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Golden Bridge Tutoring

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Semester Test 2 Notes

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Semester

Test 2 Notes



Golden Bridge Tutoring

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Theme 1: Study Unit 1

Introduction and background of the NCA

- Define credit(1)

Section 1 of the Act defines it as the "deferral of payment of money owed to a person, or a promise to defer such a payment".

- What are the advantages of credit?(4)
 - Enables consumers to access goods and services immediately without full upfront payment.
 - Promotes economic growth by encouraging consumer spending and business investment.
 - Allows businesses to expand and manage cash flow effectively.
 - Provides individuals with financial flexibility in emergencies or large purchases.
- What are the disadvantages of credit?(4)
 - Can lead to over-indebtedness if consumers borrow irresponsibly.
 - Increases financial risk for both lenders and consumers.
 - May result in high interest charges and hidden costs.
 - Can contribute to economic instability when large portions of the population are unable to repay debt.
- What does credit entail?(3)
 - A promise to advance or pay money to or at the direction of another person.
 - Therefore, credit is money that is lent and borrowed as a monetary loan, or as any part of the purchase or lease price of goods or services not paid immediately but deferred for later settlement.
 - The NCA, in certain circumstances, also applies to contracts for the sale of land in instalments.
- Historical Background to the NCA(3)
 - **Hire-Purchase Act → Credit Agreements Act:**
 - Regulated the contractual aspects of credit (e.g., installment sales, hire-purchase agreements). Focused on the relationship between credit providers and consumers.
 - **1926 Usury Act → 1968 Usury Act:**

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- Controlled the financial aspects of credit, especially interest rates and credit charges. The 1968 Act modernised these financial controls but excluded many low-income consumers from formal credit.
- **National Credit Act (2005, fully effective 1 June 2007):**
 - Repealed both the Credit Agreements Act and the Usury Act.
 - Combined contractual and financial regulation into one comprehensive law.
 - Aimed to promote fair, transparent, and accessible credit, and align credit law with South Africa's constitutional and socio-economic goals.
- What is the place of Credit Agreements in the South African Legal System?(3)
 - Credit agreements form part of South African private law, as they create obligations between individuals.
 - These agreements regulate the contractual relationship between a credit provider and a consumer, outlining each party's rights and duties.
 - Since they deal with the performance of obligations arising from private transactions, credit agreements fall under the broader field of the law of obligations within contract law.
- What is the essential characteristic of all credit agreements(1)
 - The deferral of payment, meaning that cash transactions are not relevant.
- What is the function of credit?(1)
 - Credit enables consumers who cannot, or choose not to, pay in cash for products or services, to have the use of such products or services prior to their having paid for it.
- What is the importance of credit?(1)
 - Due to the unequal bargaining position between credit providers on the one hand and consumers on the other, this unequal position may easily be misused in order to exploit the consumer.
- What is the aim of credit legislation?(1)
 - To protect the consumer from exploitation by credit providers.
- Who drafted it?(1)
 - It was drafted by Canadian experts and written in English and Zulu.
- When was the NCA assented?(1)
 - 10 March 2006
- When did the NCA come into effect?(1)

- 1 June 2006
- When was the Act amended?(3)
 - The National Credit Amendment Act 19 of 2014, effective 13 March 2015, and
 - Further subsequent amendments to strengthen consumer protection and credit regulation.
- What of the composition of the NCA?(3)
 - 173 sections
 - 3 schedules
 - Accompanying regulations and prescribed forms
- The NCA aims to transform and democratise the credit market by:(4)
 - Promoting fair access to credit for historically disadvantaged groups.
 - Preventing reckless lending and over-indebtedness.
 - Ensuring responsible credit marketing and transparent disclosure of costs.
 - Supporting the Constitutional values of equality, human dignity, and economic inclusion.
- Which bodies interpret the NCA?(1)
 - The NCT and courts, the must interpret it in a manner that gives effect to the purposes that are highlighted in section 3
- What are the purposes of the NCA according to section 3
 - 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".
- What is the function of **section 3(d)**

Is directed at promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers.

- Does the NCA apply to contracts for the sale of land?(1)

It does under certain circumstances, but the same contracts are primarily regulated in terms of another piece of consumer protection legislation, the ALA.
- What is the practical relevance of the NCA?(4)
 - The credit industry in South Africa is worth approximately R2.43 trillion.
 - The Act applies to almost all agreements in which credit is granted (unless specifically excluded).
 - In legal practice, there are around 3,000 credit-related cases each year.
 - As consumers ourselves, we all require protection from unfair or exploitative credit practices.
- What are the key parties under the NCA?(2)

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- Consumer:
 - The person to whom credit is provided, for example, a purchaser, borrower, or lessee.
- Credit Provider:
 - The person or institution who provides the credit, for example, a seller, lender, or lessor.

Theme 1: Study Unit 2

Scope of application of the NCA

Introduction

- Define a credit provider(1)

According to section 1 of the NCA, the credit provider is the party which supply's goods or services, or advances money or credit in terms of a credit agreement to the consumer (the party to whom goods or services are sold, to whom money is paid or credit is granted).

- When is the NCA applicable?(4)

1. **A Credit Agreement Was Concluded:**

Confirm that a valid credit agreement (CA), as defined in the NCA, has been entered into.

2. **The Parties Are Dealing at Arm's Length:**

The agreement must be between parties acting independently and not related in a way that affects the fairness or commercial nature of the transaction.

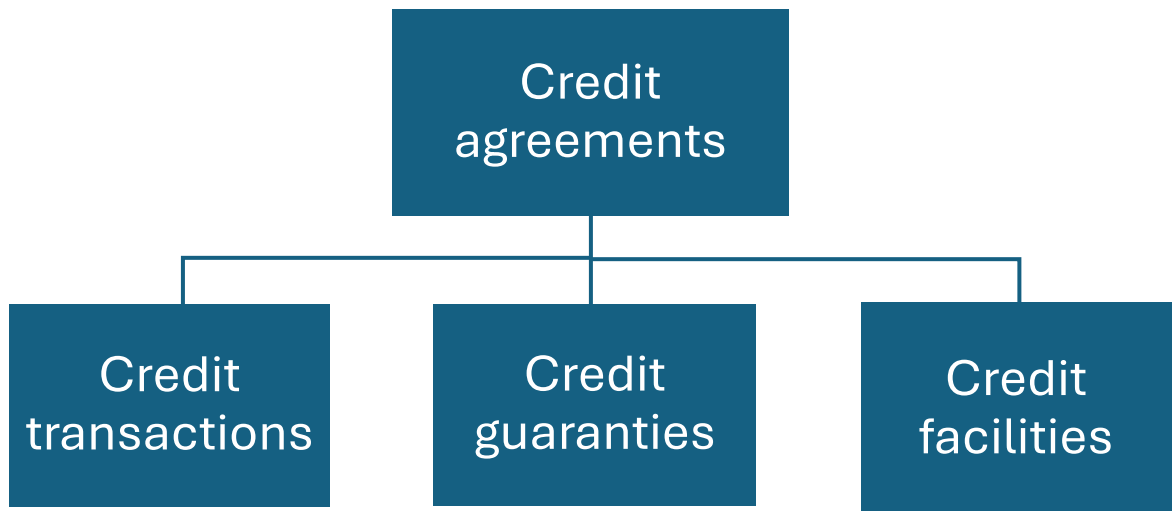
3. **The Agreement Was Made Within or Has Effect in the Republic of South Africa:**

The NCA applies if the agreement was entered into in South Africa or has legal or practical effect within the country.

4. **No Statutory Exception Applies:**

Check that no exclusions listed in the NCA (e.g. certain large corporate transactions, state credit agreements, or incidental credit agreements) apply to the transaction.

- What if the NCA does not apply to the credit agreement?(2)
 - It is possible for the parties to render the NCA in part or in its totality applicable to such an agreement by means of consensus.
 - This may, for instance, be done where one of the exceptions to the scope of application of the Act is relevant.
- Discuss RMB Private Bank a Division of First Rand Bank Ltd v Kaydeez Therapies CC
 - The court held that the parties to a credit agreement that is not subject to the Act, may incorporate certain provisions of the Act into their agreement, whereupon such provisions will form part of their agreement by means of consensus.
 - However, the mere fact that the parties erroneously referred to the Act in their agreement, does not render the Act applicable in its totality.
- Discuss First National Bank (a Division of First Rand Bank Ltd) v Clear Creek Trading (Pty) Ltd's
 - The court held that the parties may indeed by means of agreement subject their credit agreement to the whole Act.
 - Both the stated cases confirmed that the agreement between the parties (to subject their credit agreement to the Act or part thereof) will only be valid between themselves, and will not be binding on any third party, such as the NCR.
- The Act applies to a (proposed) credit agreement irrespective of whether the credit provider(4)
 1. resides or has its principal office within the Republic or not;
 2. is an organ of state or an entity controlled by an organ of state (except the Reserve Bank of South Africa);
 3. is an entity created in terms of any public regulation; or
 4. is the Land and Agricultural Development Bank.
- Define a credit agreement(2)
 - An agreement constitutes a credit agreement to which the Act applies if it qualifies as a credit facility, credit transaction, credit guarantee, or a combination thereof.
 - The overarching term is thus "credit agreement", which comprises of the mentioned main types of credit agreements.



Credit facility

- An agreement constitutes a credit facility in terms of section 8(3) if a credit provider undertakes:(2)
 1. to supply goods or services or to pay an amount or amounts to a consumer, "as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer;" and
 2. to either:
 - (i) defer payment of the cost (or part thereof) of such goods or services or to defer repayment of any part of such amount; or
 - (ii) bill the consumer periodically for any part of such costs or amount; and any charge, fee or interest is payable to the credit provider.
- What are the three characteristics of a credit facility(3)
 1. **Revolving Credit:**
 - According to section 8(3) It means that payments effected by the consumer create new or additional credit that can be used by the consumer.
 2. **Payment Deferred:**
 - The consumer is allowed to pay later for goods, services, or money received now.
 - This creates a debt obligation that must be settled over time.
 3. **Interest Levied:**
 - Interest is charged on amounts that are either:
 - Deferred (not yet due), or

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- Billed but not paid within the agreed contractual period.
- What are the types of credit facilities?(3)
 1. **Undertaking to Supply Goods on a Revolving Credit Basis**
 - This involves a contract of purchase and sale where goods are supplied on revolving credit terms.
 - The consumer may make repeated purchases up to a set credit limit, repaying amounts over time.
 - Example: In-store or retail credit card transactions (e.g. Edgars, Jet, or Truworths accounts).
 - Interest is charged on any deferred (unpaid) amounts.
 - Transfer of Ownership: Usually, ownership passes immediately upon purchase, even though payment is deferred.
 - Distinction: Unlike instalment sale agreements, payment here is flexible and revolving, not fixed in instalments for a specific item.
 2. **Undertaking to Supply Services on a Revolving Credit Basis**
 - The credit provider undertakes to supply services (rather than goods) on ongoing credit terms.
 - This category is less significant in practice.
 - Example: Certain subscription or utility accounts that allow deferred payment.
 3. **Undertaking to Pay an Amount or Amounts on Behalf of a Consumer**
 - Involves revolving credit money-lending arrangements, where the credit provider pays amounts on behalf of the consumer, who must repay later.
 - Examples:
 - Credit cards
 - Bank overdrafts on cheque or current accounts
 - The consumer can borrow, repay, and borrow again within the approved credit limit.
- What does a credit facility include?(1)
 - Sale contracts for movable goods on revolving credit
 - Contract for rendering of services
 - Revolving credit money loans
- What is the difference between a credit facility and an instalment agreement?

Credit facility ((Section 8(3))	Instalment Agreement (Section 8(4)(b))
Allows a consumer to purchase goods or services and defer payment (e.g. store accounts, credit cards).	A sale agreement where the consumer pays the purchase price in instalments over time.
The NCA does not require the agreement to address transfer of ownership, thus, common-law rules apply (ownership usually passes to the consumer upon delivery).	The NCA requires the agreement to specify that ownership passes only after full payment of the price (the transfer of ownership must be addressed).
Usually involves revolving credit , once a payment is made, the available credit is restored.	Involves fixed-sum credit , the amount owed decreases with each payment, and no new credit is created

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Interest runs from the outset, and the main purpose is for the credit provider to earn profit through interest.	Interest applies to the fixed amount owed, usually linked to the purchase price and payment period.
Store account, credit card, or overdraft facility.	Hire-purchase or instalment sale of movable goods (e.g. buying a car on instalment).

Credit transaction

- List the types of credit transactions(8)
 1. Pawn transaction
 2. Discount transaction
 3. Incidental credit agreement
 4. Instalment agreement
 5. Mortgage agreement
 6. Secured loan
 7. Lease agreement
 8. Other credit agreements
- Discuss Pawn transactions
 - These are agreements in terms of which a party advances money or grants credit to another, and takes possession of goods as security for the money advanced or credit granted.
 - Either the estimated resale value of the goods exceeds the value of the money advanced, or credit granted or a charge, fee or interest is imposed.
 - On expiry of a defined period the party who took possession of the goods as security is entitled to sell the goods and retain "all the proceeds of the sale in settlement of the consumer's obligations under the agreement".
 - The Act, therefore, applies to normal pawn broker transactions.
 - The NCT held that it is an inherent requirement in the case of a pawn transaction that the pawned goods must remain in the possession of the credit provider.
 - Therefore, a transaction in terms whereof the goods are returned to the consumer immediately, is not a pawn transaction
- Discuss **NCR v The Loan Company (Pty) Ltd**
 - The NCT held that the credit provider is not entitled to the entire proceeds of the sale under circumstances where the proceeds of the sale of the pawned goods exceeds the consumer's outstanding obligations to the credit provider in terms of the agreement.
 - The surplus must be paid to the consumer.
 - However, if there is a shortfall, in other words if the pawned goods are sold for less than the amount due to the credit provider in terms of the agreement, the credit provider has no further recourse against the consumer to claim the shortfall.
 - Loan Company (Pty) Ltd v NCR (SCA): the SCA confirmed the decision of the NCT in NCR v The Loan Company

- **Discuss NCR v CMR Group (Pty) Ltd**
 - An inherent requirement of a pawn transaction is that the pawned goods must remain in the possession of the credit provider.
 - This means the borrower cannot retain the goods as security; possession by the credit provider is essential for the validity of the pawn agreement.
- **Discuss Discount transactions**
 - These are agreements in terms of which goods or services are to be provided to a consumer over a period of time and where a **lower and higher** price is quoted for the goods or services.
 - The lower price is payable if the account is settled on or before a determined date.
 - If payment occurs after that date, or is paid periodically during the period, the higher price(s) will apply.
 - The following is an example: P purchases goods that are to be provided to P over a period of time. The price of the goods is R5 000 provided P pays for it before a certain date. If P pays after that date the price is R6 500.
- **Discuss incidental credit agreements**

These are agreements in terms of which an account was tendered for goods or services that have been provided to the consumer and either or both of the following conditions apply:

1. 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.
2. A lower or higher price was quoted for settlement of the account. If the account is settled on or before a determined date, the lower price applies. After that date the higher price will be payable.
 - To charge or recover any fee, charge, or interest, the amount or basis must be disclosed to and accepted by the consumer on or before the date the goods or services are supplied.
 - Dealer obtains stock from supplier; the agreed price is payable within 30 days from delivery or invoice date. Interest is only levied after the 30-day period if the account is not paid.
 - Section 5(2) of the NCA provides that the agreement is deemed to be made 20 business days after:
 - A late payment fee or interest is first charged, or
 - A higher price for late settlement becomes payable.
 - The rendering of an account and the charging of a fee, interest, or higher price are required for an incidental credit agreement to come into existence.
 - In terms of utilities, they can also be incidental credit agreements if:
 - Payment is deferred until a periodic account is issued, and
 - No charge is made for the deferral unless the consumer fails to pay on time.
 - Payment must be allowed at least 30 days after the statement is delivered.

- Also referred to as “overdue accounts.”
 - The National Credit Act (NCA) applies only partly to incidental credit agreements.
 - For example, the reckless credit provisions do not apply to them.
- Discuss instalment agreements
 - These entail the sale of movable goods where payment of the price or part thereof is deferred and is to be paid by means of periodic payments.
 - Possession and use of the goods (property) are transferred to the consumer immediately.
 - Interest is usually levied.
 - Ownership reservation clause:
 - Ownership remains with the seller until the consumer fulfils the agreement.
 - If no such clause, ownership may pass to the consumer immediately.
 - Importance of ownership reservation clause: Protects the seller’s interest if the consumer defaults.
 - Examples: Furniture, appliances, vehicles purchased on instalments.
 - Distinction from credit facilities:
 - Instalment agreements: Sale contract with specific terms for deferred payment.
 - Credit facilities: Offer ongoing access to credit without fixed repayment of each item; the transfer of ownership may differ.
- Discuss Mortgage agreements
 - These are credit agreements that are secured by the registration of a mortgage bond at the Office of the Registrar of Deeds for immovable property.
 - If, for example, a money lending contract with the purpose of financing the purchase price of a home is secured by the registration of a bond over immovable property, it constitutes a mortgage agreement.
 - The legislature did not require the charging of interest or any other fee or charge in the case of this type of agreement.
- Discuss Secured loans
 - A secured loan is an agreement (excluding an instalment agreement) in terms of which a person advances money or grants credit to another and retains or receives a pledge of movable goods or another thing of value as security for all amounts due under that agreement.
 - Although the legislature did not specifically exclude pawn transactions and mortgage agreements from the definition of a secured loan, they do not form part of secured loans because they are defined separately in the Act.
 - The definition of a secured loan does not require the charging of interest or any other fee or charge.
 - Certain notarial bonds serve as examples of secured loans.
 - Although the definition of the secured loan overlaps with the definition of the pawn transaction, the NCT held that in the case of the secured loan, the credit provider "retains, or receives a pledge to any movable property or other thing of value as security for all amounts due under that agreement" , and not the asset itself.

- Interest is generally not required
- Discuss Leases
 - A lease is an agreement in terms of which temporary possession of any movable goods is delivered to the consumer or the right to use any such goods is granted to the consumer.
 - Payment is made on an agreed or determined periodic basis during the term of the agreement or deferred in whole or in part for any period during its existence.
 - Interest, fees or other charges are payable to the credit provider.
 - At the end of the term of the agreement, ownership of the movable goods either passes to the consumer absolutely or on satisfaction of specific conditions set out in the agreement.
- Discuss Absa Technology Finance Solutions v Michael's Bid a House CC 2013 (3) SA 426 (SCA)
 - A “rental” agreement where a bank buys equipment and lets a business use it, but the business must return it to the bank at the end of the lease, is **not considered a lease or a credit agreement under the Act.**
- Discuss other agreements
 - They fall under section 8(4)(f)
 - In terms of which payment of an amount owed by one person to another is deferred
 - A fee, charge or interest is payable to the credit provider
 - This is a "catch-all provision" and has the aim to bring credit agreements that do not form part of one of the definitions of the nominate credit agreements discussed above, within the Act's ambit of protection.
- Discuss Evans v Smith 2011 (4) SA 472 (WCC)

In this case, the court confirmed that a typical personal loan, where a lender gives money to a borrower and the borrower must repay it (often with interest), falls under the category of “other agreements” in section 8(4)(f) of the NCA.

- Discuss Ratlou v Man Financial Services
 - An acknowledgement of debt (settlement agreement) which is not a mere novation, and which provides for deferral of payment and interest, fees or charges, may serve as a further example of the other agreement.
 - However, the latter will only be true if the underlying contract or causa in respect to which the acknowledgement of debt is concluded is governed by the Act.
 - If not, for instance in the case of a settlement agreement in respect of which the payment of damages is postponed, the acknowledgement of debt does not constitute a separate other agreement.
- Discuss Carter Trading (Pty) Ltd v Blignaut 2010 (2) SA 46 (ECP)
 - In this case, Blignaut signed an acknowledgement of debt in favor of Carter Trading for goods purchased. The underlying causa was a commercial transaction involving the sale of goods.

- The court found that the acknowledgement of debt fell within the scope of the NCA, specifically under section 8(4)(f), which defines “other credit agreements.” The terms of the AOD included deferred payment and the payment of interest, which are indicative of a credit transaction. Therefore, the court held that the AOD was subject to the NCA
- **Discuss Grainco (Pty) Ltd v Broodryk NO 2012 (4) SA 517 (FB)**
 - In this case, the acknowledgement of debt was concluded to settle a claim for damages. The plaintiff agreed to defer the payment of damages by the defendants. This arrangement was not a money-lending transaction but a settlement of a legal dispute.
 - The court held that the acknowledgement of debt did not constitute a credit agreement under the NCA. The underlying causa was a damages claim, not a money-lending transaction. The court emphasized that the NCA was not intended to regulate settlement agreements arising from legal disputes

Credit guarantee

- When does an agreement constitute a credit guarantee?(1)
 - An agreement constitutes a credit guarantee if a person in terms thereof undertakes or promises to satisfy on demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the Act applies.
- When does the act apply?(1)
 - The Act applies to a credit guarantee only to the extent that it applies to a credit facility or credit transaction in respect of which the credit guarantee is granted
- **Discuss Firststrand Bank v Carl Beck Estates 2009 (3) SA 384 (T)?(1)**
 - Suretyship agreements concluded in respect of either a credit facility or credit transaction subject to the Act are therefore covered by the Act as well. However, should a credit guarantee, for example, be concluded in respect of a lease of immovable property, the NCA does not apply to the credit guarantee because the Act does not apply to the lease.
- **Discuss Shaw v Mackintosh(1)**
 - The court confirmed in Shaw v Mackintosh that an agreement only constitutes a credit guarantee in terms of section 8(5) of the Act if the credit guarantee is entered into in respect of either a credit facility or a credit transaction which is subject to the Act.

- Discuss Investec Bank Ltd v Louw; Louw v Minister of Trade and Industry [2012] ZAWCHC 170
 - The Western Cape High Court considered whether the exclusion of suretyship agreements from the NCA's protection was unconstitutional.
 - The Louw brothers had signed unlimited suretyships to secure their company's loans and argued that the NCA should apply to them.
 - The court held that suretyships are distinct from ordinary credit agreements and that individuals signing them in a business context are not considered vulnerable consumers.
 - The legislature's exclusion of such agreements from the NCA was therefore **constitutional**, as the NCA is intended to protect those who are vulnerable in credit transactions, not business persons acting with knowledge and bargaining power.
 - Consequently, the court upheld the enforceability of the unlimited suretyships, emphasizing that business owners or directors cannot rely on the NCA for protection when entering into such agreements.
- Combination of transactions(2)
 - Instalment sale: The consumer purchases goods and ownership may be reserved by the seller until payment is complete.
 - Payment over a period of time via credit card (on budget): The consumer pays for goods or services in periodic instalments, often involving a credit agreement.
- What are the main features of a credit transaction?(2)
 1. Deferral of payment:
 - The consumer delays full payment for goods or services.
 - Usually accompanied by a fee, charge, or interest for the credit.
 2. Prepayment of debt with discount:
 - The consumer pays upfront or earlier than required.
 - Often results in a discount for early settlement.

Size categorisation of credit agreements

- To facilitate effective regulation of the consumer credit industry, the NCA provides for:(3)
 1. Small credit agreements. Pawn transactions, a credit facility with a credit limit of R15 000 or below or any other credit transaction (except a mortgage agreement) with a principal debt of R15 000 or below.
 2. Intermediate credit agreements. A credit facility with a credit limit above R15 000 or any credit transaction (except a pawn transaction or a mortgage agreement) with a principal debt above R15 000 and below R250 000).
 3. Large credit agreements. A mortgage agreement or other credit transaction (except a pawn transaction) with a principal debt of R250 000 or above.

Transactions specifically excluded

- State the rule under [section 4\(1\)](#)

The parties to a credit agreement must deal at arm's length in order for NCA to be applicable. If parties do not deal at arm's length (or then within arm's length) then the NCA is not applicable.

- What is a juristic person in terms of the Act?(1)

It includes partnerships, associations or other bodies of persons, corporate or unincorporated, and trusts are included, provided that the particular trust has three or more individual persons as trustees, or that the trustee of that trust is a juristic person, such as a company.

- When is the NCA not applicable in terms of the arm's length principle?(4)

In the following instances the parties are **not** dealing at arm's length and the Act does not apply to such agreements:

1. A shareholder loan or other credit agreement between a juristic person (as the consumer) and a person who has a controlling interest in that juristic person (as the credit provider)
 2. A loan to a shareholder or other credit agreement between a juristic person (as the credit provider), and a person who has a controlling interest in that juristic person (as the consumer),
 3. A credit agreement between natural persons who are in a familial relationship and are codependent on each other **OR** one is dependent on the other.
 4. Any other arrangement in which each party is dependent of the other **AND** consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction. An example of this arrangement is an employer who extends a loan to an employee against a nominal interest rate.
- [Discuss Bester v Coral Lagoon Investments 232 \(Pty\) Ltd \[2013\] ZAWCHC 27 paras 31-42](#)

The "controlling interest" in this instance cause the credit agreement to be within arm's length.

- [Discuss Beets v Swanepoel \[2010\] JOL 26422 \(NC\)](#)

The concepts "familial relationship" and "co-dependent" or "dependent" are not defined in the Act and, therefore, the question whether the parties deal at arm's length is a factual one.

- [Discuss Forsyth v Heydenrych \[2022\] ZAGPJHC 391](#)

The court held that the term “family” extends to include brothers-in-law. In this case, two brothers-in-law who had known each other for 35 years and were not independent of one another entered into a credit agreement. The court found that their agreement was **not concluded at arm’s length**, given the close familial relationship and lack of independence between the parties.

- Discuss *Cloete v Van den Heever* 2013 JDR 1075 (GNP)

The court considered a credit agreement entered into between close acquaintances, where the interest rate charged mirrored that imposed on the credit provider by his bank. It was held that despite the parties’ close relationship, the agreement was **concluded at arm’s length**, as the terms reflected those that a reasonable third party would expect in similar circumstances.

Direct exclusions from the scope of application of the NCA

- Which juristic entities are excluded?(1)

Credit agreements where the consumer is a juristic person whose asset value or annual turnover (including that of related juristic persons) equals or exceeds R1 million at the time the agreement is made, are excluded from the NCA.

- What is the definition of a related juristic entity?(2)
 - It is stated s 4(2)(d) that a juristic person is related to another if:
 - One has direct or indirect control over the whole or part of the business of the other; or
 - A person has direct or indirect control over both of them.
- Discuss *Nedbank v Wizard Holdings* 2010 (5) SA 523 (GSJ)

If the consumer is a juristic person that concludes a large credit agreement, the NCA is not applicable, irrespective of the consumer’s asset value or annual turnover

- Discuss large agreements with smaller juristic persons(2)
 - Large credit agreements where the consumer is a juristic person whose asset value or annual turnover is below R1 million are also excluded from the NCA.
- Discuss the limited application where the NCA does apply(1)

Where the NCA does apply to credit agreements involving juristic persons, it applies **only to a limited extent**.

- Discuss *Standard Bank v Hunkydory Investments*

The court held that it was not unconstitutional for the legislature to exclude certain groups of juristic persons as consumers from the scope of application of the Act or from accessing consumer protection measures in this regard.

- The following are examples of transactions that are excluded from the operation of the NCA(6)
 - The State or organ of state as consumer
 - Credit provider Reserve Bank
 - Credit provider outside South Africa
 - Insurance policies
 - Leases of immovable property
 - Stokvel transactions
- What is the relationship between the NCA and CPA(2)

In terms of S 5(2)(d) of the CPA:

- CPA does not apply to any transaction that constitutes a credit agreement under the NCA
 - However, CPA applies to the goods or services that are the subject of the credit agreement
- Discuss credit agreements involving the State(1)

Credit agreements where the consumer is the State or an organ of State are excluded from the NCA.

- The following agreements do not constitute credit agreements and, therefore, the Act does not apply to such agreements(3)
 1. A policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance.
 2. A lease of immovable property.
 3. A transaction between a stokvel and members thereof.
- NCA applies to all credit agreements (unless excluded):

Regardless of:

- Whether small or large
 - Irrespective of its form
 - Irrespective of type of movable goods(or services) involved
 - Irrespective of amount of money involved

Application examples for Theme 1: Study Unit 2

Characteristics of different credit transactions

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Characteristic / Scenario	Type of Credit Agreement
Revolving credit (payment of instalments creates new credit) money loan: e.g., overdraft on cheque account and credit card transactions.	Credit Facility
Revolving credit sale of movable goods: e.g., in-store card transactions.	Credit Facility
Fixed-sum (payment of instalments does not create new credit) money loan: e.g., personal loans with a bank.	s 8(4)(f) Other Transaction
Fixed-sum sale of movable goods with an ownership reservation clause.	Instalment Agreement
Fixed-sum sale of movable goods without an ownership reservation clause.	s 8(4)(f) Other Transaction
Purchase price or money loan secured by the registration of a bond in the deeds office over immovable property.	Mortgage Agreement
Goods or services provided, account delivered, account not settled, interest charged, 20 business days expired since interest first charged.	Incidental Credit Agreement
Suretyship agreement concluded iro a credit facility or transaction subject to the NCA.	Credit Guarantee
Acknowledgement of debt signed in respect of a credit facility or transaction falling under the NCA.	s 8(4)(f) Other Transaction
Lease of movable goods where the consumer becomes the owner upon expiry of the lease.	Lease
A watch is pawned as security to a pawn shop to buy or obtain credit.	Pawn Transaction
Certain notarial bonds and cessions <i>in securitatem debiti</i> .	Secured Loan
Goods are sold at a discount if the consumer pays before a determined date.	Discount Transaction

N.B Please familiarise yourself with the above scenarios

Examples of the application of the Arm's length principles

Scenario	Relationship Type	Arm's Length Status	NCA Applicable?
Controlling interest in a juristic person as credit provider or consumer.	Juristic Person Control	Within Arm's Length	NO
Brother and sister (or other family, e.g., father and	Family (Independent)	At Arm's Length	YES

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daughter) who are independent.			
Brother and sister (or other family, e.g., father and daughter) who are dependent.	Family (Dependent)	Within Arm's Length	NO
Employer and employee (or close friends) where the credit provider strives for utmost advantage (high market interest).	Employer/Employee (Market Interest)	At Arm's Length	YES
Employer and employee (or close friends) where the credit provider does not strive for utmost advantage (low interest).	Employer/Employee (Low Interest)	Within Arm's Length	NO

The NCA applicability for Juristic Persons

Consumer Juristic Person Scenario	Credit Agreement Type	NCA Applicability
Asset value or annual turnover is R1 million or more (Big juristic person).	Any	NCA NOT applicable
Asset value or annual turnover is less than R1 million (Small juristic person).	Small or Intermediate agreement.	NCA APPLICABLE (Note: Not all provisions apply, e.g., reckless credit and general over-indebtedness provisions do not apply.)
Any juristic person (irrespective of asset value/turnover).	Large credit agreement.	NCA NOT applicable

Theme 1: Study Unit 3

Registration of Credit providers

Conclusion of a credit agreement

- What is the registration threshold?(2)

Previously:

A person was required to register as a credit provider only if they had entered into 100 or more credit agreements, or if the total principal debt owed under all credit agreements exceeded R500 000.

Currently (since 11 November 2016):

The threshold has been reduced to R0, meaning any person who enters into even a single credit agreement, regardless of the number or value, must register as a credit provider under the National Credit Act (NCA).

- Regarding contractual capacity and legality, the NCA provides that a credit agreement (excluding pawn transactions) is unlawful if it(5)
 1. was concluded with a consumer who is an unemancipated minor and was not assisted by a guardian;
 2. is an agreement with a consumer subject to a court order holding him to be mentally unfit;
 3. is an agreement with a consumer subject to an administration order in terms of section 74 of the Magistrates' Courts Act 32 of 1944 and the administrator did not consent to the agreement;
 4. results from negative option marketing; or
 5. was concluded by an unregistered credit provider. 106
- **Discuss Friend v Sendal 2015 (1) SA 395 (GP)**

The court held that only persons who grant credit in the ordinary course of their business are required to register as credit providers under the National Credit Act (NCA).

- **Discuss Van Heerden v Nolte [2014] ZAGPPHC 12 (28 January 2014)**

The court found that even individuals who provide credit on a once-off or ad hoc basis are required to register as credit providers in terms of the NCA.

- **Discuss De Bruyn NO v Karsten 2019 (1) SA 403 (SCA)**

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At present, a person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements (other than incidental credit agreements) exceeds an amount of RO. This means that all credit providers must register as such. This includes a credit provider that concludes a once-off credit transaction.

- Which credit agreement is unlawful in terms of the consumers capacity(1)

If a consumer induced the credit provider to believe the consumer possessed the required contractual or legal capacity to enter into the credit agreement, or attempted to obscure or suppress the fact that the consumer was subject to any of the aforementioned court orders, the particular credit agreement is not unlawful.

- Is a credit agreement entered into with an unregistered credit provider unlawful?(2)
 - A credit agreement entered into with an unregistered credit provider is not unlawful if that credit provider had already applied for registration as a credit provider at the time the credit agreement was entered into.
 - The same applies to a credit agreement if the credit provider had applied for registration within 30 days after the conclusion of the credit agreement.
- Discuss the effect of [section 89](#)
 - If a credit agreement is unlawful in terms of [section 89\(2\)](#), a court must make a just and equitable order including but not limited to an order that the credit agreement is void as from the date the agreement was entered into.
 - The wording of [section 89\(5\)\(a\)](#) is unclear on whether a court must declare an unlawful credit agreement void.
 - However, if a court declares an unlawful credit agreement void, the normal consequences of unlawful agreements in terms of the common law prevail.
 - A prohibited credit agreement in terms of the NCA cannot be void until the agreement is declared to be unlawful by a court.
- What are the consequences of non-registration?(3)

[Section 40\(3\):](#)

A person who is not registered as a credit provider may not offer, make available, or extend credit, or enter into any credit agreement.

[Section 40\(4\):](#)

Any credit agreement entered into by an unregistered credit provider is unlawful and void, to the extent provided for in [section 89](#).

[Section 89\(5\):](#)

If a credit agreement is unlawful under this section, a court must make a just and equitable order

Enforcement of the NCA

- What is the duty of the NCR?(5)
 - The NCR is responsible for the enforcement of the NCA.
 - This includes receiving of complaints concerning alleged contraventions of the Act and the investigation and evaluation of such complaints.
 - The NCR also has the power to issue and enforce compliance notices in terms of section 55 of the Act.
 - The NCR may also monitor the consumer credit market and industry to ensure that prohibited conduct is prevented or detected and prosecuted.
 - Prohibited conduct means an act or omission in contravention of the Act.
- What enforcement tool does the NCR use?(5)
 - The requirement that credit industry role players must apply to be registered with the NCR.
 - In addition to credit providers, credit bureaus, debt counsellors, payment distribution agents' and ADR agents must be registered with the NCR.
 - A payment distribution agents is a person who distributes payments on behalf of a consumer who has applied successfully for debt review and whose obligations to credit providers have been rearranged.
- How are unregistered credit providers treated?(2)
 - A person who is required to be registered as a credit provider, but who is not so registered, must not offer, make available or extend credit or enter into a credit agreement.
 - Should such a credit agreement be entered into, it is unlawful and void.
- Where must the applications for registration go?(1)

Applications for registration as a credit provider must be submitted to the National Credit Regulator (NCR)

