

ASPECTS OF INCIDENTAL CREDIT IN TERMS OF THE NATIONAL CREDIT ACT 34 OF 2005

1 Introduction

An incidental credit agreement is one of the credit transactions to which the National Credit Act 34 of 2005 (“the Act”) applies. (The Act applies to credit facilities, credit transactions, credit guarantees or a combination thereof – s 4(1) read together with s 8(1) and s 8(4); for a full exposition of the Act’s field of application, see Otto and Otto *The National Credit Act explained* (2010) 17 ff; Renke, Roestoff and Haupt “The National Credit Act: New parameters for the granting of credit in South Africa” 2007 *Obiter* 229ff; and Scholtz (ed) *Guide to the National Credit Act* (2008) chs 4 and 8.) Section 1 of the Act defines “an incidental credit agreement” as

“an agreement . . . in terms of which an account was tendered for goods or services that have been provided to the consumer, or 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”.

It is clear from the definition of “incidental credit agreement” that such a transaction entails the provision of goods or services. It does not matter whether the goods or services have already been delivered to the consumer or whether they still have to be provided to the consumer over a period of time. The latter possibility presupposes an undertaking by the credit provider to supply goods or services to the consumer over a period of time in the future. The impression is therefore created that the credit provider may bill the consumer (an account *was* tendered – my emphasis) for goods or services that have not yet been provided. It is also clear in terms of the definition that the following requirements have to be met in order for the agreement to qualify as an incidental credit agreement:

- (a) An account must have been tendered for the goods or services that have been provided or that are to be provided to the consumer.
- (b) A fee, charge or interest should have become payable upon failure to pay an amount stipulated in the account on or before a determined period or date. The levying of such fee, charge or interest is therefore a *sine qua non* for incidental credit.
- (c) Alternatively, two prices must have been quoted for settlement of the account (provision for the payment of interest etc and for a lower and higher price also renders the agreement an incidental agreement).

The purpose of this note is to evaluate the nature of incidental credit agreements, especially in the light of the provisions of section 5(2) of the Act. Regard will also be had to the application of the Act to these agreements.

2 Section 5(2) of the Act

Section 5(2) provides for two possibilities. In terms of section 5(2)(a), the parties to an incidental credit agreement are deemed to have made that agreement on the date that is 20 business days after a late payment fee or interest is charged for the first time in respect of the account by the supplier of the goods or services (see s 2(5) regarding the calculation of “business days”). It therefore seems that the fact that consensus was reached by the parties to supply goods or services, to pay for the goods or services, to defer payment by means of the tendering of an account and to charge interest, is irrelevant as far as the formation of the agreement is concerned. The agreement is only formed 20 business days after the date upon which the credit provider levies a late payment fee or interest for the first time. If, for example, the consumer in terms of the account has until 30 August 2010 to pay an amount charged in terms of the account and fails to do so, the credit provider may start to levy interest or a late payment fee on any date after 30 August. Should the credit provider indeed commence with the levying of interest on, for example, 2 September, incidental credit will only be deemed to have been extended 20 business days after 2 September (the calculation of the 20 business days will commence on 3 September and will include the 20th business day – see s 2(5)). The right of the supplier to charge a late payment fee or interest is subject to certain conditions (discussed in para 3 below).

The other possibility is that the parties to an incidental credit agreement are deemed to have made the agreement only upon the expiry of 20 business days after the date upon which 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 – see s 5(2)(b); see s 2(5) for the calculation of the 20 business day-period).

The question arises as to the purpose of the provisions of section 5(2). Related questions concern the parties’ legal position and the question whether the Act applies to the agreement pending the expiry of the period of 20 business days in terms of section 5(2). It has to be realised from the onset that pending expiry of the 20 business days the extension of credit is pertinent. Payment for the goods or services is deferred and interest is levied, constituting compliance with the requirements for an agreement to qualify as a credit agreement in terms of the Act (in terms of the definitions of all the credit agreements to which the Act applies, except for the definition of a mortgage agreement and a secured loan, either deferral of payment and the levying of interest or prepayment of the debt and the granting of a discount are required in order to constitute the specific type of credit agreement – see s 1 above; see also Renke, Roestoff and Haupt 2007 *Obiter* 235). It may therefore be argued that, pending the expiry of the 20 business days, a section 8(4)(f) other agreement could be involved (payment of an amount owed by one person to another is deferred and interest is payable in respect thereof). Such argument, however, is untenable and should be rejected. It is unthinkable and impracticable that one could have a certain type of credit agreement (a s 8(4)(f) other agreement) pending expiry of the 20 business days which then becomes something totally different (an incidental credit agreement) upon expiry of the 20 business days. This is especially true when regard is had to the fact that all the sections of the Act apply to section 8(4)(f) agreements but that the Act only has limited application to incidental credit agreements (see s 5(1)). It is my contention that the answers to the above questions are to be found in section 5(1).

3 Section 5(1) of the Act

The Act consists of nine chapters. Some chapters apply *in toto* to incidental credit agreements (chs 1, 2, 7, 8 and 9 – s 5(1)(a)). Only certain sections (ch 3 ss 54 and 59 – s 5(1)(b)) or Parts (ch 4 Parts A and B, ch 4 Part D, ch 5 Part C, ch 5 Parts D and E and ch 6 Parts A and C – s 5(1)(c)–(g)) of the other chapters apply to incidental credit agreements. Below a summary of the chapters, sections and parts of chapters that apply to incidental credit agreements is provided. As the application of certain of the above-mentioned Parts to incidental credit agreements is subject to provisos, the latter receive attention as well.

It has already been pointed out that chapters 1, 2, 7, 8 and 9 apply *in toto* to incidental credit agreements. Chapter 1 concerns the interpretation, purpose and application of the Act. Chapter 2 deals with consumer credit institutions, namely the National Credit Regulator (“the Regulator”) and the National Consumer Tribunal (“the Tribunal”). Dispute settlement other than debt enforcement, for instance alternative dispute resolution and the initiation of complaints to the Regulator, is addressed in chapter 7. Hearings before the Tribunal and Tribunal orders are also addressed. Chapter 8 contains general provisions aimed at the enforcement of the Act. There are provisions regarding searches, offences and miscellaneous matters, for instance the serving of documents and the proof of facts. General provisions with regard to the regulations in terms of the Act (GN R489 in GG 28864 of 2006-05-31; all references to specific regulations in this note are to these regulations), conflicting legislation, consequential amendments, the repeal of laws and transitional arrangements are contained in chapter 9.

Chapter 3 concerns the regulation of the consumer credit industry and *inter alia* renders it compulsory for certain credit providers to apply to be registered as credit providers. Due to the fact that a credit provider who only extends incidental credit is exempt from the obligation to register as a credit provider (see s 40(1)(a) and (b)), it is peculiar that sections 54 and 59 apply to incidental credit agreements. Section 54 authorises the Regulator to issue a notice to a person – or association of persons – who is engaging in an activity that requires registration in terms of the Act and who is not registered, requiring that person – or association of persons – to stop engaging in that activity. Section 59 provides for the review or appeal of decisions in respect of registrations in terms of chapter 3. It is submitted that sections 54 and 59 may become applicable to incidental credit agreements in the event of voluntary registration (although it is not compulsory to register as a credit provider for the granting of incidental credit only, such credit providers may voluntarily apply to the Regulator to be registered – s 40(5)).

Part A of chapter 4 confers certain rights on the consumer, for instance the right to (a) apply for credit (s 60); (b) protection against discrimination in respect of credit (s 61); and (c) the right to information in an official language (s 63). Part B of chapter 4 concerns “[c]onfidentiality, personal information and consumer credit records” and *inter alia* provides for the removal of a record of debt adjustment or judgment (s 71) and the right to access and challenge credit records and information (s 72). The sections in chapter 4 Part D dealing with reckless lending (ss 80–84) do not apply to incidental credit agreements (see, in general regarding reckless lending, Kelly-Louw “The prevention and alleviation of consumer over-indebtedness” 2008 *SA Merc LJ* 218ff; Stoop “South African consumer credit policy: Measures indirectly aimed at preventing consumer over-indebtedness” 2009 *SA Merc LJ* 367ff; Vessio “Beware the provider of reckless

credit” 2009 TSAR 274 ff and Boraine and Van Heerden “Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005” 2010 *THRHR* 650). The implication is therefore that the provider of incidental credit does not have to do a section 81 assessment to assess the proposed consumer’s (a) general understanding and appreciation of the risks and costs of the proposed credit, and of his or her rights and obligations under the credit agreement; (b) debt re-payment history under credit agreements; and (c) existing financial means, prospects and obligations before entering into an incidental credit agreement with the consumer. As a result the granting of incidental credit cannot take place recklessly (see s 80 for the three instances of reckless credit lending). It is important to realise that incidental credit is also excluded from the instance of reckless lending described by Vessio 2009 TSAR 274 as “[the] last-entered credit agreement [having] the effect of precipitating a credit consumer into over-indebtedness”.

However, it is possible for a consumer to become over-indebted without reckless credit granting taking place at all. The same holds true for consumers in terms of incidental credit agreements, in which case the Act affords protection (in terms of the remainder of Part D of ch 4 – ss 79 and 85–88 – dealing with over-indebtedness, the powers of a court to declare and relieve over-indebtedness, etc).

The application of chapter 5 Part C (ss 100–106 of the Act and by implication the regulations (regs 39–48) – giving effect to ss 100–105) to incidental credit agreements is subject to section 5(3)(a). Chapter 5 Part C and the mentioned regulations afford protection to consumers with regard to the financial implications of credit agreements and *inter alia* protect consumers against usurious interest rates and with regard to other credit costs (see in general Scholtz (ed) ch 10). Section 5(3)(a) restricts the deferred amount upon which interest, fees or charges are calculated in the event of an incidental credit agreement to the amounts provided for in section 101(1)(d) and (f)–(g) (dealing with interest, default administration charges and collection costs respectively; s 5(3)(a) refers to s 101(d) etc which is clearly a mistake in the Act that has to be rectified). The other amounts (s 101(1)(b)–(c) and (e), respectively dealing with initiation fees, service fees and the cost of credit insurance) that form part of the deferred amount of the other credit agreements to which the Act applies are therefore excluded in the case of incidental credit (see in general the concept “deferred amount” reg 39; see also reg 42(2)). Although the application of Part C of chapter 5 is not subject to section 5(3)(b), the latter also qualifies the right of a credit provider to charge or recover a fee, charge or interest in terms of an incidental credit agreement and should therefore be mentioned. It should be borne in mind that in order for an agreement to qualify as an incidental credit agreement, one of the conditions is that a fee, charge or interest should have become payable upon a failure to pay an amount stipulated in the account on or before a determined period or date (see para 1). In terms of section 5(3)(b) the right to recover or charge such fee, charge or interest is dependent upon the credit provider having disclosed, and the consumer having accepted, the amount of such fee, charge or interest, or the basis on which it may become payable, on or before the date on which the relevant goods or services that are the subject of the account were supplied. Section 5(3)(b) only refers to para (a) of the definition of an incidental credit agreement (see para 1). It therefore seems to be unnecessary for a credit provider to specifically disclose to a consumer – and for

the consumer to accept – that the higher of the two prices quoted for settlement of the account, if that was the case, will be applicable if the account is not paid on or before the date stipulated in the account in order for the credit provider to be able to claim the higher price.

Section 5(1)(f) provides that Parts D and E of chapter 5 only apply with respect to an incidental credit agreement once the credit agreement is deemed to have been made in terms of section 5(2), in other words 20 business days after the date upon which interest is charged for the first time or after the date upon which the higher price first becomes applicable (see para 2 above). Part D regulates statements of account and *inter alia* compels credit providers to deliver to consumers periodic statements of account (s 108(1)). Section 109 prescribes the form and content of such statements. A credit provider is also obliged to furnish the consumer on request, free of charge, with a statement of the amount owing and of other matters (s 110(1)). Section 107, however, provides that sections 108–110 do not apply in respect of an incidental credit agreement until the time that interest is first charged on the principal debt owed to the credit provider (see the discussion in para 4 below). Part E (ss 116–120) of chapter 5 addresses the alteration of credit agreements. In terms of section 116 any change to a document that records a credit agreement or an amended credit agreement, after it is signed by the consumer (if applicable) or delivered to the consumer, is void. There are a few exceptions to this rule, for instance that the change will not be void if it reduces the consumer's liabilities under the agreement (s 116(a); see also s 116(b)–(d)). Section 117 applies if the parties to a credit agreement agree to change its terms. It is submitted that sections 118 (reduction of the credit limit under a credit facility) and 119 (increases in the credit limit under a credit facility), though they form part of Part E, could not be applicable to incidental credit agreements. An incidental credit agreement is a credit transaction and not a credit facility (see para 1). Section 120(1)(a) and (b) prohibits certain unilateral changes to a credit agreement by a credit provider (for instance of the period allowed in the agreement for repayment of the principal debt, except to lengthen it). Section 120(2) prescribes the applicable notice periods in the event of a unilateral change by a credit provider.

Part A of chapter 6 involves collection and repayment practices and *inter alia* confers the right on a consumer, or guarantor in terms of a credit guarantee, to settle a credit agreement before its actual date of termination (s 125). Section 126(1) and (2) allows a consumer to prepay any amount owed to a credit provider under a credit agreement at any time, without notice or penalty. The section also prescribes how and when payments should be credited to a consumer's account (s 126(3)). Chapter 6 Part C is entitled "Debt enforcement by repossession or judgment" and requires compliance with certain procedures before debt enforcement (s 129), prescribes debt procedures in court (s 130) and the realisation procedure that has to be adhered to in the case of repossession of goods that are the subject of a credit agreement (ss 131–132) and prohibits certain collection and enforcement practices (s 133).

The sections in the Act or parts of chapters not mentioned in section 5(1) naturally do not apply to incidental credit agreements. The Act's prescriptions regarding credit marketing practices (ch 4 Part C, ss 74–77), unlawful credit agreements (s 89), unlawful provisions of a credit agreement (s 90), the compulsory disclosure of certain (especially financial) information to a consumer prior to the conclusion of the credit agreement (s 92), the consumer's right to rescind a

credit agreement (s 121) and to surrender the goods (s 127), may be mentioned as the most important provisions in this regard. It needs to be pointed out that the rights of a consumer to rescind a credit agreement or to surrender the goods that form the subject of the agreement only apply to certain credit agreements anyway.

4 Above-mentioned principles applied and interpreted

As previously mentioned, the argument that a section 8(4)(f) other agreement (or another credit agreement) exists pending the expiry of the 20 business days (after the date upon which interest or a late payment fee is levied for the first time or upon which the pre-determined higher price first becomes applicable) and that the agreement then changes to an incidental credit agreement after expiry of the 20 business days, should be rejected (see para 2). The questions that were posed in paragraph 2 above therefore remain to be answered.

It is submitted that the proviso in section 5(1)(f) should serve as a point of departure. It is significant that only Parts D and E of chapter 5 apply to an incidental credit agreement once the incidental credit agreement is deemed to have been made in terms of section 5(2). It is further submitted that it can therefore be deduced that the other chapters, sections and Parts in chapters mentioned in section 5(1)(a)–(e) and (g) already apply to an incidental credit agreement before expiry of the 20 business days. In other words, the said chapters, sections and Parts in chapters apply even before the incidental credit agreement is deemed to have been made in terms of section 5(2) and it must have been the legislature's intention that they should find application once there is compliance with the definition of "incidental credit agreement" in section 1 of the Act (once a fee, charge or interest became payable when payment of an amount charged in terms of the account was not made on or before a determined period or date or once the higher of the quoted prices became applicable). The latter submission is based on the premise that, had it been the legislature's intention that all the chapters, sections and parts of chapters mentioned in section 5(1) have to apply to an incidental credit agreement only once the agreement is deemed to have been made in terms of section 5(2), a specific provision to that effect would have been included in the Act. The legislature could for instance have provided in the introductory sentence to section 5(1) that all the chapters, sections and parts in chapters mentioned in section 5(1)(a)–(g) only apply in respect of an incidental credit agreement once the incidental credit agreement is deemed to have been made in terms of section 5(2). Although this submission is based on an ordinary reading of the text, the interpretation of legislation is a purposive activity. Any reading of the text must take the context of the legislation into account in order to support the purpose of the legislation (otherwise known as the "intention of the legislature"). Ngcobo J said the following in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC):

"The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting *any* legislation . . . [F]irst, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be reasonably capable of such interpretation . . . [Legislation] must be construed purposively to "promote the spirit, purport and objects of the Bill of Rights" . . . *The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous*" (paras 72, 88 and 90; my emphasis).

With reference to the purport of the legislation it must be reiterated that a statute must be read as a whole. The long title of the Act expressly states that the Act aims (amongst others) to “promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information”. Furthermore, section 2(1) provides that the Act must be interpreted in a manner that gives effect to the purposes set out in section 3. In general section 3 provides (amongst others) that the Act intends “to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers”.

Even if it is argued that the initial reading of section 5(1) of the Act gives rise to another possible interpretation, it should be borne in mind that the common-law presumption against futile or nugatory results supports a purposive construction of legislation. In my view a different interpretation than the one submitted above could result in a number of futile and absurd results (see Du Plessis *Re-interpretation of statutes* (2002) 162–164 187–191 and case law mentioned).

Perhaps this is an opportune time to consider an example. Attorney A provided services to his client, B. He tendered an account to B for the services rendered. B had to settle the account on or before a determined date and failed to do so. A commenced with the levying of interest the day after the date determined for settling of the account (A had disclosed, and B had accepted, the basis on which interest would become payable as well as the amount thereof before the date on which the services were supplied). In terms of section 5(2), the incidental credit agreement between A and B is deemed to have been made 20 business days after the date upon which A levied interest for the first time. Awaiting expiry of the 20 business days, B is afforded protection by the Act in terms of section 5(1)(a)–(e) and (g). B for instance has the right to information in a plain and understandable language (s 64); confidential treatment (s 68); to access and challenge credit records and information (s 72); and to apply for debt review should he become over-indebted, for instance due to a loss of income (s 86). B also receives financial protection in terms of the Act. The principal debt of the incidental credit agreement upon which interest is calculated, for instance, is defined (reg 39) and restricted (s 5(3)(a) discussed in para 3 above); the maximum prescribed interest rate for incidental credit agreements is 2 per cent per month (s 105 read together with reg 42(1)) and the amount of default administration charges (the charge that may be imposed by a credit provider to cover administration costs incurred as a result of a consumer defaulting on an obligation under a credit agreement – s 1) and collection costs (an amount that may be charged by a credit provider in respect of enforcement of a consumer’s monetary obligations under a credit agreement, excl default admin charges – s 1) is restricted (regs 46 and 47 respectively). Section 125 affords B the right to settle the agreement (account). This seems superfluous as B has to settle the account on or before the determined date in the account. However, the Act’s provisions (s 125(2)) with regard to the amount that is required to settle a credit agreement are relevant. The same holds true for section 126(3) that concerns the crediting of payments.

Section 126(3) provides that a credit provider must credit each payment made under a credit agreement to the consumer, firstly to satisfy any due or unpaid interest charges, secondly to satisfy any due or unpaid fees or charges and lastly

to reduce the amount of the principal debt. If B therefore settles the account for instance on the 19th business day since the date upon which A commenced to charge interest, A is obliged to first use the payment to satisfy the interest (for 19 days) and other fees or charges. That would mean that there is a shortfall on the amount of the principal debt of the incidental credit agreement (the amount on which the supplier of goods or services charges interest or a late payment fee, per s 5(2)(a), or the lower price in respect of agreements referred to in s 5(2)(b) – reg 39(1)(a)(ii); it is submitted that the reference in reg 39 to s 5(2)(a) is incorrect. The charging of a late payment fee or interest takes place in terms of the definition of “incidental credit agreement” in s 1 and not in terms of s 5(2)(a)). If A wants to enforce the shortfall he will have to comply with chapter 6 Part C. The application of chapters 7, 8 and 9 to incidental credit agreements in the interim period awaiting the expiry of the 20 business days is self-explanatory. Should a dispute for example arise between A and B concerning the account, the parties may opt for alternative dispute resolution in terms of section 134.

The legislature seems to contradict itself with regard to the time upon which B would become entitled to statements of account (or of the amount owing and related matters). In terms of section 5(1)(f) read together with section 5(2), B would only be entitled to such statements after expiry of the 20 business days after the date upon which interest is charged for the first time. In terms of section 107, B qualifies to receive the statements when interest is first charged on the principal debt. If regard is had to section 107(1), it is clear that Part D of chapter 5 that concerns statements of account only becomes applicable to a credit guarantee once the credit guarantee becomes effective, namely, the time that the credit provider first calls on the guarantor to satisfy an obligation in respect of the guarantee. It is therefore submitted that Part D should by analogy only apply to an incidental credit agreement (and that B would only be entitled to the mentioned statements) once the agreement is deemed to have been made, in other words 20 business days after the date upon which interest is charged for the first time. Another interpretation would in any case render section 5(1)(f) nonsensical. It also seems logical that Part E of chapter 5 would apply to an incidental credit agreement only once the agreement is deemed to have been made. The parties to the agreement would for instance only then be able to change the terms of the agreement in terms of section 117.

The reason why the remainder of the Act’s provisions do not apply to incidental credit agreements may be explained by having regard to the nature of incidental credit agreements. As mentioned earlier (paras 1 and 2), deferral of payment and the charging of interest are required in order to constitute an incidental credit agreement (and most of the other credit agreements to which the Act applies). Whether interest is going to be charged by, for instance, A in the example above depends on the question whether B is going to settle the account for the services on or before the determined date in the account. It is therefore never certain whether an incidental credit agreement is indeed going to come into existence. For this reason it is impracticable to require A first to do a credit assessment (in terms of s 81 to see whether B can afford the credit; see para 3 above) before rendering the services, just in case an incidental credit agreement to which the Act applies comes into existence. For similar reasons no initiation fee (a fee in respect of costs of initiating a credit agreement – s 1) is payable with respect to an incidental credit agreement and so forth (see para 3 above).

5 Conclusion and final remarks

In the final analysis I am of the opinion that compliance with the definition of “incidental credit agreement” in section 1 of the Act creates a tie between the credit provider and the consumer. Though an incidental credit agreement in the sense intended by the legislature has not yet come into existence, the fact that the tie between the parties is recognised in law is evidenced by the application of certain sections in the Act (mentioned in s 5(1)(a)–(e) and (g)) in the interim period until the incidental credit agreement is deemed to have been made (in terms of s 5(2)). Once the agreement is deemed to have been made, Parts D and E of chapter 5 become applicable as well.

It therefore seems that the reaching of consensus between the parties to supply goods or services, to pay for the goods or services, to defer payment and so forth, does constitute an incidental credit agreement. The legislature in fact calls the agreement an “incidental credit agreement” (in the introductory sentence to s 5(1)) before the agreement is deemed to have been made. However, it is an agreement that, until it is deemed to have been made in terms of section 5(2), “hinkende in die lug bly hang” (to use the words of Basson J in *Van der Westhuizen v BOE Bank Bpk* 2002 1 SA 876 (T) to describe the position – in terms of the Act’s predecessor, the Credit Agreements Act 75 of 1980 – where a credit agreement that was initially void – or unenforceable – due to the initial non-payment of the deposit, was revived by the later payment of the deposit by means of instalments). Be that as it may, perhaps the name of the agreement says it all. It is an agreement that “incidentally” comes into existence once there is compliance with a requirement (the charging of interest), the occurrence of which is uncertain. That said, the reason for the 20 business days-provision in section 5(2) remains unclear and there appears to be no reason why an incidental credit agreement could not come into existence as soon as interest is charged for the first time.

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