The at arm's length principle in terms of the National Credit Act 34 of 2005

by

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SUMMARY

The National Credit Act 34 of 2005 ("NCA") applies to a credit agreement that is concluded between the parties to the agreement "at arm's length", in South Africa, or having an effect in South Africa, provided that no exclusion applies. The legislature opted not to define the concept "at arm's length", but rather to provide an open list of arrangements in section 4(2)(b) in terms whereof the particular credit agreement is entered into "within arm's length", with the implication that the consumer in any of these arrangements is not protected by the NCA. The arrangements related to within arm's length in section 4(2)(b) form the focus of my dissertation, and all the section 4(2)(b) arrangements centre around dependency between the credit provider and the consumer. In the absence of dependency between these parties, in other words, where each is independent of the other, the consumer needs protection, the transaction is at arm's length, and the NCA applies.

The provisions in section 4(2)(b) and their interpretation by the courts are addressed, together with conclusions. The introduction of the principle of at arm's length as a prerequisite for the NCA's application to a credit agreement is endorsed.

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CHAPTER 1

GENERAL INTRODUCTION

1.1 Introduction

This dissertation pertains to the National Credit Act's[1] application. It is by now trite that the NCA regulates the credit industry in South Africa, and also protects consumers, especially those who have been historically unable to access credit and banking services.[2] The NCA was enacted on 15 March 2006, but only became fully effective on 1 June 2007, in three stages, with the aim of granting credit providers the opportunity to register themselves as such, and so that the necessary financial systems, contracts, and other documentation for compliance could be put in place.[3] Upon its becoming effective, the Act[4] repealed and replaced the Credit Agreements Act, [5] the Usury Act,[6] and the Integration of Usury Laws Act[7] With the previous Acts, consumer credit was convoluted and not easily understandable, as both the Credit Agreements Act and the Usury Act had to be applied jointly.[8]

The main purpose of the NCA is to facilitate the social and economic welfare of every citizen of South Africa, to ensure fair and transparent access to the credit market and industry, amongst others, and to ensure consumer protection.[9] Although the NCA was an improvement compared to its predecessors, it created some uncertainties regarding its interpretation, which warranted its amendment, thus leading to the National Credit Amendment Act 19 of 2014, which came into effect on 13 March 2015.[10] The main purpose of the Amendment Act is to address challenges of interpretation that had emerged during the NCA's lifespan and make the necessary improvements.[11]

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[1] Act 34 of 2005 ("NCA"). All references to sections and regulations hereinafter will be in accordance with the Act, unless indicated otherwise.
[2] Scholtz "The implementation, objects and interpretation of the National Credit Act and related matters" in Scholtz ed *Guide to the National Credit Act* (2008), "Scholtz in Scholtz ed", par 2.3.
[3] Scholtz in Scholtz ed par 2.2.
[4] S 172(4).
[5] Act 75 0f 1980, Credit Agreements Act".
[6] Act 73 of 1968, "Usury Act".
[7] Act 57 of 1996.
[8] Scholtz in Scholtz ed par 2.1.
[9] See s 3.
[10] "National Credit Amendment Act" or "Amendment Act"; Scholtz in Scholtz ed par 2.2.
[11] Scholtz in Scholtz ed par 2.2.

The field of application of consumer credit legislation is of crucial importance, because a particular Act's scope determines the extent of the protection afforded to consumers.[12] Consumer credit enactments contain rules that determine an Act's scope of application. The same holds for the NCA, which provides, in section 4(1), that the Act applies to credit agreements concluded "at arm's length". It is further required that the credit agreement be concluded in South Africa, or, if concluded elsewhere, that it has an effect in South Africa. Section 4(1) further requires that no exception to the NCA's field of application must be pertinent.

Thus, only credit agreements fall within the ambit of the NCA, and an agreement will be considered as such for the Act's purposes if there was credit granted and if there was an imposition of a fee, charge, or interest pertaining to the deferred payment.[13] Upon establishment that a credit agreement has indeed been entered into by the parties, a court, in order to determine if the NCA is applicable, must consider whether the credit agreement was concluded "at arm's length".[14] The latter concept, which was introduced into South African consumer credit legislation, means that the parties who concluded the credit agreement are independent of each other. It is important to note that "at arm's length" is a requirement in order for the Act to be applicable. If the parties did not conclude the credit agreement at arm's length, the NCA is not applicable. The principle of "at arm's length" is the focus of my dissertation. The credit agreements subject to the Act, the "within, or having an effect within, the Republic",[15] and the exceptions to the NCA's field of application[16] will receive no further attention.

"At arm's length" is not defined in the NCA. However, the legislature provides in section 4(2)(b) that, "in any of the following arrangements, the parties [to a credit agreement] are not dealing at arm's length". The parties therefore enter into the credit agreement "within arm's length", which means they are not independent of each other. Five arrangements are subsequently mentioned where the parties are not dealing at arm's length. Sections 4(2)(b)(i) and (ii) deal with shareholder loans and other credit agreements between a juristic person (as

[12] Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005*, thesis submitted for the degree Doctor Legum, University of Pretoria (2012), "Renke LLD thesis" 9.
[13] Van Zyl "The scope of application of the National Credit Act" in Scholtz ed *Guide to the National Credit Act* (2008), "Van Zyl in Scholtz ed", par 4.2. See Otto and Renke "Types of credit agreement" in Scholtz ed *Guide to the National Credit Act* (2008) ch 8 and Kelly-Louw (assisted by Stoop) *Consumer credit regulation in South Africa* (2012) par 2.4 for a complete discussion of the credit agreements subject to the Act.
[14] Van Zyl in Scholtz ed par 4.2.
[15] Van Zyl in Scholtz ed par 4.2; Kelly-Louw (assisted by Stoop) par 2.1.
[16] Van Zyl in Scholtz ed par 4.2; Kelly-Louw (assisted by Stoop) par 2.2.

either the credit provider or the consumer) and another party. Credit agreements between natural persons who are in a familial relationship are addressed in section 4(2)(b)(iii). Section 4(2)(b)(iv) refers to "any other arrangement" than the ones already mentioned, being an arrangement where the parties are not independent of the other, and consequently do not strive to obtain the maximum benefit from their agreement,[17] or an arrangement that is of the sort that the law deems to be between parties not engaged in a transaction at arm's length.[18]

1.2 Research statement

The purpose of this dissertation is to investigate and analyse what the principle of "at arm's length" entails for purposes of the NCA and its field of application.

1.3 Research objectives and overview of chapters

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

(a) Chapter 1 provides the introduction to the dissertation, the research statement, and the research objectives, and delineates the scope of the research. An overview of the definitions of selected key concepts is also provided.
(b) Chapter 2 discusses the arrangements in section 4(2)(b)(i) and (ii) with regard to "within arm's length", mentioned above.[19]
(c) Chapter 3 discusses section 4(2)(b)(iii), which provides, as mentioned in the previous sub-paragraph, for "within arm's length" transactions between family members.
(d) Section 4(2)(b)(iv)(aa) of the Act is discussed in Chapter 4, which deals with arrangements that are not at arm's length, and thus do not fall within the ambit of the Act.
(e) Chapter 5, which is the final chapter, provides conclusions and recommendations based on the research conducted.

1.4 Delineations

[17] S 4(2)(b)(iv)(aa).
[18] S 4(2)(b)(iv)(bb).
[19] Par 1.1.

It has already been mentioned[20] that the focus of my dissertation is the "at arm's length" principle in terms of the NCA. Other Acts will thus only be considered if and to the extent necessary to explain the NCA's "at arm's length" provisions. The same holds for section 4(2)(b)(iv)(bb), types of arrangements that have been held in law not to be at arm's length, and cases decided in respect of the latter. The purpose of my dissertation is not to provide a comprehensive guide to case law, but to illustrate the application and interpretation of provisions in the NCA and to set out the principles involved.

1.5 Terminology

For purposes of this dissertation, the definitions provided in section 1 of the NCA apply:

'consumer', in respect of a credit agreement to which this Act applies, means –

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

'credit', when used as a noun, means –

(a) a deferral of payment of money owed to a person, or a promise to defer such a payment; or
(b) a promise to advance or pay money to or at the direction of another person;

'credit agreement' means an agreement that meets all the criteria set out in section 8;

'credit provider', in respect of a credit agreement to which this Act applies, means –

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

[20] Par 1.2.

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

1.6 Reference techniques

For a juristic person, the term "it" is used.

In the next chapter the first within arm's length arrangement in terms of section 4(2)(b)(i) and (ii) will be discussed. This arrangement deals with shareholder loans and other credit agreements between a juristic person (as either the credit provider or the consumer) and another party.

CHAPTER 2

SECTION 4(2)(b)(i) AND (ii) OF THE NCA

2.1 Introduction

As the second inquiry conducted by the court, after it has been established that a credit agreement is subject to the NCA, the parties to a credit agreement must have engaged in business at arm's length in order for the NCA to be applicable to their agreement.[21] There is no definition of "at arm's length" in the Act, but such types of agreements are, instead, enumerated in the Act to prevent confusion. It is crucial to note that this list is not exhaustive. The main goal of this chapter is to address the first two transactions that do not constitute arm's-length dealings. However, as an interpretation of the Act's provisions must be done in accordance with its purposes,[22] this is discussed first, in brief.

2.2 The purposes of the NCA

According to its preamble, the NCA is, amongst others, aimed at the promotion of a marketplace that does not discriminate and is not unfair, as well as regulating consumer credit and better provision of consumer information so that consumers can access credit. The Act also aims to ensure a consumer credit industry that promotes black economic empowerment and ownership. Moreover, the Act aims to endorse credit provision by credit providers and its use by consumers that is responsible, and it aims to do this by preventing unfair credit- and credit-marketing practices. In cases where there has been the provision of reckless credit that resulted in the over-indebtedness of consumers, the Act aims to provide debt re-organisation for consumers. It is also the NCA's aim to ensure that there is adequate credit information for consumers and that the credit framework is enforced consistently, and it also provides for the establishment of the National Credit Regulator and the National Consumer Tribunal.[23]

Section 3 lists the purposes of the NCA. This section starts off by stating that the Act is aimed at the social and economic promotion and advancement of South African citizens, as well as the promotion of a credit market and industry that is not unfair, that is based on transparency,

[21] S 4(1).
[22] S 2(1).
[23] Preamble of the NCA.

that allows for competition, that is responsible, sustainable, effective, efficient, and one that consumers can access.[24] Moreover, the Act is aimed at protecting consumers by: endorsing a credit market that all South African citizens can access, particularly those who, in the past, have been barred from accessing and attaining credit in terms of sustainable market conditions; making sure that different credit products and credit providers are treated consistently; forging responsibility within the credit market and industry by encouraging consumers to use credit responsibly, to ensure that they borrow what they can afford, so that they avoid over-indebtedness; encouraging consumers to pay their dues and fulfil their financial obligations; discouraging credit providers from providing reckless credit to consumers; ensuring that there is equality between consumers and credit providers by balancing their rights and responsibilities; levelling the playing field and providing consumers with credit education and educating them about their rights, disclosing the standardised information to consumers so that they make informed decisions before seeking credit, and protecting them from deception and fraudulent conduct by credit providers; regulating credit bureaux and improving credit information for consumers; dealing with the issue of over-indebtedness, providing ways to solve this issue and encouraging consumers to fulfil their financial duties; ensuring that there is a system of dispute resolution for consumers and credit providers when disputes pertaining to their credit agreements arise; ensuring that there is a system that deals with debt restructuring, enforcement, and judgement that prioritises the fulfilment of financial obligations by consumers; and, finally, granting consumers debt intervention if they qualify for it.[25] The aims of the NCA, discussed above, do not contain a particular aim directed at the field of application of the Act, which includes the at arm's length requirement. However, it is logical that the field of the Act is important in respect of the realisation of its aims, *inter alia* consumer protection. Next section 4(2)(b)(i) and (ii), the first within arm's length arrangement, will be discussed.

2.3 Section 4(2)(b)(i) and (ii)

Section 4(2)(b)(i) and (ii) of the NCA, which form the focus of this chapter, pertain to a shareholder loan, a loan to a shareholder, or other credit agreement, and involve juristic persons. The sub-subsections provide as follows:

[24] S 3.
[25] S 3(a) – (i).

"(b) in any of the following arrangements, the parties are not dealing at arm's length:

(i) a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider;

(ii) 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."

A few concepts in section 4(2)(b)(i) and (ii) warrant defining before dissecting what these sub-subsections entail.

2.3.1 "Juristic person"

The NCA defines a "juristic person" as including (in addition to the known legal persons recognised in terms of our law, such as companies and close corporations) a partnership, association, or other body of persons that is corporate or unincorporated, or a trust, in the case that such a trust consists of three or more individual trustees, or if a trustee is a juristic person.[26] Stokvels,[27] however, are excluded from the definition of a juristic person.[28]

A juristic person's asset value or annual turnover is the criterion used by the Act to establish whether the juristic person qualifies as a consumer. If the juristic person's annual turnover or asset value, including the combined asset value or annual turnover of all related juristic persons, when the agreement was entered into was R1 million or more, the Act will not find application to such an agreement.[29] Juristic persons with an annual turnover or asset value below R1 million that conclude a large credit agreement[30] similarly fall outside the NCA's scope of protection.[31] Juristic persons with an annual turnover or asset value below R1 million that conclude small[32] or intermediate[33] credit agreements are subject to the Act, but only enjoy limited protection.[34]

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[26] S 1.
[27] Defined in s 1 as "an informal savings scheme".
[28] S 1.
[29] S 4(1)(a)(i) read with s 7(1)(a) and the Determination of thresholds in GN 713, *GG* 28893, 1 June 2006, "Determination of thresholds".
[30] A mortgage agreement (defined in s 1) and any other credit transaction (except a pawn transaction, defined in s 1) with a principal debt of R250 000 and above. See s 9(4) read with s 7(1)(b) and "Determination of thresholds".
[31] S 4(1)(b), read with s 7(1)(b) and "Determination of thresholds".
[32] Pawn transactions and credit facilities (s 8(3)) and credit transactions (s 8(4)) with a credit limit or principal debt of R15 000 and below, but excluding mortgage agreements. S 9(2) read with s 7(1)(b) and "Determination of thresholds".
[33] Credit facilities with a credit limit above R15 000 and credit transactions (excluding pawn transactions and mortgage agreements) with a principal debt between R15 000 and R250 000. S 9(3) read with s 7(1)(b) and "Determination of thresholds".
[34] S 6. Van Zyl in Scholtz ed par 4.3.

Clearly, in the case of section 4(2)(b)(i) and (ii), loans between a company and the company's shareholders, and between other juristic persons and a person who holds an interest in such juristic persons, are involved. The key criterion is whether the one person or entity has a "controlling interest" in the other, which indicates dependency and therefore a transaction that is within arm's length.

2.3.2 "Controlling interest"

"Controlling interest" is not defined in the NCA, and therefore, according to Van Zyl, a meaning should be attached to the concept in the context in which it is used. She further submits that a person may have a "controlling interest" in a juristic person notwithstanding the degree of control such a person exercises.[35] Thus, Van Zyl distinguishes "controlling interest" and "control", and makes the point that "all shareholder loans and all loans to shareholders" are excluded from the Act's ambit, irrespective of the "measure of control conferred by such shareholding on the holder exercised by the shareholder over the company". The measure of control exercised by the partner in a partnership or a member of a close corporation should similarly be irrelevant in determining whether a particular transaction was concluded at or within arm's length.[36]

The aforementioned interpretation by Van Zyl is in harmony with the interpretation by the court in *Bester and Others v Coral Lagoon Investments.*[37] In this case, Henney J, relying, *inter alia*, on *Sandoz Products (Pty) Ltd v Van Zyl NO*,[38] held that other legislation can be used in order to attach meaning to "controlling interest".[39] In *Sandoz*,[40] it was held that, at times, a different statute's provision can be used to acquire guidance, either by contrast or by analogy, in order to gain more understanding of the concept in the statute being considered. Henney J subsequently considered the provisions in a number of other legislative enactments.

[35] Van Zyl in Scholtz ed par 4.2.
[36] Van Zyl in Scholtz ed par 4.2.
[37] *Bester and Others NNO v Coral Lagoon Investments (Pty) Ltd (Tonnissen NO and Others Intervening)* 2013 (6) SA 295 (WCC), "*Bester*".
[38] 1996 (3) SA 726 (C) par 732B, "*Sandoz*".
[39] *Bester* par 34.
[40] Par 732B.

2.3.2.1 The Diamonds Act

Henney J proceeded to refer to section 1 of the Diamonds Act[41] for the definition of the term "controlling interest", which provides as follows:

"in relation to –

(a) a company, controlling interest means –

i. more than 50 percent of the issued share capital of the company;

ii. more than half of the voting rights in respect of the issued shares of the company; or

iii. the power, either directly or indirectly, to appoint or remove the majority of the directors of the company."

This section essentially entails that a shareholder will be considered to have a controlling interest in a company if the person owns more than 50% of the company's share capital, or has more than half of the voting rights with regard to the company's shares, or has direct or indirect power to appoint or remove a company's majority directors.

2.3.2.2 The Competition Act

Section 12(2) of the Competition Act[42] provides the following definition of the word "control":

"(2) A person controls a firm if that person –

(a) beneficially owns more than one half of the issued share capital of the firm;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes either directly or through a controlled entity of that person;

(c) is able to appoint or to veto the appointment of a majority of the directors of the firm;

(d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);

(e) in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or

(g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)."

It is apparent from this section that the word "control" has several meanings. In the case of a firm, for example, the person could own more than one half of the firm's share capital, have

[41] Act 56 of 1986.
[42] Act 89 of 1998.

the prerogative to cast a majority of the votes or control the casting of those votes, and have a say and capacity in a majority of directors' appointment or rejection by right of veto.[43] In the event of a trust, the person controls the majority of votes cast by trustees, or even appoints such trustees, or makes decisions concerning the beneficiaries of the trust.[44] The person will be entitled to the interests of majority members of a close corporation, or even control their votes.[45] The firm's policy can also be influenced to a great extent by this person.[46]

2.3.2.3 The Companies Act

The Companies Act[47] also offers a definition of "related and inter-related persons" and "control". Section 2 of the Companies Act provides as follows:

"2. Related and inter-related persons, and control –

(1) For all purposes of this Act –

(a) an individual is related to another individual if they –

(i) are married, or live together in a relationship similar to marriage;

or

(ii) are separated by no more than two degrees of natural or adopted consanguinity of affinity;

(b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2); and

(c) a juristic person is related to another juristic person if –

(i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);

(ii) either is a subsidiary of the other;

(iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2).

(2) For purposes of subsection (1), a person controls a juristic person, or its business, if –

(a) in the case of a juristic person that is a company –

(i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3(1)(a); or

(ii) that first person together with any related or inter-related person, is –

(aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise, or

[43] S 12(2)(a) – (d) of the Competition Act.
[44] S 12(2)(e) of the Competition Act.
[45] S 12(2)(f) of the Competition Act.
[46] S 12(2)(g) of the Competition Act.
[47] Act 71 of 2008 ("Companies Act").

(bb) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c).

(b) in the case of a juristic person that is a close corporation, that first person owns the majority of the members' interest, controls directly, or has the right to control, the majority of the members' interest, or controls directly, or has the right to control, the majority of members' votes in a close corporation;

(c) in the case of a juristic person who is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust;

(d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary Commercial practice, would be able to exercise an element of control referred to in paragraphs (a), (b) or (c)."

There are clear similarities in the definitions of the term "control" in the Competition Act and the Companies Act. Section 2 of the Companies Act starts off by describing what it means when it is said that individuals are related — they are either married or are in a relationship that is set up as a marriage, especially with regard to their living arrangements.[48] The section further states that, if there are no more than two degrees of either natural or adopted consanguinity of affinity, the individuals are in a relationship.[49] Relations between a juristic person and an individual are described as direct or indirect control of the juristic person by the individual. Lastly, the subsection states that there are relations between two juristic persons if there is direct or indirect control of either of them by the other, or if one juristic person is a subsidiary of the other, or if there is direct or indirect control of both juristic persons by a person.[50]

Subsection 2 of this section elaborates on what it means when a juristic person or its business is controlled by a person. In the event that the juristic person is a company, then a person will be said to control a juristic person in the case that the juristic person is that first person's subsidiary; if a majority of the voting rights are exercised, or the exercising of these rights is either directly or indirectly controlled by such person; and, lastly, if the appointment or election, or the control of this election or appointment of directors holding a majority of voting rights is the prerogative of such person.[51]

A person will control a close corporation if the person owns the interests of a majority of the members, or either controls these interests or the votes of the majority of the members.[52] With a trust, the majority of the trustees or the beneficiaries of the trust are appointed by such person,

[48] S 2(1)(a)(i) of the Companies Act.
[49] S 2(1)(a)(ii) of the Companies Act.
[50] S 2(1)(b) and (c)(i) – (iii) of the Companies Act.
[51] S 2(2)(a) of the Companies Act.
[52] S 2(2)(b) of the Companies Act.

or this person controls the majority of the votes of these trustees.[53] Moreover, the juristic person's policy can also be influenced significantly by this person; as such, the person has the capability to do so.[54]

Henney J referred to *Mogale Allows (Pty) Ltd v Nuco Chrome Bophuthatswana*[55] to assert his stance that context is the contingency factor when it comes to the meaning of the terms "controlling interest" or "direct or indirect control" in the NCA.[56] In the latter case, the court held that the interpretation of words found in legislation must occur within the bounds of their context, and context not only refers to the language used by the legislator, but also to the legislation's scope, purpose, and background.[57]

2.3.3 *Bester*

It is appropriate to discuss the facts of *Bester* in order to gain more understanding of the stance that the court took, especially when applying the subsections discussed earlier in this chapter. In this case, the Respondent, which was a company, Coral Lagoon Investments, and Ekosto, Spec Props Trust, Rusverdient Trust, and Roy Trevor Boast each held 25% of the shares.[58] Coral Lagoon Investments came about because the shareholders had as aim to buy a beachfront property and build luxury beachfront apartments, which would then be sold for profit.[59]

The property was bought and transferred into the name of the Respondent for an amount of R2 679 000 on November 26th, 2007.[60] A mortgage bond amounting to R1 880 000 from Absa Bank was used to fund the purchase price, and the shareholders' loans were used to fund the balance.[61] The parties had hoped that the development of the property and the repayment of the bond would be funded by a financial institution, and whilst waiting for this financial institution to grant the finance, the VAT refund from the South African Revenue Service would be used pay off the purchase price.[62] However, problems started arising because the Respondent had no assets or turnover when loans were granted to it by the shareholders.[63] Moreover, there was

[53] S 2(2)(c) of the Companies Act.
[54] S 2(2)(d) of the Companies Act.
[55] 2011 (6) SA 96 (GSJ), "*Mogale*".
[56] *Bester* par 38.
[57] *Mogale* par 23.
[58] *Bester* par 2.
[59] *Bester* par 3.
[60] *Bester* par 3.
[61] *Bester* par 4.
[62] *Bester* par 6.
[63] *Bester* par 6.

a delay in the property development, resulting in the VAT refund running out.[64] In an attempt to keep funding the bond instalments, the shareholders agreed to grant more loans to the Respondent, and subordination agreements between the Respondent and the shareholders had to be entered into to avoid the Respondent becoming insolvent.[65]

Ekosto, which was one of the shareholders of Coral Lagoon Investments, later underwent a process of liquidation, and, during this time, the Respondent owed Ekosto an amount of R554 994.01, which was the sum of the loans made by Ekosto to the Respondent.[66] Referring to section 345(1) of the Companies Act 61 of 1973, the liquidators demanded, in an application, that the Respondent pay the outstanding amount owed to Ekosto.[67]

The crux of the case was whether the loan agreement between Ekosto and the Respondent was a credit agreement subject to the NCA, because, if it were, the agreement would be unlawful and null and void[68], due to the fact that Ekosto was not registered as a credit provider in terms of section 40(1) of the Act.[69] In what follows, only the arguments in the case relevant to my dissertation are addressed.

The liquidator-applicants argued that the loan agreement between Ekosto and the Respondent did not fall within the scope of the NCA. According to them, the loan was actually a shareholder loan, and because Ekosto was a shareholder loaning the money to Coral Lagoon as a consumer, while at the same time having a controlling interest in Coral Lagoon, the loan was not at arm's length, as required by the NCA.[70]

Creditors who had intervened in the matter submitted that the NCA found application in the loan agreement between the parties.[71] They submitted that it could not have been possible for a person to control Coral Lagoon, as all four shareholders had shares equalling 25%, and, thus, there were no relations between Ekosto and the Respondent.[72]

Regarding the agreement not being at arm's length, per the liquidator-applicants' submission, it was argued by the creditors that the shares in the Respondent were equally held (25%) by the

[64] *Bester* par 7.
[65] *Bester* par 7.
[66] *Bester* par 8.
[67] *Bester* par 8.
[68] In terms of s 89(2) and (5) of the NCA.
[69] S 40(1), which is discussed by Van Zyl in Scholtz ed par 5.2.2, renders the registration of credit providers in terms of the NCA compulsory.
[70] *Bester* par 16.
[71] *Bester* par 17.
[72] *Bester* par 19.

four shareholders, which made it impossible for Ekosto to have a controlling interest in the Respondent.[73]

Accordingly, Henney J[74], *inter alia*, had to decide if Ekosto had a controlling interest in the Respondent per section 4(2)(b)(i), which necessitated Henney J to consider the meaning of "controlling interest" as discussed previously.[75]

Henney J reached the conclusion that it would be in line with the NCA's purposes to interpret "controlling interest" in a wider sense than mere majority shareholding. A person can influence another by means other than the latter.[76]

Since the four shareholders had equal shares of 25% in the Respondent, Ekosto could not have had a controlling interest in the Respondent.[77] Moreover, it was not shown by the liquidator-applicants that Ekosto had a direct or indirect interest in the Respondent, that is, that it had the power to influence the Respondent in any direct or indirect manner.[78] Henney J thus held that the agreement between Ekosto and the Respondent was, in fact, at arm's length as contemplated in section 4(1) of the NCA, which caused the agreement to fall within the ambit of the Act.[79] Since the NCA applied to the agreement, Ekosto had an obligation to register as a credit provider, and its failure to do so rendered the loan agreement unlawful and null and void.[80]

To conclude, it is evident that what is essentially provided by section 4(2)(b)(i) is that an arrangement whereby a company is granted a loan by its shareholder, or when a juristic person is granted a loan by an individual who has a controlling interest in that juristic person, such an agreement will not be considered an arrangement concluded at arm's length.[81] As seen in *Bester*, the loan agreement that was entered into between Ekosto, the shareholder, and Coral Lagoon, the juristic person as a consumer was, in fact, at arm's length, because although Ekosto was a shareholder, it did not have a controlling interest in the juristic person. It only held 25% of the shares, like the other three shareholders. Therefore, the determining factor is that the person granting the loan to the juristic person must have a controlling interest in the juristic person.

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[73] *Bester* par 20.
[74] *Bester* par 30.
[75] Par 2.3.2.
[76] *Bester* par 39.
[77] *Bester* par 43.
[78] *Bester* par 44.
[79] *Bester* par 44.
[80] *Bester* par 46.
[81] Van Zyl in Scholtz ed par 4.2.

Section 4(2)(b)(ii), on the other hand, provides that, if a shareholder of a company is granted a loan by a company in which the shareholder has a controlling interest, or in the case that another juristic person grants a loan to an individual with a controlling interest, then such agreement or arrangement will not be at arm's length.[82] In such an arrangement, the determining factor is also that the shareholder being granted the loan must have a controlling interest. Taking from the decision in *Bester*, the shares that this shareholder holds must be more than what the other shareholders hold in that juristic person. However, majority shareholding is not the only factor in determining controlling interest, and the question whether there is a controlling interest is for a court to decide in a particular case. In the next chapter familial relationships as an arrangement where the parties to a credit agreement do not deal at arm's length, are discussed.

[82] Van Zyl in Scholtz ed par 4.2.

CHAPTER 3

SECTION 4(2)(b)(iii) OF THE NCA

3.1 Introduction

This chapter discusses familial relationships between the parties to a credit agreement as a factor excluding "at arm's length" as a prerequisite in terms of section 4(1) of the NCA for the Act to apply to the credit agreement, and therefore the NCA's application. However, it will become apparent hereafter that section 4(2)(b)(iii), providing for the "within arm's length" arrangement, sets a dual compliance test, and that the mere existence of a familial relationship between the credit provider and the consumer is not sufficient to cause the credit agreement not to be at arm's length.

3.2 Section 4(2)(b)(iii)

Section 4(2)(b)(iii) provides as follows:

"(2) For greater certainty in applying subsection (1) –

(b) in any of the following arrangements, the parties are not dealing at arm's length:

(iii) a credit agreement between natural persons who are in a familial relationship and –

(aa) are co-dependent on each other; or

(bb) one is dependent upon the other."[83]

Section 4(2)(b)(iii) clearly provides for arrangements where the parties to a credit agreement are not only in a familial relationship, but also where the one is dependent on the other, or co-dependency on each other exists. It may be argued that the mere fact that a familial relationship is involved should be an indication that each party is not completely independent of the other; they are bound by blood. However, the legislature pertinently added an additional layer of dependency, in addition to being family, by requiring dependency or co-dependency between the natural-person family members. However, the legislature failed to define the concepts "familial relationship", "co-dependent", and "dependent", necessitating referencing other sources to ascertain their meaning, as was the case with the concept "controlling interest", discussed in the previous chapter.[84]

[83] S 4(2)(b).
[84] Par 2.3.2.

3.2.1 "Familial relationship"

The Companies Act and the Income Tax Act,[85] discussed next, do not refer to "familial relationship" as is done in the NCA, but to "related to", "connected to", and "relative", and will thus be used to shed light on the meaning of "familial relationship" in the NCA. Another factor to take cognisance of is the fact that the South African family unit usually extends farther than the immediate family of a person.[86]

3.2.1.1 Companies Act

The Companies Act, in section 2(1), provides the following:

> "(1) For all purposes of this Act –
>
> (a) an individual is related to another individual if they –
>
> (i) are married, or live together in a relationship similar to marriage; or
>
> (ii) are separated by no more than two degrees of natural or adopted consanguinity of affinity."

Married persons, or persons living together in a relationship like married persons, are thus regarded as related to each other for purposes of the Companies Act. The same holds for persons if there are no more than two degrees of natural or adopted consanguinity of affinity separating the parties. According to the Google dictionary (online),[87] "consanguinity" means "the fact of being descended from the same ancestor". The Oxford advanced learner's dictionary[88] defines the concept as the "relationship by being descended from the same family". A person's parents and children are related in the first degree of consanguinity to the person, the person's grandchildren, grandparents, and brothers and sisters are related in the second degree, and the person's great-grandchildren, great-grandparents, uncles and aunts, and nephews and nieces in the third degree.[89] The courts will have to decide each case individually on its merits to determine whether the parties are related.

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[85] Act 58 of 1962 ("Income Tax Act").
[86] Simpson "The hidden teeth of the National Credit Act" 2013 *Without Prejudice* 8.
[87] Google dictionary https://chrome.google.com/webstore/detail/google-dictionary-by-goog/mgijmajocgfcbeboacabfgobmjgjcoja?hl=en
[88] Oxford learner's dictionaries https://www.oxfordlearnersdictionaries.com/
[89] Du Preez *The interpretation of the arm's length principle in terms of the National Credit Act* LLM mini-dissertation University of Pretoria (2016), "Du Preez mini-dissertation", 44.

3.2.1.2 Income Tax Act

Section 1 of the Income Tax Act defines "connected persons" as follows:

> "(a) In relation to a natural person
>
> (i) Any relative; and
> *(ii)* Any trust (other than a portfolio of a collective investment scheme in securities or a portfolio of a collective investment scheme in property) of which such natural person or such relative is a beneficiary."

The Income Tax Act also defines a "relative" as follows:

> "In relation to any person, [a relative] means the spouse of that person or anybody related to that person or that person's spouse within the third degree of consanguinity, or any spouse of anybody so related, and for the purpose of determining the relationship between any child referred to in the definition of 'child' in this section and any other person, that child shall be deemed to be related to the adoptive parent of that child within the first degree of consanguinity."

"No more than two degrees of … consanguinity" and "within the third degree of consanguinity" in the Companies Act and Income Tax Act respectively, seem to indicate that any family member further removed than the stipulated degree; for instance, a great-great-grandchild should not be regarded as in a familial relationship with the other party to the credit agreement when applying the provisions of the NCA. However, it is submitted that the additional requirements "co-dependent" or "dependent" in section 4(2)(b)(iii), discussed next, should be the determining factor with regard to "an arm's length", irrespective of how far removed in degrees the family members are from each other.

3.2.2 "Dependent" or "co-dependent"

The NCA also fails to define the meaning of the terms "co-dependent" or "dependent" in section 4(2)(b)(iii). In the Oxford learner's dictionary, the term "dependent' is defined as "requiring someone or something for financial or other support".[90]

Renke provides an example that demonstrates section 4(2)(b)(iii), and this is an instance where a son is a grown adult, but still lives at home with his mother and is maintained by his mother, because he does not have a job. If the mother extends a loan to the son, then such a loan will not be at arm's length, because it complies with the wording of the abovementioned section.[91]

[90] Oxford learner's dictionaries. https://www.oxfordlearnersdictionaries.com/
[91] Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005* LLD thesis University of Pretoria (2012), "Renke thesis", par 7.2.3.2.

However, if the son has a job and is not dependent on his mother at all, and neither is his mother dependent on him, then such a loan will be considered to have been extended to the son at arm's length.[92] This is due to the fact that, although the mother and the son share a familial relationship, it cannot be said that they are co-dependent, or that one is dependent on the other.

Another example is a case where a loan is extended by a sister to her brother. If the brother and sister are neither dependent nor co-dependent on each other, then it will be said that the loan extended to the brother by his sister is at arm's length and, as such, falls within the scope of the Act.[93]

Thus, when encountering a credit agreement between family members, the facts of the case and established legal principles, for instance, other decisions by the courts and definitions in other Acts and dictionary meanings, will have to be considered and applied by the court to reach a decision whether the agreement was concluded within arm's length, with the implication that the consumer forfeits the NCA's protection.

3.2.3 The interpretation of section 4(2)(b)(iii) by the courts

3.2.3.1 *Beets v Swanepoel*[94]

The plaintiff (Beets) and the defendant (Swanepoel) had a familial relationship, with the defendant being the plaintiff's daughter.[95] The two parties entered into a credit agreement whereby the plaintiff issued a loan to the defendant/excipient in the amount of R600 000.[96] The agreement between the parties was aimed at helping the excipient in acquiring and taking transfer of a seaside property.[97] The parties agreed that the excipient would pay a monthly interest rate 4% below the prime lending rate at the time, from the date that the property is registered in the excipient's name, until the plaintiff meets her demise.[98] This monthly interest was very generous, considering the fact that it was below the prime lending rate. An amount

[92] Renke thesis par 7.2.3.2.
[93] Renke thesis par 7.2.3.2.
[94] *Beets v Swanepoel* [2010] ZANCHC 55 (5 October 2010), "*Beets*".
[95] *Beets* par 3.
[96] *Beets* par 3.
[97] *Beets* par 3.
[98] *Beets* par 3.

of R200 000 was payable to the plaintiff's granddaughter, and this was to be paid within 90 days from the date of registration of the property in the excipient's name.[99]

Moreover, the will of the plaintiff would also have to be amended, so that the loan issued would be the excipient's bequest, contingent upon the payment being made to the granddaughter as agreed.[100] A second mortgage bond was also passed over property in the plaintiff's favour, as security for the loan.[101]

The plaintiff alleged that the defendant had failed to pay the amount of R200 000 to the granddaughter, to issue the successful registration of the second bond over the property in Beet's favour, and to issue payment of the monthly interest as agreed.[102] Thus, the plaintiff alleged breach of the agreement between the two parties by the defendant.[103]

With regard to the question of whether the loan agreement between the two parties was a credit agreement, the court held that the loan agreement was indeed a credit agreement to which the NCA could apply, provided that the parties had transacted at arm's length.[104]

It was submitted on behalf of the plaintiff that the credit agreement was not at arm's length, due to the familial relationship between the parties and the favourable repayment- and interest arrangements. The court found that section 4(2)(b)(iii) did not find application, in spite of the mother–daughter relationship between the plaintiff and defendant. No dependence or co-dependence could be discerned from the pleadings or the transaction itself.[105] The *Beets* case thus serves as confirmation that "within arm's length" in terms of 4(2)(b)(iii) is reliant on a dual test — a familial relationship and dependency or co-dependency. However, the court did not stop here, but considered the provisions of section 4(2)(b)(iv), which are discussed in the next chapter.

3.2.3.2 *Heydenrych v Forsyth*[106]

In this case, which was an appeal to the full bench of the Gauteng South Division of the High Court, the core question for decision was whether the credit agreement *in casu* was concluded

[99] *Beets* par 3.
[100] *Beets* par 3.
[101] *Beets* par 4.
[102] *Beets* par 4.
[103] *Beets* par 4.
[104] *Beets* par 5.
[105] *Beets* par 6.
[106] *Heydenrych v Forsyth* [2022] 19 ZAGPJHC 391 (31 May 2022) ("*Heydenrych*").

at arm's length. This would have resulted in the NCA being applicable and, in turn, the requirement that the respondent (Forsyth) had been registered as a credit provider in terms of the Act. The court *a quo* found that the agreement was not at arm's length, and thus not subject to the NCA. Heydenrych appealed the decision. The appellant and the respondent were brothers-in-law, with the respondent being the appellant's sister's husband; the couple had been married for 33 years.[107] At the time of the case, the appellant and respondent had known each other for 35 years.[108] The appeal court first dealt with the provisions of section 4(2)(b)(iii), stating that, despite the fact that no definition of "dealing at arm's length" could be found in the NCA, it was clearly the legislature's intention that a credit agreement would not be considered to be at arm's length and not fall within the NCA's scope where natural persons are not only in a familial relationship, but are also either co-dependent on each other, or the one is dependent on the other. The court reiterated that the term "familial relationship" is not defined in the NCA, and referred to section 2(1) of the Companies Act and section 1 of the Income Tax Act to attach meaning to the term.[109] Considering the above definitions, and specifically applying a common sense meaning to the concept "familial relationship", the court remarked that the relationship between the parties as brothers-in-law was clearly a familial one.[110] With the familial relationship having been successfully determined, the next enquiry was whether there was dependency between the parties, that is, if the parties were co-dependent on each other, or if one party was dependent on the other.[111] For the meaning of the terms "co-dependent" and "dependent", the court also turned to various dictionary meanings of the word "dependent", which are, *inter alia*, that one relies on another person or requires aid or support from another person.[112] The court then concluded that "loans between related parties or loans between parties where the one has some measure of control over the other are not loans between independent parties".[113] The court in *Heydenrych* next referred to the cases *Dayan v Dayan* (discussed next) and *Philip Claasen t/a Mostly Media v Delport t/a AD Industrial Chemicals*, *Fourie v Geyer*, and *Cloete v Van den Heever* (discussed in the next chapter). However, the court remarked that, although decided cases may be useful tools, every case should be decided on its own facts. Apart from being brothers-in-law, Heydenrych and Forsyth had known each other for a very long time, spent many family holidays and gatherings together, were

[107] *Heydenrych* par 8.
[108] *Heydenrych* par 8.
[109] *Heydenrych* pars 20 – 22.
[110] *Heydenrych* par 23.
[111] *Heydenrych* par 23.
[112] *Heydenrych* par 24.
[113] *Heydenrych* par 24.

emotionally close, and the respondent had invested in business ventures of the appellant to support the latter, *et cetera*. At the trial in the court *a quo*, the respondent testified that he and Heydenrych were in a familial relationship, and that the appellant was dependent on him.[114] The court consequently held that the credit agreement in this case fell within the ambit of section 4(2)(b)(iii) and was not at arm's length, and that the NCA thus did not apply.[115] However, the court subsequently considered the provisions of section 4(2)(b)(iv), which will be discussed later.

3.2.3.3 *Dayan v Dayan*[116]

Dayan v Dayan was also an appeal to the full bench of the Gauteng South Division of the High Court in Johannesburg. In this case, in spite of the fact that the court found that the agreement was not interest-bearing, and therefore not a credit agreement for purposes of the NCA, the court visited section 4(2)(b) of the Act. The court considered the fact that the parties who had entered into the credit agreement not only had a close relationship, but were actually half-brothers who had previously entered into a number of credit agreements, which comprised loans, transfer of immovable property, a contract of employment, and salary payments.[117] The court found that the parties were related to each other, and that the familial relationship between the two parties was thus established. The court noted that the loan agreement they had entered into was consequently not concluded at arm's length as required by the Act.[118] Moreover, the court established that the parties were dependent on each other, and ultimately did not strive to obtain the best possible advantage from their transaction, but this concerns section 4(2)(b)(iv), which is discussed next.[119]

[114] *Heydenrych* par 28.
[115] *Heydenrych* par 29.
[116] *Dayan v Dayan* 2011 JOL 27225 GSJ ("*Dayan*").
[117] *Dayan* par 9.
[118] *Dayan* par 9.
[119] *Dayan* par 9.

CHAPTER 4

SECTION 4(2)(b)(iv)(aa) OF THE NCA

4.1 Introduction

It has already been mentioned[120] that the provisions of section 4(2)(b)(iv)(bb) regarding any other arrangement "that is of a type that has been held in law" not to be at arm's length will only be referred to if necessary. This chapter discusses the provisions of section 4(2)(b)(iv)(aa), which have already been referred to, and which the courts seem to apply as an alternative to section 4(2)(b)(iii), irrespective of whether a familial relationship between the parties has already been established by the court.

4.2 Section 4(2)(b)(iv)(aa)

Section 4(2)(b)(iv)(aa) provides as follows:

> "[I]n any of the following arrangements, the parties are not dealing at arm's length:
>
> (iv) any other arrangement –
>
> (aa) 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."

The introductory words to section 4(2)(b)(iv)(aa), "any other arrangement", are important, and seem to indicate any other arrangement than those already discussed, namely where a controlling interest or a familial relationship and dependency or co-dependency are involved.

Section 4(2)(b)(iv)(aa) takes the issue of dependency further and essentially provides that any other arrangement will not be considered to have been entered into at arm's length if the parties are not independent of each other, and such parties, as a result, do not aim to gain the best possible advantage from the transaction.[121] Therefore, a dual test is once again pertinent, similar to the "familial relationship" arrangement discussed previously. Two aspects must be present for the arrangement to be classified as not being at arm's length, namely some form of dependency and the fact that the parties therefore do not aim for the best possible outcome from the transaction. Renke considers this section a "catch-all" provision, due to the use of the words "any other arrangement", and states that this phrase is in contrast to the other credit

[120] Par 1.4 above.
[121] Simpson 2013 *Without Prejudice* 8.

arrangements that are provided for in sections 4(2)(b)(i) to (iii). According to Renke, whether parties are dealing with each other at arm's length as per section 4(2)(b)(iv)(aa) is a factual question.[122] Renke uses the example of an employer extending a loan to an employee, and argued that the employment relationship and contract cause a form of dependency between the parties, which satisfies the first leg of the section 4(2)(b)(iv)(aa) test. However, whether the employer and employee are dealing within arm's length will depend on whether the parties strive to obtain the utmost possible advantage from the transaction. If the employee is granted the loan by the employer at a notably low interest rate, it may be argued that the employer does not necessarily aim to gain the best possible advantage from the transaction, and such a loan agreement will not be at arm's length.[123] The opposite is also true: if the employer charges interest at the same rate than the rate prevailing in the market at the time, the credit provider, on a balance of probabilities, strives to obtain the utmost possible advantage from the transaction, and the loan agreement is considered concluded at arm's length.

Renke's example is supported by Leppan, who states that it is common cause that employers will come to their employees' rescue in times of need by, for example, covering the costs of their education or an emergency.[124] The employment relationship between the employer and employee is what gives rise to the dependency, as the employee depends on the employer to remunerate the employee for the skills, capacity, and services rendered to the employer.[125]

Leppan further remarks that, in many cases, the employer not being in the business of providing credit is the factor upon which dependency is based. In such instances, the employer feels morally compelled to come to the employee's financial rescue by advancing the loan in a time of need, rather than striving to retrieve a profit from the transaction or to somehow benefit commercially.[126] However, this is not always a straightforward and easy procedure, and the transaction's nature and extent will have to be looked at in context to determine if the NCA applies to the loan agreement, and if, amongst other things, the transaction can be classified as being at arm's length.[127] As another example, if a mine advances staff loans to its employees at high interest rates, these loans will be considered to have been entered into at arm's length, and will thus fall within the ambit of the NCA.[128] However, it will be seen below that the

[122] Renke thesis par 7.2.3.2.
[123] Renke thesis par 7.2.3.2.
[124] Leppan "Do loans to employees fall within the ambit of the National Credit Act? 2007 *Without Prejudice* 6.
[125] Leppan 2007 *Without Prejudice* 6.
[126] Leppan 2007 *Without Prejudice* 6.
[127] Leppan 2007 *Without Prejudice* 7.
[128] Renke thesis par 7.2.3.2.

dependency ("each party is not independent of the other") between the credit provider and the consumer required in terms of section 4(2)(b)(iv)(aa) may arise from a variety of facts, such as friendship.

4.3 The interpretation of section 4(2)(b)(iv)(aa) by the courts

It has already been mentioned that the courts seem to refer to and apply the provisions of section 4(2)(b)(iv)(aa) as an alternative to the arrangements provided for in section 4(2)(b). Although the court in *Bester* focussed on the provisions of section 4(2)(b)(i) and (ii) and "controlling interest", it referred to the provisions of section 4(2)(b)(iv)(aa).[129] The courts in *Beets* and *Heydenrych*, subsequent to their discussions of a familial relationship, considered and applied section 4(2)(b)(iv)(aa). However, before the latter and other cases are discussed, it is noteworthy that most of the cases addressing the "at arm's length" principle in terms of the NCA refer to the decision in *Hicklin v Secretary for Inland Revenue*[130] as a point of departure. In *Hicklin*, the court described "at arm's length" as connoting that the parties are independent of each other, and that they, when they transact, will strive for the utmost possible advantage from the transaction.[131]

4.3.1 *Beets*

The application of section 4(2)(b)(iii) in *Beets* was discussed above.[132] The court, naturally, found that a mother and her daughter transacted as family members, but held that section 4(2)(b)(iii) did not find application because dependency could not be deduced from the pleadings. The court in *Beets* subsequently considered the application of section 4(2)(b)(iv)(aa), and remarked that, except for being family, there is no dependency between the parties.[133] The mother and daughter also strived to obtain the utmost possible advantage from the transaction for themselves. The plaintiff credit provider was satisfied to earn an income from the interest payments, and the defendant consumer was keen to acquire shares in the seaside property on favourable terms.[134]

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[129] *Bester* par 39. The court remarked that the reason underlying the at arm's length principle "is to prevent a situation where" followed by a quotation of s 4(2)(b)(iv)(aa) by the court.
[130] *Hicklin v Secretary for Inland Revenue* 1980(1) SA 481 (A) ("*Hicklin*").
[131] *Hicklin* par 495 A-B.
[132] Par 3.2.3.1.
[133] *Beets* par 7.
[134] *Beets* par 7.

The court next referred to *Hicklin* and a number of other cases. Arm's length regarding a property valuation where a claim for compensation for land that had been expropriated had been issued was defined as an open-market sale between a willing seller and a willing buyer in *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality*.[135] In *Commissioner, South African Revenue Service v Woulidge*, Froneman AJA submitted that a commercial arm's-length transaction on interest would be between a lender insisting on payment of interest charged and a borrower who has the ability to pay the interest.[136] In the instance that a debtor prefers one creditor over the others, the court in *Cooper and Another NNO v Merchant Trade Finance Ltd* held that it can be said that parties are dealing at arm's length if there is only the relationship of debtor and creditor between them.[137]

The court finally held that the plaintiff and the defendant were "in fact and in law" independent of each other, despite the fact that they had a mother–daughter relationship.[138] Although the interest that had to be paid was at a more favourable rate than normal, it was to be paid, and it was the parties' aim that they gain the maximum possible benefit from the transaction for themselves.[139] The plaintiff not only made a demand, but also issued summons when there was a breach of the repayment terms by the defendant-excipient. All considered, the court held that the parties transacted at arm's length, making their loan agreement to fall within the ambit of the NCA.[140]

4.3.2 *Heydenrych*

The court of appeal in *Heydenrych* applied section 4(2)(b)(iii) and held that the brothers-in-law *in casu* were family, with the one dependent on the other, that the transaction was within arm's length, and that the NCA was not applicable.[141] However, the court also briefly considered section 4(2)(b)(iv)(aa) and, based on the respondent credit provider's testimony at the trial, stated that the agreement did not benefit him in any way and that he did not strive to obtain the maximum advantage from the transaction. The court held that the latter, at least on a balance

[135] *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 (1) SA 670 (C) par 681J, "*Opera House*".
[136] *Commissioner, South African Revenue Service v Woulidge* 2002 (2) SA 68 (SCA) ("*Woulidge*").
[137] *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) ("*Cooper*"). See also *Commissioner for Inland Revenue v Malcomess Properties (Isando) (Pty) Ltd* [1991] 4 All SA 145 (A) at 152 A ("*Malcomess Properties*").
[138] *Beets* par 13.
[139] *Beets* par 13.
[140] *Beets* par 13.
[141] See par 3.2.3.2 above.

of probabilities, was true. The court in *Heydenrych v Forsyth* also held that the parties were not independent of each other. Forsyth would not have made a similar loan to anybody except to a "very familiar family member".[142]

In the case that friends venture into business together, it has been held by our courts that such an instance does not necessarily indicate dependency between the parties. A few examples of such cases are discussed next.

4.3.3 *Fourie v Geyer*[143]

The facts of the case concerned loans extended by Fourie, the applicant, to Geyer, the respondent, and an acknowledgement of debt ("AoD") signed by Geyer in favour of Fourie. Geyer, *inter alia*, argued the point *in limine* that the NCA applied to the AoD. Geyer further argued that the applicant had a duty to register as a credit provider, and that the agreement between the two parties was therefore unlawful per section 89 of the Act.[144]

Fourie pointed out that he had been friends with Geyer for 18 years, and that the financial help extended to the respondent in terms of the AoD does not fall under the NCA. He further emphasised the previous loans granted to Geyer, another loan that had previously been granted to Geyer by Fourie's wife, as well as a loan that had previously been granted to Geyer's daughter by Fourie.[145] Therefore, according to Fourie, the agreement per the AoD was not entered into at arm's length as required by section 4(1) of the Act.[146]

Arguing that the agreements between the two parties per the AoD were indeed entered into at arm's length, Geyer referred to section 4(2)(b) of the Act, and relied on the judgment in *Du Bruyn NO and Others v Karsten* in his argument.[147] Geyer further argued that the applicant's aim to obtain the best possible advantage from the transaction was demonstrated by the AoD's content, as well as the formal manner in which the AoD had been drafted, as it sought to retrieve the capital amounts owed, together with interest and litigation costs based on the attorney–client scale.[148] Geyer also contended that the amounts of money mentioned in the AoD were

[142] *Heydenrych* pars 28 and 29, "MM".
[143] *Fourie v Geyer* 2020 (6) SA 569 (NWM) ("*Fourie*").
[144] *Fourie* par 5.
[145] *Fourie* par 6.
[146] *Fourie* par 6.
[147] *Fourie* par 8; *Du Bruyn NO and Others v Karsten* 2019 (1) SA 403 (SCA).
[148] *Fourie* par 9.

business-related, and were advantageous to Fourie, as the AoD was mainly aimed at advancing Fourie's interests and obtaining the best possible contractual gains.[149]

The court had to determine whether there was a familial relationship between Fourie and Geyer, or if the agreement that the parties had entered into had been concluded at arm's length. The court also had to consider whether one or both parties benefitted from the relationship.[150]

The court pointed out that, due to the fact that the parties had been friends for 18 years, Fourie had lent financial help to Geyer and his family whenever they needed it.[151] The parties also entered into formal business contracts of rental agreements regarding property that Fourie owned.[152] Per Fourie's assertions, he was entitled to the commission from the respondent's immovable property when it was sold.[153] The court then held that the fact that the parties in this case were friends who concluded formal business transactions, with loans being granted by one friend to another when needed, does not necessarily take away from the fact that they entered into these agreements at arm's length.[154]

Pertaining to whether the AoD was a credit agreement as per the NCA, the court stated that, from a legal perspective, there were main features in the AoD that alluded to the fact that it was indeed a credit agreement entered into at arm's length.[155] Not only was there a capital amount in the agreement that bore interest, but payments were deferred, collection fees were levied, and the AoD mentioned possible litigation in the event of non-payment, plus the costs of litigation.[156] The court held that it is not ordinary that one would advance a loan to a family member and expect interest in return and make provision for litigation costs.[157]

Despite the fact that the parties had been friends for more than a decade, the loan agreements they concluded were pure business transactions that were significantly advantageous to Fourie. Thus, their relationship was not familial, and their transactions had been entered into at arm's length.[158] The court then concluded that, pertaining to sections 4(2)(b)(iii) and (iv), as well as section 8(4) of the NCA, the arm's-length requirement was met when the parties transacted

[149] *Fourie* par 10.
[150] *Fourie* par 16.
[151] *Fourie* par 18.
[152] *Fourie* par 18.
[153] *Fourie* par 18.
[154] *Fourie* par 18.
[155] *Fourie* par 20.
[156] *Fourie* par 20.
[157] *Fourie* par 20.
[158] *Fourie* par 21.

with each other, and that their relationship was not excluded by section 4(2)(b)(iii) and (iv).[159] Therefore, the NCA applied to the agreements that gave rise to the AoD, and the point *in limine* was decided in Geyer's favour.[160]

4.3.4 *Harris v Rossouw*[161]

The plaintiff, Harris, and the defendant, Rossouw, entered into an oral loan agreement, in terms of which Harris loaned Rossouw an amount of R515 361.[162] Harris then sought default judgment from the court to retrieve the loan amount, with interest.[163] According to the particulars of claim submitted, it was agreed upon by the parties that the loan amount would not only be repayable on demand, but would also bear interest at a rate as prescribed in the Prescribed Rate of Interest Act 55 of 1975.[164] Rossouw acknowledged her indebtedness to Harris by executing an AoD, in which she stated, amongst other things, that the amount loaned to her made a contribution towards expenses of her own and to establish her new business, called Biolab.[165] Harris was initially part of the business, when the loan amount was issued to Rossouw, but later chose to no longer be a part of the business. Rossouw also stated that she was not in a position to make a commitment to repaying the loan, due to the fact that she had not yet earned any income from the business.[166]

Since the loan agreement qualified as a credit agreement in terms of the NCA, which is the first enquiry that must be made by the court, Harris alleged that the loan agreement had not been entered into at arm's length.[167] Thus, the loan agreement did not fall within the ambit of the NCA, as this requirement was not met as per section 4(1) read with section 4(2)(b). Harris alleged that the loan agreement was merely an arrangement between the parties, whereby they were dependent on each other and did not necessarily aim or strive to retrieve the best possible advantage from the agreement.[168]

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[159] *Fourie* par 22.
[160] *Fourie* par 30.
[161] *Harris v Rossouw* [2019] ZAWCHC 75 ("*Harris*").
[162] *Harris* par 1.
[163] *Harris* par 1.
[164] *Harris* par 2.
[165] *Harris* par 2.
[166] *Harris* par 2.
[167] *Harris* par 3.
[168] *Harris* par 3.

However, it was difficult to discern the type of relationship that existed between the parties, because the particulars of claim submitted by the plaintiff shed no light in this respect.[169] Moreover, the particulars of claim neither provided insight into whether the parties were dependent on each other, nor did it elaborate on the either party's failure to strive to gain the best possible advantage from their transaction.[170] The allegations by Harris were only a regurgitation of the provisions in sections 4(2)(b)(iv)(aa) and (bb), with no substantiation regarding applicability.[171] Thus, these allegations in the particulars of claim did not clarify why it was said that the parties did not transact at arm's length as per the requirement of the NCA.[172]

From the AoD executed by Rossouw, it was apparent that she and Harris initially ventured into a business opportunity together.[173] Moreover, it was also apparent that part of the loan issued to Rossouw by Harris was meant to contribute towards the capital of the business.[174] Be that as it may, the particulars of claim of the plaintiff did not plead to this effect, and this was a matter of speculation by the court.

The court held that, albeit that Rossouw and Harris were friends who ventured into a business opportunity together, it did not necessarily mean that they were not independent of each other, nor that they did not strive to obtain the best advantage and profit from the transaction.[175] It could also not be correctly concluded that any other arrangement entered into by the parties under their business would not be at arm's length.[176] The fact that Rossouw had executed an AoD, as well as the loan's interest rate being specified, was indicative that the parties were indeed independent of each other when they entered into the loan agreement; therefore, the agreement was entered into at arm's length.[177]

4.3.5 *Philip Claasen t/a Mostly Media v Delport t/a AD Industrial Chemicals*[178]

In *Philip Claasen*, a provisional sentence was sought by the plaintiff against the defendant regarding two cheques drawn by the defendant in favour of the plaintiff in the amount of

[169] *Harris* par 4.
[170] *Harris* par 4.
[171] *Harris* par 4.
[172] *Harris* par 6.
[173] *Harris* par 7.
[174] *Harris* par 7.
[175] *Harris* par 7.
[176] *Harris* par 7.
[177] *Harris* par 7.
[178] [2009] ZAWCHC 84 (4 June 2009) ("*Philip Claasen*").

R129 578 each that were dishonoured upon presentment.[179] These cheques formed part of the many loans that the plaintiff had advanced to the defendant and recorded in various "I Owe U's".[180] The plaintiff contended that the loan agreements were not concluded at arm's length, and that the NCA was thus not applicable.[181] It was common cause that the parties were not only friends, but socialised and ventured into business together. The plaintiff brought forth an argument that he financially assisted the defendant, making the defendant dependent on him, thus meaning that the agreement between the parties was not concluded at arm's length.[182] However, the court came to a different conclusion, and held that the agreement between the parties had indeed been concluded at arm's length, because the parties were independent of each other, despite their friendship and social contact, and did, in fact, strive to gain the best possible advantage from the transaction. In coming to this conclusion, the court placed emphasis on the terms of the agreement between the parties, which imposed interest and penalties on arrears, and held that the agreement fell within the scope of the NCA.[183] Importantly, the court remarked that "friendship *per se* does not necessarily mean that the parties are not dealing 'at arm's length'".[184]

4.3 *Cloete v Van den Heever*[185]

With regard to credit agreements concluded between parties who are considered close acquaintances, at an interest rate that the bank charges to the credit provider, the court in *Cloete* found that such an agreement had not been entered into at arm's length.[186]

Section 4(2)(b)(iii) clearly concurs with the Memorandum on the Objects of the National Credit Bill, 2005, where it was expounded that the NCA's initial intention was not to deal with loans that are extended informally between members of the same family, partners, or friends.[187]

[179] *Philip Claasen* par 1.
[180] *Philip Claasen* par 1.
[181] *Philip Claasen* par 3.
[182] *Philip Claasen* par 9.
[183] *Philip Claasen* par 14.
[184] *Philip Claasen* par 9.
[185] *Cloete v Van Den Heever* 2013 JDR 1075 (GNP) ("*Cloete*").
[186] Van Zyl in Scholtz ed par 4.2.
[187] *Opperman v Boonzaaier* (24887/2010) 2012 ZAWCHC 27 (17 April) par 28 ("*Opperman*").

4.3.7 *Friend v Sendal*[188]

This often-cited case was heard by a full bench of the High Court in Pretoria. The appellant (Friend) acknowledged his indebtedness to the respondent (Sendal) for the amount of R1 225 000 in writing, and undertook to not only pay this amount fully on or before 1 December 2007, but to also pay interest on the amount, calculated at the prime rate charged by Standard Bank.[189] However, on 1 December, Friend failed to pay back the full amount as per his AoD, and issued payment for only a portion of the capital amount; thus, the capital amount outstanding was R620 000.[190]

Motion proceedings for the payment of R620 000 plus interest were then brought by Sendal against Friend.[191] Friend, the appellant, raised two defences in the court *a quo*; the first was the fact that the AoD he executed was a credit agreement in terms of the NCA, and that the respondent thus did not have the prerogative to bring an application against the appellant without having furnished a section 129 debt enforcement notice in terms of the Act.[192] The appellant further argued that, in view of the fact that the AoD was indeed a credit agreement, this meant that the agreement was null and void, because Sendal was not registered as a credit provider as required by section 40(1)(b) of the NCA.[193] I will focus on the court's judgment regarding section 4(2)(b) of the NCA.

In the court *a quo*, one of the questions that had to be answered was whether Friend and Sendal were dealing with each other at arm's length, and if an AoD falls within the ambit of the NCA.[194]

The court had difficulty in reconciling the principle of at arm's length with the facts of the case, and stated that, if the AoD was indeed a credit agreement as found by the court *a quo*, then the NCA should find application to it.[195] The court further stated that whether the parties had transacted at arm's length was irrelevant, and that registration would still not have been required as per section 40 of the Act. [196]

[188] *Friend v Sendal* 2012 ZAGPPHC 162, 2015 (1) SA 23 (GNP) ("*Friend*").
[189] *Friend* par 4.
[190] *Friend* par 5.
[191] *Friend* par 6.
[192] *Friend* par 7.
[193] *Friend* par 7.
[194] *Friend* par 29.
[195] *Friend* par 30.
[196] *Friend* par 32.

The court then stated that the establishment that the AoD was indeed a credit agreement for purposes of the NCA did not necessarily mean that the respondent was obligated to register as a credit provider.[197] Moreover, the court agreed with the finding of the court *a quo* that the parties transacted at arm's length, and stated that sections 4(2)(b)(iv)(aa) were of significant importance.[198] The facts of the matter were indicative that the parties had a familial relationship, and that the AoD executed was concluded between the two parties. Furthermore, the series of electronic mails that Friend sent to Sendal alluded to the fact he was dependent on Sendal.[199] Consequently, concessions were made by Sendal in order to accommodate Friend throughout the issuing of payment of the outstanding amount.[200] It was also not apparent that Sendal strove to obtain the best possible advantage from the transaction at Friend's expense.[201] Judging from the wording of the electronic mails from Friend to Sendal, the court finally held that the parties did not transact with each other at arm's length, and, as such, the NCA was not applicable to their agreement, despite the fact that the transaction was a credit agreement as per section 8(4) of the NCA.[202]

[197] *Friend* par 32.
[198] *Friend* par 33.
[199] *Friend* par 35.
[200] *Friend* par 36.
[201] *Friend* par 36.
[202] *Friend* par 36.

CHAPTER 5

CONCLUSIONS

5.1 Introduction

The introduction of the "at arm's length" principle into the South African consumer credit legislation in terms of the NCA is to be welcomed. It is in accordance with the Memorandum on the Objects of the National Credit Bill, 2005, a policy document that preceded the promulgation of the NCA and made the underlying reasoning of the legislature clear that it was never the intention with the latter to make credit agreements informally concluded between members of the same family, partners, or friends subject to the Act.[203] This is also in line with the objectives of the Act[204] to, *inter alia*, protect the consumer, and it makes sense that a loan between a father and son, at least theoretically, should not require the NCA's protection. This is in contrast to a loan between the same son and a financial institution. In the latter instance, there is complete independence between the parties to the credit agreement, and that is what "at arm's length" is, which is a prerequisite in order for the NCA to be applicable.[205] Independence necessitates consumer protection.

The legislature opted not to define "at arm's length", but rather to provide for "within arm's length" arrangements in section 4(2)(b)(i) to (iv), in which instances, according to the legislature, consumer protection is forfeited.[206] The provisions of section 4(2)(b)(i) to (iv) make it clear that within arm's length centres around dependency, indicated by "controlling interest", "familial relationship", "co-dependent", "dependent", and "each party is not independent". If the underlying policy referred to above is considered, it must be endorsed that the list of "within arm's length" arrangements is not a closed list.[207]

[203] See *Opperman* par 28, where the Memorandum is referred to.
[204] Par 2.2.
[205] Pars 1.1.
[206] Par 1.1 and chs 2– 4.
[207] Par 2.1.

5.2 The provisions of section 4(2)(b)

The NCA has been criticised over the years by the courts and academics for a lack of clearly drafted provisions. The comment by the Supreme Court of Appeal in *Du Bruyn NO v Karsten*[208] that "the National Credit Act 34 of 2005 (the NCA) is not a model of clarity" serves as an example. However, the provisions of section 4(2)(b) do not seem to create serious interpretation problems for the courts, which is supported by the fact that section 4(2)(b) remained unchanged despite two major amendments to the Act, in 2014/5 and in 2019. I am also of the opinion that the wide ambit of the subsection and, for instance, the legislature not defining concepts such as "controlling interest" and "familial relationship" should be welcomed, due to the discretion afforded to the courts to interpret these provisions liberally and in line with the objectives of the NCA.

The only uncertainty is section 4(2)(b)(iv), the catch-all "within arm's length" provision, and its interrelation with the arrangements in section 4(2)(b)(i) to (iii). Section 4(2)(b)(i) to (iv) seem to be listed separately. The sub-provisions are separated with a semicolon, and section 4(2)(b)(iii) is separated from section 4(2)(b)(iv) with the word "and". The introductory part to section 4(2)(b)(iv) refers to "any other arrangement", which seems to indicate any other arrangement than those already mentioned in section 4(2)(b)(i) to (iii) ("controlling interest" and "familial relationship"). However, the courts do not seem to consider the section 4(2)(b) arrangements, and, for example, intermix section 4(2)(b)(iii) and (iv).[209] Clarity by the legislature in this regard will be welcomed.

5.3 The interpretation by the courts

The interpretation of the provisions of section 4(2)(b) of the NCA by the courts[210] cannot be faulted. The courts, in accordance with section 2(1) of the NCA, interpret the Act in order to give effect to its objectives, listed in section 3. The courts also seem to 'adhere' to the remark by Henney J in *Bester*, namely that context is crucial in determining the meaning of phrases in legislation. The only uncertainty is whether the courts are correct to even consider the provisions of section 4(2)(b)(iv) where, for instance, a mother and daughter are "in fact and in

[208] Par 1.
[209] E.g., *Beets* and *Heydenrych* in pars 3.2.3.1, 3.2.3.2, 4.3.1, and 4.3.2 respectively.
[210] Pars 2.3.3, 3.2.3, and 4.3.

law" independent. The opposite of this "at arm's length" arrangement is patently provided for in section 4(2)(b)(iii).

5.4 Final remarks

The NCA, the legislative enactment currently protecting South African consumers, was never intended to provide blanket protection to all consumers irrespective of whether protection is required. Only those consumers entering into a credit agreement with a credit provider whose business it is to provide credit, even if it is to a friend to assist the latter with, for instance, a business venture, should be protected. The introduction of the "at arm's length" principle into our credit laws as a prerequisite for the application of the legislation that aims to protect the consumer, the NCA, accordingly makes perfect sense.

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