The registration of credit providers under the National Credit Act 34 of 2005

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Student Number: 11077532

Submitted in accordance with the requirements for the degree of

Masters of Law

At the University of Pretoria

Supervisor: Prof S Renke

November 2017

ACKNOWLEDGMENTS

I would like to express my profound gratitude to my dissertation supervisor, Professor Stefan Renke of the Department of Mercantile Law at the University of Pretoria. Thank you for your unfailing support, patience, contributions and encouragement.

I would also like to thank my parents and everyone else who has supported me throughout the writing process.

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CHAPTER 1

GENERAL INTRODUCTION

1 1 Introduction

The National Credit Act 34 of 2005[1] is the main piece of consumer credit legislation that is currently effective in South Africa. The NCA is a fairly recent, comprehensive piece of consumer credit legislation with schedules and regulations thereto. Various sections of the NCA came into effect on different dates,[2] but the NCA came fully into effect on the 1 June 2007.[3] The NCA repealed both the Usury Act 73 of 1968[4] and the Credit Agreements Act 75 of 1980[5] and introduced major changes to the South-African consumer credit legislation environment.[6]

It is important to note that the said pieces of legislation did not require the registration of any role-players in the credit industry.[7] However, the situation changed with the coming into operation of the NCA which now, for the first time in the history of South African credit legislation, makes the registration of certain role-players in the South African credit industry compulsory.[8] Initially only certain credit providers,[9] all credit bureaux[10] and all debt

[1] Hereinafter "the National Credit Act, "the NCA" or "the Act".
[2] On 1 June 2006: ch 1, ch 2 (Parts A, C and D), ch 3, ch 7, ch 8 (excluding s 163), ch 9 and schedules 1, 2 and 3 came into effect; on 1 September 2006: ch 2 (Part B and ss 67, 68, 70 and 72) came into effect; and on 1 June 2007: ch 4 (Parts A, C and D), ch 5, ch 6 and s 163 came into effect – see Proc 22 in *GG* 28824 of 11 May 2006. According to Otto & Otto *The National Credit Act Explained* (2016) par 5, the reason for the different dates was to give credit providers an opportunity to get the necessary measures into place in order to comply with registration as a credit provider.
[3] Scholtz (ed) *Guide to the National Credit Act* (2008) par 2 1.
[4] Hereinafter the "Usury Act".
[5] Hereinafter the "Credit Agreements Act".
[6] Kelly-Louw & Stoop *Consumer Credit Regulation in South Africa* (2012) par 1 1.
[7] However, in terms of an Exemption Notice that was issued in terms of s 15A of the Usury Act, it was required of a credit provider to register with the Micro Finance Regulatory Council (hereinafter the "MFRC") and comply with its rules in order to get exemption from certain provisions of the Usury Act, *inter alia* the maximum interest rates imposed in terms of the said Act – Kelly-Louw & Stoop par 1 2.
[8] Van Heerden & Renke "Perspectives on selected aspects of the registration of credit providers in terms of the National Credit Act 34 of 2005 (1)" 2014 *THRHR* 615.
[9] If the total principal debt owing to such a credit provider exceeded the threshold as prescribed in s 42(1) – s 40. See the discussion in par 3 4 2 below.
[10] S 43.

counsellors[11] had to register in terms of the Act. Later on, with the amendment of the NCA in terms of the National Credit Amendment Act 19 of 2014,[12] which came into operation on 13 March 2015, the requirement to register was also imposed on payment distribution agents and alternative dispute resolution agents.[13] A major amendment to the registration of credit providers thresholds was effected by and as a result of the Amendment Act.[14] In terms of section 45 applications for registration have to be lodged with the National Credit Regulator.[15]

The registration obligation that is imposed in terms of the NCA is understandable if the Act's preamble and objectives in section 3 are considered. In terms of its preamble specific provision is made for the "registration of credit bureaux, credit providers and debt counselling services". The main objectives of the Act are "to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers".[16] These main objectives are addressed by *inter alia* promoting the development of a credit market that is accessible to all South Africans;[17] by promoting responsibility in the credit market by encouraging responsible borrowing, avoiding over-indebtedness[18] and discouraging reckless credit granting by credit providers;[19] by promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;[20] by addressing and preventing over-indebtedness of consumers and providing mechanisms to resolve over-indebtedness.[21] In order to achieve these objectives and to ensure that the protective measures in

[11] S 44.
[12] Hereinafter the "NCAA" or the "Amendment Act". GN 389 in *GG* 37665 of 19 May 2014.
[13] Ss 44A & 134A. S 44A(6) of the Amendment Act provided both natural and juristic persons who operated as payment distribution agents prior to the Amendment Act, a period of 12 months after the Amendment Act's commencement to comply with this registration requirement. S 134A was inserted by s 35 of the Amendment Act and requires the NCR to register and accredit alternative dispute resolution agents. See s 134B for the deregistration of alternative dispute resolution agents by the Tribunal upon application by the NCR.
[14] See par 3 4 3 below.
[15] Hereinafter "the NCR" or the "Regulator". The NCR was established in terms of s 12 of the NCA and its main functions in terms of ss 14 & 15 respectively, are to conduct the registration of credit role-players and enforce the NCA.
[16] S 3.
[17] In particular to those who have historically been unable to access credit under sustainable market conditions – s 3(a).
[18] S 3(c)(i).
[19] S 3(c)(ii).
[20] S 3(d).
[21] S 3(g).

terms of the NCA serve their purpose, an authorised regulatory body, such as the NCR, must regulate all registered credit providers in the credit market to ensure compliance with the Act.[22]

It has to be realised that the registration of credit role-players requirement only becomes pertinent if and when the NCA is applicable. The reason is self-explanatory: the NCA imposes the obligation to register.[23] In a nutshell, the NCA applies to all credit agreements[24] which are entered into between parties dealing at arm's length[25] and made within or having an effect in the Republic of South Africa, subject thereto that no exemption to the Act's ambit applies.[26]

The main exemptions[27] from the Act's field of application are credit agreements where the consumer is either a juristic person with an asset value or annual turnover,[28] that equals or exceeds the threshold determined by the Minister in s 7(1),[29] or a juristic person with an asset value or annual turnover below the threshold value, who concludes a large agreement.[30] Further exemptions include a consumer which is the state or an organ of state;[31] where the credit provider is either the Reserve Bank of South Africa[32] or located outside of South Africa and in the latter instance a consumer's application to exclude the agreement from the amble of the Act was approved by the Minister.[33]

[22] Kelly-Louw & Stoop par 1 1. See also Van Heerden & Renke 2014 *THRHR* 615.
[23] S 40 ff.
[24] See ss 8-11 for a classification and categories of credit agreements in terms of the Act. In short, a credit agreement in terms of the Act is either a credit facility, credit transaction, credit guarantee or a combination thereof, where credit is granted and a fee, charge or interest is imposed in respect of the deferred amount – Scholtz par 4 2.
[25] For a discussion of arm's length, see Scholtz par 4 2.
[26] For a complete discussion of the NCA's field of application, see Van Zyl & Otto in Scholtz ch 4 & 8 respectively; Otto & Otto ch 3 & 4; Kelly-Louw & Stoop ch 2.
[27] For other exclusions see ss 4(2) & 8(2).
[28] Together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made – s 4(1)(a)(i).
[29] S 4(1)(a)(i). The threshold at present is R1 million.
[30] S 9(4). Small agreements include pawn transactions and any other credit transaction or credit facility where the principal debt does not exceed R15 000, where an intermediate agreement is a credit transaction or credit facility where the principal debt falls between R15 000 and R250 000 and large agreements include mortgage agreements and any other credit transaction (except pawn transactions or credit guarantees) where the principal debt is equal to or exceeding R250 000 – ss 9(2)-(4).
[31] Ss 4(1)(a)(ii)-(iii).
[32] S 4(1)(c).
[33] S 4(1)(d).

The colossal size of the current credit market[34] is indicative that credit plays a vital role in our modern day society as it enables commercial activity and also plays an important role in our economy.[35] However, credit encourages spending and enables overspending, which can be to the detriment of the consumer.[36] The NCA was *inter alia* designed for this reason to protect consumers participating in the credit market. As will become evident later in this dissertation, the registration of credit providers requirement is one of the tools available to the NCR to enforce such protection.

1 2 Research Statement

The broad problem statement of this dissertation is to investigate and evaluate the registration of credit providers requirement in terms of section 40 of the National Credit Act (and related provisions).

1 3 Research Objectives

Pertinent research objectives have been formulated with reference to the above-mentioned research statement in order to define and restrict the scope of this study. These are as follows:

(a) It has already been mentioned that now, for the first time in the history of our consumer credit legislation, *inter alia* (certain) credit providers have to apply for registration in terms of the NCA. An examination of the policy considerations underlying this obligation will provide clarity as to why the registration of credit providers, or certain credit providers, is required.

(b) Since the National Credit Act became fully operational on 1 June 2007, the registration of credit providers requirement in terms of the Act underwent major amendments in respect of the thresholds that were set for the registration of this particular role-player in the

[34] R1.66 trillion as on 31 March 2016 – see the National Credit Regulator's Annual Report (2015/2016) 6, available at http://www.ncr.org.za [accessed on 17 October 2016].
[35] Kelly-Louw & Stoop pars 1 1 & 1 2. See also Nagel *et al Business Law* 172.
[36] Nagel 172.

credit market. The progressive development of the registration thresholds will therefore be discussed in order to ascertain why there was a need for reform and to establish if the current registration threshold is susceptible to criticism.

(c) The non-registration of a credit provider that has to be registered in terms of the National Credit Act entails statutory consequences, the development of which since the NCA became effective will receive attention.

(d) Finally, conclusions will be drawn and, where necessary, recommendations will be made which could be used to address and find solutions for shortcomings in the National Credit Act as far as the registration of credit providers-requirement is concerned.

1 4 Delineation and Limitations

It has already been mentioned[37] that other role-players are also required to register in terms of the Act. For purposes of this dissertation the focus hereinafter will only be on the registration of credit providers. A few other limitations must also be indicated:

(a) The supplementary registration of credit providers providing developmental credit (section 41) will not be addressed in this dissertation.

(b) The application for registration is evidently relevant to the scope of this dissertation. Although a complete discussion of section 45 will not be addressed, where applicable reference thereto will be made.

(c) In addition to the exclusion of certain credit providers and consumers from the ambit of the Act,[38] sections 46 and 47 make provision for certain disqualifications to register. A full discussion on these disqualifications falls outside the scope of this dissertation, but once again , where applicable reference will be made thereto.

[37] See par 1 1 above.
[38] See par 1 1 above.

(d) The relevant objectives of the Act,[39] namely 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",[40] will merely be referred to in order to limit the scope of this dissertation.

1 5 Overview of Chapters

(a) Chapter 1 consists of the background information to the study and sets out the problem statement and the research objectives in relation to it.

(b) Chapter 2 will concern the policy considerations underlying the registration requirement pertaining to credit providers.

(c) Chapter 3 provides an overview of the registration requirements and thresholds for credit providers, with specific reference to the position prior to and after the amendment of the NCA.

(d) The non-compliance of the requirement to register as a credit provider and the development of the subsequent consequences therefore are addressed in chapter 4.

(e) My final conclusions and recommendations in relation to the development and shortfalls of the requirement in terms of the NCA to register as a credit provider are set out in chapter 5.

1 6 Terminology

In this dissertation the concept "consumer", in respect of a credit agreement to which this Act applies, means: [41]

[39] See par 1 1 above.
[40] S 3.
[41] S 1.

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

The concept "credit provider", in respect of a credit agreement to which this Act applies, means:[42]

(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;

1 7 Reference Techniques

(a) For the sake of convenience the masculine form is used throughout this dissertation to refer to a natural person.

(c) The law as stated in this dissertation reflects the position as on August 2017.

[42] S 1.

CHAPTER 2

POLICY CONSIDERATIONS UNDERLYING THE REGISTRATION OF CREDIT PROVIDERS

2 1 Introduction

The micro-lending industry became colossal towards the end of the 20th century as it specifically served low-income consumers who did not qualify for finance in the formal market.[43] As micro-lenders were not adequately regulated, vulnerable consumers were exploited and did not enjoy much protection.[44] The dysfunctional state of the consumer credit market required reform, which led to an intensive research project initiated by the Department of Trade and Industry.[45] This research project resulted in the enactment of the NCA, which repealed and replaced the previous consumer credit legislation, namely the Usury Act and the Credit Agreements Act.[46] Government saw it necessary to establish a new and effective consumer credit regulatory framework and therefore established a statutory body to regulate the credit industry, *inter alia* by requiring certain credit providers to register.[47] The purpose of this chapter is to research and investigate the policy considerations underlying this requirement.

2 2 Policy Considerations

The Usury Act and the Credit Agreements Act mainly regulated the consumer credit industry prior to the enactment of the NCA.[48] In the absence of a consolidated piece of legislation fragmented legislation existed as each Act regulated certain agreements and/or aspects in the

[43] Kelly-Louw & Stoop par 1 1. Kelly-Louw "The Prevention and Alleviation of Consumer Over-indebtedness" 2008 *SA Merc LJ* 203.
[44] Kelly-Louw & Stoop par 1 1.
[45] Hereinafter the "DTI". See Kelly-Louw & Stoop par 1 1.
[46] Kelly-Louw & Stoop par 1 1.
[47] Department of Trade and Industry *Consumer Credit Law Reform: Policy Framework for Consumer Credit* (Aug 2004) 9 & 34. Hereinafter the "*Policy Framework for Consumer Credit* 2004".
[48] Other pieces of consumer credit legislation *inter alia* included the Lay-Byes Regulations, as amended by GN R1814 in *GG* 3061 of 29 August 1980 and made under the Sales and Service Matters Act 25 of 1964, the Alienation of Land Act 68 of 1981 and the Banks Act 94 of 1990 – Kelly-Louw 2008 *SA Merc LJ* 201 & fn 5.

consumer credit industry.[49] The Usury Act, for instance, only regulated money loans that did not exceed R500 000 and provided a capped interest rates on such loans.[50] Even though the Usury Act required that basic disclosures had to be made to the consumer, such disclosures were purely selective, which in practice led to only the interest rate being disclosed.[51] Furthermore it did not make any provision for penalties in the instance of non-compliance, and due to its poor drafting it was a complicated Act which quickly became outdated.[52]

The Usury Act, although unintendedly, excluded low-income consumers from access to credit, as the capped interest rates made it impossible for credit providers to provide profitable small loans to such consumers.[53] Proposals were submitted to the Minister of Trade and Industry to render these small loans to low-income consumers more profitable for credit providers.[54] Subsequently, the Exemption Notice of 1992 was issued in terms of section 15A of the Usury Act which exempted loans less than R6 000 from the ambit of the Act.[55] In practice this meant that low-income and poor consumers who had no securable assets to obtain finance in the formal sector, had to resort to non-bank credit and informal sector loans, such as the micro-lending industry, where interest rates and other costs of credit were uncapped.[56] Lenders now had, to the detriment of the consumer, access to an unregulated micro-lending industry.[57] As the door was left right open for Lenders, it comes as no surprise that interest rates and other costs of credit were high, whilst extreme and unregulated money-collecting practices[58] transpired.[59]

The R6 000 exemption proved to be an inappropriate exemption amount for credit providers, as it was far below the minimum amount that credit providers could feasibly lend within the interest

[49] *Policy Framework for Consumer Credit* 2004 16.
[50] Kelly-Louw 2008 *SA Merc LJ* 201. It also applied to lease agreements that did not exceed R100 000 in value – *Policy Framework for Consumer Credit* 2004 22.
[51] Kelly-Louw 2008 *SA Merc LJ* 201.
[52] Kelly-Louw 2008 *SA Merc LJ* 201.
[53] Kelly-Louw & Stoop par 1 2.
[54] Kelly-Louw & Stoop par 1 2.
[55] Kelly-Louw 2008 *SA Merc LJ* 202.
[56] Kelly-Louw 2008 *SA Merc LJ* 202. *Policy Framework for Consumer Credit* 2004 12.
[57] Kelly-Louw 2008 *SA Merc LJ* 202. The Exemption Notice of 1992 did not impose any checks on the conduct of micro-lenders and they were also not regulated – Kelly-Louw & Stoop par 1 2.
[58] Where lenders took consumers' bank cards and identification numbers in order to draw an amount from their bank accounts, and often left them with little or no money at all. Such practices were later abolished by the Exemption Notice and prohibited by the Usury Act – Kelly-Louw 2008 *SA Merc LJ* 202 & 203.
[59] This was due to the fact that the micro-lending industry did not have access to the National Payment System like banks did – Kelly-Louw 2008 *SA Merc LJ* 202.

rate limitation.[60] Fortunately for credit providers, the 1999 Exemption Notice, which repealed and replaced the 1992 Exemption Notice, provided that loans of R10 000 or less were exempted from the ambit of the Usury Act and capped interest rates, on condition that it was payable in less than 36 monthly installments and not advanced in terms of a credit card or an overdraft.[61] Unlike the First Exemption Notice, the 1999 Exemption Notice required micro-lenders to comply with certain conditions in order to qualify for the exemption.[62] One of these conditions specifically required micro-lenders to register with the MFRC and therefore to comply with its rules.[63] The MFRC's purpose was to provide consumer protection to the clients who operated in the unrestricted interest rate zone.[64] However, unlike the position in terms of the NCA, the MFRC could only control lenders that were registered with it.[65] Another shortfall of this regulatory structure was that it created inconsistent regulatory requirements as compliance standards, registration and costs differed for similar transactions.[66]

The intent of the 1999 Exemption Notice, to bring about a well-regulated micro-lending industry and to focus more on consumer protection, becomes evident if one *inter alia* considers the registration requirement pertaining to certain micro-lenders, as well as administrative penalties imposed in the event of non-compliance and the compulsory disclosures which had to be made to consumers.[67] Even though the Exemption Notice attempted to regulate the micro-lending industry, its regulation was very limited and failed to close some of the most problematic loopholes.[68]

[60] Kelly-Louw & Stoop par 1 2.
[61] Kelly-Louw 2008 *SA Merc LJ* 202.
[62] Kelly-Louw 2008 *SA Merc LJ* 202.
[63] Kelly-Louw 2008 *SA Merc LJ* 202. Kelly-Louw & Stoop par 1 2.
[64] *Policy Framework for Consumer Credit* 2004 22.
[65] Kelly-Louw 2008 *SA Merc LJ* 202.
[66] Such as money loans in terms of the Usury Act, money loans in terms of the Exemption Notice, items bought on credit in terms of the Credit Agreements Act, and credit related to items that are not listed and which may potentially not be governed by either law – *Policy Framework for Consumer Credit* 2004 22.
[67] In terms of the 1999 Exemption Notice, limited disclosures had to be made to the consumer and administrative penalties were provided for in the event of non-compliance by registered micro-lenders – Kelly-Louw 2008 *SA Merc LJ* 202. *Policy Framework for Consumer Credit* 2004 16.
[68] One such a loophole was that lenders were able to provide a consumer with several loans of up to R10 000, which in practice enabled lenders to provide large amounts of money with high interest rates, as such loans (individually) fell outside the ambit of the Usury Act – Kelly-Louw 2008 *SA Merc LJ* 203.

Unlike the Usury Act, the Credit Agreements Act neither applied to money-lending transactions nor did it aim to regulate its financial aspects, as it mainly dealt with instalment-sale transactions and the contractual aspects of such agreements.[69] The Credit Agreements Act had a limited scope, as it only applied up to a cash price of R500 000 and to items that were listed by the Minister of Trade and Industry in a Government Notice.[70] Despite these obvious dissimilarities, the Usury Act and Credit Agreements Act had to be applied jointly as their scopes overlapped.[71] As the Usury Act was more comprehensive, the overlapping of legislation caused inconsistencies and confusion as some transactions and/or items were regulated by only one Act, whilst some were regulated by both and others not by either of the Acts, which ultimately led to a lack of enforcement.[72]

The enforcement of the Usury Act and Credit Agreements Act has for the most part been ineffective due to *inter alia* the unequal treatment of different transactions and providers.[73] Both these Acts have been subject to criticism as it exploited consumers through, *inter alia*, the lack of adequate consumer protection and the charging of excessive interest rates.[74] Other problems, such as discrimination, outdated debt-collecting procedures, credit providers' reckless behaviour towards consumers, lack of access to reasonably priced credit and, most importantly, the lack of adequate regulation,[75] rendered the credit market dysfunctional.[76] These problems were indicative that the credit market and its regulatory framework became ineffective and did not suite South Africa's political, economic and social context.[77] It evidently necessitated a review of the applicable regulatory framework for consumer credit.[78] The Department of Trade and

[69] Kelly-Louw 2008 *SA Merc LJ* 203.
[70] *Policy Framework for Consumer Credit* 2004 22.
[71] Kelly-Louw 2008 *SA Merc LJ* 203. Scholtz par 2 1.
[72] *Policy Framework for Consumer Credit* 2004 13 & 22.
[73] *Policy Framework for Consumer Credit* 2004 23.
[74] Kelly-Louw & Stoop par 1 1. Kelly-Louw 2008 *SA Merc LJ* 205.
[75] Credit bureaux for example, were not regulated at all, and the information they had and provided were often the incorrect credit information which ultimately resulted in consumers being incorrectly black-listed – Kelly-Louw 2008 *SA Merc LJ* 205.
[76] Kelly-Louw & Stoop par 1 1. Kelly-Louw 2008 *SA Merc LJ* 204.
[77] Kelly-Louw 2008 *SA Merc LJ* 205. *Policy Framework for Consumer Credit* 2004 13.
[78] The regulatory framework for contract enforcement and debt collection also had to be reviewed – *Policy Framework for Consumer Credit* 2004 13.

Industry initiated a review of the credit legislation in 2001, which ultimately resulted in the enactment of the NCA,[79] has already been mentioned above.[80]

The credit review drew on several other reports and investigations into the credit industry[81] and was co-ordinated by the MFRC.[82] The DTI's Technical Committee was responsible for conducting the review of the applicable consumer credit legislation, investigating the problems experienced in the credit market and obtaining expert opinions and proposals for a new and effective consumer credit regulatory framework.[83] The review and its proposals are best understood if one considers the DTI's policy objectives, being the promotion of a stable, efficient and competitive credit market where consumers' rights are adequately protected and access to credit is improved.[84] The review *inter alia* focused on the economic analysis of the consumer credit market and the consumer's perception of consumer protection.[85] Some weaknesses in the credit market came to light during the review and the most prominent ones included (a) the inadequate rules regarding the disclosures of the costs of credit; (b) the unrealistically low cap of the Usury Act; (c) the inappropriate mechanisms for debt-collection; (d) the inadequate rehabilitation of over-indebted consumers and prevention of reckless credit; (e) inconsistencies in legislation; (f) inaccurate information held by credit bureaux; and (g) regulatory uncertainty.[86] It therefore makes perfect sense that addressing these weaknesses forms part of the NCA's section 3 objectives which it aims to promote and advance.

During the review, consumer representatives indicated their concern regarding the effectiveness of consumer protection, specifically in relation to low-income and poor consumers.[87] It also became apparent that credit providers, consumer bodies and consumer representatives all agreed

[79] Kelly-Louw & Stoop par 1 1.
[80] See par 2 1 above.
[81] The review drew *inter alia* on the 1992 SA Law Commission review of the Usury Act and the 1995 SA Law Commission report on debt review, whilst the policy framework drew on the government's policy documents of the Reconstruction Development Programme of 1994 and the Microeconomic Reform Strategy of 2002 – *Policy Framework for Consumer Credit* 2004 7 & 8.
[82] Kelly-Louw 2008 *SA Merc LJ* 205. *Policy Framework for Consumer Credit* 2004 8.
[83] Kelly-Louw 2008 *SA Merc LJ* 205. *Policy Framework for Consumer Credit* 2004 13.
[84] Department of Trade and Industry *Credit Law Review: Summary of Findings of the Technical Committee* (Aug 2003) 3 (also available at http://www.ncr.org.za/documents/pages/background_documents/Summary%20of%20Findings.pdf – Accessed on 1 May 2017). Hereinafter the "*Summary of Findings of the Technical Committee* 2003".
[85] Kelly-Louw 2008 *SA Merc LJ* 205.
[86] Kelly-Louw 2008 *SA Merc LJ* 206.
[87] *Summary of Findings of the Technical Committee* 2003 3.

that the current consumer credit legislation had ineffective enforcement capacity, lacked a central credit regulator, became outdated, necessitated legislative reform and therefore had to be replaced with a simplified Credit Act.[88] This echo's the review by the South African Law Commission on the Usury Act of 1992, which also recommended that the then consumer credit legislation[89] must be replaced by a new Consumer Credit Act.[90] The recommendations by the DTI's Technical Committee on new legislation and the weaknesses of the consumer credit market were then published in a report during 2003.[91] The 2001 review's findings and recommendations were followed up in a Policy Framework for Consumer Credit by the DTI in August 2004,[92] in which the DTI *inter alia* conceded that consumers in the consumer credit market are particularly vulnerable and as such regulatory requirements, compliance and adequate redress are essential in order to provide protection to these consumers.[93] Subsequently, the DTI's report indicated the need for a new consumer credit regulatory framework[94] and the need for balance between consumer protection measures and regulatory burdens imposed on credit providers.[95]

In order to achieve such a framework, the DTI recommended the enactment of a new consolidated piece of legislation to replace the Usury Act, its Exemption Notice and the Credit Agreements Act.[96] It was proposed that the new Credit Act will apply to all credit providers and consumer credit transactions, introduce a common regulatory scheme,[97] require credit providers to disclose costs in a standard manner, have a consistent approach to interest rates and clear compliance requirements.[98] The DTI also proposed that the new consumer credit legislation must provide adequate protection to consumers by empowering a statutory regulator, namely the National Credit Regulator, which will be responsible for regulating the credit industry, ensuring

[88] *Summary of Findings of the Technical Committee* 2003 6.
[89] The Usury Act, Credit Agreements Act and the Exemption Notice.
[90] *Summary of Findings of the Technical Committee* 2003 8 & 9.
[91] Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005,* LLD Thesis (2012) UP 406 & 407.
[92] Kelly-Louw & Stoop par 1 3.
[93] *Policy Framework for Consumer Credit* 2004 9.
[94] *Summary of Findings of the Technical Committee* 2003 7. *Policy Framework for Consumer Credit* 2004 7.
[95] *Policy Framework for Consumer Credit* 2004 7.
[96] *Policy Framework for Consumer Credit* 2004 23.
[97] Whilst still providing differential treatment to accommodate different products and costs associated with smaller transactions – *Policy Framework for Consumer Credit* 2004 23.
[98] *Policy Framework for Consumer Credit* 2004 23.

compliance, and most significantly, requiring the registration of credit providers.[99] The National Credit Bill was subsequently tabled to Parliament in March 2005, where after it was adopted in the National Assembly and the National Council of Provinces in December 2005 and assented to by the President in March 2006.[100] The eventual enactment of the NCA brought about a new[101] and consolidated regulatory framework,[102] with the aim of providing policy direction on the regulation of the consumer credit market.[103] If one considers the size of the consumer credit market,[104] it goes without saying that adequate regulation thereof is pivotal to minimise abuse of consumers and ensure adequate consumer protection.[105] As such, the NCA, unlike its predecessors, requires the registration of (certain) credit providers.[106]

2 3 Conclusion

The previous consumer credit regulatory framework required reform as it proved to be fragmented, outdated and dysfunctional due to its inadequate regulation.[107] The DTI recognised that the consumer credit market is an industry that requires adequate regulation in order to minimise abuse of consumers and ensure consumer protection.[108] The DTI therefore initiated a review which indicated the desperate need for adequate regulation in the consumer credit industry, which ultimately led to the enactment of a consolidated piece of legislation, the NCA, which repealed and replaced the previous consumer credit legislation.[109] The NCA brought about a new regulatory regime by *inter alia* requiring certain credit providers to register.

[99] *Policy Framework for Consumer Credit* 2004 26.
[100] Kelly-Louw 2008 *SA Merc LJ* 207 at fn 29
[101] The NCA is not just an amendment of the previous consumer credit legislation, as it seeks to achieve much more and replaces the legislation that governed consumer credit for more than a quarter of a century – see *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA). Hereinafter "*Nedbank*".
[102] Kelly-Louw & Stoop par 1 1.
[103] Renke 407.
[104] See par 1 1 above.
[105] Renke 408.
[106] Kelly-Louw & Stoop par 1 1. See the discussion in par 3 below.
[107] See par 2 2 above.
[108] *Policy Framework for Consumer Credit* 2004 6. See par 2 2 above.
[109] See par 2 2 above.

CHAPTER 3

THE REGISTRATION REQUIREMENT OF CREDIT PROVIDERS IN TERMS OF THE NATIONAL CREDIT ACT

3 1 Introduction

It has already been mentioned above[110] that the National Credit Act repealed both the Usury Act and the Credit Agreements Act. The NCA should however not be seen as an amendment of its predecessors, as it replaced the previous consumer credit legislation[111] and attempted to make a clean break from the past.[112] The NCA, unlike its predecessors, is written in plain language, has a very broad scope of application and aims to provide more adequate and extensive protection to consumers.[113] Even though the NCA improved the legislative regime, it is not without shortcomings, as it, *inter alia*, contains concepts and definitions that our legal system are not accustomed to.[114] These cause, *inter alia*, uncertainty, interpretational problems, a lack of clarity and deviations from our common law.[115] It is quite unfortunate that the Amendment Act did not address all these uncertainties.[116]

The overreaching purpose of the NCA is to create a single consolidated system that regulates credit, whilst establishing a National Credit Regulator to administer the credit industry, as well as a National Consumer Tribunal[117] to ensure enforcement of the Act.[118] The fact that different

[110] See par 1 1 above.
[111] Scholtz par 2 1.
[112] See *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) par 15; *Nedbank* par 1; *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) pars 38 & 39; Kelly-Louw & Stoop pars 1 1 & 1 5.
[113] Kelly-Louw & Stoop pars 1 4-1 5.
[114] Scholtz par 2 1. According to Malan JA in *Nedbank*, the NCA cannot be described as the best drafted Act of Parliament which was ever passed as it contains numerous drafting errors untidy expressions and inconsistencies which make its interpretation a difficult task – par 2. See also *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 (1) SA 374 (WCC), where it was stated that the Act is notorious due to its lack of clarity – par 17.
[115] Scholtz par 2 1.
[116] Scholtz pars 1 3 6 & 2 1.
[117] Hereinafter the "NCT" or the "Tribunal".
[118] Kelly-Louw 2008 *SA Merc LJ* 208. Kelly-Louw & Stoop par 3 1. For a discussion on the purposes of the NCA see Scholtz par 2 3.

phases of the NCA came into effect over a period of twelve months,[119] afforded some time to the NCR and NCT to be operational prior to the final enactment of the NCA on 1 June 2007.[120] It also provided role-players, such as credit providers, time to register with the NCR in order to ensure compliance with the Act.[121]

It will become evident in this chapter that adequate regulation of the consumer credit industry is enabled through the registration requirement imposed on credit providers by the NCA.[122] The first question this chapter will address is who or what the Act defines as a credit provider.[123] Thereafter a brief overview of the registration process will be discussed.[124] The next point of discussion will concern the historic development of the registration requirement since the Act has been promulgated up until the most recent developments, to establish who is currently required to be registered as a credit provider in terms of the Act.[125] In a separate discussion, the issue relating to once-off and/or *ad hoc* credit agreements will also be touched on.[126]

3 2 Credit Provider

In order to establish which persons are required and/or eligible to be registered as credit providers in terms of section 40 of the Act, dealing with the matter, cognisance should first be taken of the Act's definition of a credit provider.[127] This definition does not specifically refer to or exclude natural or juristic persons. Therefore one can deduce that a natural person may be registered as a credit provider, unless such a person is disqualified in terms of section 46 from being registered.[128] This is where a natural person is *inter alia* an unrehabilitated insolvent or under the age of 18 years.[129] The same holds true for a juristic person[130] which is also permitted

[119] See par 1 1 above. The provisions dealing with the establishment and functions of the NCR, as well as the registration requirements and procedures for certain role-players came into operation during the first phase of the implementation of the Act on 1 June 2006 – Kelly-Louw & Stoop par 1 4.
[120] Kelly-Louw & Stoop pars 1 3-1 4.
[121] Kelly-Louw & Stoop pars 1 3-1 4.
[122] See Kelly-Louw & Stoop par 3 2 9 2.
[123] See par 3 2 below.
[124] See par 3 3 2 below.
[125] See pars 3 4 2-3 4 4 below.
[126] See par 3 4 5 below.
[127] The definition of a credit provider in terms of s 1 has already been mentioned in par 1 6 above.
[128] See s 46 for the disqualification of natural persons.
[129] Ss 46(2) & (3).

to register as a credit provider, as long as such a juristic person is not disqualified from registration in terms of section 47.[131] In the instance where a registered natural or juristic person becomes disqualified in terms of section 46 or 47 respectively, the NCR is obliged to deregister such a disqualified registrant.[132]

Even though the field of application of the Act falls outside the scope of this dissertation,[133] it is important to note that the definition of a credit provider in section 1 states "in respect of a credit agreement to which this Act applies", which according to various academics implies that only a credit provider in respect of a credit agreement that falls within the scope of application of the Act will therefore be subject to the application of the Act and will have to register as a credit provider with the NCR.[134] In short, credit providers who only provide incidental credit or credit in terms of credit agreements that are not governed by the Act, due to it being exempted from the Act's application in terms of section 4 or not constituting a credit agreement as classified in section 8, are not required to be registered as credit providers in terms of the Act.[135] However, the registration of a credit provider is not a prerequisite for the Act to apply to a credit agreement.[136]

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[130] S 1 of the Act defines a juristic person as a partnership, association or other body of persons, corporate or unincorporated, or a trust if there are three or more individual trustees or where the trustee is itself a juristic person, but excludes a stokvel. See s 1 for the definition of a "stokvel".

[131] See s 47(2) for when a juristic person may not be registered as a credit provider. See also Kelly-Louw & Stoop par 4 1 1 1.

[132] Ss 46(5) & 47(6). Otto & Otto pars 22 5 & 22 7.

[133] See s 4 for the application of the Act, which application is subject to s 5 (which deals with the limited application of the Act to incidental credit agreements and clearly states that s 40, which deals with the registration of credit providers, is not applicable to incidental credit agreements) and s 6 (which entails the Act's limited application to juristic persons). For a brief discussion of the Act's application see par 1 1 above for relevant sources. See also Van Heerden & Renke 2015 *THRHR* 83.

[134] Van Heerden & Renke 2015 *THRHR* 83. Scholtz par 5 2 2 1. A similar view has also been expressed in *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2014 (4) SA 253 (SCA) at par 4 read with pars 45 & 47, where it was held that the defendant was not required to register as a credit provider in terms of s 40 of the Act, as the Act did not apply to that credit agreement. The court further held that the more sensible interpretation of s 40 is that only those credit providers who provide the threshold number of credit agreements that are subject to the Act, must register – par 36.

[135] Van Heerden & Renke 2015 *THRHR* 83 & 84. See also s 40(1) which clearly excludes incidental credit agreements from the requirement to register. Courts must decide whether an agreement constitutes an incidental credit agreement or not in order to establish if a credit provider is required to be registered – see *Nedan (Pty) Ltd v Selbourne Food Manufacturers CC & Another* (53658/2010) [2014] ZAGPPHC 979 (18 November 2014). For a discussion see also Renke "Is an Incidental Credit Agreement Pertinent or not?: *Nedan (Pty) Ltd v Selbourne Food Manufacturers CC & Another*" 2017 *SA Merc LJ* 129.

[136] Scholtz par 4 1.

3 3 A Brief Overview of the Registration Application

3 3 1 Introduction

On 1 June 2006, section 12 of the Act established the NCR as an independent juristic person with extensive functions and responsibilities, which ended the MFRC's mandate and transferred all its assets, liabilities and staff to the NCR.[137] The NCR acts as a watchdog and its main responsibilities consist *inter alia* of registering credit providers and other role-players, enforcing the Act, and regulating the credit industry.[138] Other responsibilities *inter alia* include the cancellation or suspension of registration.[139]

3 3 2 Registration Application

Section 14 imposes the responsibility on the NCR to regulate the consumer credit industry through *inter alia* registering credit providers, credit bureaux and debt counsellors, payment distribution agents and alternative dispute resolution agents.[140] Every credit provider[141] who meets the threshold must apply to the NCR to be registered.[142] A credit provider must lodge his application for registration together with his registration fee in the prescribed manner and form to the NCR.[143] The NCR may then exercise its discretion to determine whether further information

[137] Items 8(a) & (b) of the NCA – Kelly-Louw 2008 *SA Merc LJ* 209 at fn 39. Subsequently, the previous CEO of the MFRC also became the first CEO of the NCR, namely Mr G Davel – Kelly-Louw & Stoop par 3 2 1 at fn 13.
[138] In terms of s 13(a) the NCR is also responsible to realise the objectives of the Act, as set out in s 3 – Scholtz par 2 3. For the responsibilities of the NCR see ss 12-18 and Scholtz par 3 2. In light of the NCR's extensive responsibilities, it must be noted that the NCR has jurisdiction throughout the Republic of South Africa – s 12(1)(a).
[139] Such suspension and cancellation is subject to s 57(2). See also ss 54-59 – Kelly-Louw & Stoop par 3 1 at fn 6 & par 3 2 9 2 at fn 112.
[140] S 14(a). Scholtz par 3 2. The Amendment Act inserted ss 44A & 134A in the main Act in respect of the registration of payment distribution agents and alternative dispute resolution agents respectively (ss 12 & 35 of the Amendment Act) and also inserted regulations stipulating the registration criteria of payment distribution agents and alternative dispute resolution agents – GN R202 of 13 March 2015.
[141] And every debt counsellor, credit bureau, payment distribution agent and alternative dispute resolution agent – Scholtz par 5 3 1.
[142] Scholtz par 5 3 1. Otto & Otto par 15 2.
[143] S 45(1). The prescribed form for the application for registration as a credit provider is Form 2; Form 3 is prescribed for supplementary registration as a developmental credit provider; Form 4 for registration as a debt counsellor; Form 5 for registration as a credit bureau; Form 46 for the registration as a payment distribution agent and Form 47 for the registration as an alternative dispute resolution agent – Scholtz par 5 3 2. See also Schedule 1 of the Act as amended by GN R202 of 13 March 2015 and reg 4(1)(a). In terms of s 51(1)(a) the Minister may prescribe an application fee which is paid once-off to the NCR upon the submission of the application for

is required and subsequently refuse an application if such information is not supplied within 15 business days from the NCR's request.[144] In terms of the Amendment Act, a prospective registrant must further satisfy the fit and proper test which is conducted by the NCR.[145] The NCR has a wide discretion to deny an application for registration where the Regulator is of the view that there are compelling grounds which disqualifies a person from being registered.[146] However, the NCR may not refuse an application for registration where there are no compelling grounds for disqualification and the applicant complied with the registration criteria in terms of the Act.[147] This application for registration is however subject to NCR's application of the following two criteria, namely the commitments of the applicant to black economic empowerment, if any, as well as its commitments, if any, to combat over-indebtedness and compliance with a prescribed code of conduct and affordability assessment regulations.[148]

An initial registration fee is payable once the applicant is registered as a credit provider, and thereafter the credit provider is obliged to pay an annual renewal fee for the duration of his registration.[149] A credit provider is further obliged to comply with other duties subsequent to registration, such as stating its registered status and complying with conditions of registration, if any.[150] Fortunately the registration of a credit provider in terms of the Act is not territorial, and a registrant is permitted to conduct registered activities throughout South Africa.[151]

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registration, which is additional to the initial registration fee and annual renewal fee, and is currently R550 – Scholtz pars 5 3 3 1 & 5 3 3 6. See also GN 514 in *GG* 39981 of 11 May 2016, hereinafter the "Determination of Application, Registration and Renewal Fees Regulations of 2016". See pars 5 3 3 2-5 3 3 5 of Scholtz for the application fees of credit bureaux, debt counsellors, payment distribution agents and alternative dispute resolution agents, which varies from R500 to R550. An applicant can also be required to submit additional documents with his application form if such application form requires it – Scholtz par 5 3 2.

[144] S 45(2) read with reg 4(3). If an applicant refuses to comply with an unreasonable request and the NCR subsequently denies his application for registration, such an applicant would be entitled to approach the Tribunal for an order to review and set aside the NCR's decision to deny his application for registration, in which case the Tribunal – Scholtz par 5 3 2. In terms of s 59(1) when such an affected person applied to the Tribunal for a review of the decision, the Tribunal may either make an order confirming the decision or setting it aside in whole or in part.

[145] S 45(3). Scholtz par 5 2 1.

[146] S 45(3). Scholtz par 5 2 1. See also Otto & Otto par 22 5.

[147] Unless the NCR is of the view that there are compelling grounds which disqualifies a person from being registered in terms of the Act – s 45(3).

[148] S 48. These conditions of registration in terms of s 48 may be reviewed by the NCR – s 49.

[149] Scholtz par 3 5 1. Kelly-Louw & Stoop pars 4 1 & 4 1 5. S 51 read with the Regulations on the Determination of Application, Registration and Renewal Fees Regulations – see table A for the initial registration fee and annual renewal fee of a credit provider and tables B-E for the initial registration fees and annual renewal fees of credit bureaux, debt counsellors, payment distribution agents and alternative dispute resolution agents.

[150] In terms of s 48(3) the NCR may propose conditions for registration on an applicant by providing the applicant with a written notice in the prescribed manner and form setting out the conditions for registration and the reasons for

The NCR ensures the registration requirement is complied with by utilising its powers through *inter alia* issuing a section 54(1) notice to an unregistered person to stop engaging in an activity that requires registration,[152] alternatively issuing a compliance notice to a registrant who has *inter alia* failed to comply with a provision of the Act[153] or with its registration condition(s),[154] or by cancellation of the registrant's registration.[155] A section 54(1) notice and a compliance notice may be objected to by applying to the Tribunal in the prescribed manner and form to review such notice.[156] When a compliance notice is complied with, the NCR is obliged to issue a compliance certificate to such a registrant.[157] However, in the event where the registrant fails to comply with a compliance notice and does not object to it either, it constitutes an offence and the NCR is permitted to refer it to the National Prosecuting Authority or to the Tribunal.[158] The NCR may furthermore request the Tribunal to cancel any registration in the event where a registrant repeatedly failed to comply with any conditions of its registration[159] or contravened the Act.[160] When the Tribunal cancels the registration of a credit provider, the NCR is obliged to give written notice thereof to the registrant, stating the reasons for the cancellation and the date of the said cancellation, being the date on which the order was issued by the Tribunal.[161]

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them. See s 48(4) for the requirements of the registration conditions and s 49 for the variations the NCR may propose to the registration conditions. See also Otto & Otto par 34 for a list of the credit provider's extensive duties.

[151] S 50(1). Kelly-Louw & Stoop par 4 1.

[152] S 54(1). If such a person is a regulated financial institution, the NCR may not issue such a notice before it has consulted with the regulatory authority that issued the licence to such regulated financial institution – Kelly-Louw & Stoop par 4 2 1.

[153] S 55(1)(a).

[154] S 55(1)(b). If such a person is a regulated financial institution, the NCR may not issue such a notice before it has consulted with the regulatory authority that issued the licence to such regulated financial institution – Kelly-Louw & Stoop par 4 2 2.

[155] S 57(1). See Otto & Otto pars 22 5-22 7.

[156] S 56(1). See Kelly-Louw & Stoop pars 4 2 1 & 4 2 2.

[157] S 55(5).

[158] Ss 55(6)(a) & (6)(b). See Kelly Louw & Stoop par 4 2 2.

[159] In terms of s 48(3) the NCR may propose any conditions of registration by delivering a written notice in the prescribed manner and form to such an applicant, like a credit provider, setting out the conditions and reasons for them – Kelly-Louw & Stoop par 4 1 4. See also ss 48(4)-(7).

[160] Kelly-Louw & Stoop par 4 3 1.

[161] Ss 57(5) & (7)(a).

The NCR is obliged to keep a register of all industry participants, such as credit providers, who are registered or have previously been registered,[162] and as such, the NCR has the duty to cancel a registrant's registration certificate and to amend the Registration Register accordingly when the Tribunal cancelled a registration.[163] The NCR may also take international developments in consumer credit and financing into consideration whilst carrying out its functions.[164]

From the above it is quite evident that the NCR is charged with a few important tasks, such as the registration of certain credit providers, which enables the adequate regulation of the consumer credit industry in South Africa.[165] However, the question still remains which credit providers are required to lodge an application for registration to the NCR?

3 4 Who is Required to Register as a Credit Provider?

3 4 1 General

It has already been mentioned above[166] that for the first time the NCA has made it compulsory for credit providers to register with the NCR.[167] Although the registration requirement in terms of section 40 of the Act has seen a few amendments, the NCA has however always required certain credit providers to be registered.[168] This part will discuss the historic developments of the registration criteria since the Act was promulgated up until the most recent developments, as well as the evolvement of the threshold requirement in terms of section 42. The question regarding once-off and/or *ad hoc* credit agreements will be discussed separately after having regard to the current registration requirements.

[162] S 53. Kelly-Louw & Stoop par 3 2 9 3 1.
[163] Ss 57(6)(a) & (6)(b). Kelly-Louw & Stoop par 4 3 1.
[164] S 12(4)(a). Kelly-Louw & Stoop par 3 2 1. It is interesting to note that the amendment of the threshold by the Minister during 2016 is in line with international laws – see par 3 4 4 below.
[165] Scholtz par 3 2 3.
[166] See par 1 1 above.
[167] Kelly-Louw & Stoop par 4 1.
[168] Before and after the amendment of the NCA – see s 40. See also pars 3 4 2-3 4 3 below.

3 4 2 The Registration Requirement in terms of the National Credit Act (Prior to the Amendment Act)

Prior to the amendment of the NCA in 2014, section 40(1) required a person to apply to be registered as a credit provider if:

a.) that person, alone or in conjunction with any associated person,[169] is the credit provider under at least 100 credit agreements, other than incidental credit agreements;[170] or

b.) the total principal debt owed to that credit provider under all outstanding credit agreements, excluding incidental agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).[171]

Even though the Act required at that stage the registration of all credit bureaux[172] and debt counsellors,[173] it is evident from section 40(1)(a) and (b) that it did not require the registration of all credit providers.[174] Only credit providers who have concluded at least 100 credit agreements, or alternatively credit providers who were owed more than R500 000 under all outstanding credit agreements, had to register unless the credit provider concluded only incidental credit agreements, in which case registration was not required.[175] Where a person for instance provided credit under 99 credit agreements (to which the Act applied and which were not incidental credit agreements) and the total outstanding principal debt under all such credit agreements amounted to R470 000, for example, such a person would not have been required to register as a credit

[169] For the definition of "Associated Person" see s 40(2)(d). See also Van Heerden & Renke 2015 *THRHR* 85.

[170] S 1 of the Act defines an incidental credit agreement as an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods and services that are to be provided to a consumer over a period of time and either or both of the following conditions apply:

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

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

S 40(6)(b) also excludes credit guarantees to which the credit provider was a party. A credit guarantee is defined in s 8(5) and includes suretyship agreements that are entered into in respect of a credit facility or a credit transaction falling under the NCA.

[171] Which was at that stage set at R500 000 and prescribed in terms of s 42(1) read with s 40(1)(b) and the Threshold Regulations of 2006, GN 713 in *GG 28893* of 1 June 2006 (hereinafter the "Threshold Regulations"), and which could not be less than R500 000.

[172] S 43.

[173] S 44. The debt counsellor is introduced by the Act as a new role-player in the credit industry – Renke 463 at fn 423.

[174] Ss 40-42.

[175] Ss 40(1)(a) & (1)(b). See also Kelly-Louw & Stoop par 4 1 1 1.

provider in terms of the Act.[176] Similarly, where a person provided credit under only one agreement (to which the Act applied and which was not an incidental credit agreement) where the outstanding principal debt was R498 000 for example, such a person was also not required to be registered.[177] It must also be noted that subsections 40(1)(a) and (b) were stated in the alternative, meaning that a person who provided credit under 100 credit agreements were required to be registered as a credit provider in terms of the Act, even though the total outstanding principal debt did not exceed the determined threshold, and vice versa.[178]

Prior to the Amendment Act, section 42(1) clearly stated that the Minister had to determine a threshold of not less than R500 000 to determine whether a credit provider was required to be registered in terms of section 40(1). The threshold was therefore set at the required minimum of R500 000.[179] The position has however since changed, which will be discussed below.[180]

The question regarding when a credit provider had to apply for registration in terms of the aforementioned criteria also often arose. Section 42(3)(a) however provided some clarity in respect of section 40(1)(b), as it stated[181] that a credit provider who is required to be registered for the first time, must apply for registration by the time the threshold takes effect (in other words, once the total outstanding principal debt exceeded R500 000) but could thereafter still continue to provide credit until the NCR has made a decision on its application.[182] In light thereof, academics such as Van Heerden and Renke argued by analogy that a person would therefore only have been required to register as a credit provider once he had concluded at least 100 credit agreements in terms of section 40(1)(a).[183] By the letter of the law it would thus have been possible for an unregistered credit provider to have concluded 99 lawful credit agreements (where the total outstanding principal debt did not exceed the R500 000 threshold) and only apply for registration as a credit provider after the conclusion of its 100th credit agreement.[184]

[176] See Van Heerden & Renke 2015 *THRHR* 84 for other examples.
[177] See Van Heerden & Renke 2015 *THRHR* 84 for other examples.
[178] Van Heerden & Renke 2015 *THRHR* 84.
[179] See the Threshold Regulations.
[180] See pars 3 4 3 & 3 4 4 below.
[181] And still currently states the same, as this section has not been amended.
[182] Van Heerden & Renke 2015 *THRHR* 85.
[183] Van Heerden & Renke 2015 *THRHR* 85.
[184] Van Heerden & Renke 2015 *THRHR* 85.

However, Van Heerden and Renke suggested that where a person anticipated that he would be providing credit under a 100 or more credit agreements or that the total principal debt would exceed the threshold of R500 000, it would have been sensible (at that stage) to have already applied for registration before entering into the credit agreement(s) (that would have taken the credit provider over the registration threshold) and thereby not to compromise the lawfulness of any succeeding agreement due to the credit provider being unregistered.[185] A similar view was also held in light of credit providers who were already granting credit but not yet required to be registered in terms of section 40, in that registration had to be done in advance before meeting the registration requirements in terms of section 40(1).[186] Where a credit provider was however unregistered at the time he met the registration criteria, section 89(4)(a) provided assistance to such an unregistered credit provider in the form of a 30 calendar day grace period to apply for registration in terms of section 40 of the Act, without rendering the credit agreement unlawful, which assistance is still currently provided.[187]

The abovementioned registration criteria however changed when the Amendment Act came into operation, which will be discussed next.

3 4 3 The Registration Requirement in terms of the Amendment Act

The National Credit Act has been amended substantially by the Amendment Act, which came into effect on 13 March 2015.[188] The Amendment Act brought about important amendments to section 40 and 42 respectively.

It is interesting to note that the National Credit Amendment Bill of 2013 did not propose any amendments to section 40 initially. However, the third draft of the Bill proposed the amendment of section 40 by deleting one of the registration requirements in terms of section 40.[189] The consequences was that in terms of the Amendment Act, the registration requirement in terms of

[185] Van Heerden & Renke 2015 *THRHR* 85 & 86.
[186] Van Heerden & Renke 2015 *THRHR* 86.
[187] S 89(4)(a) has not been amended and still provides unregistered credit providers with such a 30 calendar day period after the credit agreement was entered into to apply for registration in terms of s 40.
[188] Proc R10 in *GG* 38557 of 13 March 2015.
[189] Van Heerden & Renke 2015 *THRHR* 98.

section 40(1)(a), which concerned the total number of credit agreements concluded, was repealed and the amended section 40(1) subsequently only required a person to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements exceeded the prescribed threshold in terms of section 42(1).[190] Even though the threshold was still set at R500 000, section 11 of the Amendment Act amended section 42 of the principal Act by omitting the words "not less than R500 000".[191] Section 42(1) as amended therefore stated that the Minister had to determine a threshold by way of notice in the Gazette to determine whether a credit provider was required to be registered in terms of section 40(1), without there being any reference to a minimum threshold amount, which was previously set at R500 000.[192] The effect of this amendment was that the Minister could determine any threshold. However, no new threshold was determined until May 2016.[193]

The immediate effect of the amendments in terms of the Amendment Act was thus that: (a) the number of credit agreements threshold no longer applied; and (b) the principal debt threshold remained and was initially kept at R500 000. The amendments did not have any effect on the exclusion of credit guarantees and incidental credit agreements from the registration of credit providers requirement.[194]

Even where a credit provider was not required to be registered in terms of section 40 but its credit agreement still fell within the ambit of the Act, the NCA was still applicable to such a credit agreement.[195] Unregistered credit providers were therefore not exempted from the Act's provisions dealing with credit agreements and were thus still obliged to comply therewith or else face heavy sanctions.[196]

It must also be noted that credit providers who satisfied the threshold(s) were by no means the only persons who were eligible to be registered as a credit provider under the Act, as section

[190] S 10 of the Amendment Act.
[191] See s 11 of the Amendment Act.
[192] S 11 of the Amendment Act.
[193] See par 3 4 4 below.
[194] Ss 40(1) & (6)(b).
[195] Kelly-Louw & Stoop par 4 1.
[196] Kelly-Louw & Stoop par 4 1. See also Van Heerden & Renke 2015 *THRHR* 102.

40(5) also enabled persons who were not required by section 40(1) to be registered, to apply voluntarily to the NCR for the registration as a credit provider.[197]

The functions and powers of the NCR are quite extensive, as is evident from above.[198] When one considers the colossal size of the credit industry,[199] it seemed to have been rather a blessing in disguise that not all credit providers were required to be registered, as it would have placed a large(r) burden on the NCR to regulate each and every credit provider participating in the credit industry, even though the latter situation would be ideal. However the registration criterion in respect of the outstanding principal debt has seen another amendment as a new threshold for the registration of credit providers has been determined in 2016.

3 4 4 The Registration Requirement after November 2016

It has already been mentioned above[200] that despite the amendment to section 42, no new threshold was determined immediately. On 11 May 2016, the Minister of Trade and Industry issued a government notice determining a new and final threshold of R0 for the registration of credit providers in terms of section 42(1),[201] which was previously set at R500 000.[202] The R0 threshold came into effect 6 months later,[203] on 11 November 2016.[204] The registration requirement, as it currently stands, therefore requires a credit provider to be registered in terms of section 40 of the Act if the total principal debt owed to him under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold which is prescribed

[197] See s 40(5) read with s 39(1). In terms of s 40(5), a person to whom this section does not apply in terms of s 39, or who is not required to be registered as a credit provider in terms of this section, may voluntarily apply to the NCR to be registered as a credit provider, at any time. S 39(1) states that ss 40, 42, 45, 48, 49 and 51 does not apply to a credit provider who:

(a) operates only within one province; and
(b) is registered as a credit provider in terms of applicable provincial legislation, if the Minister has declared that the registration requirements in terms of that provincial legislation are comparable to or exceed the registration requirements in terms of the Act.

[198] See par 3 3 above.
[199] See par 1 1 above.
[200] See par 3 4 3 above.
[201] GN 513 in *GG* 39981 of 11 May 2016. Hereinafter the "Determination of a Threshold for Credit Provider Registration of 2016". The draft determination of a threshold for credit provider registration was published for public commenting under GN 158 in *GG* 39663 of 4 February 2016.
[202] See par 3 4 3 above.
[203] As prescribed in terms of s 42(2).
[204] Determination of a Threshold for Credit Provider Registration of 2016.

in terms of section 42(1), which is currently R0.[205] The effect of this new threshold is that from 11 November 2016 all credit providers, except those that only provide incidental credit, are required to be registered.[206]

This amendment evidently brought forth practical implications for credit providers whom were not previously required to be registered in terms of the Act but are now required to be registered in light of the new threshold. Such credit providers were obliged to apply for registration as soon as the threshold took effect, but, in terms of section 42 they were still permitted to provide credit during the period pending the NCR's decision of their applications.[207]

Although this amendment of the threshold sets a plausible ideal of regulating all credit providers in the credit industry and is furthermore in line with the credit law in the United Kingdom where no provision for a specific threshold pertaining to the licensing of credit providers is made,[208] it was, as will be indicated later, perhaps not well thought through by government.

3 4 5 Once-off and/or *Ad hoc* Credit Agreements

A question which often arose was whether or not it was the legislature's intention that a person who was not in the business of granting credit, but provided credit on a once-off and/or *ad hoc* basis to another person, such as to a friend, that exceeded the threshold of R500 000 was also required to be registered as a credit provider in terms of the Act.[209] The courts handed down a number of conflicting judgments relating to this issue, which will be discussed hereafter.[210] It must be noted that these judgments were handed down prior to the amendments of the Act and whilst the pre-amendment threshold of R500 000 was still applicable. However, whether one sits with a R500 000 or a R0 threshold, the question remains whether a credit provider that concludes a once-off and/or *ad hoc* credit agreement and thus exceeds the threshold, must apply to be registered under the NCA.

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[205] S 40(1) read with s 42(1) and the Determination of a Threshold for Credit Provider Registration of 2016.
[206] Scholtz pars 5 2 1 & 5 2 2 1.
[207] S 42(3)(a).
[208] Van Heerden & Renke 2015 *THRHR* 80 & 102.
[209] See Otto & Otto par 22 4.
[210] Scholtz par 5 2 2 1.

3 4 5 1 *Friend v Sendal*[211]

Sendal considered the implications of section 40(1)(b). The facts were as follows: On or about 10 December 2006, the Appellant (the Respondent in the court *a quo*) acknowledged in writing that he was indebted to the Respondent (the Applicant in the court *a quo*) in the amount of R1 225 000, and undertook to pay the said amount in full on or before 1 December 2007.[212] He further undertook to pay interest on the aforementioned amount on or about the first day of every month which interest is to be calculated at prime rate charged by Standard Bank from time to time on the unsecured overdraft facilities.[213] However, by 1 December 2007, the Appellant had only paid a portion of the outstanding capital amount, which caused the Respondent to institute motion proceedings against the Appellant for the payment of the remainder of the capital in the sum of R620 000 plus interest.[214] The court *a quo* handed down judgment in favour of the Plaintiff where after the Respondent appealed against the judgment handed down by Kollapen AJ.[215] The Appellant raised two defences in the court *a quo*, the second defence being relevant to the scope of this dissertation. The first defence raised by the Appellant was that the acknowledgement of debt constituted a credit agreement in terms of the NCA, and therefore that the Respondent was not entitled to institute the application as no notice in terms of section 129 was given. The second defence was that the credit agreement, being an acknowledgment of debt, was null and void as the Respondent was not registered as a credit provider.[216]

The court of appeal confirmed that the court *a quo* correctly found that the acknowledgment of debt is a credit agreement in terms of the Act.[217] The court *a quo* also found that the Respondent was indeed required to be registered as a credit provider. However, the full bench raised the question whether section 40 obliged the Respondent to register as a credit provider where he

[211] 2015 (1) SA 396 (GP). Hereinafter "*Sendal*". For a discussion of this case see Van Heerden & Renke 2015 *THRHR* 93-96.
[212] *Sendal* par 4.
[213] *Sendal* par 4.
[214] *Sendal* pars 5-6.
[215] The court *a quo* ordered the Appellant to pay the Respondent R620 000 together with interest accrued on the capital amount which is calculated on the applicable interest rate levied by Standard Bank from time to time on the unsecured overdraft facility from 2 December 2008 to 1 March 2009, which amounted to R30 515.89, and also from 2 March 2009 to date of payment. The court also ordered the Appellant to pay the costs of the application – *Sendal* pars 1-3.
[216] *Sendal* par 7.
[217] *Sendal* pars 10 & 15.

only concluded one credit agreement.[218] The court of appeal held that section 40(1)(a) refers to a situation where a person provides credit or concludes credit agreements on a regular basis, and that a person would be obliged to register if he, alone or in conjunction with an associated person, concluded at least a 100 credit agreements.[219] Subsequently, the court found that the Respondent was not required to be registered as a credit provider where he concluded only one credit agreement, as section 40(1)(b), which requires the total principal debt owed to that credit provider under all outstanding credit agreements to exceed the threshold of R500 000, is directed at those who participate in the credit market, and not at those who provide once-off transactions.[220]

3 4 5 2 *Opperman v Boonzaaier*[221]

A similar view has been held in *Boonzaaier*. What transpired in this case is as follows: The court raised concern regarding a farmer's non-registration as a credit provider who brought an application to sequestrate his friend after the said friend could not to repay the farmer in respect of a loan of R7 million.[222] The court held that a loan constitutes a credit agreement, which meant that the farmer qualified as a credit provider in terms of the Act and had to be registered as a credit provider at the time he advanced the R7 million to his friend, or had to apply to be registered within a month after he entered into the loan agreement with his friend, which was not the case.[223] It was further held that registration fulfils an important part in assisting the NCR to fulfil its functions, but information of an individual who extends credit on an *ad hoc* basis and therefore not in the course of his business, would hardly contribute in a meaningful manner to the NCR's functions and duties.[224] With reference to section 40(1)(b) Binns-Ward J held that "the total principal debt owed to that credit provider under all outstanding agreements" indicates that a credit provider must have concluded a number of credit agreements and not just one or

[218] *Sendal* par 13.
[219] *Sendal* par 17. The court also held that s 40(1)(b) should be interpreted as it reads, namely that a credit provider is obliged to be registered if he provides credit under credit agreements, referring to the frequency in which he provides credit, and the court further stated that if this was not so, s 40(1)(b) could simply have referred to a credit agreement – *Sendal* par 22.
[220] *Sendal* pars 19 & 24.
[221] Unreported case nr 24887/2010 (WCC) (17 April 2012). Hereinafter "*Boonzaaier*".
[222] *Boonzaaier* par 1.
[223] *Boonzaaier* pars 3 & 5.
[224] *Boonzaaier* par 24.

two.[225] He also stated that other provisions in the NCA also confirm the legislature's intention that only persons carrying on business as credit providers should be registered as credit providers.[226] In this regard Binns-Ward J referred to section 50(2)(a) as an example, as it states:

> It is a condition of every registration issued in terms of this Act that the registrant must—
> (a) permit the National Credit Regulator or any person authorised by the National Credit Regulator to enter any premises at or from which the registrant conducts the **registered activities during normal business hours**, and to conduct reasonable inquiries for compliance purposes, including any act contemplated in section 154/91)(d) to (h);

The same argument is also made in respect in respect of section 52,[227] as well as the content of the prescribed application for registration form, as the court held it relates more to a person conducting business as a credit provider rather than an individual that intends to conclude one or two *ad hoc* loans to an acquaintance, regardless of the amount thereof.[228] The court further stated that it is not evident from the provisions of the Act why an individual who intends to provide credit to a friend on an *ad hoc* basis and in an amount that exceeds the determined threshold, should provide information to the NCR to enable the NCR to apply the criteria as set out in section 48(1).[229] It is also interesting to note that the "Memorandum on the Objects of the National Credit Bill, 2005"[230] suggested that the Act would not apply to or regulate loans between family members, partners and friends on an informal basis.[231]

3 4 5 3 *Black v Stroberg*[232]

[225] *Boonzaaier* par 26.
[226] *Boonzaaier* par 27.
[227] Which contemplates a certificate of registration which must be issued for each premises from which the credit provider conducts the activities authorised in terms of the registration – *Boonzaaier* par 27.
[228] *Boonzaaier* par 28.
[229] *Boonzaaier* par 28. The criteria in terms of s 48 relates to the commitments made by the applicant, if any, to black economic empowerment and the commitments made by the applicant, if any, in connection with combatting over-indebtedness, compliance with a prescribed code of conduct, and affordability assessment regulations – ss 48(1)(a) & (1)(b).
[230] This document accompanied the proposal which was submitted to Parliament for the adoption of the NCA – *Boonzaaier* par 28.
[231] Binns-Ward J further comments that no explanation was given as to the meaning of a loan "on an informal basis" and states that even though the Act also specifically excluded credit agreements concluded between individuals in a family relationship who are dependent or co-dependent, it does not exclude credit agreements concluded between friends from its ambit as there was no reference made to "friends" – *Boonzaaier* par 28.
[232] [2013] ZAKZPHC 16 (15 April 2013). Hereinafter "*Stroberg*".

A similar view was held in *Stroberg*. In this case the Applicant sold his member's interest and loan account in a close corporation to the Respondent.[233] After the conclusion of the sale agreement, the Respondent sought indulgence to pay the purchase price which resulted in a loan agreement.[234] When the Respondent breached his contractual obligations in terms of the loan agreement, the Applicant's attorney notified the Respondent of his non-payment by way of a breach letter, where after a few payments were made.[235] Subsequent to another breach letter, the Respondent's attorney notified the Applicant's attorney that the loan agreement was unlawful and void to the extent provided for in section 89 of the Act as the Applicant was not registered as a credit provider in terms of section 40(1)(b).[236]

The question the court asked was whether the Applicant was required to be registered as a credit provider in terms of section 40(1)(b).[237] The court referred to *Sendal*, and held that it disagrees with Legodi J who held that the frequency of the credit provider's activities is relevant to interpret section 40(1)(b), as the frequency of the credit provider's lending transactions is dealt with in section 40(1)(a).[238] The court further held that section 40(1)(b) deals with a credit provider who has lent an amount exceeding the threshold of R500 000, whether or not it was one or more credit agreements.[239] However, the court also referred to *Boonzaaier*, and held that it could not have been the Act's intention that an individual who makes a loan to another at arm's length that exceeds that threshold of R500 000, is required to be registered as a credit provider in terms of the Act.[240] The court further held that section 40(1)(a) suggests that the legislature intended that only persons who make it their business to provide credit at a cost to a consumer should be registered as credit providers.[241]

3 4 5 4 *Evans v Smith and Another*[242]

[233] *Stroberg* par 1.
[234] *Stroberg* pars 1 & 4.
[235] *Stroberg* par 5.
[236] *Stroberg* par 5.
[237] *Stroberg* par 8.
[238] *Stroberg* par 28.
[239] *Stroberg* par 28.
[240] *Stroberg* pars 29 & 30.
[241] *Stroberg* par 31.
[242] 2011 (4) SA 472 (WCC). Hereinafter "*Evans*".

In *Evans*, the Applicant advanced various amounts to the First Respondent, which more or less amounted to R640 000, to enable the First Respondent to secure the release of gold and diamonds from the Moroccan Department of Customs as the gold would be sold to a refinery in Johannesburg.[243] With reference to section 40(1)(b), the court stated that a credit agreement entered into by a credit provider who is required to be registered but is not so registered, is unlawful and void to the extent provided for in section 89.[244] The court found, contrary to the above decisions, that where a credit agreement exceeds the threshold of R500 000, such an individual who grants the credit is required to be registered as a credit provider in terms of section 40 of the Act.[245]

3 4 5 5 *National Credit Regular v Opperman and Others*[246]

In the *Boonzaaier* matter,[247] the High Court declared section 89(5)(c) unconstitutional and the judgment was subsequently referred to the Constitutional Court to be confirmed.[248] It is quite unfortunate that the Constitutional Court was so preoccupied with the constitutionality or not of section 89(5)(c) that it did not specifically consider the interpretation of section 40(1)(b).[249] The Constitutional Court however, without considering and determining this aspect, confirmed the findings of the High Court that a credit provider is required to be registered in terms of the Act where the total principal debt exceeded the threshold of R500 000.[250]

3 4 5 6 *Van Heerden v Nolte*[251]

In *Van Heerden*, the Plaintiff alleged that the parties entered a written agreement for the sale of immovable property, in terms of which the Defendant sold the property to the Plaintiff for R700 000.[252] The Defendant was however unable to transfer the said property to the Plaintiff as the

[243] *Evans* par 2.
[244] *Evans* par 5.
[245] *Evans* par 4.
[246] 2013 (2) SA 1 (CC). Hereinafter "*Opperman*".
[247] See par 3 4 5 2 above.
[248] *Opperman* par 1.
[249] Van Heerden & Renke 2015 *THRHR* 93.
[250] *Opperman* pars 7, 8 & 88.
[251] [2014] ZAGPPHC 12 (28 January 2014). Hereinafter "*Van Heerden*".
[252] *Van Heerden* par 2.

property has been unlawfully transferred to a close corporation and was bonded to a financial institution.[253] The Plaintiff subsequently lend money to the Defendant to enable him to repay the financial institution and have the property transferred to the Plaintiff.[254] The Plaintiff also entered into two other oral loan agreements with the Defendant.[255] The Defendant failed to repay the outstanding amount which resulted in the institution of legal proceedings.[256] The Defendant raised exception to the Plaintiff's particulars of claim relating to *inter alia* the Plaintiff's non-compliance with the NCA.[257] One of the grounds for exception was based on the fact that the agreements constituted credit agreements which exceeded the threshold of R500 000, and therefore that the Plaintiff was required to be registered as a credit provider in terms of the Act.[258]

The court held that the agreements constituted credit agreements in terms of the Act and questioned whether the Plaintiff was indeed required to be registered as a credit provider in terms of section 40(1).[259] The court held that although it appreciates the pragmatism of the idea that it may be socially and economically imprudent to regulate lending to such an extent that all loans above the threshold of R500 000 will be illegal where the lender is not registered, the interpretation is strained.[260] The court further held that the purpose and intention of section 40(1) is to require credit providers who conclude more than a 100 loans or who lend more than R500 000, to register.[261] It further held that the reference in section 40(1)(b) to "all outstanding agreements" does not demonstrate an intention to exclude a single agreement in excess of R500 000 and therefore if there is only one transaction it will constitute "all" of the outstanding agreements.[262] Subsequently, if there is only one transaction that exceeds the threshold of R500 000, the Act requires such a credit provider to be registered, before extending credit or making a loan where the principal debt exceeds the threshold.[263]

[253] *Van Heerden* par 2.
[254] *Van Heerden* par 2.
[255] *Van Heerden* par 3.
[256] *Van Heerden* par 3.
[257] *Van Heerden* par 5.
[258] *Van Heerden* par 6.
[259] *Van Heerden* pars 7-9.
[260] *Van Heerden* par 12.
[261] *Van Heerden* par 12.
[262] *Van Heerden* par 12.
[263] *Van Heerden* pars 12 & 15.

The court further pointed out that *Friend* differed from the present, in that *Friend* held that the requirements of section 40(1) do not apply to a single credit agreement with a principal debt exceeding the R500 000 threshold, where the present case concerns two or three credit agreements where the principal debt exceeds R500 000.[264] Subsequently, *Van Heerden* confirmed that one credit agreement may be exempted from the application of section 40(1), even where the principal debt exceeds the R500 000 threshold by far (for example R6 million), however two credit agreements would not suffice for exemption even if they collectively total more than R500 000.[265]

3 4 5 7 *Vesagie NO and Others v Erwee NO and Another*[266]

In *Vesagie* the Supreme Court of Appeal had to determine whether a purchase and sale agreement provides that interest will be payable on deferred payments.[267] The relevance of such a determination was that if interest was payable, it will constitute a credit transaction in terms of section 8(4)(f), in which event the credit provider would have been required to be registered in terms of the Act.[268] The court held that interest was indeed payable and that the agreement clearly constituted a credit transaction in terms of section 8(4)(f).[269] The agreement was subsequently held to be void *ab initio* due to the credit provider's failure to be registered as such at the time the agreement was concluded.[270] *Vesagie* therefore requires the registration of a credit provider even where only one credit agreement was concluded.

3 4 5 8 *Maepi v Abrahams*[271]

Abrahams was decided after the enactment of the Amendment Act, and concerned a loan agreement in terms of which the capital loan amount of R700 000 was payable over a period of

[264] *Van Heerden* par 13.
[265] *Van Heerden* par 13.
[266] [2014] ZASCA 121 (19 September 2014). Hereinafter "*Vesagie*".
[267] *Vesagie* par 1.
[268] *Vesagie* par 1.
[269] *Vesagie* pars 11 & 21.
[270] *Vesagie* par 22.
[271] [2017] ZAGPPHC 17. Hereinafter "*Abrahams*".

four months, at an interest rate of 84%.[272] The court had to determine whether the loan agreement was illegal due to the non-registration of the Plaintiff as a credit provider in terms of the Act.[273] The court referred to both *Van Heerden* and *Opperman*, and held that a judgment by a full bench may not enjoy precedence over a Constitutional Court by virtue of the *stare decisis* principle.[274] Subsequently the court held that the Plaintiff was required to be registered as a credit provider as the total principal debt exceeded the prescribed threshold of R500 000, even though he only concluded one credit agreement.[275]

3 5 Conclusion

The Act enables the regulation of the credit industry by imposing a registration requirement on credit providers, credit bureaux, payment distributions agents, and alternative dispute resolution agents.[276] As the law currently stands, the Act requires a person to register as a credit provider in terms of the Act if the principal debt owed to him under all outstanding credit agreements, excluding incidental credit agreements, exceeds the prescribed threshold, which has been declared to be R0 on 11 May 2016.[277] Through this amendment, the Department of Trade and Industry ensured that all credit providers must register, except those who only provide incidental credit.[278]

In practical terms this will mean that everyone who provides credit, including a person who loans money to his friend or an acquaintance, will be required to register as a credit provider in terms of the Act. However, section 39(1) states that section 40 and 42 (as well as sections 45, 48, 49 and 51) do not apply to a credit provider who operates only within one province. So it can be argued that section 39(1) protects friends and acquaintances who provide credit to each other within the same province. However, if they don't reside in the same province, they will be required to register as a credit provider even though they are not in the business of providing credit.

[272] *Abrahams* par 1.
[273] *Abrahams* par 4.
[274] *Abrahams* par 29.
[275] *Abrahams* par 29.
[276] See Renke in Nagel *et al Business Law* 181.
[277] See pars 3 4 3 & 3 4 4 above.
[278] Scholtz par 5 2 2 1.

It is evident from the conflicting judgments discussed above[279] that the position regarding the registration of credit providers who provide credit under once-off and/or *ad hoc* credit agreements remain uncertain. It appears that the courts were, in some cases, hesitant to interpret section 40(1)(b) in such a manner that once-off and/or *ad hoc* credit agreements required a person to be registered in terms of the Act.[280] The same will hold for the amended version of the provision, namely, section 40(1).

[279] See pars 3 4 5 1-3 4 5 8 above.
[280] Van Heerden & Renke 2015 *THRHR* 100.

CHAPTER 4

NON-COMPLIANCE WITH THE REGISTRATION REQUIREMENT IN TERMS OF THE NATIONAL CREDIT ACT

4 1 Introduction

It is evident from chapter 3 above that all credit providers (perhaps with the exception of once-off and/or *ad hoc* agreements) are now required to be registered in terms of the National Credit Act.[281] Non-compliance with the Act's registration requirement has daunting effects and consequences which will be discussed in this chapter.

4 2 Non-compliance with the Registration Requirement in terms of Section 40

4 2 1 General

The registration requirement in terms of section 40(1) is casted in peremptory terms and the Act clearly states the effects and consequences in the event of non-compliance with the registration requirement.[282] The most apparent effect of such non-compliance is that a credit provider is prohibited from providing credit, offering credit or entering into a credit agreement.[283]

Section 89(2) lists instances in which a credit agreement would be unlawful. One such an instance is where an unregistered credit provider whom is required to be registered in terms of section 40 of the Act enters into a credit agreement.[284] However, it must be noted that the

[281] S 40(1).
[282] Ss 40(3)-(4) & s 89(2)(d).
[283] S 40(3).
[284] S 89(2)(d), which is subject to certain exceptions set out in ss 89(3) and (4) – Kelly-Louw & Stoop par 8 2 1. See s 89(2) for a list of unlawful credit agreements. See also *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2014 (4) SA 253 (SCA) at par 43 where it was held that s 89(2)(d) of the NCA is not unqualified, as it renders an agreement unlawful if at the time that it was made, the credit provider was unregistered and this Act required that credit provider to be registered.

consequences of unlawful credit agreements changed after the Amendment Act came into operation.

4 2 2 The Position Prior to the Amendment Act

Prior to the enactment of the Amendment Act, the position regarding unlawful credit agreements in terms of section 89(5) was as follows: [285]

> (5) If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that—
> (a) the credit agreement is void as from the date the agreement was entered into;
> (b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated—
> (i) at the rate set out in that agreement; and
> (ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer; and
> (c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either—
> (i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or
> (ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.

The mandatory provisions of section 89(5) required the court to make the orders provided for in the section, without granting any discretion to the court as to whether or not it deemed it appropriate to grant such orders.[286] The consequences of a credit agreement which was entered into by an unregistered credit provider, who was required to be registered, was that the credit agreement was unlawful, in which case a court was obliged to order that the credit agreement is void *ab initio*.[287] The effect on credit providers who concluded unlawful credit agreements were devastating as a court was obliged to order that the credit provider must refund the consumer with all the monies paid by such a consumer to the credit provider together with interest calculated from the date the money was paid by the consumer until the date the money is refunded to the consumer and at the rate applicable to the agreement.[288] The credit provider

[285] Ss 89(5)(a)-(c) as repealed by the Amendment Act.
[286] Kelly-Louw & Stoop par 8 2 1 1.
[287] Scholtz par 5 6.
[288] S 89(5)(b). Scholtz par 5 6.

furthermore lost his performance either to the consumer or to the state, regardless of which order the court made in terms of section 89(5)(c).[289]

4 2 2 1 *Opperman*[290]

In *Opperman* the Constitutional Court found that the forfeiture of a credit provider's restitution claim in terms of section 89(5)(c) left the courts with no discretion with regards to the forfeiture of rights and subsequently amounted to arbitrary deprivation of property which is in conflict with section 25 of the Constitution. The court therefore declared section 89(5)(c) unconstitutional.[291] Instead of amending section 89(5)(c) to bestow the courts with a discretion, the Constitutional Court suggested that the legislature should amend section 89(5) as a whole.[292] The effect of this judgment was that the common law position on unlawful contracts prevailed, until the Amendment Act came into operation.[293]

4 2 2 2 *Chevron SA (Pty) Ltd v Dennis Edwin Wilson t/a Wilson's Transport and Others*[294]

Section 89(5)(b) discussed above[295] also received criticism and was subsequently challenged in the *Chevron* case in the High Court.[296] The facts of the Chevron case are shortly as follows: the

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[289] Ss 89(5)(b) & (5)(c). Kelly-Louw & Stoop par 8 2 1 1. See also Scholtz par 5 6.
[290] See par 3 4 5 5 above.
[291] See *Opperman* par 72; Scholtz par 17 1; Brits "The National Credit Act and the bill of rights: towards a constitutional view of consumer credit regulation" 2017 *TSAR* 482-483. For a full discussion see Marais "The constitutionality of section 89(5)(c) of the National Credit Act under the property clause: *National Credit Regulator v Opperman*" 2014 *SALJ* 215; Brits "Arbitrary deprivation of unregistered credit provider's right to claim restitution of performance rendered: *Opperman v Boonzaaier* (24887/10) 2012 ZAWCHC 27 (17 April 2012) and *National Credit Regulator v Opperman* 2013 2 SA 1 (CC)" 2013 *PELJ* 422. The forfeiture of a credit provider's enrichment claim reached the Constitutional Court for the first time in *Cherengani Trade and Investment 107 (Edms) Bpk v Mason NO and Others* 2011 11 BCLR 1123 (CC) where some of the difficulties regarding the effect of the nullification and forfeiture provisions of s 85(5)(c) were pointed out, but unfortunately not determined – pars 14, 15, 16, 18 & 20. In *Boonzaaier* (see par 3 4 5 2 above) s 89(5)(c) was also considered as the credit provider was required to be registered but was however not registered – pars 3 & 5. The court held that the effect of ss 89(2)(d) & 89(5)(a) read with s 40(4) was that the loan agreement was unlawful and should be treated as void – par 6. The court declared this forfeiture to the state in terms of s 89(5)(c) unconstitutional as it allowed the arbitrary deprivation of property which is inconsistent with s 25 of the Constitution – see pars 5, 6, 48 & 88. The unconstitutionality of s 89(5)(c) was confirmed by the Constitutional Court in *Opperman*.
[292] *Opperman* par 43. Scholtz par 5 6.
[293] Scholtz par 5 6.
[294] 2015 10 BCLR 1158 (CC). Hereinafter "*Chevron*".
[295] See par 4 2 2 above.
[296] *Chevron SA (Pty) Ltd v Dennis Edwin Wilson* (5244/13) [2014] ZAWCHC 121 (5 June 2014).

Applicant extended credit to the First Respondent during 1997 for the purchase of petroleum products.[297] The Applicant provided diesel to the First Respondent's vehicles at its Caltex filling stations and supplied the First Respondent with diesel in bulk at his business premises.[298] A dispute arose in 2008 when the First Respondent contested the accuracy of the Applicant's billing, which eventually resulted in the Applicant instituting legal proceedings against the First Respondent for payment of the outstanding balance, which amounted to R3 330 977.03.[299] The Applicant accepted that it was required to be registered as a credit provider in terms of section 40(1) of the NCA, but was however unregistered.[300] The Applicant contended that section 89(5)(b) permits an arbitrary deprivation of property which is in conflict with section 25(1) of the Constitution.[301] The Applicant held that the arbitrary deprivation stems from the fact that section 89(5)(b) obliges a court to order that all the amounts paid under the invalid agreement must be refunded and leaves no room for the exercise of judicial discretion.[302] The High Court accepted the Applicant's argument and found that the arbitrary deprivation could not be reasonably justified in terms of section 36 of the Constitution and declared section 89(5)(b) invalid and unconstitutional.[303] The Constitutional Court confirmed the High Court's declaration of invalidity and held that the fact that a credit provider must refund the consumer with any moneys already paid by such a consumer to the credit provider under an unlawful credit agreement, amounted to arbitrary deprivation of property as section 89(5)(b) left the courts with no discretion.[304]

4 2 3 The Position After the Amendment Act came into Operation

The fact that sections 89(5)(c) and 89(5)(b) were declared unconstitutional in the *Opperman* and *Chevron* cases respectively, in all probability resulted in the ultimate deletion of both these subsections by the Amendment Act.[305] Section 89(5) was amended by the Amendment Act and

[297] *Chevron* par 4.
[298] *Chevron* par 4.
[299] *Chevron* par 5.
[300] *Chevron* par 6.
[301] *Chevron* par 10.
[302] *Chevron* par 10.
[303] *Chevron* par 12.
[304] Chevron pars 18, 20-24 & 36. Brits 2017 *TSAR* 483.
[305] S 27(b) of the Amendment Act. Brits 2017 *TSAR* 483.

now obliges a court to order that such a credit agreement is void *ab initio* and bestows the court with a discretion to make a just and equitable order, such as enforcing or relaxing the *par delictum* rule.[306] Section 89(5) now reads as follows:

> (5) If a credit agreement is unlawful in terms of this section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that—
> (a) the credit agreement is void as from the date the agreement was entered into.

These dire consequences of unlawful credit agreements in terms of section 89(5) only apply to the unlawful credit agreements listed in section 89(2). Other agreements, which are not listed in section 89(2), that are also unlawful in terms of the general law of contract will be dealt with in terms of the common law.[307]

In terms of the common law, none of the parties to the contract acquires any enforceable rights or duties where the contract is unlawful/illegal and void.[308] All parties are thus prohibited from instituting action against each other to claim a promised performance made in terms of the unlawful agreement, which situation is expressed by the maxim *ex turpi causa non oritur actio* (no action arises from a shameful case), which rule is never relaxed.[309] Furthermore, a person who has already performed would normally not be entitled to reclaim his performance based on unjustified enrichment, due to the *par delictum* rule[310] which states that neither party to the unlawful contract is entitled to restitution of performance if both parties acted improperly.[311] Fortunately, the courts may deviate from the *par delictum* rule and order that the performance be returned if it is in the interest of the public and if justice calls for it.[312]

However, this relaxation of the *par delictum* rule was not possible prior to the deletion of section 89(5)(c), as a court was obliged to order that a credit provider's claim for restitution was either

[306] S 27(b) of the Amendment Act. See also Scholtz pars 5 2 2 1 & 5 6; Brits 2017 *TSAR* 483; Otto & Otto par 27 2.
[307] Kelly-Louw & Stoop par 8 2 1 1.
[308] Kelly-Louw & Stoop par 8 2 1 1.
[309] Kelly-Louw & Stoop par 8 2 1 1.
[310] Contained in the maxim *pari delicto potier est conditio possidentis*.
[311] In terms of the *par delictum* rule the person in possession of the performance has the stronger right when a contract is illegal and both parties forfeit their performances – Kelly-Louw & Stoop par 8 2 1 1.
[312] Kelly-Louw & Stoop par 8 2 1 1.

cancelled or forfeited to the State.[313] The fact that the *par delictum* rule may be relaxed and that the common law action for unjustified enrichment allows the court to exercise a discretion, is indicative thereof that the amendment of section 89(5)(a), which now bestows the court with a discretion to make a just and equitable order, is in line with the common law position. It can therefore be argued that the consequences of an unlawful credit agreement that is declared unlawful and void *ab initio*, are that the common law principles discussed above are now essentially re-instated and applicable.[314]

Section 164(1) makes it clear that an unlawful credit agreement is only unlawful and void if so declared. Cognisance should also be taken of the fact that section 164 states that an unlawful credit agreement can only be declared unlawful and void by a court.[315] The Tribunal cannot declare such an agreement unlawful in terms of section 89.[316]

Section 89(4) provides for two exceptions to unlawfulness where a credit provider was required in terms of section 40 to be registered, but was unregistered at the time the credit agreement was entered into. It states that such a credit agreement would not be unlawful if:[317]

(a) at the time the credit agreement was made, or within 30 days[318] after that time, the credit provider had applied for registration in terms of section 40, and was awaiting a determination of that application; or

(b) at the time the credit agreement was made, the credit provider held a valid clearance certificate issued by the National Credit Regulator in terms of section 42(3)(b).[319]

4 3 Conclusion

It is evident from the discussion above that if an unregistered credit provider, who was required to be registered, enters into a credit agreement, such an agreement would be unlawful, unless the

[313] S 89(5)(c).
[314] Scholtz par 6 2. Otto & Otto par 27 2.
[315] S 164(1). Kelly-Louw & Stoop par 8 2 1 1.
[316] Kelly-Louw & Stoop par 8 2 1 1.
[317] S 89(4)(a).
[318] Calendar days.
[319] If a credit provider was previously required to be registered but now falls below the newly determined threshold made by the Minister in terms of s 42(1), that credit provider may apply to the NCR for a clearance certificate which releases the credit provider from the obligation to be registered. The credit provider must however remain registered until the NCR makes a decision.

exception in terms of section 89(4)(a) applies.[320] Section 89(5)(b) and (c) as it originally stood before the enactment of the Amendment Act, did not bestow the courts with any discretion and therefore deviated substantially from the common law position in respect to unlawful or illegal contracts.[321] However, these dire consequences have been amended in terms of the Amendment Act, by now conferring the court with a discretion, after declaring an unlawful credit agreement void *ab initio,* to make any further appropriate order.[322] The amendment of section 89(5), which in effect re-instates the common law principles in respect to illegal contracts, is in my opinion a positive change as it allows a court to exercise its discretion when faced with an unlawful credit agreement to either enforce the *par delictum* rule or relax it where necessary. The courts are now empowered to make a just and equitable order which may be to the benefit of unregistered credit providers whose credit agreements are declared to be unlawful and void.

[320] See par 4 2 3 above.
[321] See par 4 2 2 above.
[322] See par 4 2 3 above.

CHAPTER 5

FINAL CONCLUSION, REMARKS AND RECOMMEDATIONS

It is evident from chapter 1 that the National Credit Act, for the first time in the history of South African credit legislation, made the registration of certain role-players in the South African credit industry compulsory.[323] The aim of this dissertation was to investigate the registration of credit providers requirement in terms of the NCA.

Chapter 2 addressed the outdated and ineffective preceding Act's, namely the Usury Act and the Credit Agreements Act, which was repealed and replaced by the NCA in an attempt to address and solve the problems the consumer credit market was experiencing at the time.[324] The NCA created a single, consolidated system to regulate credit and the credit industry, whilst establishing two new and independent consumer credit institutions, namely the NCR and the NCT, which are fundamental to the proper regulation of the South African consumer credit industry.[325] The same pertains to the registration requirement in terms of the NCA, which is an effective tool to achieve proper regulation.[326]

Chapter 3 discussed the registration of credit providers requirement and the newly determined threshold of R0 which has the effect that all credit providers, perhaps with the exclusion of credit providers who provide credit on a once-off and/or *ad hoc* basis, are now required to be registered in terms of the Act.[327] It seems idealistic for the NCR to regulate and monitor each and every credit provider participating in the credit industry. However, in practical terms one should consider whether the NCR will be able to effectively regulate the voluminous amount of credit providers participating in the South African credit industry.

[323] See par 1 1.
[324] See par 2 2.
[325] See par 2 2.
[326] See par 3 1.
[327] See pars 3 4 3-3 4 5 8.

Another practical challenge which was addressed in chapter 3 and requires clarification, is the registration of credit providers who grant credit on a once-off and/or *ad hoc* basis. It is evident from the discussed case law that the issue regarding the registration of credit providers who provide such once-off and/or *ad hoc* credit agreements remains unanswered.[328] In order to avoid future litigation, it is submitted that the highest courts or the legislature must provide clarity on this aspect. The mere fact that the credit providers who only provide incidental credit are not required to be registered, are indicative of the legislature's intention that persons who do not provide credit in the ordinary course of business should not be required to be registered.[329] Perhaps a blanket requirement should be introduced which only requires a person to register as a credit provider if he provides credit in the ordinary course of business.[330] The latter suggestion is especially plausible in light of the newly established R0 threshold. It is therefore submitted that the R0 threshold should be amended by inserting a blanket requirement in the NCA that requires a person the register as a credit provider if he provides credit frequently and/or in the course of his business, which will therefore automatically exclude once-off and/or *ad hoc* credit agreements.

I submit that the amendment of the threshold to R0, as the law currently stands, will only give rise to an increase in litigation and non-compliance with the registration requirement of the Act. One can therefore also argue that this amendment can give rise to more unlawful credit agreements as more credit providers attempt to avoid registering as a credit provider in terms of the NCA. This in turn will result in less effective regulation of the credit industry which could mean reduced consumer protection, which would be in direct conflict with the very purpose of the Act in section 3 to protect consumers.

Chapter 4 addressed the consequences of non-compliance with the registration requirement in terms of section 89(5) prior to the enactment of the Amendment Act, as well as thereafter. Section 89(5)(b) and (c) were both declared unconstitutional which subsequently led to the amendment of section 89(5) by the deletion of subparagraphs (b) and (c).[331] The amendment of

[328] See the conflicting judgments in par 3 4 5.
[329] Van Heerden & Renke 2015 *THRHR* 102.
[330] Van Heerden & Renke 2015 *THRHR* 103.
[331] See par 4 2.

section 89(5) has the effect that the common law consequences of unlawful agreements apply,[332] which is in my opinion a positive change as it allows a court to exercise its discretion when faced with an unlawful credit agreement to either enforce the *par delictum* rule or relax it, where necessary. The fact that the courts are now bestowed with a discretion to make a just and equitable order,[333] speaks thereto that the rights of credit providers are now also taken into consideration, which is justifiable if one considers the purpose of the Act as contained in section 3.[334]

The registration of credit providers requirement, in particular as an effective tool to regulate our credit industry, is in my opinion one of the most important developments caused by the promulgation of the NCA. However, the NCR must effectively enforce the said requirement and it is doubtful whether the NCR will have the manpower to deal with the increased number of new registration resulting from the R0 threshold. Therefore, only those persons or institutions who provide credit in the course of their business should be required to register as a credit provider in terms of the Act.

[332] See par 4 2 3.
[333] See par 4 2 3.
[334] With specific reference to s 3(d), which provides that equity in the credit market is promoted by balancing the rights and responsibilities of credit providers and consumers.

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