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**SELECTED CONTRACTS OF SALE OF MOVABLE GOODS IN
TERMS OF THE NATIONAL CREDIT ACT 34 OF 2005**

by

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CHAPTER 1

GENERAL INTRODUCTION

1.1 Introduction

My dissertation concerns selected contracts of sale of movable goods in terms of the National Credit Act,¹ namely the credit facility, incidental credit agreement, instalment agreement, and the section 8(4)(f) other agreement. The reasons for addressing and distinguishing these agreements subject to the Act will be made clear below. The NCA, which was passed by Parliament in 2005 and assented to by the President on 10 March 2006,² was implemented in three phases, and only came into full force and effect on 1 June 2007.³ When the first part of the NCA became effective on 1 June 2006, the Usury Act,⁴ Integration of Usury Laws Act,⁵ and Credit Agreements Act⁶ were repealed.⁷ The NCA applies to the full credit cycle,⁸ and affords protection to credit consumers in the pre-agreement phase,⁹ in respect of the credit agreement itself,¹⁰ and post-agreement.¹¹ The broad-spectrum protection afforded credit consumers is also reflected in the NCA's objectives.

Section 3 of the NCA¹² sets out its main purposes, which are “to promote and advance the social and economic welfare of South Africans, promote a fair, transparent,

¹ Act 34 of 2005 (“NCA” or “Act”). The NCA is the consumer credit enactment currently effective in South Africa and applies in conjunction with the Alienation of Land Act 68 of 1981 to contracts of sale of immovable property on instalments. These contracts fall outside the scope of this dissertation.

² See Kelly-Louw (assisted by Stoop) *Consumer credit regulation in South Africa* (2012) par 1.3 for the history to the NCA.

³ See Kelly-Louw (assisted by Stoop) par 1.4 for the implementation of the NCA. The other effective dates are 1 June 2006 and 1 September 2006.

⁴ Act 73 of 1968 (“Usury Act”).

⁵ Act 57 of 1996.

⁶ Act 75 of 1980 (“Credit Agreements Act”).

⁷ S 172(4).

⁸ See Otto and Otto *The National Credit Act explained* (2015) par 6.

⁹ E.g., all consumers in SA, whether natural persons or juristic persons have the right in terms of the Act to apply for credit, and to the dominant reason in writing if credit is refused. Ss 60 and 62. The NCA also affords protection to consumers in respect of undesirable credit marketing practices (ss 74–76), and renders credit assessments before entering into new credit agreements compulsory. S 81(2).

¹⁰ The NCA, *inter alia*, regulates the form and content of credit agreements subject to the Act. See s 90 and s 93, read with regs 30 and 31 of the Regulations made in terms of the Act. See GN R489, GG 28864, 31 May 2006 (“Credit Regulations”).

¹¹ Statements of account that must be provided to the consumer (Ch 5 Part D) and debt enforcement protection, should the consumer default in terms of a credit agreement (Ch 6 Part C), serve as examples.

¹² Which reiterates some of the broad goals in the Preamble.

competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers”. The legislature pursued the achievement of these aims by setting a number of sub-objectives in section 3(a) to (i), which are, *inter alia*, the promotion of a credit market that is accessible to all South Africans,¹³ encouragement of responsible borrowing and the prevention of over-indebtedness,¹⁴ discouraging of reckless credit,¹⁵ the promotion of equity in the credit market,¹⁶ ensuring the proper disclosure of information to consumers,¹⁷ and the provision of a “consistent and harmonised system” of “debt enforcement and judgment”.¹⁸ No particular aim of the NCA directly addresses its field of application, but the ambit of the Act’s protection of credit consumers is directly influenced by the scope of its field of application.

The NCA applies to credit agreements,¹⁹ provided that the particular credit agreement is concluded at arm’s length²⁰ and in South Africa. The Act also applies if the credit agreement is not concluded in South Africa but still has an effect in the Republic.²¹ The proviso to the aforementioned is that no exclusion to the NCA’s field of application

¹³ In particular, those who are historically disadvantaged. S 3(a).

¹⁴ S 3(c)(i).

¹⁵ S 3(c)(ii).

¹⁶ S 3(d).

¹⁷ S 3(e)(ii).

¹⁸ S 3(i).

¹⁹ See below.

²⁰ “At arm’s length” is not defined in the NCA. However, the concept means that the credit provider and the consumer concluding the credit agreement are independent of each other. S 4(2)(b) provides arrangements where the particular credit agreement is not entered into at arm’s length (such as credit agreements between family members who are co-dependent on each other or the one party is dependent on the other), with the implication that the Act does not apply in these instances. See Van Zyl “The scope of application of the National Credit Act” in Scholtz (ed) *Guide to the National Credit Act* (2008) (“Van Zyl Scope”) par 4.2.

²¹ The NCA may thus also be applicable to a credit agreement that was concluded outside the borders of the Republic. Van Zyl Scope par 4.2.

must be pertinent.²² The Act *inter alia* excludes large²³ juristic persons,²⁴ and smaller juristic persons²⁵ concluding large credit agreements,²⁶ from its ambit.

The NCA applies to three main categories of credit agreements: the credit facility, credit transaction, and credit guarantee. A combination of any of these credit agreements is also possible.²⁷ The definitions of “credit facility”²⁸ and “credit guarantee”²⁹ are provided in section 8(3) and 8(5) respectively. The eight credit transactions are listed in section 8(4), and all, with the exception of the “other agreement”,³⁰ are defined in section 1. The credit transactions are: the pawn transaction, discount transaction, incidental credit agreement, instalment agreement, mortgage agreement, secured loan, lease, and any other agreement.³¹ The credit facility and the incidental credit agreement *inter alia* involve the supply of goods, and may, therefore, constitute contracts of sale of movable goods.³² The instalment agreement,³³ per its definition, is a contract of sale of movable goods. The definition of the section 8(4)(f) other agreement, which serves as a catch-all provision to subject credit transactions not specifically defined in the NCA to the provisions of the Act, may include contracts of sale of movable goods.³⁴

The NCA determines its own field of application. The importance of the field of application of consumer credit legislation arises from the fact that the scope of its application immediately determines the ambit of its protection afforded credit

²² S 4(1). For a complete discussion of the NCA’s field of application, see Kelly-Louw (assisted by Stoop) ch 2; Van Zyl Scope ch 4; Otto and Renke “Types of credit agreement” in Scholtz (ed) *Guide to the National Credit Act (2008)* (“Otto and Renke Types”) ch 8.

²³ A juristic person with an asset value or annual turnover of R1 million or more. See s 4(1)(a)(i) read with the Determination of Thresholds GN 713 GG 28893, 1 June 2006, “Determination of Threshold Regulations”.

²⁴ “Juristic person” is defined in s 1 of the NCA and includes partnerships, associations or other bodies of persons, or a trust, if the trust has three or more natural persons as trustees, or if the trustee of the trust is a juristic person.

²⁵ A juristic person with an asset value or annual turnover below R1 million. See s 4(1)(b) read with the Determination of Threshold Regulations.

²⁶ S 9(4) read with the Determination of Threshold Regulations classifies a credit agreement as large if it has a principal debt of R250 000 or more. Pawn transactions are not large. See par 2.6 below for the size categorization of credit facilities.

²⁷ S 8(1).

²⁸ See Otto and Renke Types par 8.2.2.

²⁹ See Otto and Renke Types par 8.2.4.

³⁰ Defined in s 8(4)(f).

³¹ See Otto and Renke Types par 8.2.3.

³² See respectively pars 2.2 and 3.2 below.

³³ See par 3.3 below.

³⁴ See par 3.4 below.

consumers.³⁵ It was seen above that “to protect consumers” is one of the main aims of the Act.

Due to the fact that the NCA applies to credit agreements, the general principles of the law of contract, the common law, remain important.³⁶ However, if the NCA, according to its own rules, is not applicable to the particular agreement, only the common law and, of course, other legislation that may be applicable, such as the Consumer Protection Act,³⁷ protect the consumer.³⁸ For these reasons, clarity and certainty in respect of the field of application of the NCA is crucial.

The term “credit agreement” is the overarching term for all agreements that are subject to the NCA, irrespective of whether the agreement is a credit facility, credit guarantee, or one of the credit transactions mentioned above. The question arises as to the necessity to correctly identify a credit agreement by name, having regard to the facts in a particular case and the terms of the particular contract, and measuring them against the identifying characteristics of the different credit agreements defined in sections 8(3), 8(4) (read with section 1, 8(4)(f)), and 8(5) of the NCA. The main reasons, as will become apparent from the case law discussed in the dissertation, are, *inter alia*, the following: (1) the NCA enjoys limited application to the incidental credit agreement, but applies in full force to the “other credit agreements” subject to the Act, and (2) the size classification of credit agreements into small, intermediate, or large is influenced by the type of credit agreement involved. Both these aspects have an influence on the protection consumers enjoy.

As far as the first aspect mentioned above is concerned, in terms of *Du Bruyn NO and others v Karsten*,³⁹ it was held that all credit providers must register as a credit provider

³⁵ See Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005* (2012) LLD thesis, UP (“Renke LLD thesis”) par 1 4 (c).

³⁶ See Scholtz “The implementation, objects and interpretation of the National Credit Act and related matters” Scholtz (ed) *Guide to the National Credit Act* (2008) par 2.1.

³⁷ Act 68 of 2008.

³⁸ In spite of the fact that the NCA, in terms of s 4(1) and the other provisions mentioned above in respect of its field of application, does not apply to a particular credit agreement, the parties to the agreement may render the Act applicable to their agreement by means of the agreement itself. See *RMB Private Bank v Kaydeez Therapies CC* 2012 (6) SA 308 (GSJ) (“*RMB Private Bank*”) and *First National Bank (a Division of First Rand Bank Ltd) v Clear Creek Trading (Pty) Ltd* 2014 (1) SA 23 (GNP). See Otto and Renke Types par 8.1.

³⁹ 2019 (1) (SA 403 (SCA) (“*Du Bruyn*”).

in terms of the NCA, even if only a once-off or *ad hoc* credit agreement is involved.⁴⁰ The registration of credit providers is provided for in section 40, which must be read with the new threshold of R0 that was set for the registration of credit providers, and which became effective on 11 November 2016.⁴¹ Incidental credit agreements are specifically excluded from the requirement to register as a credit provider,⁴² which means that, if a person or institution only grants incidental credit, it is not obliged to register as a credit provider in terms of the NCA. What makes it important to determine whether registration as a credit provider is required in terms of the Act is the fact that a credit agreement entered into by a credit provider that is not registered in terms of the NCA, but that is required to be registered by the Act, is unlawful and void.⁴³ The point that a particular credit agreement is unlawful and void due to the credit provider's failure to register as a credit provider is raised frequently as a defence in the courts, which then obliges the court to decide whether a credit facility, an incidental credit agreement, or another type of credit agreement is pertinent.

As regards the second aspect mentioned above, it has been mentioned that the NCA does not apply to a juristic person as a consumer that concludes a large credit agreement. If a credit agreement is therefore incorrectly classified as large, the particular agreement is exempt from the NCA, which means that the consumer forfeits the Act's protection.

Section 123 is titled "Termination of agreement by credit provider". The credit facility is singled out for certain actions by the credit provider, which also necessitates that a particular credit agreement be correctly classified as a credit facility. Section 123(3)(a) empowers the credit provider to suspend a credit facility at any time that the consumer

⁴⁰ *Du Bruyn* par 28. For a discussion of the registration of credit providers in terms of the NCA, see Van Zyl "Registration and consequences of non-registration" in Scholtz (ed) *Guide to the National Credit Act* (2008) par 5.2.2.

⁴¹ See GN 513 GG 39981 11 May 2016. In terms of s 7(3) the new threshold took effect six months after its publication.

⁴² S 40(1).

⁴³ S 89(2)(d), read with s 89(5)(a). S 89(4)(a) provides a period of 30 days within which to apply for registration as a credit provider if this was not done before the credit agreement, taking the credit provider over the registration threshold, was entered into. An application for registration, lodged with the National Credit Regulator ("NCR") within the period of 30 days will prevent the particular credit agreement from being unlawful and void in terms of s 89 of the Act.

is in default in terms of the agreement. The NCA⁴⁴ also authorises a credit provider to close a credit facility with at least 10 business days' written notice to the consumer.⁴⁵

It was noted above that some of the credit agreements in terms of the NCA overlap, which may make it difficult for a court to distinguish credit agreements based on the facts of a case. However, the point is that the correct identification of a particular credit agreement in terms of the NCA by the courts could be crucial, but could be a complicated task when considering the way in which certain provisions in the Act were drafted. This is exacerbated by the fact that the National Credit Act, in the words of the Supreme Court of Appeal in *Du Bruyn*, "is not a model of clarity, [as] has been bemoaned by the High Court, [the Supreme Court of Appeal] and the Constitutional Court on a number of occasions".⁴⁶

1.2 Research statement

The purpose of my dissertation is to compare and distinguish the credit facility, incidental credit agreement, instalment agreement, and the section 8(4)(f) "other agreement" as contracts of sale of movable goods in terms of the NCA. This will be done with reference to the respective definitions of each agreement, case law (where applicable), and the opinions of academics. The ultimate aim is to provide a 'user guide' with the identifying characteristics of each of these agreements, which may facilitate easier identification of each. If required, amendments to definitions will be suggested.

1.3 Research objectives and corresponding chapters

This chapter provided a general introduction and background to the dissertation. The chapter also provided the research statement, research objectives, delineation, finally, the definitions of selected key concepts.⁴⁷ The remainder of the dissertation is structured as follows:

⁴⁴ S 123(3)(b).

⁴⁵ The suspension or closure of a credit facility may not be based on specified grounds, e.g., that the consumer has rejected an offer by the credit provider to increase the credit limit of the facility. S 123(5).

⁴⁶ *Du Bruyn* par 1.

⁴⁷ Provided below.

Chapter 2 provides a discussion of the credit facility as one of the main categories of credit agreements subject to the NCA, but in particular as a contract of sale of moveable goods. The aim is to identify the distinguishing characteristics of this type of credit agreement. Related provisions, such as the size categorisation of the credit facility in section 9 of the Act, are also discussed.

As mentioned, the credit transaction, one of the other main categories of credit agreement subject to the Act, has eight sub-categories. In Chapter 3, the incidental credit agreement, instalment agreement, and the “other credit agreement” are compared as contracts of the sale of movable goods in terms of the NCA. These agreements are also compared to the credit facility as a contract of sale of movable goods. Provisions related to these credit agreements are also noted.

Chapter 4 contains my final conclusions and remarks.

1.4 Delineations

The focus of my dissertation and its aims were indicated above. Although the pawn transaction, discount transaction and the secured loan, credit transactions in the Act, provide for the provision of goods⁴⁸ or the granting of credit to the consumer,⁴⁹ and therefore the sale of movable goods, they are not addressed in this dissertation. A complete discussion of the field of application of the NCA falls outside the ambit of my dissertation. Only the size classification of credit facilities will be addressed. Although certain credit agreements in terms of the NCA overlap, these will not be attended to.

1.5 Terminology

The following key concepts, defined in section 1 of the NCA, are referred to throughout the dissertation:

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

- (a) the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement;
- (b) the party to whom money is paid, or credit granted, under a pawn transaction;
- (c) the party to whom credit is granted under a credit facility;

⁴⁸ The discount transaction.

⁴⁹ The pawn transaction and the secured loan.

- (d) the mortgagor under a mortgage agreement;
- (e) the borrower under a secured loan;
- (f) the lessee under a lease;
- (g) the guarantor under a credit guarantee; or
- (h) the party to whom or at whose direction money is advanced or credit granted under any other credit agreement;”

“**credit agreement**” means an agreement that meets all the criteria set out in section 8;

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

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

Unless otherwise stated, the interpretations associated with the rest of the terms used in this dissertation are those provided in the National Credit Act.⁵⁰

⁵⁰ S 1.

CHAPTER 2

THE CREDIT FACILITY

2.1 Introduction

The credit facility, which is one of the main categories of credit agreements subject to the NCA, is of utmost importance, due to its widespread practical application and utilisation by consumers on a daily basis. All store-card and credit-card transactions in terms whereof payment is deferred and charges, fees, or interest is levied by the credit provider in respect of the deferred payment are credit facilities. This chapter discusses the credit facility and its characteristics in accordance with its definition in section 8(3) of the NCA and case law. This is pertinent as, on a number of occasions, it was necessary for the courts to distinguish the credit facility, a contract of sale of movable goods, a service delivery contract, or a moneylending agreement from one of the credit transactions discussed in the next chapter, the incidental credit agreement.⁵¹ The question also arises whether a sale agreement of movable goods (or an agreement for the delivery of services or the payment of money), which does not meet the requirements of a credit facility, falls under the catch-all provision in section 8(4)(f) of the NCA. Section 8(3) provides as follows:

“An agreement ... constitutes a credit facility if, terms of that agreement –

(a) a credit provider undertakes –

(i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

(ii) either to –

(aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or

(bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and

(b) any charge, fee or interest is payable to the credit provider in respect of –

(i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or

⁵¹ The incidental credit agreement, which is defined in s 1, also involves the delivery of goods or services. See par 3.2 below.

- (ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided in the agreement.

If the definition of the credit facility is considered, three aspects are evident: three types of credit facilities are distinguished, namely the supply of goods, the supply of services, and the payment of an amount or amounts of money; the deferral of payment; and the payment of a fee, charges, or interest by the consumer. Only if all these aspects are complied with will it be deemed a credit facility. This is indicated by the use of the word “and” between section 8(3)(a)(i) and (ii), and between section 8(3)(a)(ii) and section 8(3)(b). However, meaning must be attached to all the words in the definition. The phrase “on behalf of, or at the direction of, the consumer” could, for instance, be where the bank pays the seller for goods bought by the consumer with the latter’s credit card. Important words often neglected are: “as determined by the consumer from time to time”.

2.2 “As determined by the consumer from time to time”

The credit provider undertakes, in terms of section 8(3) of the NCA, to supply goods or services, or to pay an amount or amounts, “as determined by the consumer from time to time”. This phrase should thus be given effect, as it clearly indicates the credit provider supplying goods or services, or paying an amount or amounts. The consumer determines the supply of goods or services, or payment by the credit provider, and, accordingly, the amount of the debt owed by the consumer to the credit provider. The consumer chooses the manner in which “to operate the credit facility”.⁵² Revolving credit, which is defined by Grové and Otto⁵³ as the credit situation in terms whereof the payment of instalments by the consumer creates new or additional credit for the consumer, which the latter may use again, is one of the distinguishing characteristics of a credit facility. This is reiterated by Grové and Otto,⁵⁴ who state that “a revolving-credit contract is a credit facility”. The word “facility” is the operative word. The operation of a typical revolving credit facility is explained below by means of an

⁵² Grové and Otto *Basic principles of consumer credit law* (2002) 64.

⁵³ Grové and Otto 80.

⁵⁴ Grové and Otto 64. See also Otto and Renke Types par 8.2.2 and Lombard and Renke “The impact of the National Credit Act on specific company transactions” 2009 *SA Merc LJ* 488.

example but, importantly, all the aforementioned agreements must be entered into on a revolving-credit basis in order to qualify as a credit facility in terms of the NCA.

2.3 The types of credit facilities

An undertaking by a credit provider “to supply goods or services or to pay an amount or amounts” constitutes a credit facility in terms of the NCA, provided that the other provisions of section 8(3) are complied with. The legislature therefore clearly distinguishes three different types of credit facility.

The first credit facility, the undertaking to supply goods, is one of the focus points of the dissertation. The word “goods” indicates that movable property⁵⁵ is involved. Although the NCA applies to leases of movable goods, the legislature did not have the latter in mind in section 8(3), as the lease is defined as a separate credit agreement. It may therefore be deduced that an undertaking to supply goods in terms of section 8(3) constitutes a contract of sale of movable goods, provided, of course, that the credit contract is entered into on a revolving credit basis.

An example of a credit facility as a contract of sale of movable goods is a store-card transaction, in terms of which interest is payable by the consumer.⁵⁶ Let us take the example of the fictitious ‘W-Store’ card: Using a W-Store card, a consumer is allowed to purchase goods from the store, subject to the credit limit applicable to the store card. If the consumer uses the card and purchases goods from W-store, W-store will bill the consumer; in other words, payment is deferred. As a result of the purchase, the limit on the card, minus the amount of the purchase, is now available for future purchases. However, if the consumer pays the amount billed, the full limit in terms of the card is restored and available to the consumer. This arrangement therefore complies with the definition of revolving credit — the payment of instalments by the consumer (the amount of the account) creates credit that may be used again by the consumer. Whether interest, fees, or charges are payable by the consumer in question in respect of the deferred amount will depend on the terms of the agreement. However, if W-store charges interest, fees, or charges, the store card qualifies as a credit facility in terms of the NCA. The consumer determines how much is paid in monthly

⁵⁵ Such as clothing, cell phones, etc.

⁵⁶ Renke, Roestoff and Haupt “The National Credit Act: new parameters for the granting of credit in South Africa” 2007 *Obiter* 231.

instalments, provided that the amount paid is that which is the minimum stipulated by the credit provider, or an amount higher than the stipulated minimum.⁵⁷ W-store is not permitted in terms of the NCA to allow the consumer to exceed the limit on the store card, unless the credit limit is temporarily increased.⁵⁸ The credit limit may be increased by agreement,⁵⁹ or in terms of a unilateral increase by W-store.⁶⁰

Otto and Renke⁶¹ mention another typical example of the credit facility as a contract of sale of movable goods: a dealer orders and obtains stock from a supplier. In terms of the agreement between the parties, the dealer must pay the purchase price for the goods with 30 days “from delivery or the date of the invoice”. If the contract also stipulates that “interest will be levied at a certain rate right from the start”, a credit facility is created. The authors also mention, as a common example of a credit facility, “an account with a retailer which supplies furniture of other consumer goods on a buy-now-pay-later system”.⁶²

Under circumstances where a credit facility as a contract of sale is pertinent, the date of transfer of ownership of the goods to the buyer (consumer) is of importance to, *inter alia*, determine whether the goods bought may be alienated by the consumer to a third party without the credit provider’s permission. In contrast to an instalment agreement, a credit facility neither contains an ownership reservation clause, nor a clause providing for the passing of ownership to the consumer, subject to the right of the credit provider to re-possess the goods if the consumer does not comply with any of the consumer’s obligations in terms of the agreement. Consequently, the passing of ownership is regulated in terms of the common law, which always applies in

⁵⁷ *JMV Textiles (Pty) Ltd v De Chalain Spareinvest* 14 CC 2010 (6) SA 173 (KZD) (“*JMV Textiles*”) par 14.

⁵⁸ S 119(1)(a). S 119(2)(b) is pertinent. It allows a consumer to request, and the credit provider to agree to, raising the credit limit on the credit facility in order to accommodate a particular transaction. However, the proviso is that the preceding credit limit will apply again at a later stage, either “within a specified period, or after a specified occurrence has taken place”. Due to the fact that the increase is only temporary, a fresh affordability assessment by the credit provider in terms of s 81(2) is not required. The reckless credit provisions in the NCA do not apply in the case of such increases. S 78(2)(f).

⁵⁹ S 119(1)(b). The consumer may initiate an increase by agreement at any time, and may do so orally or in writing (s 119(1)(b)(i)). The consumer may also give written consent to the increase, in response to a written proposal by the credit provider (s 119(1)(b)(ii)). In terms of s 119(3), a fresh credit assessment must be conducted by the credit provider in terms of s 81(2), to determine if the consumer can afford the additional credit on the card, which may potentially be used by the consumer.

⁶⁰ S 119(1)(c) read with s 119(4). In terms of s 119(4), the consumer must specifically have requested the option to have the credit limit increased from time to time. Unilateral increases are subject to limitation, and may, for instance, only happen once a year.

⁶¹ In Nagel *et al Commercial Law* (2019) (“Otto and Renke in Nagel”) 297.

⁶² Otto and Renke Types par 8.2.2.

conjunction with the NCA to a credit agreement subject to the Act. The common law provides that, in the case of a credit sale, the only requirement for the passing of ownership to the buyer is the delivery of the goods to the buyer.⁶³ Therefore, and reliant on the common law, movable goods bought in terms of a credit facility will become the property of the buyer-consumer immediately upon the delivery of the goods to the buyer.⁶⁴

Service delivery contracts⁶⁵ of revolving credit constitute the second type of credit facility in terms of the NCA. An example of this is an agreement in terms of which a consumer has a credit account with a geyser maintenance company on an ongoing basis. The provisos are that revolving credit must be involved, payment must be deferred, and interest, fees, or charges must be levied by the credit provider.⁶⁶

The final type of credit facility provided for in section 8(3) is a moneylending contract, if revolving credit, deferral of payment, and the charging of credit costs are involved. Typical examples provided in this respect include credit-card transactions⁶⁷ and overdrafts on a cheque account offered by a banking institution.⁶⁸ These credit facilities work on exactly the same principles explained above in respect of store-card transactions.

The mere fact that each and every credit-card transaction concluded on credit⁶⁹ using a credit facility in South Africa falls within the ambit of the NCA indicates the importance of this type of credit agreement in practice.

2.4 The deferral of payment

The essence of credit is the deferral of payment.⁷⁰ The same holds for the credit facility. Section 8(3)(a)(ii)(aa) and (bb) make this clear. The credit provider has to either defer any payment or repayment obligations on the part of the consumer, or bill

⁶³ Lötz in Nagel *et al Commercial Law* (2019) 217.

⁶⁴ See also Stoop "n Kritiese evaluasie van die toepassingsveld van die 'National Credit Act' 2008 *De Jure* 356.

⁶⁵ An undertaking to supply services.

⁶⁶ Du Pisani *A critical analysis of the transactions to which the National Credit Act 34 of 2005 applies* (2012) LLM mini-dissertation UP 5.

⁶⁷ See also *JMV Textiles* 179B.

⁶⁸ Lombard and Renke 2009 *SA Merc LJ* 488.

⁶⁹ See the discussion in par 2.4 below.

⁷⁰ See the definition of "credit" in s 1.

the consumer periodically for the credit extended.⁷¹ Billing the consumer, by its very nature, means that payment of the debt is deferred.

2.5 A charge, fee, or interest

The payment of charges, fees, or interest is required in terms of the NCA in order for the agreement to constitute one of the credit agreements in terms of the Act.⁷² Charges, fees, or interest is provided for in section 8(3)(b) of the Act, and will be payable in respect of “any amount deferred” or “any amount billed ... and not paid within the time provided in the agreement”.⁷³ Whether interest, fees, or charges are payable in terms of a particular credit facility will depend on the terms of the agreement. However, the payment of fees, charges, or interest by the consumer is a statutory requirement in terms of the definition of the credit facility. Section 8(3)(b)(i) and (ii) make this clear.⁷⁴ Otto and Renke⁷⁵ remark as follows:

“It must always be borne in mind, however, that the rendering of credit by the credit provider is not in itself enough to bring the agreement within the ambit of the definition of ‘credit facility’ for the purposes of the Act. The definition requires that a charge, fee or interest be payable to the credit provider in addition to the amount of credit provided. Thus, when goods or services are rendered and payment is deferred but no agreement exists as to the payment of a charge, fee or interest ‘in terms of that credit agreement’, the agreement does not constitute a credit facility.”

Consequently, if a store-card agreement, for instance, does not require the payment of a fee, charges, or interest, a credit facility is not pertinent.⁷⁶ In *JMV Textiles*, it was noted that credit providers charge interest in terms of a credit facility *ab initio*, which serves as the credit provider’s compensation for the advancement of credit to the consumer. In other words, the credit provider uses the charging of interest as a means to make a profit from granting credit.⁷⁷ This is important, and is one of the characteristics that distinguish the credit facility from the incidental credit agreement. In the example of the credit facility provided by Otto and Renke, the supplier providing

⁷¹ S 8(3)(a)(ii)(aa) and (bb) respectively.

⁷² The exceptions are the mortgage agreement, secured loan and the credit guarantee.

⁷³ See s 8(3)(a)(ii)(aa) or (bb) discussed in par 2.4 above. Otto and Renke Types par 8.2.2.

⁷⁴ See also *JMV Textiles* par 14.

⁷⁵ Otto and Renke Types par 8.2.2.

⁷⁶ *Voltex v Chenleza* CC 2010 (5) SA 267 (KZP) par 39; *Bridgeway Ltd v Markam* 2008 (6) SA 123 (WLD).

⁷⁷ *JMV Textiles* par 16. See also Otto and Renke Types par 8.2.3.3.

goods to the dealer,⁷⁸ the contract stipulates “that interest will be levied ... from the start”.

2.6 The size of credit facilities

The size categorisation of credit agreements in terms of section 9 of the NCA is important, as an incorrect size categorisation may cause the particular credit agreement to fall in- or outside the ambit of the Act, thereby determining whether the consumer is afforded or deprived of the NCA’s protection. In terms of section 9(1) of the NCA, every credit agreement is characterised as small, intermediate, or large. Section 9(2), (3) and (4), read with the Determination of Threshold Regulations, provide for small, intermediate, and large credit agreements. It should be borne in mind that, if a juristic person, as the consumer, concludes a large credit agreement, the Act is not applicable.⁷⁹

The sizes of credit facilities are as follows: (a) a credit facility is a small agreement if the credit limit applicable to such agreement is R15 000 or lower;⁸⁰ and (b) a credit facility is intermediate if the credit limit under that facility is above R15 000.⁸¹ Section 9(4),⁸² providing which credit agreements constitute large agreements, does not mention the credit facility at all, and it therefore seems that the legislature did not intend for a credit facility, irrespective of its amount,⁸³ to be large.⁸⁴ However, in a number of cases, the courts have classified a credit facility as large solely based on the amount of the credit facility’s principal debt.⁸⁵ Otto and Renke are of the opinion that these decisions are incorrect.⁸⁶

⁷⁸ See par 2.3 above.

⁷⁹ See par 1.1 above.

⁸⁰ S 9(2)(b), read with the Determination of Threshold Regulations.

⁸¹ S 9(3)(a), read with the Determination of Threshold Regulations.

⁸² Read with the Determination of Threshold Regulations.

⁸³ In terms of s 7(2), the principal debt of the credit facility serves as the credit limit under that facility.

⁸⁴ See also the case note by Renke “Die grootte-klassifikasie van kredietfasiliteite ingevolge die Nasionale Kredietwet 34 van 2005 *Collotype Labels RSA (Pty) Ltd v Prinspark CC* (6722/2016) [2016] ZAWCHC 159 (9 November 2016)” 2019 *LitNet Akademies*, where he discusses the latter court’s incorrect deviation from s 9 of the NCA in classifying a credit facility as a “large agreement”.

⁸⁵ See *Collotype Labels RSA (Pty) Ltd v Prinspark CC* [2016] ZAWCHC 159; *Nedbank v Wizard Holdings* 2010 (5) SA 523 (GSJ); *RMB Private Bank* 15; *Firststrand Bank Ltd v Two Gees Trading (Pty) Ltd* 2018 JDR 1155 (FB) pars 15 and 17 – 20.

⁸⁶ See also Kelly-Louw “Categorising credit agreements, particularly credit guarantees, as small, intermediate or large agreements under the National Credit Act 34 of 2005” 2012 *SA Merc LJ* 214, who criticises the courts’ decisions and argues that a credit facility can never be a large agreement.

2.7 Preliminary observations

This main category credit agreement consists of three types: the supply of goods, the supply of services, and payment of an amount or amounts. For purposes of my dissertation, the credit facility as a contract of sale of movable goods is important. In this respect, store-card transactions and a credit facility provided by, for instance, a supplier of stock to a dealer were identified as examples. Some of the crucial distinguishing characteristics of this type of credit agreement are: the involvement of revolving credit as its core attribute, deferral of payment, and the *ab initio* levying of interest.⁸⁷ Although a credit facility's revolving credit characteristics clearly distinguish it from other credit agreements, some of the essential elements used to distinguish the credit facility can also be found in the other credit agreements provided for in the NCA, such as an incidental credit agreement.⁸⁸ One contentious aspect surrounding the credit facility is, however, the fact that the courts, probably incorrectly, classify the credit facility as a large agreement, completely disregarding the provisions and literal wording of section 9(4) of the Act and its implied exclusion of the credit facility as a large agreement. This impacts the protection of juristic persons as consumers. A small juristic person consumer concluding an intermediate credit facility will therefore forfeit the NCA's protection based on an incorrect classification of the credit facility as large.

⁸⁷ Pars 2.2 – 2.5 above.

⁸⁸ See the discussion in par 3.2 below.

CHAPTER 3

THE INCIDENTAL CREDIT AGREEMENT, INSTALMENT AGREEMENT, AND THE OTHER CREDIT AGREEMENT

3.1 Introduction

The credit transaction and credit guarantee (aside from the credit facility) form the other main types of credit agreements subject to the NCA.⁸⁹ It was established in the previous chapter that the credit facility constitutes, *inter alia*, contracts of sale of movable goods. In this chapter, selected credit transactions, namely the incidental credit agreement, instalment agreement, and the “other agreement” in terms of section 8(4)(f) of the NCA as contracts of sale of movable goods, are discussed and compared.

3.2 The incidental credit agreement

3.2.1 General

The incidental credit agreement, similar to the other credit transactions (with the exception of the section 8(4)(f) “other agreement”), is defined in section 1 of the NCA.⁹⁰ However, one cannot consider its definition without having regard to the provisions of section 5, titled “Limited application of Act to incidental credit agreements”. In what follows, the section 1 definition will be discussed first, followed the section 5 provisions. Section 5(3) is discussed in terms of fees, charges, or interest.⁹¹

3.2.2 The section 1 definition

Section 1 of the NCA defines the incidental credit agreement as follows:

“**incidental credit agreement**’ means 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

⁸⁹ S 8(1).

⁹⁰ For a complete discussion of this type of credit agreement, see Aucamp “The incidental credit agreement: A theoretical and practical perspective (1)” 2013 *THRHR* 377 – 399” and (2) 2013 *THRHR* 507 – 520.

⁹¹ See par 3.2.2.3 below.

goods or 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.”

If the section 1 definition of the incidental credit agreement is considered, it is apparent that the provision of goods or services is involved, that payment is deferred, and that fees, interest, or charges may become payable. These aspects are discussed next.

3.2.2.1 Goods or services

The incidental credit agreement involves the provision of goods or services to the consumer. Goods are clearly movable goods, which thus indicates that a contract of sale of movable goods is pertinent. This is reiterated by the definition of “consumer” in section 1 of the NCA, which, in the case of an incidental credit agreement, is defined as “the party to whom goods or services are sold under...[an] incidental credit agreement”. Section 1 provides for the situation where the goods or services have already been provided to the consumer, or are to be provided to the consumer over a period of time. Both these instances may give rise to an incidental credit agreement, but the terms of the agreement and the facts of a particular case will determine which instance is pertinent.

Professionals, for instance attorneys and doctors rendering services to clients, enter into incidental credit agreements, provided that the requirements in terms of the section 1 definition are met.

3.2.2.2 The deferral of payment

Importantly, in terms of the definition of the incidental credit agreement, “an account was tendered for the goods or services” provided to the consumer, which means payment for the goods or services was deferred. The word “tendered” is criticized as “probably a mistake” by Otto and Renke. If the account is tendered to the consumer,

the consumer may refuse to accept the tender. The correct word would probably have been “rendered”.⁹²

3.2.2.3 Fees, charges, or interest

Two conditions are stipulated in the definition of the “incidental credit agreement”, and compliance with either or both is required in order to constitute an incidental credit agreement. The first condition is that a fee, interest, or charge must have become payable when the “payment of an amount charged in terms of that account was not made on or before a determined period or date”. The second is that a lower and a higher price were quoted for the settlement of the account. If the account is paid on or before a date determined in the account, the lower price is applicable. However, if the account is not paid on the determined date, the higher of the two prices applies. It is submitted that the difference between the lower and the higher price in the second instance is a form of interest.

The fact that, in terms of the agreement, a fee, charge, or interest became payable “when payment of an amount charged in terms of [the] account was not made”, or “the higher price [only] being applicable due to the account not having been paid by that date”, is a clear indication that the fees, charges, or interest, or the higher price, are not payable from the outset, but only if the account is not paid on or before the stipulated date.

In *JMV Textiles*,⁹³ the court held that the obligation to pay interest in the case of an incidental credit agreement only arises if the consumer is in default with the payment obligations. The court distinguishes the incidental credit agreement, a conventional sale on credit, from the credit facility.⁹⁴ In the case of the incidental credit agreement, or then the conventional sale on credit, which the court referred to as “the ordinary contract for the purchase and sale of goods and services”, the position is as follows:

“[C]redit is extended and interest is only charged if payment is not made timeously. There the expectation of the parties is that payment of the purchase price will be forthcoming in accordance with the credit arrangements agreed between the parties. It is not the intention underlying those transactions that the supplier will profit from the interest charged. Rather that amount is levied in order to compensate the seller for the non-receipt of the purchase price”.⁹⁵

⁹² Otto and Renke Types par 8.2.3.3.

⁹³ Par 16.

⁹⁴ *JMV Textiles* pars 13 – 17.

⁹⁵ *JMV Textiles* par 17.

Otto and Renke⁹⁶ mention the same example mentioned above⁹⁷ in respect of the credit facility of the dealer that obtains stock from the supplier. However, if the agreement stipulates “that interest will only be levied after the lapse of 30 days if the account is not paid”, an incidental credit agreement is pertinent.

The court in *Independent Plumbing v Thomas Classen t/a TPC Plumbing*⁹⁸ explained the charges, fees, or interest payable in the case of an incidental credit agreement. According to the court, “the incidental credit agreement is a novel statutory creation by the NCA that was hitherto unknown to South African law. The agreement *in casu* provided for the charging of collection and recovery of collection costs and commission, which are permissible charges in terms of section 5(3)(a), discussed below.⁹⁹ The court made the following important remark: “Unless provision is made [in the agreement] for an entitlement to claim a fee, charge or interest, as required by the definition of an incidental credit agreement, the agreement is not an incidental credit agreement.”¹⁰⁰

The charges, fees, or interest that a credit provider may charge in the case of an incidental credit agreement is restricted in the case of an incidental credit agreement. In terms of section 5(3)(a), the cost of credit in the case of the incidental credit agreement is restricted to the amounts mentioned in section 101(1)(d), (f), and (g). These amounts are calculated on the deferred amount in terms of the incidental credit agreement, and entail interest, default administration charges, and collection costs. “Default administration charges” are the charges that may be imposed by a credit provider to cover administration charges incurred by the credit provider because of the consumer defaulting on the credit agreement, particularly the costs of registered letters of demand.¹⁰¹ “Collection costs”¹⁰² exclude default administration charges; these costs are the amount a credit provider may charge in respect of “the enforcement of a consumer’s monetary obligations under a credit agreement”.

Section 5(3)(b) contains the important provision that a charge fee or interest under an incidental credit agreement that arises as a result of an unsettled account after a

⁹⁶ Otto and Renke in Nagel 297.

⁹⁷ Par 2.3.

⁹⁸ [2014] ZAGPPHC 523 (13 June 2014) (“*Independent Plumbing*”).

⁹⁹ *Independent Plumbing* par 22.

¹⁰⁰ *Independent Plumbing* par 39.

¹⁰¹ S 1 (“default administration charges”), read with reg 46 of the Credit Regulations.

¹⁰² S 1.

determined date or period may only be imposed upon the disclosure of the amount thereof¹⁰³ by the credit provider, and if accepted by the consumer “on or before the date on which the relevant goods or services were supplied”. Therefore, if the parties had not reached consensus with regard to the charge, fee, or interest payable in the case of an incidental credit agreement, the credit provider may not charge such amounts.¹⁰⁴

The provisions of section 5(1) and (2) of the NCA are addressed next.

3.2.3 Section 5

3.2.3.1 Section 5(1)

The heading of section 5 of the NCA makes it clear that the Act enjoys only limited application to incidental credit agreements. Section 5(1) provides for the chapters and parts or sections in those chapters¹⁰⁵ that apply to incidental credit agreements, and provides that the mentioned parts or sections are the only ones applicable in the case of the incidental credit agreement. Interesting exceptions of parts or sections that do not apply to the latter credit agreement are: the requirement for registration of credit providers¹⁰⁶ and the provisions regarding reckless credit.¹⁰⁷ Their exemption from the Act’s field of application makes sense if section 5(2), discussed hereafter, and the nature of the incidental credit agreement are considered. It will be shown later that the incidental credit agreement does not come into existence immediately upon consensus that the goods or services will be provided, but only incidentally, upon the realisation of the “deemed” provisions in section 5(2). Therefore, it cannot be expected of a credit provider to register as a credit provider in terms of section 40 of the Act, or to do the compulsory credit assessment in accordance with section 81 of the Act to ascertain whether the consumer can afford the credit just in case an incidental credit agreement does come into existence.¹⁰⁸ However, an incidental credit agreement may

¹⁰³ Or the basis on which it may become payable.

¹⁰⁴ See Otto “Mora interest, consensual interest, incidental credit agreements and the National Credit Act” 2014 *TSAR* 399.

¹⁰⁵ Chs 1, 2, 7, 8, and 9 *in toto*, ch 3 ss 54 and 59, ch 4 Parts A and B, ch 4 Part D, except the reckless credit provisions, ch 5 Part C subject to sub-s (3)(a), ch 5 Parts D and E, once the incidental credit agreement is regarded to have been concluded in accordance with s 5(2) ch 6 Parts A and C.

¹⁰⁶ S 40.

¹⁰⁷ Ss 79 – 84.

¹⁰⁸ See Renke “Aspects of the incidental credit agreement in terms of the National Credit Act 34 of 2005” 2011 *THRHR* 466-471 for a full discussion of the limited application of the National Credit Act in respect

cause a consumer's over-indebtedness, which entitles the consumer to the NCA's debt-alleviation process in terms of sections 85 to 88.

3.2.3.2 Section 5(2)

It was mentioned earlier¹⁰⁹ that, for an incidental credit agreement to come into existence in terms of its definition, "a fee, charge or interest [must have become] payable". Alternatively, two prices, a lower and a higher price, must have been quoted for the settlement of the credit provider's account for the goods or services delivered to the consumer. Section 5(2) provides as follows:

The parties to an incidental credit agreement are deemed to have made that agreement on the date that is 20 business days after –

- (a) the supplier of the goods or services that are the subject of that account, first charges a late payment fee or interest in respect of that account; or
- (b) a pre-determined higher price for full settlement of the account first becomes applicable, unless the consumer has fully paid the settlement value before that date.

An incidental credit agreement does not come into effect immediately upon conclusion of the sale or service contract by the parties. According to Otto, once entered into, this contract merely serves as an underlying contract between the parties, and may not yet be classified as a credit agreement for purposes of the NCA.¹¹⁰ This is due to the fact that the legislator's intention could not have been to include all contracts relating to the purchase and sale of goods and services in the ambit of the Act.¹¹¹ This underlying contract is therefore subject to a conditional time delay that triggers an incidental credit agreement.

Section 5(2) of the Act provides for two instances that relate to the moment of conclusion of an incidental credit agreement. According to the Act, an incidental credit agreement, in the first instance, will be deemed to have been entered into by the parties involved 20 business days¹¹² after a late payment fee or interest has been

of the incidental credit agreement. See also Otto "The incidental credit agreement" 2010 *THRHR* 648-649.

¹⁰⁹ See par 3.2.2.3 above.

¹¹⁰ Otto and Renke Types par 8.2.3.3.

¹¹¹ Van Zyl Scope par 4.4.1.

¹¹² S 2(5). The Act provides a clear explanation of the meaning of the term "business days", which essentially means that the first day of the occurrence of the event in question is excluded and the last day of the occurrence is included ("LIFO"). Also excluded in the calculation are Saturdays and Sundays, as well as any public holidays that fall within the days in question.

charged by the person responsible for the provision of the goods or services.¹¹³ In the second instance, the incidental credit agreement will only come into being 20 business days after “a pre-determined higher price for full settlement of the account first becomes applicable, unless the consumer has fully paid the settlement value before that date”.¹¹⁴

What triggers the 20 business days to run in terms of section 5(2) is the charging of a late payment fee or interest, or the higher price becoming payable. This was explained in *Independent Plumbing*.¹¹⁵ The court made the following important remarks:

“[Section] 5(2) has the effect if goods were sold and supplied in terms of an agreement of sale and purchase on credit on a determined date and the credit provider has charged a late payment fee and interest when payment was not made on the deferred date, the date when the agreement was concluded is deemed to have been concluded on a date twenty business days after plaintiff first charged a late payment fee.”¹¹⁶

“It is important to note that the deeming provision of s 5(2) only comes into operation when a ‘supplier’ of the goods or services, first charges a ‘late payment fee’ or ‘interest’ that are subject to that account.”¹¹⁷

“The effect of s 5(2) coming into operation is... [that] the date of the particular incidental credit agreement is deferred... most importantly, the incidental credit agreement constitutes a ‘credit transaction’ – and a ‘credit agreement’ – on the deferred date.”¹¹⁸

The implication of section 5(2) is that, should the account be settled by the receiver of the goods or services within the period of 20 business days, no incidental credit agreement comes into being.

In *Nedan (Pty) Ltd v Selbourne Food Manufacturers*,¹¹⁹ the parties entered into a contract that made provision for the charging of interest at zero percent, and the credit provider therefore never charged any interest to the consumer in respect of the outstanding amounts in terms of their agreement.¹²⁰ According to the court, the fact that provision is made for the payment of interest in the event of non-payment by the consumer does not mean that the credit provider ought to actually charge interest for the agreement to constitute an incidental credit agreement.¹²¹ The court, with no regard of or reference to the wording of section 5(2) of the Act, found that an incidental

¹¹³ S 5(2)(a).

¹¹⁴ S 5(2)(b).

¹¹⁵ Pars 26 – 30.

¹¹⁶ Par 27.

¹¹⁷ Par 29.

¹¹⁸ Par 30.

¹¹⁹ [2014] ZAGPPHC 979 (“*Nedan*”).

¹²⁰ *Nedan* par 18.

¹²¹ *Nedan* par 24.

agreement was involved in the case.¹²² This finding was incorrect. As indicated by the court in *Independent Plumbing*, to get the full picture of the incidental credit agreement, its definition in section 1 cannot be considered in isolation. The coming into operation of this type of credit agreement is deferred and, in this respect, section 5(2), which is dependent on the charging of a late payment fee or interest, or a higher price of two quoted prices being applicable, is vital.¹²³ The court in *JMV Textiles* also failed to consider the provisions of section 5(2).

The intention of the legislature with the introduction of the 20 business days' time delay before activation of the incidental credit agreement is unclear. There seems to be no plausible explanation why such an agreement cannot come into effect immediately upon the charging of interest at the first instance.¹²⁴ However, the 20 business days' waiting period before an incidental credit agreement comes into existence gives rise to a number of interesting questions, such as whether another credit agreement is pertinent pending the expiry of the 20 business days. The answer to these questions do not pertain to the characteristics of the incidental credit agreement, and are therefore not attended to.

3.2.4 Preliminary observations

The incidental credit agreement is a new statutory creation. A contract of sale of movable goods or services is involved, provided that an account was rendered to the consumer in respect of the goods or services, which indicates that payment must be deferred. The fact that the account that was rendered to the consumer was not settled as determined, and the subsequent payment of a late payment fee or interest, or the higher of two quoted prices, distinguish this type of credit agreement. The agreement must not only provide for a late payment fee or interest to be charged (or a higher price to become applicable), but these conditions must actually be fulfilled by the supplier of the goods or services. The reason for the latter is to put the deemed provision of section 5(2) into operation, which defers the coming into existence of the incidental

¹²² *Nedan* par 32.

¹²³ See also Tennant "The incorrect understanding of the incidental credit agreement leads to undesirable consequences: *JMV Textiles v De Chalain Spareinvest*" 2011 *SA Merc LJ* 128 and Renke "Is an incidental credit agreement pertinent or not? *Nedan (Pty) Ltd v Selbourne Food Manufacturers CC and another*" 2017 *SA Merc LJ* 133.

¹²⁴ Renke 2011 *THRHR* 472.

credit agreement. The reason for the deemed provision in section 5(2) of the Act is unclear, and the provision does not make sense. If the incidental credit agreement does come into being, the consumer in terms of this credit transaction enjoys only limited protection by the NCA.¹²⁵

What are the similarities and differences between the incidental credit agreement and the credit facility¹²⁶ as contracts of purchase and sale of movable goods? In both cases the credit agreement's payment must be deferred and a fee or interest must be charged. In both instances an account is rendered to the consumer, although the rendering of an account to the consumer is not pertinently required in terms of the definition of the credit facility. With regard to the rendering of an account in both instances, Otto and Renke remark that the definition of the incidental credit agreement may create the impression that credit-card transactions, and therefore also store-card transactions, are included in the definition. However, a difference is that, in the case of a credit card or store card, an account is rendered to the consumer in respect of the credit that was granted to the consumer. In the case of the incidental credit agreement, the account is rendered for the goods (or services) that have been provided to the consumer.¹²⁷

The main differences between these credit agreements are the time and purpose of charging interest, fees, or charges by the credit provider. In the case of the credit facility interest, fees or charges are charged by the credit provider from the start, with the purpose of making a profit. However, in the case of the incidental credit agreement, the late payment fee or interest is charged by the credit provider to compensate the latter for the consumer being in default by not settling the account for the goods or services in time as specified in the account. The purpose is not to make a profit. The supplier of the goods or services is not in the business of granting credit to consumers, and the credit agreement comes into existence incidentally.

The credit facility as a contract of sale of movable goods is distinguished by the fact that the sale takes place on a revolving credit basis. This is, of course, not true in respect of the incidental credit agreement.

¹²⁵ Pars 3.2.2 and 3.2.3 above.

¹²⁶ Discussed in ch 2.

¹²⁷ Otto and Renke Types par 8.2.3.3.

Finally, in the case of the credit facility, the credit agreement comes into existence at the conclusion of the agreement, which is not the case with the incidental credit agreement. The deemed provision in section 5(2) of the NCA causes the incidental credit agreement to come into being as a credit transaction 20 business days after the date upon which a late payment fee or interest, or the higher of two quoted prices, is charged by the credit provider.

3.3 The instalment agreement

3.3.1 Section 1 definition

The instalment agreement is a credit transaction listed in section 8(4)(c) of the NCA. Section 1 of the Act defines the instalment agreement as follows:

“**[I]nstalment agreement**’ means a sale of movable property in terms of which –

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

From the wording of the definition, it is evident that a contract of purchase and sale in relation to movable goods is at play.¹²⁸ According to Renke and Pillay,¹²⁹ there are five requirements that need to be complied with for an agreement to constitute an instalment agreement in terms of the Act: (a) there has to be a deferral of payment in relation to the purchase price, or part thereof; (b) the whole or part of the purchase price should be paid by way of instalments; (c) a charge, fee, or interest is levied by the credit provider in respect of the deferred purchase price or the agreement; (d) in terms of the agreement, the consumer ought to immediately have the right to the possession and use of the property; and (e) the agreement between the seller and the

¹²⁸ Renke and Pillay “The National Credit Act 34 of 2005: The passing of ownership of the thing sold in terms of an instalment agreement” 2008 *THRHR* 641.

¹²⁹ Renke and Pillay 2008 *THRHR* 641.

purchaser has to make provision for the passing of ownership of the *res vendita* to the consumer.

The definition of the instalment agreement in the NCA refers to the payment of the deferred purchase price, or part thereof, by means of “periodic payments”. This puts to rest the debate that existed in terms of the Credit Agreements Act, one of the immediate predecessors of the NCA, namely whether the purchase price in the case of a credit transaction, which included an instalment sale transaction, could be paid in a lump sum in future.¹³⁰ The NCA makes it clear that the debt in terms of an instalment agreement, or part thereof, must be paid in instalments.¹³¹

The Act does not provide a definition of “periodic payments”, and it can therefore be assumed that the instalment payments by the consumer are not required to be equal in size, nor are they required to be paid at regular, specified intervals.¹³² In practice, these payments are often the same size, save for the deposit (if applicable) and the final instalment, which may be a balloon payment.

Although it depends on the terms of the particular instalment agreement, this type of agreement is usually a fixed-sum credit agreement, which is the opposite of the revolving credit agreement. In other words, in the case of a fixed-sum credit agreement, the payment of instalments by the consumer does not create additional credit to be used by the consumer.¹³³ This means that the consumer must pay the purchase price of the goods until the full purchase price has been paid, which will bring the instalment agreement to an end.

The most important part of the definition of the instalment agreement in the NCA concerns the transfer of ownership of the goods to the consumer.

3.3.2 The transfer of ownership

The definition of the instalment agreement provides the credit provider with a choice in respect of the transfer of ownership of the movable property subject to the agreement. The credit provider may either transfer the ownership in the goods to the

¹³⁰ See Renke LLD thesis par 6.7.1.

¹³¹ *Mercedes Benz Financial Services South Africa (Pty) Ltd v Mtutuzeli Paulos Ntloko t/a MP Ntloko Attorneys* (7438/2012) [2012] ZAWCHC 166 (“*Mercedes Benz*”) par 14.

¹³² *Mercedes Benz* par 14.

¹³³ See Grové and Otto 80.

consumer only once a condition has been met, which is usually that the agreement has been fully complied with, or ownership may be transferred to the consumer immediately, subject to the right reserved in the agreement that the credit provider may repossess the goods if the consumer fails to comply with any of the consumer's obligations in terms of the agreement. The latter option seldom finds application in practice,¹³⁴ and will therefore not receive any further attention. However, it is important to note that the definition of the instalment agreement in terms of the NCA clearly requires the agreement to address the transfer of ownership of the goods to the consumer.

The instalment agreement in terms of the NCA may reserve the passing of ownership of the goods to the consumer until the fulfilment of a condition in the agreement. A typical condition is that ownership will only pass to the consumer once the full purchase price has been paid by the consumer. Such a clause, which is an ownership reservation clause,¹³⁵ may also make provision for ownership to be transferred after certain payments have been made by the consumer.¹³⁶ Renke and Pillay submit that the existence of an ownership reservation clause in a contract of sale does not suspend the entire agreement.¹³⁷ The transaction is a completed sale from the beginning. This clause merely suspends the transfer of ownership to the consumer under a completed sale, rendering the delivery of the goods subject to the agreement conditional, as a credit sale generally provides a consumer with ownership upon delivery.¹³⁸

Where an agreement pertaining to the sale of movable goods is subject to an ownership reservation clause, the ownership and control of the goods reside with the credit seller from the period when the agreement is entered into until the applicable condition is met, namely the payment of the amounts agreed upon. The retention of ownership by the seller in this period grants the seller important security over the goods, considering that the goods are no longer in the seller's possession.¹³⁹ The seller has a real right of ownership in respect of the *res vindita*, and if, during this

¹³⁴ Renke and Pillay 2008 *THRHR* par 4.1.

¹³⁵ Renke and Pillay 2008 *THRHR* 643. Ownership reservation clauses are also referred to as *pacta reservati dominii*.

¹³⁶ Renke and Pillay 2008 *THRHR* 643.

¹³⁷ Renke and Pillay 2008 *THRHR* 644.

¹³⁸ Renke and Pillay 2008 *THRHR* 644; Du Pisani mini-dissertation 30.

¹³⁹ Renke and Pillay 2008 *THRHR* 644.

period, the consumer attempts to sell the goods in question to a third party, the property would be considered a *res aliena*,¹⁴⁰ which would entitle the seller to claim the property back from the third party through the common law *rei vindicatio*.¹⁴¹ The consumer is, however, entitled to sell the goods subject to an ownership reservation clause to a third party with the credit provider's permission.

The ownership reservation clause provides an important real right to the credit provider by ensuring that the consumer pays the debt in terms of the agreement. This renders the instalment agreement popular in practice when more expensive consumer goods are involved.

3.3.3 Preliminary observations

In what follows, the instalment agreement will be compared only with the credit facility, which was discussed in Chapter 2. Both agreements' definitions provide for contracts of sale of movable goods with deferred payment and the charging of interest, fees, or charges by the credit provider. In both instances, the goods are delivered to the consumer immediately, or soon after the date of conclusion of the agreement. This entitles the consumer to the possession and immediate use of the goods. However, in the case of the credit facility, the consumer in terms of the common law becomes the owner of the goods immediately upon the delivery of the goods to the consumer.¹⁴² The instalment agreement, in contrast, usually contains an ownership reservation clause that reserves passing of ownership of the goods to the consumer until the fulfilment of a condition stipulated in the agreement.¹⁴³

Another difference between the credit facility and the instalment agreement is that, in the case of the credit facility, revolving credit is involved,¹⁴⁴ while the instalment agreement is usually concluded on a fixed-sum basis.¹⁴⁵ The question is whether contracts of sale of movable goods that do not comply with the definition of the credit facility or the instalment agreement, but that are concluded on a credit basis, are subject to the NCA.

¹⁴⁰ This means property belonging to another person. See Lötj in Nagel 198.

¹⁴¹ Renke and Pillay 2008 *THRHR* 644.

¹⁴² Par 2.3 above.

¹⁴³ Par 3.3.2 above.

¹⁴⁴ Par 2.2 above.

¹⁴⁵ Par 3.3.1 above.

3.4 The section 8(4)(f) other agreement

3.4.1 Definition

It was mentioned earlier¹⁴⁶ that section 8(4)(f) is a catch-all credit transaction in terms of the NCA that caters for all credit transactions that do not comply with the definitions of any of the other credit transactions listed in section 8(4)(a) to (e). Section 8(4)(f) defines this final credit transaction as follows:

“[A]ny other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of –

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

By a process of elimination, if an agreement that provides for the sale of movable goods, the deferral of payment, and the levying of charges, fees, or interest by the credit provider is not concluded on a revolving credit basis, a credit facility is not pertinent. Section 8(3) of the NCA provides for revolving credit sales.¹⁴⁷ If the sale of goods contract does not regulate the transfer of ownership of the goods to the consumer, the agreement is also not an instalment sale agreement in terms of the Act.¹⁴⁸ However, due to the fact that, in terms of the sale agreement, an amount is owed by one person to another, which is deferred, and interest, fees, or charges are levied by the credit provider in respect of the deferred amount or the agreement, a section 8(4)(f) “other agreement” is involved. The consumer will therefore enjoy the NCA’s full protection.

3.4.2 Preliminary observations

The difference between a sale agreement of movable goods that resorts under the section 8(4)(f) catch-all definition of the credit transaction and the credit facility is that the section 8(4)(f) sale is concluded on a fixed-sum basis. The payment of instalments by the consumer does not create new or additional credit that may be used by the consumer in future. The section 8(4)(f) sale agreement does not regulate the transfer

¹⁴⁶ Par 1.1.

¹⁴⁷ Par 2.2 above.

¹⁴⁸ Par 3.3.1 above.

of ownership in the goods to the consumer, which disqualifies this contract as an instalment agreement in terms of the Act.

CHAPTER 4

CONCLUSIONS, RECOMMENDATIONS, AND FINAL REMARKS

4.1 Conclusions

The purpose of this dissertation was to discuss and compare the credit facility, incidental credit agreement, instalment agreement, and the section 8(4)(f) “other agreement” as contracts of sale of movable goods in terms of the NCA. A further aim was to provide a checklist with the main characteristics of these agreements, to facilitate their identification.¹⁴⁹

The NCA contains its own rules for determining its scope of application. It was indicated earlier that the correct interpretation of the provisions of the NCA in respect of its field of application is of vital importance. The scope of the field of application of the NCA determines the ambit of the Act’s protection afforded to credit consumers.¹⁵⁰ This is important, because consumer protection is one of the main objectives of the Act.¹⁵¹ If the aforementioned provisions of the Act are interpreted incorrectly, for instance, a credit facility is erroneously deemed large,¹⁵² the particular consumer forfeits the Act’s protection. This may have dire consequences for the consumer.

The credit sale agreements of movable goods mentioned above have already been compared with and distinguished from each other.¹⁵³ However, the main characteristics of these agreements, which all include the deferral of payment and the charging of charges, fees or interest, are discussed below.

The credit facility is a revolving credit agreement, reflected in the operating word “facility”. The consumer determines the supply of goods by the credit provider to the consumer.¹⁵⁴ The aim of the interest, fees, or charges in the case of the credit facility is to compensate the credit provider for the granting of credit and, therefore, interest is payable by the consumer *ab initio*.¹⁵⁵

¹⁴⁹ Pars 1.1, 1.2, and 1.3.

¹⁵⁰ Par 1.1. This holds for consumer credit legislation in general.

¹⁵¹ See par 1.1.

¹⁵² Par 2.6.

¹⁵³ Pars 2.7, 3.2.4, 3.3.3, and 3.4.2.

¹⁵⁴ Par 2.2.

¹⁵⁵ Par 2.5.

The incidental credit agreement, considered a new statutory creation by the court in *Independent Plumbing*,¹⁵⁶ is not so new, and provides for the ordinary sale of goods on credit. The exception is the deemed provision in section 5(2) of the Act, which provides that the incidental credit agreement does not come into existence when payment for the goods is deferred and interest is charged in respect thereof, but only 20 business days after a late payment fee, interest, or the higher price is charged by the supplier of the goods.¹⁵⁷ As indicated by the phrase “late payment fee” in the definition of the incidental credit agreement, this fee or interest compensates the supplier of the goods for the fact that the consumer did not settle the account rendered to the consumer in the specified time. The late payment fee or interest is a penalty for being in default. The late payment fee, or interest in the case of this credit agreement, is not charged *ab initio* with the aim to make a profit.¹⁵⁸ This distinguishes the incidental credit agreement from the credit facility. In contrast to the credit facility, the incidental credit agreement does not enjoy the full protection of the Act. The example was mentioned that, in terms of the incidental credit agreement, the credit provider does not have to register as a credit provider, which is different from the credit facility.¹⁵⁹ This is important, and gave rise to a number of court cases where the courts had to distinguish the two agreements.¹⁶⁰ Although accounts are rendered in the case of both agreements, they serve different purposes.¹⁶¹

The instalment agreement is distinguishable from the credit facility regarding the transfer of ownership of the goods to the consumer.¹⁶² In the case of the credit facility, ownership passes to the consumer immediately upon the delivery of the goods to the consumer.¹⁶³ The common law applies in this case, because the agreement does not necessarily address the transfer of ownership. However, an agreement only qualifies as an instalment agreement if the terms of the agreement regulate the transfer of

¹⁵⁶ Par 3.2.2.3.

¹⁵⁷ Par 3.2.3.2.

¹⁵⁸ Par 3.2.2.3.

¹⁵⁹ Par 1.1.

¹⁶⁰ E.g., *JMV Textiles and Independent Plumbing*.

¹⁶¹ Par 3.2.4.

¹⁶² See pars 2.3 and 3.3.2.

¹⁶³ Par 2.3.

ownership in the goods to the consumer.¹⁶⁴ The credit facility entails revolving credit,¹⁶⁵ while the instalment agreement is usually concluded on a fixed-sum basis.¹⁶⁶

Although I could not find any authority to cite, I also mentioned the section 8(4)(f) “other agreement” as a sale of movable goods.¹⁶⁷ The conclusion that a sale agreement of movable goods could be classified as an “other agreement” was reached by means of a process of elimination. If the sale is concluded on a fixed-sum basis, it is not a credit facility, and if the transfer of ownership is not addressed in the agreement itself, it is also not an instalment agreement. However, if the sale agreement complies with the definition of section 8(4)(f), the agreement is a section 8(4)(f) “other agreement”.

4.2 Recommendations

The NCA, as remarked by our courts, is not a model of clarity.¹⁶⁸ Two aspects that need to be pointed out in this regard are the size classification of the credit facility¹⁶⁹ and the deemed provision in section 5(2) relating to the incidental credit agreement.¹⁷⁰

Academics and the courts hold different views regarding the classification of the credit facility as a large agreement. Academics consider the credit facility either small or intermediate, but not large. This view is based on the plain language of the NCA in section 9(2) to (4). Section 9(4), providing for large credit agreements, does not mention the credit facility. The courts, on the other hand, do not seem to hesitate to classify the credit facility as a large agreement, purely based on the “principal debt”¹⁷¹ in terms of the agreement. If the legislature wanted to exclude the credit facility as a large credit agreement, it should have expressly provided for the exclusion.

The reason for the deemed provision in terms of section 5(2) of the NCA regarding the coming into existence of the incidental credit agreement is unclear and does not make sense. The legislature could just as well have provided that an agreement becomes an incidental credit agreement the first time the supplier of the goods charges a late

¹⁶⁴ Par 3.3.2.

¹⁶⁵ Par 2.3.

¹⁶⁶ Par 3.3.1.

¹⁶⁷ Par 3.4.1.

¹⁶⁸ Par 1.1.

¹⁶⁹ Par 2.6.

¹⁷⁰ Par 3.2.3.2.

¹⁷¹ The concept “principal debt” is used incorrectly by the courts in respect of credit facilities. S 9(2) and (3) refer to the “credit limit” in terms of the credit facility as a measure of its size.

payment fee or interest. There is already compliance with the essential characteristic of credit, the deferral of payment.¹⁷²

I recommend that section 9(4) of the NCA be amended to either include or exclude the credit facility in terms of the Act as a large credit agreement. The deemed provision in terms of section 5(2) of the Act should be abolished.

4.3 Final remarks

The field of application of the NCA is an interesting topic. However, irrespective of the considerations regarding clarity of the Act's provisions in this regard, there will always be reported and unreported case law on the NCA's field of application. Although it may not be true under all circumstances, the consumer would probably argue that the NCA is applicable to a particular agreement, while the credit provider would argue that it is not.

¹⁷² Par 1.1, 3.2.2.2, and 3.2.3.2.

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