and Kelly-Louw 2011 14(2) *PELJ* 80.

²⁸³ Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 84.

²⁸⁴ Stoop and Kelly-Louw 2011 14(2) *PELJ* 80.

²⁸⁵ *Idem* 81.

²⁸⁶ Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 84.

²⁸⁷ 2009 (3) SA 384 (T).

²⁸⁸ *Idem* 387.

²⁸⁹ *Ibid.*

²⁹⁰ *Idem* 388.

The court held that a credit guarantee as envisaged in section 8(5) of the Act will only find application in terms of the NCA if the principal credit agreement is regulated in terms of the Act.²⁹¹ In light of the fact that the credit agreement entered into, between parties, was a large agreement the mortgage agreement was exempted from the application of the NCA.²⁹²

Satchwell J's remarks on sureties and the NCA are as follow:²⁹³

There is no doubt that the suretyship obligations of the second respondent theoretically fall within the definition of a credit agreement which encompass a credit guarantee in terms whereof – a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or credit transaction. However s 8(5) requires the credit guarantee to apply to the obligations of another consumer in terms of 'a credit transaction to which this Act applies'.

As the Act did not apply to the principle agreement, the court found that it also does not apply to the suretyship in this respect.²⁹⁴

(b) *Nedbank Ltd v Wizard Holdings (Pty) Ltd*²⁹⁵

A summary judgment application was sought by the applicant (bank) against the second, third and fourth respondents (natural persons), in their capacity as sureties of the first respondent (juristic person), in respect of an overdraft facility and mortgage bond granted by the applicant to the principal debtor (first respondent).²⁹⁶

In this judgment Van der Merwe AJ considered whether a suretyship agreement is included in the definition of a credit guarantee, even though this was not an issue before this court. Van der Merwe AJ was of the view that²⁹⁷

it must firstly be considered whether the National Credit Act applies to the principal debt. This will in turn determine whether the National Credit Act applies to the deeds of suretyship entered into in respect of the principal debt.

²⁹¹ *Idem* 390.

²⁹² *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 (3) SA 384 (T) 385. See chapter 2 par 2.3.3.5.

²⁹³ *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 (3) SA 384 (T) 390.

²⁹⁴ *Idem* 391.

²⁹⁵ 2010 (5) SA 523 (GSJ).

²⁹⁶ *Idem* 525.

²⁹⁷ *Ibid.*

Arguments were made by the respondents that “the National Credit Act does apply to sureties who are natural persons”.²⁹⁸ However, Van der Merwe AJ did not support their view and stated that their approach is incorrect. The court remarks that²⁹⁹

s 4(2)(c) of the National Credit Act provides expressly that the Act ‘applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted’. It is accordingly evident that the National Credit Act does not apply to a suretyship if the principal debt does not arise from a credit agreement which falls within the scope of the Act.

Van der Merwe AJ further provided that³⁰⁰

this conclusion is also confirmed by the provisions of s 8(5) of the National Credit Act, to the effect that a credit guarantee constitutes a credit agreement for purposes of the Act only if in terms of the credit guarantee a person undertakes or promises to satisfy an obligation of another consumer in terms of a credit facility or credit transaction to which the Act applies.

The court held that the principal debtor was a juristic person and the principal debt arose from a large agreement excluding the application of the NCA in terms of section 4(1)(a)³⁰¹ and 4(1)(b)³⁰² of the Act.³⁰³

Therefore, it was decided that the NCA does not apply to the principle debt and the suretyships does not constitute a credit agreement for purposes of the Act. However, it is clear that the court accepts that a surety does resort under the definition of a credit guarantee, but that the Act will not in all such instances find application.

(c) *Ribeiro and Another v Slip Knot Investments 777 (Pty) Ltd*³⁰⁴

In this matter the first and second appellants (natural persons) bound themselves as sureties under a loan agreement in respect of moneys borrowed from the respondent (juristic person).³⁰⁵

²⁹⁸ *Idem* 526.

²⁹⁹ *Ibid.*

³⁰⁰ *Idem* 526–527.

³⁰¹ Chapter 2 par 2.4.1.

³⁰² *Ibid.*

³⁰³ *Nedbank Ltd v Wizard Holdings (Pty) Ltd* 2010 (5) SA 523 (GSJ) 526.

³⁰⁴ 2011 (1) SA 575 (SCA).

³⁰⁵ *Idem* par 1–4.

The question before the Supreme Court of Appeal was whether the appellants' agreement is a credit agreement to which the Act applies, as was contended by them, or a credit guarantee falling outside the ambit of the NCA by virtue of section 8(5) read together with section 4(2)(c) of the Act as was alleged by the respondent.³⁰⁶ The court ruled that the NCA was not applicable to the initial loan agreement, because a juristic person entered into a mortgage agreement, which constitutes a large credit agreement.³⁰⁷ On this point, the Supreme Court of Appeal concluded with the following statement:³⁰⁸

So, because the NCA did not apply to the loan agreements, by virtue of s 4(2)(c) and s 8(5), it did not apply to the respondents' accessory obligations (guarantees) under those agreements either.

Therefore, the written agreement entered into between parties only constitute a guarantee to the obligations of the appellants' and were not a credit guarantee to which the NCA apply. However, as was the case with previous judgments considered, the court acknowledge that the NCA can apply to sureties, but not in the circumstances of the matter at hand.

(d) *Geodis Wilson South Africa (Pty) Ltd v ACA Ltd*³⁰⁹

In this case the plaintiff (juristic person) had a contractual claim for payment in respect of services rendered and disbursements made in the amount of R4 520 611.65 (plus interest and costs), against the first, second and third defendants.³¹⁰ The second and third defendants (natural persons) stood surety for all the debts of the first defendant who is a juristic person.³¹¹ Accordingly, the plaintiff's claim is based on a contract of suretyship.

In this unreported judgment Mbha J grapples with the question of whether the third defendant is a defaulting consumer under a credit agreement to which the NCA applies. The judge makes the following observation:³¹²

³⁰⁶ *Idem* par 6.

³⁰⁷ *Idem* par 8.

³⁰⁸ *Ribeiro v Slip Knot Investments 777 (Pty) Ltd* 2011 (1) SA 575 (SCA) par 8. See also *Structured Mezzanine Investments (Pty) Ltd v Davids* 2010 (6) SA 622 (WCC) par 16.

³⁰⁹ Unreported, case no 41609/2008, 30 August 2010 (GSJ), also cited as [2010] JOL 25956 (GSJ).

³¹⁰ *Idem* par 1.

³¹¹ *Idem* par 3.

³¹² *Idem* par 23.

The third defendant has apparently placed reliance on the fact that he is “a consumer in default” under a credit agreement for the purposes of the Act. In my view, the third defendant seeks to assert the independent status of debtor, as opposed to being a surety, and then to argue that the Act applies to him and his credit agreement.

Mbha J confirms the judgment of Satchwell J in *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd*³¹³ and reiterates that a surety does not become a party to the main agreement, because he did not acquire any credit for himself.³¹⁴

Due to the fact that the main agreement entered into between the parties amounts to a large agreement, the court ruled that the suretyship agreement falls outside the ambit of the NCA.³¹⁵

4.4 Effects of the NCA on suretyship agreements

It has been determined by both the majority of academic writers and, most importantly, the courts that suretyship agreements do find application under the NCA in some instances. If that is the case, the next question would be what repercussions would follow where the Act does find application to a suretyship agreement.³¹⁶ In the discussion below the ramifications are briefly discussed.

In short, sureties, to which the NCA applies, have an array of consumer protection mechanisms at their disposal.³¹⁷ Some of the most pertinent matters are that consumers entering into suretyship agreements to which the Act apply must also undergo a financial assessment by a credit provider before the finalisation of the credit agreement and that, failure to do so could result in the agreement being declared reckless.³¹⁸ Defences set out in the Act are also to the disposal of the surety in that the surety could for instance raise the fact that a credit agreement, or a certain part thereof, is unlawful.³¹⁹ Further, credit providers would have to follow the NCA’s debt

³¹³ 2009 (3) SA 384 (T) 391.

³¹⁴ Unreported, case no 41609/2008, 30 August 2010 (GSJ), also cited as [2010] JOL 25956 (GSJ) par 25. See also *Neon and Cold Cathode Illumination (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) 471.

³¹⁵ Unreported, case no 41609/2008, 30 August 2010 (GSJ), also cited as [2010] JOL 25956 (GSJ) par 26. See chapter 2 par 2.3.3.5.

³¹⁶ Stoop and Kelly-Louw 2011 14(2) *PELJ* 83.

³¹⁷ *Ibid.*

³¹⁸ *Idem* 89.

³¹⁹ *Idem* 83.

collection process against a surety to enforce a credit agreement. In this respect, the credit provider has to, amongst others, comply with the notice provisions in terms of section 129 of the Act and the time periods linked thereto.³²⁰ Also, sureties have the right to seek the assistance of a debt counsellor and apply for debt review in the event that he is declared over-indebted.³²¹

Credit providers would have to be vigilant and avoid non-compliance relating to suretyship agreements at all cost.³²² This is as the repercussions for failure to adhere to the provisions of the Act, for instance the penalties that would be imposed by the courts, could be profound.³²³ A surety whose credit agreement is governed by the NCA has the distinct advantage to enjoy the various consumer protection mechanism provided for by the Act.³²⁴ Therefore, sureties can raise the same defences and have the same protection as that of the principle debtor in terms of the Act.³²⁵

4.5 Conclusion

Various authorities³²⁶ established that a surety who provides security for the debts of another person or entity in terms of a suretyship agreement, meets the criteria of a credit guarantee if the principal debt set out in the underlying credit agreement falls within the ambit of the NCA.³²⁷ In the event that the NCA does not apply to a credit facility of credit transaction in respect of which the suretyship agreement is granted the Act will also not apply to the suretyship.³²⁸ Therefore, natural person sureties will not be entitled to rely on the protection afforded by the Act if the principal debtor in terms of the underlying credit agreement is not regarded as a consumer to which the NCA applies.³²⁹ This is irrespective of the fact that the Act is mainly intended to protect natural person consumers. Nevertheless, in the event that the NCA does find

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² *Idem* 68.

³²³ *Idem* 83.

³²⁴ Stoop and Kelly-Louw 2011 14(2) *PELJ* 83. See also Kelly-Louw *Should all natural persons standing surety be protected by the National Credit Act 34 of 2005* (2012) 24 *Merc LJ* 314.

³²⁵ Kelly-Louw (2012) 24 *Merc LJ* 314.

³²⁶ Otto and Otto *The National Credit Act explained* (2016) 4th edition 32. See further Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 87.

³²⁷ Par 4.2.3.

³²⁸ Par 4.3.1.

³²⁹ Par 4.3.2.

application, the provisions of the Act must be taken into consideration.³³⁰ Consequently, in instances where the primary debt is a credit agreement that falls under the ambit of the Act, the surety is entitled to raise any defences or provisions of the NCA.³³¹

Even though Mostert holds the view that an ordinary suretyship do not find application within the definition of a credit guarantee, in *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd*,³³² the court unmistakably ruled that the obligations of a suretyship fall within the definition a credit agreement. Stoop and Kelly-Louw stoutly argued that the definition of credit guarantee do include suretyship agreement, but no primary guarantees.³³³ It is submitted that if the purpose of the Act is taking into consideration it is doubtful that the legislature only intended to protect consumers standing in for another's debt in the relatively rare cases of a guarantee, whilst intentionally leaving the much more general suretyship out in the cold.³³⁴ Otto firmly believes that it is in the Act's intention that for both suretyships and guarantees be shielded by the definition of a credit guarantee.³³⁵ However, Otto is of the opinion that the uncertainty regarding suretyship agreements is too important to be disregarded by the legislature.³³⁶ Therefore, suretyship agreement should be categorically included in the definition of a credit guarantee.³³⁷ This can be done by adding the words "a contract of suretyship" to the definition of a credit guarantee.³³⁸ It is further submitted that the word "consumer" in section 1 of the Act should also be amended to include, "a guarantor or surety under a credit agreement".³³⁹

Because suretyships in some instances resort under the NCA credit providers must adhere to the requirements of the Act. For instance, its provisions must be followed

³³⁰ Par 4.4.

³³¹ *Ibid.*

³³² 2009 (3) SA 384 (T).

³³³ Par 4.2.3.

³³⁴ Par 4.2.2.

³³⁵ *Ibid.*

³³⁶ *Ibid.*

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ *Ibid.*

when sureties are requested to perform in instances where the principal debtor has defaulted in terms of the credit agreement to which the Act applies.³⁴⁰

From the discussions in this chapter, it is clear that not all natural person sureties are being treated equally before the law.³⁴¹ It may be argued that the differentiation that the Act in this respect creates might be unconstitutional on the strength of section 9 of the Constitution.³⁴²

In the next chapter, the discussion mainly focuses on whether the protection of the NCA should be extended to all natural persons standing surety for credit agreements, irrespective of whether the underlying credit agreement constitutes an agreement to which the Act applies.

³⁴⁰ Par 4.4.

³⁴¹ Kelly-Louw (2012) 24 *Merc LJ* 300.

³⁴² *Ibid.*

CHAPTER 5: SURETYSHIP, CREDIT GUARANTEES AND THE CONSTITUTION

5.1 Introduction

Currently preferential treatment is afforded to persons, including juristic persons, standing surety for natural persons where the principal agreements entered into qualify as credit agreements governed by the National Credit Act.³⁴³ In such instances they receive the full protection of the Act.³⁴⁴ Such protection is in direct contrast with the position of natural persons standing surety for juristic persons in instances where the Act does not apply to the principal agreements.³⁴⁵ This is notwithstanding the fact that the NCA mainly strives to protect natural person consumers but not necessarily their juristic person counterparts.³⁴⁶ Thus, it can be argued that the unequal position of sureties is in direct conflict with the reasons for the existence of and goals anticipated by the NCA.³⁴⁷ Furthermore, the differentiation and exclusion illustrated above, may very well be unconstitutional in terms of section 9, the equality clause, of the Constitution of the Republic of South Africa, 1996.³⁴⁸

In this chapter, the discussion revolves around the questions of whether the exclusions imposed on sureties by the NCA are legitimate and if not whether the Act's full protection should be extended to all natural person sureties.³⁴⁹

5.2 Levels of protection

Due to high levels of natural person consumer over-indebtedness, the NCA has gone to great lengths to protect natural persons by providing them with proper debt relief mechanisms.³⁵⁰ According to Kelly-Louw the "lack of proper mechanisms to prevent and relieve over-indebtedness were just some of the reasons why the NCA was created".³⁵¹

³⁴³ 34 of 2005 (hereafter "the NCA" or "the Act"). Kelly-Louw *Should all natural persons standing surety be protected by the National Credit Act 34 of 2005* (2012) 24 SA Merc LJ 299.

³⁴⁴ Kelly-Louw (2012) 24 SA Merc LJ 298.

³⁴⁵ Scholtz *Guide to the National Credit Act* (2008) par 4.4.3. Kelly-Louw (2012) 24 SA Merc LJ 298.

³⁴⁶ Kelly-Louw (2012) 24 SA Merc LJ 299.

³⁴⁷ Kelly-Louw (2012) 24 SA Merc LJ 300. See chapter 2 par 2.2.

³⁴⁸ Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution"). Kelly-Louw (2012) 24 SA Merc LJ 300.

³⁴⁹ Kelly-Louw (2012) 24 SA Merc LJ 300.

³⁵⁰ *Idem* 317.

³⁵¹ *Ibid.*

Depending on the circumstances, the NCA has three potential levels of protective measures that could be extended to natural persons standing surety for other natural persons or certain juristic persons.³⁵² These are, full, limited or no protection.³⁵³

A juristic person whose value is below the threshold is considered to be a small juristic person who enjoys limited protection by the Act.³⁵⁴ In turn, a juristic person with an asset value or annual turnover equal to or exceeding the threshold³⁵⁵ constitutes a large juristic person and the Act is not applicable to such persons in their capacity as consumers at all.³⁵⁶

It is to be noted that juristic persons do not benefit from certain parts and sections of the NCA dealing with reckless credit, over-indebtedness, debt review, rescheduling of debt, etcetera.³⁵⁷

The discussion now focuses on the different levels of protection that are afforded to natural person sureties and their juristic counterparts, depending on the particular circumstances.

(a) Full protection

Natural person sureties standing surety for other natural persons will enjoy the full protection of the Act.³⁵⁸ Similarly, Kelly-Louw is of the opinion that small or large juristic persons standing surety for natural persons will receive the full protection of the Act, because the NCA applies to them to the same extent that it applies to the principal agreement.³⁵⁹ Although it can be agreed that the Act in principle, finds application to

³⁵² Kelly-Louw (2012) 24 SA Merc LJ 315.

³⁵³ *Ibid.*

³⁵⁴ *Idem* 299.

³⁵⁵ S 7 provides the threshold determination and industry tiers. On the effective date, and at intervals of not more than five years, the Minister, by notice in the Gazette, must determine:

(a) a monetary asset value or annual turnover threshold of not more than R1 000 000 for the purpose of section 4(1).

³⁵⁶ Scholtz *Guide to the National Credit Act* (2008) par 4.4.3. Kelly-Louw (2012) 24 SA Merc LJ 299. S 4(1)(a)(i) read with s 7(1)(2). See chapter 2 par 2.3.3.5.

³⁵⁷ *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd* 2010 (1) SA 627 (C) 630. Chapter 4 Part D. See chapter 2 par 2.4.2.

³⁵⁸ Kelly-Louw (2012) 24 SA Merc LJ 315.

³⁵⁹ *Ibid.*

the surety in such instances, it cannot be agreed that such juristic persons enjoy the same protection as the surety as some parts of the Act can never find application to juristic persons.³⁶⁰

(b) Limited protection

Natural persons standing surety for small juristic persons who entered into small or intermediate credit agreements to which the Act applies have limited protection as set out in section 6³⁶¹ of the Act.³⁶² This is as, where the Act in principle applies to juristic persons, it only affords partial protection to such juristic persons. On the same vein, small or large juristic persons standing surety for small juristic persons will be awarded with limited protection.³⁶³

(c) No protection

Natural or juristic persons standing surety for small juristic persons who entered into large credit agreements will not be protected by the Act.³⁶⁴ The reason for such exclusion is that large credit agreements entered into by juristic persons do not fall within the ambit of the Act.³⁶⁵

Natural or juristic persons standing surety for large juristic persons are also not protected by the Act.³⁶⁶ This is as large juristic persons do not enjoy the protection of the NCA at all.³⁶⁷

5.3 Case Law

5.3.1 Background

In the cases of *Standard Bank v Hunkydory Investments*³⁶⁸ and *Investec v Louw*³⁶⁹ certain provisions of the NCA were challenged for allegedly violating the right to

³⁶⁰ Provisions such as reckless lending, over-indebtedness, debt review or restructuring do not apply where the consumer is a small juristic person; see Kelly-Louw (2012) 24 SA Merc LJ 304. See chapter 2 par 4.2.2.

³⁶¹ Chapter 2 par 2.4.2.

³⁶² Kelly-Louw (2012) 24 SA Merc LJ 315.

³⁶³ *Ibid.*

³⁶⁴ S 4(1)(b).

³⁶⁵ S 9(4).

³⁶⁶ S 4(1)(a)(i). Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 87.

³⁶⁷ Scholtz *Guide to the National Credit Act* (2008) par 4.4.3.

³⁶⁸ 2010 (1) SA 627 (C).

³⁶⁹ Case no 21145/2011, 21143/2011, 21144/2011 (C) (unreported) [2012] ZAWCHC 170 (12 Sep 2012).

equality.³⁷⁰ The unequal application of the Act has two interdependent aspects. According to Brits these are that:³⁷¹

- (a) juristic persons and natural persons do not enjoy the same protection under the Act; and
- (b) a natural person who signs as surety for a juristic person does not always enjoy the same protection as a natural person who signs surety for another natural person.

The discussion now turns to a brief overview of the alleged violation of the right to equality within the context of the mentioned judgments.

5.3.2 *Standard Bank v Hunkydory Investments*³⁷²

In this matter, the plaintiff (a bank) applied for summary judgment against the first defendant (a juristic person) and the second defendant (a natural person surety), jointly and severally, demanding payment of a sum of money and an order declaring four immovable mortgage bonds executable.³⁷³

It was submitted by the defendants' that the credit agreements entered into between the plaintiff and the first defendant do not fall within the ambit of the Act.³⁷⁴ Therefore, the first and second defendant is not entitled to the protection of the parts of the Act dealing with reckless credit, debt review and rescheduling of debt, because the first defendant is a juristic person.³⁷⁵

The summary judgment application was opposed by the defendants' on the basis that sections 4(1)(a) , 4(1)(b) and 4(2)(c) of the NCA are unconstitutional.³⁷⁶ It was argued that the mentioned sections were unconstitutional, because the Act do not apply to a juristic person. The second defendant submitted that he should be afforded with the same protection as any other natural person surety standing in for the debt of another natural person.³⁷⁷

³⁷⁰ Brits *The National Credit Act and the Bill of Rights: towards a constitutional view of consumer credit regulation* 2017 TSAR 480.

³⁷¹ *Idem* 481.

³⁷² 2010 (1) SA 627 (C).

³⁷³ *Ibid.*

³⁷⁴ *Idem* 630.

³⁷⁵ *Ibid.*

³⁷⁶ *Ibid.*

³⁷⁷ *Idem* 631.

The submission is made that it is unfair that juristic persons are not afforded the same protection under the Act as natural persons. Arguments were made by the defendants' that section 9 of the Constitution declares that everyone has the right to equality and, equal protection and benefit of the law.³⁷⁸ The defendants' were of the opinion that the limitation of rights as envisaged in section 36 of the Constitution does not save the violation of their rights to equality.³⁷⁹ Steyn AJ is of the view that the purpose of the NCA is to prevent reckless credit lending by institutions to over-indebted people.³⁸⁰

The Constitutional Court judgment of *Harksen v Lane*³⁸¹ was applied by Steyn AJ in the present matter. According to Steyn AJ³⁸²

Goldstone J found, regarding arguments relating to lack of equality, that an enquiry should be directed by the court to the question as to whether the impugned provisions do differentiate between people or categories of people. If they do so differentiate, then in order not to fall foul of equality provisions in the Constitutional (at the time, s 8(1) of the then interim Constitution), there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way then it does not amount to a breach of the relevant section.

In the case of *Harksen v Lane* Goldstone J further stated that:³⁸³

If the differentiation complained of bears no rational connection to a legitimate governmental purpose which is proffered to validate it, then the provision in question violates the provisions of s 8(1) of the Interim Constitution. If there is such rational connection, then it becomes necessary to proceed to the provisions of s 8(2) to determine whether, despite such rationality, the differentiation none the less amounts to unfair discrimination.

In order to determine unfairness, the impact of discrimination on the complainant in society, past disadvantages and the nature of the provision and the purpose sought to be achieved, must be considered. Worthy societal goals will significantly impact questions of discrimination. Steyn AJ concluded that³⁸⁴

[t]here can be no doubt that there is a rational connection between the differentiation created by the relevant provisions of s 4 of the National Credit Act and the legitimate governmental purpose behind its enactment. I have not been persuaded, on a balance of probabilities, by the defendants, who bear the onus in this regard, that any differentiation or discrimination, even if it exists, is

³⁷⁸ *Ibid.*

³⁷⁹ *Ibid.*

³⁸⁰ *Idem* 632.

³⁸¹ 1998 (1) SA 300 (CC).

³⁸² *Standard Bank v Hunkydory Investments* 2010 (1) SA 627 (C) 632.

³⁸³ *Harksen v Lane* 1998 (1) SA 300 (CC) par 44.

³⁸⁴ 2010 (1) SA 627 (C) 632–633.

unfair. I have not been persuaded that the first defendant's exclusion from the protection of the relevant sections of the Act has any negative effect on it.

Therefore, the court was ultimately of the view that the defendants' failed to convince the court that any constitutional right has been infringed. Therefore, in the court's opinion, the differentiation that the NCA's provisions create between natural person and juristic person consumers is justifiable in an open and democratic society. Also, the court held that the second defendant did not suffer any prejudice as he admitted to avail himself with the first defendant to avoid certain tax implications.

5.3.3 *Standard Bank v Hunkydory Investments* considered by Kelly-Louw

The court ultimately dismissed the argument that section 4(1)(a), 4(1)(b) and 4(2)(c) of the NCA was unconstitutional because sureties of natural persons receive protection from the Act but not those of large juristic persons or juristic persons concluding large credit agreements.³⁸⁵ In this respect, Kelly-Louw correctly holds the view that³⁸⁶

[i]t is clear that the impugned provisions (particularly s 4(2)(c)) of the National Credit Act differentiate between persons or categories of persons.

In *Standard Bank v Hunkydory Investments*³⁸⁷ the court concluded that section 4 of the NCA was not unconstitutional due to the rational connection between the differentiation generated by the relevant provisions of section 4 of the Act and the legal governmental purpose behind the legislation.³⁸⁸ However, Kelly-Louw notes that the court neglected to specifically state what the goal behind the enactment of section 4 of the NCA was and only considered the general objectives of the Act.³⁸⁹ She makes the following remarks in this respect:³⁹⁰

Obviously, most of us will agree that juristic persons should not be afforded the same protection under the Act as natural persons. However, when it comes to treating natural persons acting in the same capacity (namely, as a surety) differently depending on the person or entity they stood surety for, this distinction does not seem fair. To my mind, there is no rational connection between this differentiation and the legitimate governmental purpose it was designed to further or achieve.

³⁸⁵ Kelly-Louw (2012) 24 SA Merc LJ 316.

³⁸⁶ *Ibid.*

³⁸⁷ 2010 (1) SA 627 (C) 633.

³⁸⁸ Kelly-Louw (2012) 24 SA Merc LJ 316.

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

Kelly-Louw further points out that³⁹¹

[i]n order to determine whether the discrimination is unfair, one needs to consider the objectives of the National Credit Act and the reasons why it was created in the first place. It also needs to be established whom the Act, in fact, aims to protect.

Kelly-Louw is of the view that the ruling by the court in *Standard Bank v Hunkydory Investments*,³⁹² to exclude certain natural persons who stood surety for certain juristic persons from the protection of the NCA, will most definitely undermine the purpose of the Act.³⁹³ By simply allowing credit providers to conclude suretyship agreements with natural persons for the debt of juristic persons, without being obligated to do a proper affordability or financial assessment as provided for by the Act, could result in reckless credit being extended to natural person sureties who could not afford the credit in the first place.³⁹⁴ This would refute the very conclusion reached by the court in that the purpose of the NCA is to prevent reckless credit provisions.³⁹⁵

5.3.4 *Standard Bank v Hunkydory Investments* considered by Kok³⁹⁶

In the mentioned case, Kok is of the view that the court misapplied the concepts of differentiation and discrimination.³⁹⁷ Kok states that, "Courts are not always astute in treating these concepts (rational or irrational differentiation versus fair or unfair discrimination) separately".³⁹⁸ According to Kok, the judgment is puzzling, because the court in paragraph 26³⁹⁹ submits that the defendants failed to set out the constitutional rights that would be infringed in the event that judgment is granted as prayed.⁴⁰⁰ However, in paragraph 18⁴⁰¹ of the judgment, the court states that the defendants depend on the right to equal protection and benefit of the law as explained

³⁹¹ *Ibid.*

³⁹² 2010 (1) SA 627 (C) 633.

³⁹³ Kelly-Louw (2012) 24 SA Merc LJ 316.

³⁹⁴ *Ibid.*

³⁹⁵ Par 5.2.3.

³⁹⁶ *Kok Not so Hunky-dory: failing to distinguish between differentiation and discrimination: Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd (no 1) 2010 1 SA 627 (C) (2011) 74 THRHR 340.*

³⁹⁷ *Idem* 341.

³⁹⁸ *Ibid.*

³⁹⁹ *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd* 2010 (1) SA 627 (C) 633.

⁴⁰⁰ Kok (2011) 74 THRHR 346.

⁴⁰¹ *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd* 2010 (1) SA 627 (C) 631.

in section 9 of the Constitution.⁴⁰² Thus, the defendants' argument clearly rests on the right to equality.⁴⁰³ Kok adduce that⁴⁰⁴

[t]he distinction between a natural person and a juristic person amounts to differentiation, not discrimination, and should be measured against rationality, not fairness.

In conclusion, Kok is of the view that the court should have considered the following:⁴⁰⁵

- (a) what is the purpose of the National Credit Act;
- (b) whether this purpose is legitimate;
- (c) how does the differentiation between natural and juristic persons link with this purpose; and
- (d) whether this link is rational.

Therefore, the court neglected to address the above steps and treated them as obvious.⁴⁰⁶ Also, the court incorrectly proves the concept of discrimination.⁴⁰⁷ Consequently, it seems that the matters has not been laid to rest.

5.3.5 *Investec v Louw*⁴⁰⁸

In this case there were two separate applications before the court, namely a provisional sequestration order and a "constitutional counter application" (counter application).⁴⁰⁹ In the sequestration application the respondents (natural persons), Anton, Johannes and Dewald Louw stood surety for one of their companies by the name of Dormell Properties 560 (Pty) Ltd (Dormell). Dormell entered into a loan agreement with the applicant (Investec Bank) for an amount of R86m. The applicant entered into various suretyship agreements with the respondents as security for repayment of the loan.⁴¹⁰ Dormell was placed under final liquidation after its failure to repay the loan to the applicant. After the applicant failed to collect the funds that was advanced to Dormell, the applicant instituted sequestration applications against the respondents based on the suretyship agreements. The applicant alleged that the

⁴⁰² Kok (2011) 74 *THRHR* 346.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.*

⁴⁰⁸ Case no 21145/2011, 21143/2011, 21144/2011 (C) (unreported) [2012] ZAWCHC 170 (12 Sep 2012).

⁴⁰⁹ *Idem* par 1.

⁴¹⁰ *Idem* par 6–9.

respondents are indebted to the applicant to the amount of R86m in their capacity as sureties and co-principle debtors.⁴¹¹

In the counter application the three respondents call into question several provisions of the NCA. It is the contention of the respondents' that section 4(2)(c) and the designation "*to which this Act applies*" in section 8(5) of the NCA are inconsistent with section 9(1) of the Constitution and are consequently invalid.⁴¹²

Thus, the respondents' took issue with the fact that the NCA only applies to and protects a natural person as a principal debtor but not natural persons who stand surety for an underlying agreement to which the NCA does not apply.⁴¹³ Consequently, it was contended that such distinction constitutes an arbitrary differentiation between categories of natural persons.⁴¹⁴ Bozalek J set out the primary purpose of the NCA in the following terms:⁴¹⁵

"to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and assessable credit market industry and to protect consumers" and the various protective mechanisms which are set up by the Act, it is apparent that one of the chief mischiefs that the legislature sought to remedy was the danger of sophisticated credit providers taking advantage of vulnerable consumers who might otherwise be unable to adequately protect their own interests.

He stated that it is the Act's intention to limit the protection of small juristic persons and to provide no protection to large juristic persons.⁴¹⁶ Small juristic persons can provide a credit guarantee and have the benefit of the NCA's protection as long as the agreement is not a large agreement as defined.⁴¹⁷ Therefore, no differentiation exist between people or categories of people, but rather "between types of credit agreement by specifically excluding those concluded by high worth juristic persons".⁴¹⁸ Bozalek J is of the view that⁴¹⁹

⁴¹¹ *Idem* par 7.

⁴¹² *Idem* par 44.

⁴¹³ *Idem* par 46.

⁴¹⁴ *Ibid.*

⁴¹⁵ *Idem* par 58.

⁴¹⁶ *Idem* par 52.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.*

[w]hilst it is correct therefore that some natural persons who stand surety for the debts of another fall within the scope of the NCA while others do not, it is incorrect in my view to characterise this as differentiation between natural persons. The differentiation is, rather between different kinds of principal debt rather than between people or categories of people.

Finally, the court decided that the impugned provisions do not unfairly discriminate against natural person sureties as envisaged in section 9(3) of the Constitution.⁴²⁰ Therefore, the court concluded that no case was made out by the respondents that the provisions in question threatened their human dignity, thereby establishing discrimination. Bozalek J held that “there can then be no question of unfair discrimination”.⁴²¹

5.4 Need for equal treatment

Kelly-Louw is of the opinion that the full protection of the NCA should have been afforded exclusively to all natural persons who stand surety for another, irrespective of whether the principal obligation or debt is an agreement governed by the Act.⁴²² Kelly-Louw firmly holds the view that “no juristic person should have been given any protection, never mind limited protection, in terms of the National Credit Act”.⁴²³ The true aim of the NCA is to specifically protect natural person consumers in all aspects when it relates to their involvement with a consumer credit agreement and not to protect them only in certain circumstances⁴²⁴. The specific exclusion of certain natural person sureties from the protection afforded by the Act will inevitably undermine and defeat the admirable objectives set out in the preamble⁴²⁵ and section 3⁴²⁶ of the NCA.⁴²⁷ The level of over-indebtedness could increase amongst natural persons standing surety for juristic persons if they only receive limited or no protection.⁴²⁸ A natural person standing surety for a large juristic person where substantial amounts

⁴²⁰ *Idem* par 63.

⁴²¹ *Idem* par 64.

⁴²² Kelly-Louw (2012) 24 SA Merc LJ 320.

⁴²³ *Ibid.*

⁴²⁴ *Idem* 318.

⁴²⁵ Chapter 2 par 2.2

⁴²⁶ *Ibid.*

⁴²⁷ Kelly-Louw (2012) 24 SA Merc LJ 318.

⁴²⁸ *Ibid.*

are involved will very likely have more to lose.⁴²⁹ Kelly-Louw provides the example of⁴³⁰

a director of the company for whom he has provided the suretyship. Where his company is then eventually liquidated, he not only stands to lose his form of income, but also runs the risk of losing everything else, including his home. It would thus seem that in such a case it would be desirable if the surety was also afforded the same protection as that afforded to natural persons standing surety for the debts of other natural persons in terms of the Act (eg, have the benefit of reckless credit and the debt relief mechanisms).

Therefore, Kelly-Louw holds that all natural person sureties should be protected against reckless lending and the provisions of over-indebtedness. Also, proper debt relief mechanisms should be accessible to all sureties, irrespective of whether the underlying credit agreement falls within the ambit of the NCA.⁴³¹

Kelly-Louw further states that, in circumstances where credit providers insist on a natural person signing surety for the debts of a juristic person the need for protection is especially prevalent. This is because credit providers ordinarily neglect to assess whether the surety can afford the debt and whether the surety understands his rights and obligations under the suretyship agreement.⁴³²

Kelly-Louw refers to section 4(2)(c)⁴³³ of the Act and provide that the provisions dealing with reckless lending and over-indebtedness are only available to a natural person surety if they apply to the principal credit agreement.⁴³⁴ When the provisions dealing with reckless credit and over-indebtedness are read in isolation, it appears that these provisions are, in fact, at the disposal of all natural person consumers, regardless of whether they relate to a credit facility, credit transaction, credit guarantee or a combination of these.⁴³⁵ She makes the submission that:⁴³⁶

all these provisions of the Act refer simply to the term 'credit agreement', which includes all these types of agreements. From that, for example, the interpretation could follow that before a credit provider concludes any credit

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.*

⁴³¹ Kelly-Louw (2012) 24 SA Merc LJ 321.

⁴³² *Ibid.*

⁴³³ Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 89.

⁴³⁴ Kelly-Louw (2012) 24 SA Merc LJ 321.

⁴³⁵ *Idem* 322.

⁴³⁶ *Ibid.*

guarantee with a natural person consumer, it should comply with the provisions on reckless credit (eg, conduct proper assessments).

Taking the above into consideration, she submits that it would have meant that all natural person consumers entering into a credit guarantee would be able to raise the defence that the credit guarantee itself constitutes reckless credit, irrespective of whether such a defence could be raised by the principal debtor.⁴³⁷

Therefore, where it not for section 4(2)(c) of the NCA, it would have been abundantly clear that all natural persons who stood surety for a credit agreement falling within the ambit of the Act would have been able to rely on the provisions of reckless credit and over-indebtedness, notwithstanding whether these provisions applied to the principal credit agreement.⁴³⁸

Kelly-Louw concludes that:⁴³⁹

It is submitted that s 4(2)(c) undermines the true intention of the legislature. Section 4(2)(c) should thus be declared unconstitutional, and should be amended to provide that all natural persons standing surety for another, irrespective of whether the principal debtor involved is a natural person or any juristic person, will have the same protection in terms of the National Credit Act.

5.5 Conclusion

By all accounts natural persons sureties standing in for the debt of others should in principle have the same protection provided for by the NCA, despite the fact that a credit agreement is depicted as a large agreement where the principle debtor is a juristic person or whether the original parties thereto are small or large juristic persons.⁴⁴⁰

The NCA provides full protection to natural persons who stood surety for the credit agreements of other natural persons and limited protection in instances where surety is provided for small and intermediate credit agreements concluded with certain juristic persons.⁴⁴¹ However, in instances where a natural person provides surety for a credit agreement entered into by a small juristic person that constitutes a large agreement

⁴³⁷ Kelly-Louw (2012) 24 SA Merc LJ 322.

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*

⁴⁴⁰ Par 5.4

⁴⁴¹ Par 5.2.

or where the principal debtor is considered to be a large juristic person no protection is afforded to the natural person surety and is considered to be totally exempt from the provisions of the Act.⁴⁴² It is submitted that the distinction brought forward by section 4(2)(c) of the NCA, whereby protection is only offered to sureties of natural persons or small juristic persons entering into small and intermediate agreements, but not to those of large juristic persons or small juristic persons concluding large credit agreements, clearly differentiate between persons or categories of persons.⁴⁴³ Even though these distinctions were challenged in both *Standard Bank v Hunkydory Investments*⁴⁴⁴ and *Investec v Louw*⁴⁴⁵ the courts rejected the argument that section 4(2)(c) of the Act were unconstitutional.⁴⁴⁶ This is, because the courts found that there is a cogent connection between the differentiation created by the Act and the lawful governmental purpose behind it.⁴⁴⁷

However, Kok argues that the court in *Standard Bank v Hunkydory Investments*⁴⁴⁸ misapplied the notion of differentiation and discrimination.⁴⁴⁹ As stated by Kok the court neglected to determine the purpose of the Act, and whether this purpose is legitimate.⁴⁵⁰ The court further failed to access how the purpose of the Act can be linked to the differentiation between natural and juristic persons, to enable the court to establish whether the link is rational.⁴⁵¹ Kok concluded to say that differentiation is present between natural and juristic person and not discrimination.⁴⁵² Also, the distinction should be measured against rationality and not fairness.⁴⁵³

It is submitted that the fundamental purpose of the NCA is the protection of all natural persons, especially those most vulnerable in society.⁴⁵⁴ Taking the objectives of the Act into consideration one natural person cannot be more privileged than another,

⁴⁴² *Ibid.*

⁴⁴³ Par 5.3.3.

⁴⁴⁴ 2010 (1) SA 627 (C). Par 5.3.2.

⁴⁴⁵ Case no 21145/2011, 21143/2011, 21144/2011 (C) (unreported) [2012] ZAWCHC 170 (12 Sep 2012). Par 5.3.5.

⁴⁴⁶ Par 5.3.3.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ 2010 (1) SA 627 (C)

⁴⁴⁹ Par 5.3.4.

⁴⁵⁰ *Ibid.*

⁴⁵¹ *Ibid.*

⁴⁵² *Ibid.*

⁴⁵³ *Ibid.*

⁴⁵⁴ Par 5.4.

particularly if they both acted in the same capacity by standing surety for another.⁴⁵⁵ The NCA provides comprehensive consumer protection which, amongst other things, seeks to prevent reckless credit lending and remedy over-indebtedness amongst natural persons.⁴⁵⁶ Denying all natural person sureties with the full protection of the Act, seriously undermines the purpose of the Act, and goes against some of the basic reasons for its creation.⁴⁵⁷ Therefore, all natural person sureties should have the same protection.⁴⁵⁸ Credit providers should have a duty to always assess the financial position of all natural persons, irrespective of the type of principal debt before taking surety from them.⁴⁵⁹ Similarly, all natural person sureties should have the NCA's debt relief provisions to their disposal.⁴⁶⁰

Section 4(2)(c) of the Act, ultimately determines the fate of natural persons standing surety in that the provisions dealing with reckless lending and over-indebtedness are only available to natural persons surety if the suretyship agreement is granted under a principal credit agreement to which the Act applies.⁴⁶¹ If section 4(2)(c) of the Act were to be disregarded it would have been clear that the provisions of reckless credit and over-indebtedness are to the disposal of all natural persons standing surety for credit agreements governed by the NCA regardless of whether those provisions applied to the principal credit agreement.⁴⁶²

To conclude it is submitted that section 4(2)(c) of the Act compromises the actual purpose and true intention of the legislature.⁴⁶³ By amending section 4(2)(c) of the Act and declaring the provision unconstitutional, all natural person sureties will have the same protection in terms of the NCA.⁴⁶⁴

⁴⁵⁵ Par 5.3.3.

⁴⁵⁶ Par 5.2.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ Par 5.4.

⁴⁵⁹ Par 5.3.3.

⁴⁶⁰ Par 5.4.

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*

⁴⁶³ *Ibid.*

⁴⁶⁴ *Ibid.*

CHAPTER 6: CONCLUSION

6.1 Introduction

The research objective of this dissertation were to examine sureties in terms of the National Credit Act.⁴⁶⁵ The main objective investigated in this dissertation is whether the full protection of the NCA should be extended to all natural persons standing surety for the debts of individuals or entities by way of entering into suretyship agreements.⁴⁶⁶ In this dissertation, problem areas within the provisions of the NCA are identified and finally some resolutions is offered as to how they can be rectified.

The NCA introduces new forms of protection for debtors in South Africa, both rich and poor.⁴⁶⁷ The Act is a piece of consumer legislation devised to render assistance and protection to vulnerable consumers, with the aim to curb financial harm that consumers may suffer if they are unable to perform in terms of a credit agreement.⁴⁶⁸ The purpose of the Act is clearly set out in the preamble and section 3 of the NCA.⁴⁶⁹ It is submitted that the key objectives of consumer credit legislation is to limit malpractices, establish equal bargaining power between parties to a credit agreement and most importantly the protection of private individual consumers.⁴⁷⁰ Suretyship agreements are crucial to credit providers in order to restrict risks when granting credit.⁴⁷¹ Great effort has gone into the NCA to prevent reckless credit lending and remedy over-indebtedness in order to provide natural persons with comprehensive consumer protection.⁴⁷²

This chapter draws together two sets of conclusions. Firstly, the analysis of the ordinary suretyship compared to a credit guarantee envisaged in section 8(5) of the Act. Thus, ascertaining whether a suretyship agreement is a credit agreement in terms of the NCA. Secondly, the question of whether the Act's full protection should be extended to all natural person sureties.

⁴⁶⁵ Act 34 of 2005 (hereafter "the NCA" or "the Act").

⁴⁶⁶ Chapter 1 par 1.1 and chapter 2 par 2.1.

⁴⁶⁷ Chapter 2 par 2.5.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ Chapter 2 par 2.2.

⁴⁷⁰ Chapter 1 par 1.1.

⁴⁷¹ Chapter 2 par 1.2.

⁴⁷² Chapter 5 par 5.5.

6.2 Summary of findings

The NCA's field of application is of pivotal importance to consumer credit legislation, because it sets out the extent of protection that consumers will be entitled to.⁴⁷³ Not all agreements fall within the ambit of the NCA, only certain specified credit agreements are governed by the Act.⁴⁷⁴ Chapter 2 considered the purpose, application, limitation and exception to credit agreements regulated by the Act with the main focus on suretyship agreements. The NCA applies to credit agreements entered into between parties dealing at arm's length.⁴⁷⁵ Section 8(5) of the Act provides that a credit guarantee is one of the main types of credit agreements to which the NCA applies and is described as an agreement where one person undertakes to satisfy upon demand any obligations of another consumer in terms of a credit facility or credit transaction to which the Act apply.⁴⁷⁶ Section 4(2)(c) provides that the NCA will only apply to a credit agreement to the extent that the Act applies to the underlying credit facility or credit transaction to which the credit guarantee is granted.⁴⁷⁷ It is submitted that a person or entity standing surety for the principal debt of a credit facility or credit transaction falling outside the application of the NCA will not be able to rely on the provisions of the NCA for protection.⁴⁷⁸

In chapter 3 the origin, definition and nature of suretyship agreements were discussed. The modern South African law of sureties, namely, the contract of suretyship and the principles fundamentally developed from ancient Roman law were considered.⁴⁷⁹ It is submitted that those profoundly Roman principles remain the foundation of sureties in our law today.⁴⁸⁰ The definition of a suretyship agreement incorporated into our law by the Supreme Court of Appeal is that a contract of suretyship is accessory in nature and that the surety undertake to the creditor of the principal debtor that the principal debtor will perform his obligations towards the creditor, failing which the surety will perform.⁴⁸¹ Prior to the commencement of section

⁴⁷³ Chapter 2 par 2.1.

⁴⁷⁴ *Ibid.*

⁴⁷⁵ Chapter 2 par 2.5.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*

⁴⁷⁹ Chapter 3 par 3.5.

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Ibid.*

6 of the General Law of Amendment Act,⁴⁸² a suretyship could be concluded orally.⁴⁸³ However, section 6 introduced the requirement that suretyship agreements should be expressed in a written document, which should be signed by or on behalf of the surety, to be valid.⁴⁸⁴

The discussion in chapter 4 determined whether a contract of suretyship falls within the definition of a credit agreement in terms of the NCA. The study has shown that various authorities⁴⁸⁵ concluded that suretyship agreements do form part of what the NCA refers to as a credit guarantee if the principle debt set out in the underlying credit agreement falls within the ambit of the Act.⁴⁸⁶ Mostert disagrees with the various authorities and argues that a credit guarantee does not support the accessory nature of an ordinary suretyship but rather refers to the liability of the guarantor under a primary guarantee.⁴⁸⁷ In *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd*⁴⁸⁸ the court categorically ruled that a suretyship do fall within the definition of a credit agreement as set out in section 8(5) of the NCA.⁴⁸⁹ Taking the purpose of the Act into consideration, Otto is of the view that it is not the legislature's intention to provide protection to consumers standing in for another's debt only to a certain extent while disregarding the very common case of a suretyship.⁴⁹⁰ Also, Stoop and Kelly-Louw firmly argued that suretyships are included in the definition of a credit guarantee and the definition does not include primary guarantees.⁴⁹¹

It was established that the NCA provides full protection to natural persons who stood surety for the credit agreements of other natural persons and limited protection in instances where surety is provided for small and intermediate credit agreements concluded with certain juristic persons.⁴⁹² In instances, where a natural person provides surety for a credit agreement entered into by a small juristic person that

⁴⁸² Act 50 of 1956.

⁴⁸³ Chapter 3 par 3.5.

⁴⁸⁴ *Ibid.*

⁴⁸⁵ Chapter 4 par 4.5.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *Ibid.*

⁴⁸⁸ 2009 (3) SA 384 (T).

⁴⁸⁹ Chapter 4 par 4.5.

⁴⁹⁰ *Ibid.*

⁴⁹¹ *Ibid.*

⁴⁹² Chapter 5 par 5.5.

constitutes a large agreement or where the principle debtor is considered to be large juristic person no protection is afforded to the natural person surety, which is considered to be totally exempt from the provisions of the Act.⁴⁹³ However, where juristic persons stand surety for natural persons, where the underlying credit agreement constitutes an agreement to which the Act applies, they are awarded with the NCA's full protection.⁴⁹⁴ In light of the above, it is submitted that preferential treatment is given to juristic person sureties and that the distinction brought forward by section 4(2)(c) of the Act clearly differentiate between persons or categories of persons.⁴⁹⁵

Chapter 5 considered whether the NCA's full protection should be extended to all natural person sureties. In *Standard Bank v Hunkydory Investments*⁴⁹⁶ and *Investec v Louw*⁴⁹⁷ the distinctions were challenged. However, the courts rejected the argument that section 4(2)(c) of the Act were unconstitutional and ruled that there is a cogent connection between the differentiation created by the NCA and the lawful governmental purpose.⁴⁹⁸ Kok submitted that the courts misconstrued the concepts of differentiation and discrimination.⁴⁹⁹ Kok further points out that differentiation do exist between natural and juristic persons and not discrimination.⁵⁰⁰ It was concluded that the courts failed to assess the connection of the differentiation between the Act's purpose, whilst measuring the distinction against rationality and not fairness.⁵⁰¹

The Act's objectives is clear, one natural person cannot be more privileged than another, especially if they both acted in the same instance by standing surety for another.⁵⁰² It is submitted that the fundamental purpose of the NCA is the protection of all natural persons.⁵⁰³ Depriving some natural person sureties of the Act's full

⁴⁹³ *Ibid.*

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *Ibid.*

⁴⁹⁶ 2010 (1) SA 627 (C). See par 5.3.2.

⁴⁹⁷ Case no 21145/2011, 21143/2011, 21144/2011 (C) (unreported) [2012] ZAWCHC 170 (12 Sep 2012). Par 5.3.5.

⁴⁹⁸ Chapter 5 par 5.5.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid.*

⁵⁰² *Ibid.*

⁵⁰³ *Ibid.*

protection seriously undermines the purpose of the Act and goes against some of the basic reasons for its creation.⁵⁰⁴

It is evident from this study that the simplest way to deal with some of the deficiencies created by legislature in the NCA is by amending certain of its provisions. It is submitted that the following matters should be scrutinised and rectified by the legislature:

1. Consumer in section 1 of the Act should be amended to read, “a guarantor or surety under a credit guarantee”.⁵⁰⁵
2. In section 8(5) of the Act, the words “a contract of suretyship is regarded as a credit guarantee” should be added to the definition of a credit guarantee.⁵⁰⁶
3. Section 4(2)(c) of the Act should be disregarded and be declared unconstitutional.⁵⁰⁷

6.3 A final word

Finally, it is submitted that all natural person standing surety for the debt of another should in principle have the same protection provided for by the NCA, irrespective of whether a credit agreement is portrayed as a large agreement or the parties thereto are small or large juristic persons. It is clear that the NCA do differentiate between natural persons acting in the capacity of a surety, on the basis as for whom the person or entity stood surety for. It is submitted that this distinction is unfair taking into consideration that the Act, in fact, aims to protect natural person consumers. The lack of protection of some sureties are undesirable and the legislature will have to intervene by amending the mentioned areas in order to give effect to the true intention and purpose of the NCA.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ Chapter 4 par 4.5.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ Chapter 5 par 5.5.

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