

The Impact of the National Credit Act on Specific Company Transactions

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1 Introduction

The National Credit Act 2005 ('the Act')¹ came into full operation on 1 June 2007.² It enjoyed huge publicity and much has been written about its content,³ impact on the economy,⁴ interaction with other areas of law,⁵ and so forth. Little has been written so far, though, about its impact on specific credit agreements in or by a company.

Here we will examine whether such agreements will come within the ambit of the Act and, if so, how it will affect them. We will not examine all credit agreements to which a company is a party, but only those that deserve particular attention from a company-law perspective, being expressly regulated in terms of the Companies Act 1973 ('the Companies Act').⁶ These include loans or security regulated in terms of ss 37, 38 and 226 of the Companies Act, and the issue of debentures by a company.

We will begin with a general discussion on the field of application of the National Credit Act, with the focus on moneylending transactions and credit

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¹ Act 34 of 2005 ('the Act').

² The other parts of the Act became effective on 1 June 2006 and 1 September 2006. See Proc 22 in *Government Gazette* 28824 of 11 May 2006.

³ Various authors have provided detailed analysis or an overview of the Act. See, eg, JM Otto *The National Credit Act Explained* 1 ed (2006); Stéfan Renke, Melanie Roestoff & Franciscus Haupt 'The National Credit Act: New Parameters for the Granting of Credit in South Africa' (2007) 28 *Obiter* 229; and JW Scholtz (ed) *Guide to the National Credit Act* (2008).

⁴ See, eg, 'Nuwe Wet se Uitwerking reeds gevoel' 20 May 2007 *Sake-Rapport*; 'Kredietwet se Ysvingers wurg Handel' 1 Jul 2007 *Sake-Rapport*; 'Kredietstap begin draai, maar Rente styg steeds' 8 Jul 2007 *Sake-Rapport*; 'Kopers bly Versigtig; Huise bly Langer op die Mark' 1 Aug 2007 *Sake24 (Beeld)*; and 'SA Credit Act a worldwide hit' 1 Nov 2008 *City Press Business*.

⁵ For example, the Constitution of the Republic of South Africa, 1996, and insolvency law. See Melanie Roestoff & Stéfan Renke 'A Fresh Start for Individual Debtors: The Role of South African Insolvency and Consumer Protection Legislation' (2005) 14 *International Insolvency Review* 93; S Renke & M Roestoff 'The Consumer Credit Bill – A Solution to Over-indebtedness?' (2005) 68 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 115; Melanie Roestoff & Stéfan Renke 'Debt Relief for Consumers – The Interaction Between Insolvency and Consumer Protection Legislation (Part 1)' (2005) 26 *Obiter* 561, (Part 2) (2006) 27 *Obiter* 98; and Stéfan Renke, Melanie Roestoff & Bernard Bekink 'New Legislative Measures in South Africa Aimed at Combating Over-indebtedness – Are the New Proposals Sufficient Under the Constitution and Law in General?' (2006) 15 *International Insolvency Review* 91.

⁶ Act 61 of 1973 ('the Companies Act').

guarantees in terms of the Act,⁷ as well as on those exceptions to the Act's field of application relevant to this contribution. After that we will discuss the implications of the Act's applicability and protection, and after that its relevance for specific credit agreements in or by a company.

In addition, the South African Department of Trade and Industry embarked on a process to overhaul the Companies Act completely. This process culminated in a new Companies Act 2008 ('the new Companies Act')⁸ signed on 8 April 2009.⁹ For the sake of completeness, when discussing the applicability of the Act to particular transactions to which a company is a part, we will also mention how they could be affected by the coming into operation of the new Companies Act.

2 Field of Application of the Act

2.1 General

Logically, for the provisions of the Act to apply to an agreement, it has to apply to the specific agreement. Section 4(1), the departure point for determining the Act's field of application, states that the Act applies to every credit agreement¹⁰ between parties¹¹ dealing at arm's length¹² and made within, or having an effect within, the Republic. But the ambit of the Act is subject to certain exclusions that will be discussed below.¹³

We will discuss only certain credit agreements to which the Act applies and only some of the exceptions to its field of application.^{14 15}

⁷ The reason why moneylending transactions and credit guarantees are focussed upon is that securities and loans in terms of ss 37, 38 and 226 of the Companies Act and the issuing of debentures by a company pertain to such credit agreements.

⁸ Act 71 of 2008 ('the new Companies Act').

⁹ The new Companies Act was published on 9 April 2009 in *Government Gazette* 32121.

¹⁰ See par 2.2 below.

¹¹ The 'consumer' and the 'credit provider'. Section 1 of the Act defines 'consumer' inter alia as the party to whom goods or services are sold, to whom money is paid or credit is granted. 'Credit provider' is defined in s 1 as the party who among other things supplies goods or services or advances money or credit to another under different types of credit agreements. The term includes a person who acquires the rights of a credit provider under a credit agreement after it has been entered into.

¹² See the discussion in par 2.3 below.

¹³ See par 2.3 below.

¹⁴ See par 1 above.

¹⁵ For a full exposition of the Act's field of application, see Otto op cit note 3 at 15 ff; Renke, Roestoff & Haupt op cit note 3 at 230 ff; and Scholtz op cit note 3 ch 4 and 8.

2.2 Credit Agreements in Terms of the Act

An agreement¹⁶ constitutes a credit agreement¹⁷ for the purposes of the Act if it qualifies as a credit facility, credit transaction,¹⁸ credit guarantee or a combination thereof.¹⁹

An agreement²⁰ constitutes a credit facility²¹ if a credit provider undertakes 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.²² The credit provider further undertakes to either defer the consumer's obligation to pay any part of the cost of such goods or services or to repay to the credit provider any part of such amount;²³ and a charge, fee or interest is payable to the credit provider in respect of such deferred payment.²⁴

The definition of a credit facility²⁵ therefore includes moneylending transactions.²⁶ The words '... as determined by the consumer from time to time, ...' in the definition are important because they indicate that the legislature had revolving credit moneylending transactions²⁷ in mind when defining a credit facility. This means that the payment of instalments by the debtor creates new credit for the debtor.²⁸

The other main type of moneylending transaction governed by the Act – fixed-sum credit²⁹ – is provided for in s 8(4)(f) of the Act and constitutes the so-called 'other agreements'. An 'other agreement' constitutes a credit transaction in terms of the Act, and is defined as any other agreement (except

¹⁶ Including an arrangement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties: see s 1.

¹⁷ Meaning an agreement that meets all the criteria set out in s 8: see s 1.

¹⁸ The different types of credit transactions are listed in s 8(4) and are defined in s 1. Such transactions include pawn transactions, discount transactions, incidental credit agreements, instalment agreements, mortgage agreements, secured loans, leases and any other agreement, other than a credit facility or a credit guarantee, in terms of which payment of an amount owed by one person to another is deferred and in terms of which interest, a fee or charge is payable to the credit provider.

¹⁹ Section 8(1).

²⁰ Irrespective of the form of the agreement: see s 93 with respect to the form of credit agreements. The agreements contemplated in s 8(2) are excluded and do not constitute a credit facility: see par 2.3 below.

²¹ Section 8(3).

²² For example, a bank honours a cheque drawn by the consumer: see Otto op cit note 3 at 16.

²³ Or to bill the consumer periodically for any part of such costs or amount. This is an indirect undertaking to defer the consumer's payment or repayment obligation.

²⁴ Or amount billed and not paid within the time provided in the agreement; eg, interest that is payable on a credit card account where the amount billed is not paid before the date stipulated for payment on the account: see Otto op cit note 3 at 16.

²⁵ The part dealing with an undertaking by a credit provider to pay an amount (or amounts) to a consumer.

²⁶ The definition also provides for contracts of purchase and sale of movable goods on credit (an undertaking by the credit provider to supply goods to the consumer) and for agreements in terms of which services are supplied to the consumer.

²⁷ And sale transactions.

²⁸ See NJ Grové & JM Otto *Basic Principles of Consumer Credit Law* 2 ed (2002) at 80. Credit card transactions in terms of which goods are purchased, services are paid for or cash is obtained by means of a credit card (depending, of course, on whether there is a debit or credit balance on the credit card) and overdrawn cheque accounts constitute typical revolving credit moneylending transactions. See also JM Otto 'Commentary' *Credit Law Service* (1991) in par 10.

²⁹ Where payment does not create new credit for the debtor: see Grové & Otto op cit note 28 at 80.

a credit facility or credit guarantee) in terms of which payment of an amount owed by one person to another is deferred and a fee, charge or interest is payable to the credit provider in respect of the agreement or deferred amount.³⁰

For the sake of completeness, we need to mention mortgage agreements and secured loans as further possible moneylending credit transactions³¹ to which the Act applies. A mortgage agreement is a credit agreement secured by a pledge of immovable property.³² ³³ A secured loan is an agreement³⁴ in terms of which a person advances money or grants credit to another and retains, or receives a pledge or cession of the title to movable property or other thing of value as security for all amounts due under that agreement.³⁵ ³⁶

Finally, the Act also applies to credit guarantees. An agreement³⁷ constitutes a credit guarantee if a person in terms thereof undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the Act applies.³⁸

From the definitions³⁹ of the agreements to which the Act applies as discussed above, it ought to be clear that for any agreement to qualify as a

³⁰ Included hereunder are money loans in the ordinary sense of the word whereby one person lends a sum of money to another person who undertakes to repay an equivalent sum and personal loans granted by financial institutions. Transactions that are intended to be moneylending transactions but are disguised as something else ought to be covered by the Act as moneylending contracts as well. See *Otto op cit* note 28 in par 10 and *Grové & Otto op cit* note 28 at 17 ff for a discussion and examples of genuine and disguised moneylending transactions.

³¹ See s 8(4).

³² Section 1. 'Mortgage' is defined as a pledge of immovable property that serves as security for a mortgage agreement. The terminology used by the legislature is unfortunate, because in terms of South African law only movable property may be pledged. 'Hypothecation' of immovable property would have constituted a better choice of words. But it ought to be clear that the Act also applies in cases where, eg, a bond is registered over immovable property to serve as security for repayment of an amount of money lent.

³³ Although a mortgage agreement is a credit agreement, the definition of a mortgage agreement (unlike the definitions of most of the other transactions to which the Act applies, except for a discount transaction and in some instances an incidental credit agreement that provide for the prepayment of debt and a discount) does not require the levying of a fee, interest or charge by the credit provider. Depending on the type of mortgage agreement (eg, a moneylending contract secured by the registration of a bond over immovable property), interest would be levied by the credit provider anyway.

³⁴ Excluding an instalment agreement.

³⁵ Section 1. This definition was poorly drafted. The title to movable property, meaning the ownership of movable property, cannot be pledged or ceded. *Otto op cit* note 3 at 19 suggests that the movable thing itself is, eg, pledged by the consumer to secure the repayment of the money advanced or credit granted to him. The definition of a 'secured loan' is wide enough to cover certain notarial bonds and a cession in *securitatem debiti*. Although ownership to movable property may be retained in the case of an instalment agreement, the Act specifically provides for instalment agreements (see above) and so these are excluded from the definition of a secured loan.

³⁶ The definition of a secured loan does not require the payment of a fee, interest or charge by the consumer.

³⁷ Irrespective of its form: see note 20 above. Section 8(2) agreements are excluded.

³⁸ Section 8(5). The Act therefore applies to suretyships as well. See *Scholtz op cit* note 3 in par 8.2.4, who mentions an ordinary suretyship in terms of which a person provides personal security for another person's debts arising out of an overdrawn cheque account, as an example of a credit guarantee. See also s 4(2)(c), which makes it clear that the Act applies to a credit guarantee only to the extent that it applies to a credit facility or credit transaction in respect of which the credit guarantee is granted. If the Act therefore does not apply to the specific agreement (credit facility or credit transaction), eg, because the consumer is a juristic person to which the Act does not apply (see par 2.3 below), the Act will not apply to the accessory suretyship contract (credit guarantee).

³⁹ With the exception of the definitions of 'mortgage agreement' and 'secured loan': see above.

credit agreement for the purposes of the Act, two elements have to be present. First, deferment of payment or repayment is required. Second, there is a fee, charge or interest imposed with respect to the deferred payment (or repayment).⁴⁰

It also needs to be mentioned that every credit agreement⁴¹ is characterised⁴² as a small,⁴³ an intermediate,⁴⁴ or a large agreement.^{45,46} This classification influences the Act's field of application in that not all the provisions of the Act apply to agreements of every size.⁴⁷ The classification also affects the Act's field of application with respect to one of the exceptions thereto.⁴⁸

2.3 Exclusions from the Ambit of the Act

As was stated above, the Act only applies to credit agreements between parties dealing at arm's length.⁴⁹ In the following instances, the parties are not

⁴⁰ Or discount is granted where prepayments are effected: see, eg, the definition of 'discount transaction' and 'incidental credit agreement' in s 1 of the Act.

⁴¹ It appears, on the wording of s 9(2)-(4), that credit guarantees are not classified as small, intermediate or large agreements. Section 9(2), eg, determines that a credit agreement is *inter alia* a small agreement if it is any other credit transaction except a mortgage agreement or a credit guarantee, and the *principal debt* under that transaction *or guarantee* falls at or below the lower of the thresholds established in terms of s 7(1)(b) (see note 42 below) (the wording of s 9(3) and (4) is *mutatis mutandis* the same). It is submitted that the reference to the principal debt of a guarantee as well (and not only to the principal debt of a credit transaction) is an indication that credit guarantees should also be classified as small (or intermediate or large agreements). This viewpoint is further substantiated by the wording of s 9(1), which states that every credit agreement (and therefore credit guarantees as well) is characterised as a small, intermediate or large agreement. It is suggested that the wording of s 9(2)-(4) should be amended, eg, to read that a credit agreement is *inter alia* a small agreement if it is any other credit transaction, except a mortgage agreement, or a credit guarantee, and the principal debt under that transaction or guarantee falls at or below the lower of the thresholds established in terms of s 7(1)(b). Cf. Otto *op cit* note 3 at 27 and Scholtz *op cit* note 3 in par 8.7, who are of the opinion that credit guarantees are excluded from the classification into small, intermediate or large agreements.

⁴² Sections 7(1)(b) and 9 read with GN 713 in *Government Gazette* 28893 of 1 June 2006 ('Threshold Regulations, 2006').

⁴³ A credit agreement is a small agreement if it is a pawn transaction, a credit facility with a credit limit of R15 000 or below, any other credit transaction (except a mortgage agreement) with a principal debt of R15 000 or below or a credit guarantee with respect to any such agreement: see s 9(2) read with Threshold Regulations, 2006. 'Principal debt' means the amount calculated in accordance with s 101(1)(a) and is the amount being deferred in terms of the agreement: see s 1. See also GN R 489 in *Government Gazette* 28864 of 31 May 2006 ('National Credit Regulations, 2006') reg 39 for the definition of 'deferred amount': namely any amount payable in terms of a credit agreement, the payment of which is deferred and upon which interest is calculated, or any fee, charge or increased price is payable by reason of the deferment.

⁴⁴ A credit agreement is an intermediate agreement if it is a credit facility with a credit limit above R15 000 or any credit transaction (except a pawn transaction or a mortgage agreement) with a principal debt above R15 000 and below R250 000 or a credit guarantee with respect to any such agreement: see s 9(3) read with Threshold Regulations, 2006.

⁴⁵ Mortgage agreements or any other credit transaction (except a pawn transaction) with a principal debt of R250 000 or above or a credit guarantee with respect to any such agreement constitute large agreements: see s 9(4) read with Threshold Regulations, 2006.

⁴⁶ Pawn transactions are always therefore small agreements, credit facilities are either small or intermediate agreements (but never large), and mortgages are always large agreements.

⁴⁷ For example, the provisions of the Act relating to reckless credit and unlawful credit agreements do not apply to pawn transactions: see ss 78(2) and 89(1) respectively.

⁴⁸ See par 2.3 below.

⁴⁹ See par 2.1 above.

dealing at arm's length (and logically the Act does not apply to these agreements):

- (a) A shareholder loan or other credit agreement between a juristic person,⁵⁰ as consumer, and a person who has a controlling interest in that juristic person, as credit provider.⁵¹
- (b) A loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer.⁵²
- (c) A credit agreement between natural persons who are in a familial relationship and are co-dependent on each other or one is dependent upon the other.⁵³
- (d) Any other arrangement in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction.⁵⁴
- (e) Arrangements that are of a type that has been held in law to be between parties who are not dealing at arm's length.⁵⁵

In addition, credit agreements in terms of which the consumer is the state⁵⁶ or an organ of state⁵⁷ are not subject to the Act. Also excluded are credit agreements under which the credit provider is the Reserve Bank of South Africa⁵⁸ or is located outside the Republic.⁵⁹

There are detailed provisions concerning juristic persons. Some agreements are excluded from the Act. One such agreement is where the consumer is a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons,⁶⁰ at the time the agreement is made,⁶¹ equals or exceeds R1 million.⁶² Similarly

⁵⁰ 'Juristic person', for the purposes of the Act, includes a partnership, association or other body of persons corporate or unincorporated. It also includes a trust if there are three or more individual trustees or if the trustee itself is a juristic person. However, the concept 'juristic person' does not include a stokvel (see below): s 1.

⁵¹ See s 4(2)(b)(i). In order for the parties not to deal at arm's length in this arrangement, the credit provider must have a controlling interest in the consumer.

⁵² Section 4(2)(b)(ii). Once again, a controlling interest is required.

⁵³ Section 4(2)(b)(iii).

⁵⁴ Section 4(2)(b)(iv)(aa). It is a factual question whether the parties are dealing at arm's length in this instance or not. If an employer, eg, lends money to his young employee at a very low interest rate and therefore does not strive to obtain the utmost possible advantage out of the transaction, the credit agreement is not at arm's length. However, staff loans by, eg, a mine to its employees at relatively high interest rates would probably be regarded as being at arm's length in spite of the parties' relationship of employer and employee.

⁵⁵ Section 4(2)(b)(iv)(bb).

⁵⁶ Section 4(1)(a)(ii).

⁵⁷ Section 4(1)(a)(iii).

⁵⁸ Section 4(1)(c).

⁵⁹ Approved by the Minister on application by the consumer in the prescribed manner and form: see s 4(1)(d) read with reg 2 of the National Credit Regulations, 2006.

⁶⁰ A juristic person is related to another juristic person if one of them has direct or indirect control over the whole or part of the business of the other or if a person has direct or indirect control over both of them: see s 4(2)(d).

⁶¹ In other words, the value stated as such by that juristic person at the time that it applies for or enters into that agreement: see s 4(2)(a).

⁶² Section 4(1)(a)(i) read with the Threshold Regulations, 2006.

excluded is a large agreement⁶³ in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below R1 million.⁶⁴

Sometimes, however, the Act does apply to (proposed) credit agreements under which the consumer is a juristic person. These will be where the consumer is a juristic person with an asset value or annual turnover of less than R1 million and it concludes a small or intermediate agreement.⁶⁵ However, the Act then has only a limited application,⁶⁶ since certain portions do not apply where the consumer in terms of a credit agreement is a juristic person:⁶⁷ the provisions dealing with credit marketing practices,⁶⁸ over-indebtedness and reckless lending,⁶⁹ as well as the measures in the Act protecting the consumer against the financial implications of credit agreements.⁷⁰

In addition, the following agreements do not constitute credit agreements and so are not governed by the Act: a policy of insurance,⁷¹ a lease of immovable property,⁷² and a transaction between a *stokvel*⁷³ and a member of that *stokvel* in accordance with the rules of that *stokvel*.⁷⁴

2.4 Section 4(3): Application of the Act to Credit Providers

Under s 4(3),⁷⁵ the Act applies to a (proposed) credit agreement, irrespective of whether the credit provider

(a) resides or has its principal office within the Republic or not;⁷⁶

⁶³ See the discussion of large agreements in par 2.2 above.

⁶⁴ Section 4(1)(b), read with the Threshold Regulations, 2006. In this instance, no mention is made that the combined asset value or annual turnover of related juristic persons has to be taken into consideration. It is not clear whether this was an oversight by the legislature.

⁶⁵ See par 2.2 above for the classification of credit agreements into small, intermediate and large agreements.

⁶⁶ Section 6.

⁶⁷ Section 6(a) and (d). In terms of s 6(b) and s 6(c) respectively, s 89(2)(b) (which determines that a credit agreement is unlawful if the agreement results from an offer prohibited in terms of s 74(1); in other words, as a result from negative option marketing) and s 90(2)(o) (which states that a provision of a credit agreement is unlawful if it states or implies that the rate of interest is variable, except to the extent permitted by s 103(4)), do not apply either where the consumer is a juristic person.

⁶⁸ Chapter 4 Part C.

⁶⁹ Chapter 4 Part D. See also s 78.

⁷⁰ Chapter 5 Part C.

⁷¹ Or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance: see s 8(2)(a).

⁷² Section 8(2)(b).

⁷³ Defined in s 1 as a formal or informal rotating financial scheme with entertainment, social or economic functions. It consists of two or more persons in a voluntary association, each of whom has pledged mutual support to the others towards the attainment of specific objectives. It also establishes a continuous pool of capital by raising funds by means of the subscription of its members, grants credit to and on behalf of members, provides for members to share in profits from, and to nominate management of, the scheme, and relies on self-imposed regulation to protect the interest of its members.

⁷⁴ Section 8(2)(c).

⁷⁵ Section 4(3)(a)-(b).

⁷⁶ However, see the exception in terms of s 4(1)(d) discussed in par 2.3 above. Once the Act applies to a credit agreement, it continues to apply to that agreement even if a party thereto ceases to reside or have its principal office within the Republic: see s 4(4)(a). It also applies in relation to every transaction,

- (b) is an organ of state;⁷⁷
- (c) is an entity controlled by an organ of state;
- (d) is an entity created in terms of any public regulation; or
- (e) is the Land and Agricultural Development Bank.

2.5 The Application of the Act to Pre-existing Agreements⁷⁸

The Act applies to a credit agreement entered into before the effective date: the date upon which the Act, or any relevant provision of it, came into operation.⁷⁹ Such agreement is called a pre-existing credit agreement.⁸⁰ The proviso is that the pre-existing credit agreement would have fallen within the application of the Act had the Act been in effect when the agreement was made.⁸¹ The legislature then determines to what extent the provisions of the Act apply to a pre-existing credit agreement.⁸²

3 Practical Implications

3.1 General

As was stated earlier, certain sections of the Act do not apply when the consumer is a juristic person.⁸³ But the rest of its sections do apply to such consumers. It also has to be emphasised that all the Act's sections apply where the credit provider is a juristic person that concludes a credit agreement with a natural person. The mere application of the Act to juristic persons, whether as consumers or credit providers, therefore has certain practical implications.⁸⁴ Because of their importance and the far-reaching consequences for credit providers, the provisions on the registration of credit providers and the prevention of reckless credit granting and over-indebtedness will now be addressed.

act or omission under such agreement, whether or not such transaction, act or omission occurs within the Republic: see s 4(4)(b).

⁷⁷ As defined in s 239 of the Constitution: see s 1.

⁷⁸ See in general Otto op cit note 3 at 106 ff; Scholtz op cit note 3 in pars 18.4 and 18.5.

⁷⁹ It should be remembered that the Act came into operation in a piecemeal fashion: see par 1 above.

⁸⁰ See the definitions of 'effective date' and 'pre-existing credit agreement' in Sch 3 item 1(1). Schedule 3 came into operation on 1 June 2006: see Proc 22, 2006 in *Government Gazette* 28824 of 11 May 2006.

⁸¹ Schedule 3 item 4(1). The application of the Act to pre-existing credit agreements is subject to items 4(2)-(5).

⁸² Schedule 3 item 4(2).

⁸³ See par 2.3 above.

⁸⁴ See Renke, Roestoff & Haupt op cit note 3 at 239 ff for an overview of the more important provisions of the Act. Among other things, credit providers have to abstain from certain credit marketing practices (ss 74-6 and regs 21-2) and comply with certain pre-agreement disclosure requirements (s 92 read with regs 28 and 29) and the Act's provisions regarding the consumer's liability, interest, charges and fees (ss 100-5 and regs 39-48) and debt enforcement (ss 129-33).

3.2 Registration Requirements⁸⁵

To facilitate the effective regulation of the consumer credit industry, the Act requires the registration of (among others) certain credit providers.⁸⁶ A person must apply to be registered with the National Credit Regulator⁸⁷ as a credit provider if that person alone or in conjunction with an associated person⁸⁸ has concluded at least 100 credit agreements⁸⁹ or if the total principal debt⁹⁰ owed to that credit provider under all the outstanding credit agreements exceeds R500 000.⁹¹

If a person who is required to be registered as credit provider is not so registered, that person must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things.⁹² A credit agreement, whether it is the one hundredth⁹³ or, eg, the first credit one concluded by a specific credit provider with a principal debt exceeding R500 000, is unlawful if, at the time the agreement was entered into by a credit provider, the latter was unregistered and the Act requires that credit provider to be registered.⁹⁴ This has far-reaching consequences for the particular credit provider. Section 89(5)(a) determines that an agreement which is unlawful because not registered is void. Despite any provision of the

⁸⁵ See in general Otto op cit note 3 at 37 ff; Renke, Roestoff & Haupt op cit note 3 at 239-41; and Scholtz op cit note 3 ch 5.

⁸⁶ Certain natural and juristic persons are disqualified from being registered as credit providers: see ss 46(2) and (3) and 47. See also Scholtz op cit note 3 in par 5.2.2.2. A juristic person is disqualified from registration as a credit provider if a natural person who meets any of the disqualifying criteria (in terms of s 46(3)) exercises general management or control of that juristic person: s 47(2).

⁸⁷ The National Credit Regulator is a consumer credit institution established by s 12 of the Act.

⁸⁸ An 'associated person' of a credit provider who is a natural person includes the credit provider's spouse or business partners. If the credit provider is a juristic person, 'associated person' includes any person that directly or indirectly has a controlling interest in the credit provider, or is directly or indirectly controlled by the credit provider (or any person that has a direct or indirect controlling interest in, or is directly or indirectly controlled by, such a person) or any credit provider that is a joint venture partner of any of the contemplated persons: see s 40(2)(d). Each associated person that is a credit provider in its own name and falls within the requirements of s 40(1) must apply for registration in its own name: see s 40(2)(b).

⁸⁹ Section 40(1)(a). Incidental credit agreements are excluded. In terms of s 40(6)(b), credit guarantees to which the credit provider is a party are also disregarded.

⁹⁰ See note 43 above.

⁹¹ Section 40(1)(b) read with the Threshold Regulations, 2006. The value of any credit facility (issued by a credit provider) that has to be used when determining whether the credit provider has to register is the credit limit under that credit facility: see s 40(6)(a). Incidental credit agreements and credit guarantees are again excluded: see s 40(1)(b) and 40(6)(b) respectively. Section 40(1)(b) does not mention 'or in conjunction with an associated person'. It therefore appears that only the principal debt under credit agreements owed to the particular credit provider has to be considered. However, s 40(1)(b) refers to the principal debt owed to *that* credit provider. It is therefore submitted that reference is made to the same credit provider meant in s 40(1)(a), and that the principal debt owed to associated persons of such credit provider should also be considered when the need to register or not is determined. This viewpoint is substantiated by s 40(2)(a), which states that in determining whether a credit provider is required to register as a credit provider, the provisions of s 40(1)(a) and (b) apply to the total number and aggregate principal debt of credit agreements in respect of which that person, or any associated person, is the credit provider.

⁹² Section 40(3).

⁹³ Only credit agreements to which the Act applies ought to be taken into account: see Scholtz op cit note 3 in par 5.2.2.1.

⁹⁴ Section 89(2)(d). See also s 40(4). Strictly speaking, the credit provider therefore has to apply for registration as a credit provider before the conclusion of the 100th credit agreement or of the agreement having a principal debt in excess of R500 000.

common law, any other legislation or any provision of an agreement to the contrary, a court must order that the credit agreement is void as from the date it was entered into. The credit provider must refund to the consumer any money paid by the latter under that agreement to the credit provider.⁹⁵ However, the credit provider's purported rights under the credit agreement to recover any money paid or goods delivered to the consumer in terms of the agreement are either cancelled⁹⁶ or forfeited to the state.⁹⁷ The crux of the matter is that the credit provider will not be able to claim restitution from the consumer.

It is important to take note that no credit agreement⁹⁸ is unlawful and void unless a court declares it so.⁹⁹ Further, s 89(2)(d), which determines that such a credit agreement is unlawful, does not apply to a credit provider if at the time the credit agreement was made, or within 30 days after that time, the credit provider had applied for registration as credit provider and was awaiting a determination of that application.¹⁰⁰ Credit providers in terms of pre-existing credit agreements¹⁰¹ had to apply for registration as credit providers within 40 business days¹⁰² from 1 June 2006.¹⁰³

The Act waives the national registration requirements if a credit provider operates only within one province and is registered in terms of applicable provincial legislation.¹⁰⁴ A credit provider that conducts business in its own name at or from more than one location or premises is required to register only once with respect to all of such locations or premises.¹⁰⁵

3.3 Prevention of Reckless Credit Granting and Over-indebtedness¹⁰⁶

Chapter 4 Part D, dealing with over-indebtedness and reckless credit, does not apply to a credit agreement in respect of which the consumer is a juristic

⁹⁵ With interest calculated at the rate set out in the credit agreement and for a 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: s 89(5)(b).

⁹⁶ Unless the court concludes that doing so would unjustly enrich the consumer: s 89(5)(c)(i).

⁹⁷ Where the court concludes that cancelling the rights would unjustly enrich the consumer: s 89(5)(c)(ii). See *Cherangani Trade and Investment 107 (Edms) Bpk v Mason & Others* (unreported, FB, 12 March 2009, case no 6712/08, application no 287/09).

⁹⁸ Or provision of a credit agreement.

⁹⁹ Section 164(1). See also Scholtz op cit note 3 in par 20.7.2.

¹⁰⁰ Section 89(4)(a).

¹⁰¹ Complying with the requirements for registration. Pre-existing agreements are discussed in par 2.5 above.

¹⁰² See s 2(5) for the meaning of 'business days'.

¹⁰³ Schedule 3 item 2. The date on which the Act's provisions regarding the registration of credit providers, debt counsellors and credit bureaux came into operation was 1 June 2006. These credit providers therefore had to register as credit providers on or before 27 July 2006.

¹⁰⁴ Section 39(1).

¹⁰⁵ Section 40(2)(c).

¹⁰⁶ Part D ch 4. For a full exposition of this Part in the Act, see Otto op cit note 3 at 54-5, 65-7, 85-6; Renke, Roestoff & Haupt op cit note 3 at 244-50; and Scholtz op cit note 3 chapters 11 and 14. See also *Firststrand Bank Ltd v Olivier* 2009 (3) SA 353 (SEC); *First Rand Bank v Smith* (unreported, WLD, 31 October 2008, case no 24205/08); *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (W); *First Rand Bank Ltd v Bernardo* (unreported, Eastern Cape High Court, 28 April 2009, case no 608/09); *Ex parte Ford and Two Similar Cases* 2009 (3) SA 376 (WCC).

person.¹⁰⁷ Nor do the provisions dealing with reckless credit apply to certain credit agreements.¹⁰⁸

3.3.1 Prevention of Reckless Credit

Before a credit agreement is entered into, a credit provider has to take reasonable steps to assess a proposed consumer's

- (a) general understanding and appreciation of the risks and costs of the proposed credit, and of the consumer's rights and obligations under the agreement;
- (b) debt re-payment history under credit agreements;
- (c) existing financial means, prospects and obligations; and

if a consumer has a commercial purpose for applying for credit, whether there is a reasonable basis to conclude that such purpose may prove to be successful.¹⁰⁹

A credit agreement is reckless if, at the time it was made,¹¹⁰ the credit provider failed to conduct the required assessment¹¹¹ in terms of s 81¹¹² or entered into the agreement even though the preponderance of information available to him indicated that the consumer did not understand or appreciate the nature of the risks, costs or obligations¹¹³ or that entering into the agreement would make the consumer over-indebted.¹¹⁴ A credit provider is prohibited from entering into a reckless agreement with a prospective consumer.¹¹⁵

3.3.2 Court Orders in Respect of Reckless Credit Agreements

In any court proceedings in which a credit agreement is being considered, the court may declare the credit agreement reckless.¹¹⁶ If it is declared reckless because of the credit provider's failure to conduct the required assessment¹¹⁷ or because he entered into an agreement despite the fact that there were indications that the consumer did not understand the nature of the risks, costs or obligations,¹¹⁸ the court may make an order

¹⁰⁷ Section 78(1). See par 2.3 above.

¹⁰⁸ For example, incidental credit agreements and a temporary increase in the credit limit under a credit facility: s 78(2).

¹⁰⁹ Section 81(2).

¹¹⁰ Or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of s 119(4).

¹¹¹ Irrespective of what the outcome of such an assessment might have concluded at the time.

¹¹² Section 80(1)(a).

¹¹³ Section 80(1)(b)(i).

¹¹⁴ Section 80(1)(b)(ii).

¹¹⁵ Section 81(3).

¹¹⁶ Section 83(1).

¹¹⁷ Section 80(1)(a).

¹¹⁸ Section 80(1)(b)(i).

- (a) setting aside all or part of the consumer's rights and obligations under such agreement;¹¹⁹ or
- (b) suspending the force and effect of the agreement.¹²⁰

However, when the agreement is found to be reckless because there were indications that the conclusion thereof would make the consumer over-indebted,¹²¹ the court must further consider whether the consumer is over-indebted at the time of the court proceedings. If so, the court may make an order suspending the force and effect of that agreement and restructuring the consumer's obligations under any other credit agreements in accordance with s 87.¹²²

While the credit agreement is suspended

- (a) the consumer is not required to make any payment in terms of the agreement;
- (b) no interest, fee or other charge under the agreement may be charged; and
- (c) the credit provider may not enforce any of his rights under the agreement or under any law in respect of the agreement.¹²³

After the suspension of a credit agreement ends, all the rights and obligations of the credit provider and the consumer under the agreement are revived and are fully enforceable. No amount may be charged to the consumer by the credit provider with respect to any interest, fee or other charge that was unable to be charged during the suspension.¹²⁴

3.3.3 Over-indebtedness

A consumer is over-indebted in terms of the Act if he or she is or will not be able to satisfy in a timely manner all the obligations under all the credit agreements to which he or she is a party.¹²⁵ The determination whether the consumer is over-indebted or not is done on the preponderance of available information at the time the determination is made. Regard is had to the consumer's financial means, prospects and obligations¹²⁶ and probable propensity to satisfy in a timely manner all his or her obligations under all his or her credit agreements, taking into consideration the consumer's history of debt repayment.¹²⁷

An over-indebted consumer may apply to a debt counsellor to be declared

¹¹⁹ As the court determines just and reasonable in the circumstances.

¹²⁰ Section 83(2). Suspension takes place in accordance with s 84: see the discussion below.

¹²¹ Section 80(1)(b)(ii).

¹²² Section 83(3). Restructuring or re-arrangement of debt is discussed in par 3.3.3 below.

¹²³ Section 84(1).

¹²⁴ Section 84(2).

¹²⁵ Section 79(1).

¹²⁶ 'Financial means, prospects and obligations' include income or a right to receive income, and shared income with an immediate family or household member (if obligations are mutually borne as well): s 78(3).

¹²⁷ Section 79(1). When making such determination, the settlement value at that time, eg, the credit facility is used: s 79(3).

over-indebted.¹²⁸ It may also be alleged in court that the consumer under a credit agreement is over-indebted.¹²⁹ The court may then either deal with the matter directly by making the necessary court orders¹³⁰ or refer the matter to a debt counsellor. Whether the consumer applies to a debt counsellor for debt review or a court refers over-indebtedness to a debt counsellor, that counsellor will make certain recommendations to the court. The Magistrate's Court, acting on the debt counsellor's proposal or the consumer's application,¹³¹ must conduct a hearing, having regard to the proposal and the information before it and the consumer's financial means, prospects and obligations.¹³² The court may then reject the recommendation or application, as the case may be;¹³³ or make an order declaring any credit agreement to be reckless¹³⁴ or an order re-arranging the consumer's obligations.¹³⁵

Debt re-arrangement may be done by extending the period of the agreement and thus reducing the amount of each payment due accordingly, or by postponing the dates on which payments are due under the agreement for a specified time (or by doing both).¹³⁶

3.3.4 Effect of Debt Review or Re-arrangement

A consumer who has filed an application for debt review¹³⁷ or who has alleged in court that the consumer is over-indebted¹³⁸ must not incur any further charges under a credit facility or enter into any further credit agreement¹³⁹ with any credit provider until the matter has been finalised.¹⁴⁰ If a consumer applies for or enters into a new credit agreement while debt

¹²⁸ Section 86(1).

¹²⁹ Section 85.

¹³⁰ In terms of s 87(1)(b), discussed below.

¹³¹ In terms of s 86(9), which allows a consumer, if the debt counsellor rejects the consumer's application to be declared over-indebted, to apply directly to the Magistrate's Court with the latter's leave.

¹³² Section 87(1).

¹³³ Section 87(1)(a).

¹³⁴ In which case the orders regarding reckless credit in terms of s 83(2) or (3) (discussed in par 3.3.2 above) may be made.

¹³⁵ Or both orders: s 87(1)(b).

¹³⁶ Section 86(7)(c)(ii). Another possibility of re-arrangement is provided for: the recalculation of the consumer's obligations. But this may only occur because of contraventions of certain Parts of the Act: those dealing with unlawful agreements and provisions, disclosure, form and effect of credit agreements and collection and repayment practices.

¹³⁷ In terms of s 86(1).

¹³⁸ In terms of s 85.

¹³⁹ Other than a consolidation agreement. 'Consolidation agreement' is not defined in the Act, but it is submitted, as the name indicates, that it is an agreement whereby the consumer's debts are consolidated. Conclusion of a consolidation agreement is therefore permissible, because a consolidation agreement does not create new debt for the consumer.

¹⁴⁰ For example, the debt counsellor has rejected the consumer's application and the consumer has not filed a direct application in time; the court has determined that the consumer is not over-indebted, the consumer's obligations under credit agreements as re-arranged are fulfilled, and so on: see s 88(1). But if the consumer fulfils obligations by means of a consolidation agreement, the consumer may not incur further charges under a credit facility or enter into a new credit agreement with any credit provider until all the consumer's obligations under the original (or subsequent) consolidation agreement(s) have been fulfilled: s 88(1) and (2).

re-arrangement subsists, the consumer will forfeit the protection afforded by the Part in the Act dealing with over-indebtedness and reckless lending.¹⁴¹

During a subsisting debt review, a credit provider may not exercise or enforce by litigation¹⁴² any right or security under that credit agreement until¹⁴³ the consumer is in default under the agreement and the matter has been finalised.¹⁴⁴ A new credit agreement¹⁴⁵ concluded by a credit provider while a debt re-arrangement subsists may be declared reckless credit.¹⁴⁶

4 Relevance of the Act for Specific Credit Agreements into or by a Company

4.1 Loans or Security Provided by a Subsidiary to or in favour of its Holding Company or Fellow Subsidiary

4.1.1 Position in Terms of the Companies Act

One type of credit agreement to which a company may be a party and which is specifically regulated in terms of the Companies Act is where a subsidiary grants a loan to or provides security in favour of its holding company or a fellow subsidiary. In this instance, the parties are seen not to be dealing at arm's length because of the control that the holding company has over the subsidiary.¹⁴⁷ The subsidiary may therefore find itself in a position where it cannot safeguard its own interests or those of its minority shareholders.

The interests of the subsidiary and its minority shareholders are protected by s 37 of the Companies Act. Subject to certain exceptions,¹⁴⁸ a subsidiary is thus required to disclose particulars of such loans or security in its annual financial statements for every year that the transaction is in operation.¹⁴⁹ The subsidiary may also claim damages from its directors, or the directors of its holding company, where it has suffered loss because the agreement inadequately protected the subsidiary's business interests.¹⁵⁰

Both the granting of the loan and the provision of security seem to qualify as credit agreements under the Act. The loan either constitutes a credit

¹⁴¹ Section 88(5).

¹⁴² Or other judicial process.

¹⁴³ Section 88(3).

¹⁴⁴ For example, all the consumer's obligations under re-arranged credit agreements have been fulfilled or the consumer defaults on any obligation in terms of the re-arrangement: s 88(3).

¹⁴⁵ Or a part thereof. Consolidation agreements are excluded.

¹⁴⁶ Whether or not the circumstances in s 80 apply: s 88(4).

¹⁴⁷ *Cilliers & Benade: Corporate Law* 3 ed (2000) by HS Cilliers, ML Benade, JJ Henning, JJ du Plessis, PA Delpont, L de Koker & JT Pretorius in pars 24.27–24.28, 24.30.

¹⁴⁸ Namely where the loan is made, or the security is provided '*bona fide* in the ordinary course of the business of a company actually and regularly carrying on a business a substantial part of which is the making of loans or the provision of security' (s 37(1)(b) of the Companies Act), or where the particular transaction is concluded with the consent of all the members of the company (s 37(5) of the Companies Act).

¹⁴⁹ Section 37(1)(a) of the Companies Act.

¹⁵⁰ Section 37(3) of the Companies Act.

facility¹⁵¹ or a s 8(4)(f) other agreement,¹⁵² provided that the subsidiary granting the loan is entitled to receive interest in respect thereof. And the provision of security can be classified as a credit guarantee¹⁵³ in terms of the Act.

However, the mere fact that these transactions qualify as credit agreements does not mean that they are governed by the Act. The Act only applies to credit agreements between parties dealing at arm's length.¹⁵⁴ If a subsidiary grants a loan to or provides security in favour of its holding company, the parties are clearly not dealing at arm's length, because this is 'a loan . . . or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer'.¹⁵⁵

If the loan or provision of security is between two subsidiaries in the same group, it is not a credit agreement between a juristic person and a person who has a controlling interest in that juristic person. But it could be argued that this credit agreement is also not at arm's length, under the definition in s 4(2)(b)(iv), because it is an arrangement 'in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction'¹⁵⁶ or even that it is an agreement 'that is of a type that has been held in law to be between parties who are not dealing at arm's length'.¹⁵⁷ So the Act will not apply to the type of transaction envisaged in s 37 of the Companies Act.

4.1.2 Position in Terms of the New Companies Act

The new Companies Act, as shown by s 3, expressly recognises the relationship between a holding company and its subsidiary. This recognition also appears in s 2, dealing with 'Related and inter-related persons, and control'.

Financial assistance¹⁵⁸ between related or inter-related companies is dealt

¹⁵¹ If revolving credit is involved: see par 2.2 above. However, it is improbable that the case in question would involve revolving credit.

¹⁵² In the event of a fixed-sum moneylending transaction. Should the loan be secured by means of the registration of a bond over immovable property in favour of the credit provider, the loan constitutes a mortgage. Where payment of the loan is secured by retaining, or receiving a pledge or cession of the title to any movable property or other thing of value, the loan constitutes a secured loan for the purposes of the Act: see par 2.2 above for a discussion of these credit agreements.

¹⁵³ See par 2.2 above.

¹⁵⁴ Section 4(1) of the Act. See the discussion in par 2.3 above.

¹⁵⁵ Section 4(2)(b)(ii) of the Act. The subsidiary is 'the juristic person as credit provider', and the holding company the 'person who has a controlling interest in that juristic person, as consumer'.

¹⁵⁶ Section 4(2)(b)(iv)(aa).

¹⁵⁷ Section 4(2)(b)(iv)(bb). The enactment of s 37 of the Companies Act derived from the fact that this type of transaction is seen not to be at arm's length.

¹⁵⁸ In terms of s 45(1)(a), financial assistance includes 'lending money, guaranteeing a loan or other obligation, and securing any debt or obligation'. Section 45(1)(b) stipulates that financial assistance does not include

- (i) lending money in the ordinary course of business by a company whose primary business is the lending of money;
- (ii) an accountable advance to meet-
 - (aa) legal expenses in relation to a matter concerning the company; or
 - (bb) anticipated expenses to be incurred by the person on behalf of the company; or
 - (cc) an amount to defray the person's expenses for removal at the company's request'.

with in s 45 of the new Companies Act, the same provision that regulates financial assistance to directors and officers of the company.¹⁵⁹ Financial assistance in this context is permitted to the extent that it is authorised in the company's Memorandum of Incorporation,¹⁶⁰ that it is pursuant to an employee share scheme or to a special resolution of the shareholders,¹⁶¹ that the board is satisfied that the company would satisfy the solvency and liquidity test immediately after providing the financial assistance,¹⁶² and that the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.¹⁶³ From a company-law perspective, the regulation of such transactions will thus vary, depending on whether the Companies Act or the new Companies Act applies.

Yet the application of National Credit Act will not be much affected when the new Companies Act takes effect. Credit agreements between a subsidiary and its holding company or fellow subsidiaries will still not seem to be at arm's length, especially in the light of s 2 of the new Companies Act, which defines such companies as 'related'. So this type of credit agreement will not be governed by the National Credit Act.

4.2 Financial Assistance for the Purchase or Subscription for Shares of That Company or its Holding Company

4.2.1 Position in Terms of the Companies Act

The Companies Act prohibits financial assistance by a company to enable a person to acquire shares in that company or its holding company.¹⁶⁴ Financial assistance could include a variety of transactions.¹⁶⁵ The general prohibition is subject to a number of exceptions.¹⁶⁶

This section of the Companies Act, especially s 38(2)(d), has been widely

¹⁵⁹ See this provision in that context discussed in par 4.3.2 below.

¹⁶⁰ Section 44(2).

¹⁶¹ Section 44(3)(a)(i) and (ii) respectively.

¹⁶² Section 44(3)(b)(i).

¹⁶³ Section 44(3)(b)(ii).

¹⁶⁴ Section 38(1) of the Companies Act.

¹⁶⁵ See Cilliers & Benade op cit note 147 in pars 20.31–20.33 for a comprehensive overview of transactions that will constitute the type of financial assistance prohibited in terms of s 38(1) of the Companies Act.

¹⁶⁶ Section 38(2) lists exceptions to the general prohibition in subs (1), namely:

- (a) the lending of money in the ordinary course of its business by a company whose main business is the lending of money; or
- (b) the provision by a company, in accordance with any scheme for the time being in force, of money for the subscription for or purchase of shares of the company or its holding company by trustees to be held by or for the benefit of employees of the company, including any director holding a salaried employment or office in the company; or
- (c) the making by a company of loans to persons, other than directors, *bona fide* in the employment of the company with a view to enabling those persons to purchase or subscribe for shares of the company or its holding company to be held by themselves as owners; or
- (d) the provision of financial assistance for the acquisition of shares in a company by the company or its subsidiary in accordance with the provisions of section 85 for the acquisition of such shares'.

criticised.¹⁶⁷ It has also been suggested that lifting the prohibition could facilitate black economic empowerment transactions.¹⁶⁸ So s 38 of the Companies Act was amended by s 9 of the Corporate Laws Amendment Act,¹⁶⁹ which provides yet another exception to the prohibition in s 38. The latest exception is provided for in terms of s 38(2A) and states:

‘Subsection (1) does not prohibit a company from giving financial assistance for the purchase of or subscription for shares of that company or its holding company, if –

- (a) the company’s board is satisfied that-
 - (i) subsequent to the transaction, the consolidated assets of the company fairly valued will be more than its consolidated liabilities; and
 - (ii) subsequent to providing the assistance, and for the duration of the transaction, the company will be able to pay its debts as they become due in the ordinary course of business; and
- (b) the terms upon which the assistance is to be given is sanctioned by a special resolution of its members.’

Not all transactions that could be regarded as financial assistance for the purposes of s 38 of the Companies Act will qualify as credit agreements under the National Credit Act. However, a loan or security in favour of a person to enable that person to acquire shares in the company, eg, will clearly constitute a credit agreement for the purposes of the Act.¹⁷⁰

Such agreements will furthermore be at arm’s length and the Act will apply, unless one of the two exceptions applicable to consumer juristic persons in s 4(1) of the Act applies. The first is where the consumer is a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds R1 million.¹⁷¹ Should the consumer juristic person’s asset value or annual turnover be less than R1 million, the application of the Act could still be excluded if the transaction can be defined as a ‘large agreement’ under s 9(4) of the Act.¹⁷²

As regards financial assistance in the form of loans or provision of security, the Act will therefore apply in only two instances. The first is where the consumer is a natural person. The second is where the consumer is a juristic person with an asset value or annual turnover, together with the combined

¹⁶⁷ See, eg, FHI Cassim ‘Unravelling the Obscurities of Section 38(2)(d) of the Companies Act’ (2005) 122 *SALJ* 493; Ashleigh Hale ‘Financial Assistance for Empowerment’, available at <http://www.bowman.co.za/LawArticles/Law-Article.asp?id=-334550581> (visited on 29 September 2008); KF Mtwebana *Towards a More Flexible Structure of the Share Capital – A Comparison of Company Law of South Africa and Switzerland with regard to Current Debates and Developments in the EU* (unpublished LLM dissertation, University of Cape Town (2005)) at 28.

¹⁶⁸ Paragraph 6.4 of the Explanatory Memorandum to the Corporate Laws Amendment Bill expressly states that

‘[t]he proposed amendment to section 38 introduces a further exception to facilitate shareholder diversification or BBBEE. A company will be able to offer assistance under the new provision if it complies with the solvency test and if its present shareholders approve the terms of the transaction’.

¹⁶⁹ Act 24 of 2006 (‘the Corporate Laws Amendment Act’). The Corporate Laws Amendment Act was assented to on 11 April 2007 and became effective on 14 December 2007.

¹⁷⁰ See par 4.1.1 for a discussion of the different possibilities.

¹⁷¹ Section 4(1)(a)(i). For detailed discussion, see par 2.3 above.

¹⁷² Section 4(1)(b). For detailed discussion, see par 2.3 above.

asset value or annual turnover of all related juristic persons, below R1 million and the transaction is a small or intermediate agreement as defined in s 9(2) and (3) of the Act respectively.¹⁷³

If the Act does apply to a particular transaction, its impact will vary, depending on whether the consumer is a natural or a juristic person. Where the consumer is a natural person, he or she will be entitled to all the protective measures in the Act. This includes the protection afforded to natural person consumers with regard to reckless credit granting and over-indebtedness. To avoid dire consequences, the credit provider will therefore (among other things) have to conduct a credit assessment before extending credit to the consumer in order.¹⁷⁴ But these¹⁷⁵ and certain other provisions of the Act will not apply if the consumer is a juristic person.¹⁷⁶

Furthermore, the application of the Act will mean that the company providing the financial assistance (the 'credit provider' for the purposes of the Act) will be required to apply for registration as a credit provider with the National Credit Regulator.¹⁷⁷ Failure to do so could result in the credit agreement (the transaction under which the financial assistance is provided) being declared unlawful and void.¹⁷⁸

4.2.2 Position in Terms of the New Companies Act

Financial assistance for subscription of securities is dealt with under s 44 of the new Companies Act. A company is allowed to provide financial assistance for the subscription of securities issued by the company, or a related or inter-related company,¹⁷⁹ to the extent that it is authorised in the company's Memorandum of Incorporation,¹⁸⁰ pursuant to an employee share scheme or special resolution of the shareholders,¹⁸¹ provided that the board is satisfied that the company complies with the solvency and liquidity test,¹⁸² and that the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.¹⁸³

The crux of s 44 is similar to that of the current, amended s 38. The applicability of the Act to these types of credit agreements should therefore not be influenced by the coming into operation of the new Companies Act, and so the position in this regard as discussed previously¹⁸⁴ should remain the same.

¹⁷³ See par 2.3 above.

¹⁷⁴ See par 3.3. above.

¹⁷⁵ *Ibid.*

¹⁷⁶ See the discussion in par 2.3 above.

¹⁷⁷ If the company has concluded at least 100 credit agreements, or if the total principal debt owed to the credit provider exceeds R500 000. Credit guarantees are not taken into consideration. See par 3.2 above.

¹⁷⁸ See the discussion in par 3.2 above.

¹⁷⁹ As defined in terms of s 2 of the new Companies Act.

¹⁸⁰ Section 44(2).

¹⁸¹ Section 44(3)(a)(i) and (ii) respectively.

¹⁸² Section 44(3)(b)(i).

¹⁸³ Section 44(3)(b)(ii).

¹⁸⁴ See par 4.2.1 above.

4.3 Loans to, or Security in Connection with Transactions by, Directors and Managers

4.3.1 Position in Terms of the Companies Act

Under s 226(1) of the Companies Act, a company is not permitted to make loans to, or provide security in favour of any of its own directors or managers, to directors or managers of its holding company, to directors or managers of another company which is a subsidiary of its holding company, or to any other company or body corporate controlled by one or more of the mentioned directors or managers. But this prohibition does not apply¹⁸⁵

- ‘(a) in respect of [the making of such a loan or the provision of security . . .] with the prior consent of all the members of the company or in terms of a special resolution relating to a specific transaction . . . ; or
 - (b) . . . in respect of anything done to provide any director or manager with funds to meet expenditure incurred or to be incurred by him for the purposes of the company concerned or for the purpose of enabling him properly to perform his duties as director or manager of that company; or
 - (c) in respect of anything done *bona fide* in the ordinary course of the business of a company actually and regularly carrying on the business of the making of loans or the provision of security; or
 - (d) to the provision of money or making of loans by a company for the purposes contemplated in section 38(2)(b) and (c); or
 - (e) to the making of a loan or the provision of security with the approval of the company in general meeting for housing for its director or manager; or
 - (f) in respect of –
 - (i) the making of a loan by a company to a director or manager of its subsidiary; or
 - (ii) the provision of security by a company to another person in connection with an obligation of a director or manager of its subsidiary:
- provided such director or manager is not also a director or manager of such company itself’.

A loan by a company to, or provision of security by a company in favour of, directors or managers as mentioned in s 226 can therefore be valid if it falls under one of the exceptions. The question is whether such a transaction falls within the ambit of the Act, and if so, what the implications of this will be. One could argue that the type of transaction envisaged in terms of s 226 is an arrangement ‘in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction’,¹⁸⁶ and the answer could vary, depending on the specific circumstances.

However, if it is found that the parties are dealing at arm’s length, the Act will apply.¹⁸⁷ So the company would have to apply for registration as a credit provider with the National Credit Regulator if it concluded at least 100 credit agreements,¹⁸⁸ or if the total principal debt owed to the credit provider exceeded R500 000.¹⁸⁹ If the company is not registered as required, the loan

¹⁸⁵ Section 226(2) of the Companies Act.

¹⁸⁶ As per s 4(2)(b)(iv)(aa) of the Act.

¹⁸⁷ The company concludes either a moneylending transaction or a credit guarantee with the consumer as natural person: see again par 4.1.1 above for the different possibilities.

¹⁸⁸ Section 40(1)(a) of the Act: see par 3.2 above for more detailed discussion.

¹⁸⁹ Section 40(1)(b) of the Act. It should be remembered that when determining whether a credit provider is required to register, credit guarantees to which the credit provider is a party are to be disregarded. See par 3.2 above for more detailed discussion.

or security in favour of the directors or managers may end up being unlawful and void.¹⁹⁰

As the consumer in this scenario is also a natural person,¹⁹¹ the full range of protective measures provided in terms of the Act will apply. These measures include those relating to credit marketing practices, over-indebtedness, reckless lending and measures in the Act protecting consumers against the financial implications of credit agreements.

4.3.2 Position in Terms of the New Companies Act

Loans or other financial assistance¹⁹² to directors and others¹⁹³ are regulated in terms of s 45 of the new Companies Act. Such financial assistance will be in order, provided that the requirements of s 45 are met.¹⁹⁴ From a company-law perspective, the new Companies Act, once it comes into operation, will definitely affect the regulation of these types of transactions.

The fact that these transactions are now regulated in terms of the same provision as loans or other financial assistance between subsidiary and holding companies, or fellow subsidiaries, which are traditionally seen not to be dealing at arm's length, could provide support for the argument that this is an arrangement 'in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction'.¹⁹⁵ On this reasoning, such an arrangement could be excluded from the ambit of the Act.

4.4 Debentures

4.4.1 Position in Terms of the Companies Act

One of the ways in which a company can obtain capital from outsiders is through the issue of debentures.¹⁹⁶ A debenture holder is, in effect, nothing but a specific type of creditor of the company, who is entitled to receive interest as agreed upon on his or her investment.¹⁹⁷

Again, it may be asked whether the Act applies to this type of credit agreement and, if so, what the consequences would be for the company and its debenture holders. In this scenario, the company is the debtor and, for the

¹⁹⁰ In terms of 89(2)(d) and (5)(a), read with s 40(4) of the Act. This may have far-reaching consequences for the particular company. For detailed discussion, see par 2.3 above.

¹⁹¹ Juristic persons are disqualified from being appointed or acting as directors of a company in terms of s 218(1)(a) of the Companies Act.

¹⁹² For the exclusions under s 45(1)(b), see note 158 above.

¹⁹³ Section 45(2) describes the category of persons to whom the provision of financial assistance is regulated in terms of this provision as 'a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member'.

¹⁹⁴ See the discussion in par 4.1.2 above on the content of this provision.

¹⁹⁵ Under s 4(2)(b)(iv)(aa) of the Act.

¹⁹⁶ Section 116 of the Companies Act provides that a company may create and issue secured or unsecured debentures if authorised to do so by its memorandum or articles of association.

¹⁹⁷ Cilliers & Benade op cit note 147 in par 14.41.

purposes of the Act, 'the consumer'. Credit agreements to which a juristic person is a party as consumer will be excluded from the application of the Act, where the particular consumer juristic person has an asset value or annual turnover of at least R1 million,¹⁹⁸ or where it is a large agreement.¹⁹⁹ But it is quite possible that the Act is applicable to the issue of debentures by a company, where the company has an asset value or annual turnover of less than R1 million and the individual debt issues are less than R250 000.²⁰⁰

As the consumer is a juristic person, not all the provisions of the Act will apply, such as those relating to credit marketing practices, over-indebtedness, reckless lending, as well as those measures in the Act protecting consumers against the financial implications of credit agreements.²⁰¹ However, provisions of the Act regarding registration as credit provider (or debenture holder in this scenario) will apply if such person concluded at least 100 credit agreements, or if the total principal debt owed to the credit provider exceeded R500 000. As a result, the debenture holder would be required to register as a credit provider with the National Credit Regulator or accept the risk that credit agreements entered into by him or her (here, the agreements to subscribe for the debentures of the company) would be unlawful and void.²⁰²

4.4.2 Position in Terms of the new Companies Act

Section 43 of the new Companies Act provides for the issue of securities other than shares by a company and, for the purposes of this discussion, specifically 'debt instruments'.²⁰³ The new statute will bring about some changes to the rights traditionally associated with such instruments. A debt instrument issued by a company may, eg, grant special privileges regarding attending and voting at general meetings and the appointment of directors.²⁰⁴

A debt instrument must be classified as either secured or unsecured,²⁰⁵ and would still seem to acknowledge some type of indebtedness by the company.

¹⁹⁸ Section 4(1)(a)(i) of the Act, read with the Threshold Regulations, 2006.

¹⁹⁹ Section 4(1)(b), read with the Threshold Regulations, 2006. Section 9(4) of the Act defines a large agreement as any mortgage agreement or any other credit transaction (except pawn transactions) with a principal debt of R250 000 or above or a credit guarantee with respect to any such agreement. See further discussion in par 2.2 above.

²⁰⁰ It is irrelevant whether the loan to the company constitutes a s 8(4)(f) other agreement or a secured loan, because both transactions are credit transactions. But if the loan qualifies as a credit facility (should revolving credit be involved), the agreement would either be small (with a credit limit of R15 000 or below) or intermediate (with a credit limit above R15 000). The Act would therefore apply anyway, irrespective of the amount of the loan. But if the payment of the loan is secured by the registration of a bond over immovable property, the Act will not apply, because all mortgage agreements are large agreements. See par 2.3 above.

²⁰¹ See the discussion in par 2.3 above.

²⁰² Section 89(2)(d) and (5)(a) read with s 40(4) of the Act. See the discussion in par 3.2 above for more detail.

²⁰³ Section 43(1)(a)(i) of the new Companies Act defines a 'debt instrument' as '[including] any securities other than the shares of a company, irrespective of whether or not issued in terms of a security document, such as a trust deed; . . . but [not] promissory notes and loans, whether constituting an encumbrance on the assets of the company or not'.

²⁰⁴ In terms of s 43(3)(a) of the new Companies Act. Debenture holders are traditionally regarded as not having any voting rights or the right to attend general meetings. See Cilliers & Benade op cit note 147 in par 14.41 for further discussion.

²⁰⁵ Section 43(2)(b).

As regards the applicability of the Act is concerned, the position would therefore not seem to differ much between the Companies Act and the new Companies Act.

5 Conclusion

We have attempted to analyse the impact of the Act on typical company transactions that would qualify as ‘credit agreements’. The mere fact that some of these transactions qualify as ‘credit agreements’ does not mean that they will fall within the ambit of the Act.

Where transactions do fall within the scope of application of the Act, as discussed, some unforeseen results may follow. The first example pertains to the transaction by which a company provides financial assistance for the purchase of or subscription for shares of that company or its holding company. The traditional prohibition in company law on such transactions was relaxed in order to facilitate black economic empowerment transactions. The application of the Act to some of these transactions²⁰⁶ will result in the company providing the financial assistance being required to register as a credit provider with the National Credit Regulator. If the company fails to do so where this is required, these transactions could be unlawful and void in terms of the Act. Where the financial assistance is provided to a natural person, this person will also be entitled to all the protection afforded by the Act, which will place an additional burden on the company providing the financial assistance. The company will have to do credit assessments before extending new credit to consumers in order to avoid reckless credit lending and/or over-indebtedness of the consumer. The coming into operation of the provisions of the new Companies Act would not seem to alter this situation.

Second, a company providing loans to or security in favour of directors or managers may also expose itself to the unforeseen reality that it has to register as a credit provider and that it has to comply with all the protective measures in the Act. This would depend on the facts of the particular case, specifically whether the parties are seen to be dealing at arm’s length. The uncertainty in this instance is undesirable and could leave companies that do provide such loans to or security in favour of their directors in doubt as to whether (among other things) they have to register as credit providers. One could argue that this situation is, to some extent, ameliorated by the new Companies Act. This new statute regulates financial assistance to directors in the same section as financial assistance between related companies, which is traditionally seen to be a transaction that is not at arm’s length.²⁰⁷ This could be indicative of the fact that the transaction between the company and directors is also not regarded as a transaction at arm’s length, with the result being that the application of the Act is excluded.

²⁰⁶ As discussed in par 4.2.1 above.

²⁰⁷ See the discussion in par 4.4.1 above.

Lastly, the mere issue of debentures by a company under certain circumstances²⁰⁸ could result in the debenture holder being required to register as a credit provider or else risking the issue of debentures to him or her being unlawful and void in terms of the Act. Once again, this result would not seem to be affected much by the coming into operation of the new Companies Act.

The Act does provide consumers with much-needed, much-improved protection in a volatile global economy. However, although the consequences resulting from interaction between the Act and typical company transactions may sometimes be undesirable, it is not clear whether these consequences were intended. What is evident, though, is that the legislature clearly aimed at the inclusion of basically every agreement involving the extension of credit to consumers within the Act's field of application. This is especially true, as was seen above, in instances where the consumer is a natural person, and it is evidenced by the insertion of a catch-all section in the Act.²⁰⁹ This should come as no surprise since the Act aims to protect consumers and for that reason as many consumers as possible. Those consumer juristic persons²¹⁰ that the legislature deemed able to protect themselves from the more serious consequences resulting from credit agreements²¹¹ enjoy only partial protection by the Act. Consumer juristic persons²¹² that the legislature deemed to be in a position to forfeit the Act's protection are completely excluded from the Act's field of application.

It is therefore doubtful that the application of the Act to the transactions mentioned in this article will be revisited. So companies and persons concluding credit agreements with each other should be aware of the consequences that non-compliance with the Act may entail.

²⁰⁸ As discussed in par 4.4.1 above.

²⁰⁹ Section 8(4)(f) other agreements are discussed in par 2.2 above.

²¹⁰ Consumer juristic persons with an asset value or annual turnover of less than R1 million that conclude small or intermediate credit agreements: see par 2.3 above.

²¹¹ All juristic persons, eg, are excluded from protection against reckless credit lending and over-indebtedness.

²¹² Large juristic persons or those not so large but still financially strong enough to conclude large credit agreements: see par 2.3 above.