

***IMPACT OF THE NEW NATIONAL CREDIT ACT ON
THE DEBT RECOVERY AND CREDIT BUREAU
INDUSTRIES***

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1. INTRODUCTION

The Usury Act, 73 of 1968 and the Credit Agreements Act, 75 of 1980, has been the cornerstone of consumer credit in South Africa for the last thirty odd years. The abovementioned acts have now been replaced by one piece of legislation, the National Credit Act (“NCA”), 34 of 2005. The regulations of the Act were published in *Government Gazette* 28864 of 31 May 2006. The remainder of the act will be put into operation on the 1st of June 2007, an event that will most surely change the face of consumer credit in South Africa.

2. THE AIM OF THE NATIONAL CREDIT ACT

It is important to understand why parliament thought it would be a good idea to replace the abovementioned acts, which have seemingly been sufficient for the last quarter of a century in regulating the consumer credit in South Africa, with one act.

The purpose of the NCA are “to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers.”¹

Essential to attaining the abovementioned key purpose are the following key principles:

- a) Establishing a credit market that is accessible to every citizen of the Republic of South Africa and in particular those who have been previously disadvantaged in doing so;
- b) Ensuring consistent treatment of different credit products and different credit providers;²

¹ Section 3 of the National Credit Act, 34 of 2005.

² Section 3 (b) of the National Credit Act, 34 of 2005.

- c) Establishing a responsible consumer-credit provider relationship and crafting a culture, whereby consumers do not over expose themselves to debt and credit providers do not carelessly grant credit to consumers;
- d) Establishing an equilibrium in the consumer-credit provider relationship;
- e) Education of consumers;
- f) Protection of consumers;
- g) Creating a dispute resolution system that is easily accessible, maintainable, consensual and comprehensible to resolve credit agreement disputes that may arise;
- h) Establishing a debt restructuring system, that will have as its ultimate aim the *“satisfaction of all responsible consumer obligations under credit agreements.”*³

It is important to highlight the second part of the above paragraph. I believe there is a panic amongst credit providers that the debt restructuring process will prejudice them severely as this will assist consumers that are over indebted to not have to perform in terms of the credit agreement between them.

Section 3 (i) of the NCA, in my opinion, puts that trepidation to rest. The purpose of debt restructuring may be to assist consumers who are over indebted, but will have as its priority function the duty to ensure that consumers satisfy their obligations under credit agreements.

According to the CEO of the National Credit Regulator, Mr. Gabriel Davel, the current credit environment is not sustainable, is damaging to Consumers and there is little relief in current outdated legislation, hence the reason why a new piece of legislation has been introduced to address these pressing issues.

³ Section 3 (i) of the National Credit Act, 34 of 2005.

3. SECTIONS OF THE ACT APPLICABLE OR OF INTEREST TO THE DEBT COLLECTION AND CREDIT BUREAU INDUSTRIES

It will be a too voluminous a document if I were to discuss each and every section and regulation in the act and I will therefore focus specifically on the sections of the NCA that I feel is of definite importance to the debt collection and credit bureau industries.

3.1 ADMINISTRATIVE BODIES CREATED BY THE NCA

The NCA establishes various administrative bodies, institutions and individuals, whose purpose it will be to regulate credit in South Africa and who may make statutory orders to ensure that the NCA is complied with.

The four vital role players established by the NCA are:

- a) The National Credit Regulator;
- b) The National Consumer Tribunal;
- c) Debt Counsellors; and
- d) Consumer Courts.

The duties of these bodies and the powers conferred upon them is discussed at length in the NCA and do I not want to burden this piece with the same. In summary, the duty of these bodies, in conjunction with one another, is to ensure that the purpose of the NCA, as mentioned earlier herein, are followed through and attained.

3.2 CREDIT BUREAUS

Credit Bureaus play an important role in the credit industry, and will do even more so once the NCA becomes fully operational. Credit providers will rely on credit bureaus to provide them with information on consumers, which will be utilized by credit providers in assessing the indebtedness of a consumer and to prevent the reckless granting of credit.

Sections 43, 45 and 46 of the NCA, which came into operation on the 1st of June 2006, deals specifically with the registration of credit bureaus, the application for registration and disqualifications.

Section 43⁴ of the NCA prescribes that every person that is in the business of:

- a) receiving reports of, or investigating-
 - i) credit applications;
 - ii) credit agreements;
 - iii) payment history or patterns; or
 - iv) consumer credit information as defined in section 70(1) of the NCA. relating to consumers or prospective consumers, other than reports of court orders or reasons for judgment or similar information that is in the public domain;
- b) compiling and maintaining data from reports contemplated in subparagraph (i); and
- c) issuing reports concerning consumers or other natural persons based on information or data referred to in this paragraph.

must be registered as a credit bureau in terms of the NCA, other than a credit provider or a person in the employ of a credit provider.

Section 43 (2) of the NCA stipulates, in no uncertain terms, that a person must not offer or conduct business as a credit bureau, *or hold themselves out to the public as being authorized to offer any service customarily offered by a credit bureau, unless that person is registered as a credit bureau.*

⁴ Section 43 (1) (a) – (c) of the National Credit Act, 34 of 2005.

This may be problematic to companies within the debt recovery industry who maintains databases on the credit information and personal details of individuals and who offers same to other debt recovery companies at a cost.

It may also be problematic for so-called "Tracing Agencies" and is it my view that any company, close corporation or individual who makes credit information available to other establishments or attempts to investigate and obtain individuals personal details on either instructions from other establishments to do so or as a normal course of business, will most definitely have to be registered as a credit bureau with the National Credit Regulator in terms of section 45 of the NCA.

The NCA does however not prohibit companies, close corporations and individuals within the debt recovery industry from sharing data between one another, obviously being done so at no charge to one another.

I would like to remark at this stage that, in my opinion, the debt recovery industry will be dominated by debt collection agencies who have built up a substantial database over the years in respect of individual credit and personal information and will these agencies definitely have an advantage to other agencies and can this be used as a very effective leverage tool when conducting business or when seeking new business.

It must however be noted that Section 43 (4) stipulates that "a person may not be registered as a credit bureau, *if any person who has a controlling interest in the applicant is-*

- a) a credit provider;
- b) a debt collection agency; or
- c) a person who conducts any disqualified business prescribed in terms of subsection (5).

Section 46 (1) of the NCA further stipulates that a natural person, in other words an individual or a partnership, may not be registered as a credit bureau.

It is noteworthy to look at the definition of “consumer credit information” as held by credit bureaus and as defined in section 70 (1) of the NCA. This includes information regarding a person’s credit history, income, assets, debts, patterns of payment and default, credit agreements to which he is or was a party and personal and professional details.⁵

It is also of relevance to observe the duties of a credit bureau, which are:

- 1) to accept the filing of consumer credit information from credit providers;⁶
- 2) to accept the filing of consumer credit information from the consumer for the purpose of correcting or challenging information;⁷
- 3) to verify the accuracy of any consumer credit information acquired;⁸
- 4) retain any consumer credit information reported to it for the periods prescribed in the regulations⁹ of the NCA as amended;¹⁰
- 5) maintain its records of consumer credit information in a manner that satisfies the prescribed standards;¹¹
- 6) promptly expunge from its records any prescribed consumer credit information that, in terms of the regulations, is not permitted to be entered in its records or needs to be removed from its records;¹²
- 7) issue a report to any person who requires the same for purposes of the NCA;¹³ *(For example a credit provider requiring same to determine a consumer’s creditworthiness.)*

⁵ JM Otto *The National Credit Act Explained* (2006)

⁶ Section 70 (2) (a) of the National Credit Act, 34 of 2005

⁷ Section 70 (2) (b) of the National Credit Act, 34 of 2005

⁸ Section 70 (2) (c) of the National Credit Act, 34 of 2005

⁹ Regulation 17 (1) – (5) as amended in Government Gazette 29442 of the 30th of November 2006

¹⁰ Section 70 (2) (d) of the National Credit Act, 34 of 2005

¹¹ Section 70 (2) (e) of the National Credit Act, 34 of 2005

¹² Section 70 (2) (f) of the National Credit Act, 34 of 2005; *See also* Schedule 1 items 1 to 4 of the regulations published in Government Gazette 29442 on the 30th of November 2006, which prescribes which information should be removed; *See also* Section 73 of the National Credit Act, 34 of 2005.

¹³ Section 70 (2) (g) of the National Credit Act, 34 of 2005

- 8) to issue a report regarding a consumers credit information that is a true reflection of that person's record and specifically not to draw a negative inference regarding a person's creditworthiness if the credit bureau has no consumer credit information on a person;¹⁴

Credit bureaus need to comply with these directions when dealing with consumer credit information and failure to do so will be an offence.

Any person who wishes to register as a credit bureau or who must register as a credit bureau, must do so with the National Credit Regulator and need to submit the prescribed forms as provided in the regulations¹⁵ and must pay the prescribed application costs and prescribed registration fees.¹⁶ These persons may register 40 (FORTY) business days after the date that the applicable sections came into operation,¹⁷ which has obviously passed.

It should be evident from the above paragraphs that the credit bureau industry will play a major role in the credit industry. Credit bureaus will be closely monitored by the National Credit Regulator and will they need to be very meticulous when dealing with consumer credit information as the manner in which this is done will have an express influence on the credit industry and the effectiveness of the NCA.

3.3 THE CREDIT PROVIDER – CONSUMER RELATIONSHIP

The NCA has as an underlying purpose the aim to regulate the relationship between the consumer and credit provider and confers a majority of rights upon the consumer to ensure that the “main purpose” of the NCA, to protect consumers¹⁸, is met. It is important to take a closer look at this relationship and how it will be affected by the NCA and how same will in turn affect the debt recovery industry in particular.

¹⁴ Section 70 (2) (h) and (i) of the National Credit Act, 34 of 2005

¹⁵ Government Gazette 28864 of the 31st of May 2006 Schedule 1 of Chapter 10

¹⁶ Section 51 (1) (a) and (b) of the National Credit Act, 34 of 2005. See also Government Gazette 29245 of the 21st of September 2006

¹⁷ Schedule 3 Item 2 of The National Credit Act, 34 of 2005

¹⁸ Section 3 of the National Credit Act, 34 of 2005

A consumer is defined in the NCA¹⁹ as:

- 1) the party to whom goods or services are sold under a discount transaction, incidental credit agreement or installment agreement;
- 2) the party to whom money is paid, or credit is granted, under a pawn transaction;
- 3) the party to whom credit is granted under a credit facility;
- 4) the mortgagor under a mortgage agreement;
- 5) the borrower under a secured loan;
- 6) the lessee under a lease, not for immovable property;
- 7) the guarantor under a credit guarantee;
- 8) the party who receives money or credit under any other credit agreement.

A credit provider is described in the NCA²⁰ as:

- 1) the party who supplies goods or services under a discount transaction, incidental agreement or installment agreement;
- 2) the party who extends credit under a credit facility;
- 3) the mortgagee under a mortgage agreement;
- 4) the lender under a secured loan;

¹⁹ Section 1 of the National Credit Act, 34 of 2005

²⁰ Section 1 of the National Credit Act, 34 of 2005

- 5) the lessor under a lease, not for immovable property;
- 6) the party to whom an assurance or promise is made under a credit guarantee;
- 7) the party who advances money or credit under any other credit agreement;
- 8) any person who acquires the rights of a credit provider under a credit agreement, whether it be a credit grantor or cessionary.

Of further importance are the rights that have been bestowed on consumers²¹, which in turn signifies that a number of duties have been conferred upon credit providers to ensure that these rights are honoured and *vice versa*. There are numerous rights of consumers as well as the rights of credit providers and we will only list the important ones and discuss those in short that are of importance to the credit bureau and debt recovery industries.

Some of the rights of consumers are:

- 1) The right to apply for credit and non-discrimination;
- 2) The right to information in official language;
- 3) Rights in respect of consumer credit information – *A credit provider must advise a debtor before adverse information is reported to a credit bureau and the affected person may challenge it. Any person may inspect a credit bureau, the national credit register held by the National Credit Regulator or any file or information concerning him and may challenge the accuracy of such information. The credit bureau, credit provider or the National Credit Regulator must investigate the challenge to its information and remove the same if it is unable to find credible evidence in support of their information.*²²

²¹ Chapter 4 Part A of the National Credit Act, 34 of 2005; See also Sections 60 to 67 of the National Credit Act, 34 of 2005

²² Section 72 (1) and (3) of the National Credit Act, 34 of 2005; See also JM Otto The National Credit Act Explained (2006)

- 4) The right to be protected against the marketing practices of credit providers;²³
- 5) The right to be indemnified against lost cards²⁴;
- 6) The right to documentation²⁵;
- 7) The right to privacy and confidentiality – Section 68 (1) of the NCA requires that any person who receives, compiles, retains and/or reports any confidential information in respect of a consumer or prospective consumer, protect the confidentiality of such information. They must furthermore ensure that such information is utilized only for purposes as allowed for in the NCA²⁶ and that the information is reported or released²⁷ only to the consumer himself or another person insofar as the NCA or other legislation allows such a release to a third party²⁸ or if instructed by the consumer to release such information or if ordered to do so by a tribunal.²⁹
- 8) The right to apply for debt review and re-arrangement of obligations as a result of over-indebtedness;³⁰
- 9) The right of cooling-off;
- 10) The right to settle an account and to make prepayments;
- 11) The right to surrender goods;
- 12) The right to receive statements of account;³¹

²³ Sections 74, 75 and 76 of the National Credit Act, 34 of 2005. These sections will come into operation on the 1st of June 2007

²⁴ Section 94 of the National Credit Act, 34 of 2005. This section will come into operation on the 1st of June 2007

²⁵ Section 65 of the National Credit Act, 34 of 2005. This section will come into operation on the 1st of June 2007

²⁶ Section 68 (1) (a) of the National Credit Act, 34 of 2005. This section came into operation on the 1st of September 2006

²⁷ Section 68 (1) (b) of the National Credit Act, 34 of 2005

²⁸ Section 68 (1) (b) (i) of the National Credit Act, 34 of 2005

²⁹ Section 68 (1) (b) (ii) (aa) – (bb) of the National Credit Act, 34 of 2005

³⁰ Section 79 (1) of the National Credit Act, 34 of 2005

³¹ Sections 107 to 115 of the National Credit Act, 34 of 2005. These sections will come into operation on the 1st of June 2007

Some of the rights of credit providers are:

- 1) The right to assess a consumer's credit worthiness and refusal to grant credit;
- 2) The right to enforce or terminate an agreement, subject to the provisions of the NCA,³²
- 3) The right to suspend or close a credit facility, subject to the provisions of the NCA,³³
- 4) The right to enforce remaining obligations on a consumer after the attachment and sale of goods,³⁴

It is apparent from the above paragraphs that the legislature clearly had the protection of the consumer at heart when the NCA was drafted as the consumer has far more rights than the credit provider. It was definitely the legislature's intention to put the consumer in a dominant position, one to which credit providers should be wary. There will obviously be those consumers that will enforce these rights because they may be exploited or prejudiced by a credit provider, but then there are those consumers that will enforce these rights merely because they are available to them. It will in my opinion be a complicated process for debt counselors, the tribunals and the National Credit Regulator to regulate the enforcements of these rights in the initial stages and do I believe they will be inundated with referrals, debt restructuring applications, etc.

This, in my view, is a typical course of events, as the consumers get used to the NCA and the purpose it was actually sanctioned for, *not to rid debtors of all their debt forever*, which is what many consumers think.

³² Section 123 (2) of the National Credit Act, 34 of 2005

³³ Section 123 (3) of the National Credit Act, 34 of 2005

³⁴ Section 130 (2) of the National Credit Act, 34 of 2005

A credit provider is prohibited from granting credit to consumers recklessly.³⁵ Before granting credit a credit provider must assess the consumer's credit worthiness and ability to repay the credit. In terms of section 82 (1), guidelines may be published by the National Credit Regulator to prescribe evaluating tools to be utilized when assessing a consumer's credit worthiness, but until such a time the credit provider may use its own evaluation mechanisms, subject to same being fair and objective.

The credit provider will also obtain information from the consumer himself when assessing the consumer's financial ability and must the consumer provide such information truthfully.³⁶ If the consumer provides deceptive or fabricated information, the credit provider may undoubtedly use this as a defence should the consumer allege that credit was granted to him recklessly.³⁷

A credit agreement will be reckless if the credit provider failed to do a proper assessment or if it was assessed that the consumer can not afford the credit applied for, but the credit provider proceeded with granting the same despite this.³⁸

It is important to note that if an agreement is reckless, it does not automatically mean that a consumer is over indebted.³⁹ A competent court must make that assessment and based upon there findings, the court must make the appropriate decision, whether it be to set aside any or all the obligations of a consumer under a credit agreement or whether to merely suspend⁴⁰ same until such a time that the debtors debts are restructured as per the courts direction.⁴¹

If a consumer's obligations under a credit agreement are suspended by a court, the consumer is not obligated to perform at all during such a period of suspension and may the credit provider not charge any fee, charge or interest during this period.

³⁵ Section 81 (3) of the National Credit Act, 34 of 2005

³⁶ Section 81 (1) of the National Credit Act, 34 of 2005

³⁷ Section 81 (4) of the National Credit Act, 34 of 2005

³⁸ Section 80 (1) (a) of the National Credit Act, 34 of 2005

³⁹ Sections 83 and 85 of the National Credit Act, 34 of 2005

⁴⁰ Section 83 (2) and (3) of the National Credit Act, 34 of 2005

⁴¹ Section 87 of the National Credit Act, 34 of 2005. *See also* section 83 (3) (b) (ii) of the National Credit Act, 34 of 2005

After the suspension period the *status quo* are restored, but can the credit provider not recover or attempt to recover any fees, charges or interest for the suspended period.⁴²

Apart from the above, the NCA also prescribes that only certain items may be debited from the consumer's account and recovered by the credit provider and must be done in accordance with the provisions of the NCA. Those items are prescribed in section 101 and 102 of the NCA. They are the following:

- a) The principal debt;
- b) An initiation fee;
- c) A service fee;
- d) Interest and not finance charges – The manner in which interest is calculated is prescribed by Regulations 39 and 40 as published in terms of the NCA.⁴³ Interest may be calculated daily and added to the “deferred amount”⁴⁴ monthly, at the end of the month.

Section 103 (5) of the NCA prescribes that the collective of the interest and an initiation fee, service fees, credit insurance, default administration charges and *collections costs, which ensue during the time of a consumer's default*, may not exceed the unpaid balance of the principal debt at the time of the default. The purpose of highlighting the above is to draw attention to the fact that only the amounts that accrue during the period of default are taken into consideration.

This provision will obviously have a significant impact on the debt collection industry and will be discussed further on in more detail.

⁴² Section 84 of the National Credit Act, 34 of 2005. See also section 78 (1) and (2) to note the instances where the reckless credit provisions do not apply, for example: a school loan, a student loan, an emergency loan etc. See the definitions of these loans under section 1 of the National Credit Act, 34 of 2005

⁴³ See also Section 105 (1) of the National Credit Act, 34 of 2005

⁴⁴ Regulation 39 (1)

Table A of Regulation 42 can be viewed to familiarize oneself with the maximum prescribed interest that may be charged in respect of credit agreements. The NCA does not make any mention of how the current *mora* interest rate, currently 15.50% (FIFTEEN AND A HALF PERCENT) per annum, which is charged by various credit providers and debt collectors in enforcing debt recovery procedures, in the absence of an agreement in respect of the interest charged, will affect debt enforcement procedures in future. One can only draw a hypothesis from the absence of any mention regarding the above that the legislature did not intend to change the *status quo* as far as *mora* interest is concerned, but will same obviously be subject to the certain provisions, like section 103 (5), of the NCA.

- e) Cost of any credit insurance provided for in section 106 of the NCA;
- f) Default administration charges;
- g) Collection costs – *The credit provider is entitled to recover collection costs from the defaulting consumer relevant to the enforcement of debt recovery proceedings as prescribed by the NCA.⁴⁵ The recovery of these collection costs are obviously subject to the provisions contained in the Magistrates Court Act, 32 of 1944, the Supreme Court Act, 58 of 1959 and most importantly the Debt Collectors Act, 114 of 1998, depending on whichever may be applicable.*

The credit provider definitely got the short end of the stick as far as the NCA is concerned. This prejudicial position is furthermore burdened by the numerous required procedures enforced on a credit provider when looking to enforce a debt and the limitations the credit provider faces when exercising his remedies. The NCA is in this regard much more multifarious than its predecessors.

⁴⁵ Regulation 47

I will not discuss the specific procedures required by a credit provider before it attempts to enforce a debt as same are easily comprehensible and is discussed in detail in the NCA⁴⁶ and do I not want to encumber this piece with the same.

It is however important to note that the credit provider must notify the debtor, in writing, that he or she is in default and that they have the right to refer the credit agreement to a debt counselor for a debt review, in terms of section 129 of the National Credit Act, before a credit provider may commence with further debt enforcement.

This notification can only be sent to the debtor once he has already been in default for 20 days and must a period of 10 days, after the letter has been sent, lapse before the credit provider can commence with proceedings to recover the debt, in other words hand it over to an attorney or debt collector for recovery.

The single most important provision in the NCA as far as debt enforcement is concerned, in my view, is contained in section 86 (2) of the NCA, which comes into operation on the 1st of June 2007.

In terms of the abovementioned section the consumer is prohibited from applying for a debt review in respect of a credit agreement if the credit provider under such an agreement has already proceeded with enforcement of the agreement as a result of the consumer's default.

In other words, if a credit provider has sent a notice to a debtor in terms of section 129 of the NCA and 10 days have passed since the date same was sent and the debtor did not refer the credit agreement to a debt counselor for a debt review, the credit provider may commence legal or collection procedures and will the debtor be prevented from applying for a debt review thereafter.

⁴⁶ See Chapter 6 Parts A to C of the National Credit Act, 34 of 2005; Sections 124 to 133 of the National Credit Act, 34 of 2005

This does however not prevent a court from still finding that such an agreement was reckless⁴⁷ and may the court in any proceedings, subject to over-indebtedness being alleged by a consumer, find that the consumer is over-indebted.⁴⁸

Credit providers are more understanding toward consumers who are in default than many may think. Often the credit provider will sent one or two letters or make one or two phone calls to the consumer requesting payment, before such a defaulting consumer will be handed over to attorneys or to collection agencies for recovery of the debt.

The implication of the section mentioned in the preceding paragraph will see credit providers become far more stringent in enforcing debt recovery procedures, solely for the purpose of preventing a consumer from applying for a debt review. To be honest, I will not blame credit providers for doing this.

The NCA was clearly not drafted with credit provider's interest at heart and is it only fair for them to make use of the opportunities to their advantage that is presented by the NCA, the above being one such a provision.

This will furthermore, in all probability, have the effect of an influx of defaulting consumers being handed over to attorneys or collection agencies to enforce debt recovery procedures to ensure that an influx of debt review applications do not arise.

It may of course also mean that a consumer will apply for a debt review before the consumer defaults to curtail the above provision. But consumers should bear in mind that an application for debt review or a debt restructuring order is recorded and will affect the consumer's future ability to apply for credit.

⁴⁷ Section 130 (4) (a) of the National Credit Act, 34 of 2005

⁴⁸ Section 85 of the National Credit Act, 34 of 2005

3.4 SECTION 103 (5) OF THE NATIONAL CREDIT ACT

Section 103 (5) of the NCA prescribes that the collective of the interest and an initiation fee, service fees, credit insurance, default administration charges and collections costs, which ensue during the time of a consumer's default, may not exceed the unpaid balance of the principal debt at the time of the default.

To understand this provision one need to delve into the history of the *in duplum* rule as well as the history of interest and establish why this rule has become an integral part of South African law.

If parties so agree, interest may be charged on a loan of money and will be payable by the borrower to the lender as agreed between the parties. If the parties have agreed that interest must be paid, but have failed to fix a rate of interest, same may be charged by the lender in terms of the current rate of interest as prescribed in the Prescribed Rate of Interest Act, 55 of 1975.

Arrear interest ceases to run once the sum of the interest so accrued equals the amount of the capital. This rule is known as the *in duplum* rule and is enacted and extended in the NCA.

This rule has its roots in Roman law and was introduced by the law makers of the day to protect debtors against creditors who are sluggish in enforcing the recovery of their debt, thereby charging an insurmountable amount of interest for an indefinite period, which makes it virtually impossible for a debtor to ever repay the creditor.

Over the years South African courts have upheld this Roman law principle and have found that it has a useful role to play in modern commerce and does not only relate to money lending transactions but applies to all contracts where a capital amount that is subject to interest at a fixed rate is owing.⁴⁹

⁴⁹ See *LTA Construction Bpk. v Administrateur, Transvaal* 1992 (1) SA 473 (A)

The rule is based on public policy and is meant to protect debtors from exploitation by creditors by forcing them to pay unregulated charges, and enforce sound fiscal discipline on creditors.⁵⁰

It has also found that the rule cannot be waived by borrowers, nor can it be altered or circumvented by banking practice.⁵¹

It is also important to note that the courts have found that if a debtor makes a payment which reduces the arrear interest to an amount less than the amount of the capital, interest commences to run afresh until it is equal to the capital.⁵²

Of further importance in this regard is the courts founding with regard to the appropriation of payments and same deserved a bit of a broader discussion. The most influential in this regard is the decision in *Standard Bank of SA Limited v Oeanate Investments (PTY) LTD 1995 4 SA 510 (C)*.

A debtor who is indebted to a creditor in respect of more than one debt may, when making a payment, indicate, expressly or tacitly, how the payment is to be allocated. The creditor is not always bound to accept the payment on the basis tendered. Where the debtor fails to indicate how the payment is to be appropriated, the power of appropriation passes to the creditor, who may then appropriate the payment, provided he does so immediately and that he communicates his choice to the debtor within a reasonable time. The creditor's power is not unlimited, and he cannot act inequitably.

Failing appropriation by the debtor and creditor, the common law has developed a set of residual rules, which guide the Courts, unless it is found that the parties or the circumstances have expressly, or tacitly excluded one or more of them.

⁵⁰ See *Ethekwini Municipality v Verulam Medicentre (Pty) Ltd* 2004 SCA

⁵¹ See *Standard Bank of South Africa Ltd v Oeanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA)

⁵² See *Van Coppenhagen v Van Coppenhagen* 1947 (1) SA 576 (T)

Since the common-law rules seek to appropriate payment on the principle of appropriating first to the debt which is most onerous to the debtor, where capital and interest are owing as part of the same debt (as is the case where the interest accrues as an accessory to the capital), payments are credited, first, to discharge interest and then only to pay the capital.

In England special rules of appropriation have been developed for payments credited to a current account maintained at a bank. The general application of the principle known as the rule in *Clayton's case* (*Devaynes v Noble: Clayton's case*), in terms of which the ordinary residual rules of appropriation are replaced in the case of current banking accounts by the rule that credit items go in reduction of the earliest debit items, on the principle first-in-first-out, is recognized by the leading modern textbooks on banking and in other countries where the Courts look to England for guidance.

When, however, interest on unpaid capital equals the unpaid capital, the effect of applying the rule in *Clayton's case* is to give the debtor a double benefit for his payment: any payment made would be appropriated to reduce capital, as the oldest debt, which would automatically, by virtue of the effect of the *in duplum* rule, reduce the interest recoverable by the creditor to an amount equal to the now-reduced capital amount. The Courts held that the law could not tolerate such a situation and ruled as follows:

"In the absence of effective appropriation by the customer or the bank, the rule in duplum rules. As soon as, and for as long as, the in duplum rule suspends the further running of interest, all credits to the account should be appropriated to pay the interest before they are applied to pay the capital."

It is thus clear that where the debtor and creditor cannot come to an arrangement, credits should be appropriated towards interest first and then capital to ensure that the debtor does not get an unfair advantage.

Legal costs are not discussed in this regard, but I do feel that it was the legislature's intention that legal costs follow interest and capital to ensure that the public's interest is well looked after.

Of further vital importance is the fact that the *in duplum* rule only applies to arrear interest and do not extend to accumulated interest or capital growth.⁵³ It furthermore does not apply to arrear interest accruing after the creditor has commenced proceedings to enforce payment of the debt.⁵⁴

The scope of the application of the *in duplum* rule is concisely set out in *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W).⁵⁵

"The in duplum rule is confined to arrear interest and to arrear interest alone. In my (Bliden J) judgment the reason for this is plain: it is to protect debtors from having to pay more than double the capital owed by them at the date on which the debt is claimed....."

We now need to look again at Section 103 (5) of the NCA, which prescribes that the collective of the interest and an initiation fee, service fees, credit insurance, default administration charges and collections costs, which ensue during the time of a consumer's default, may not exceed the **unpaid balance** of the principal debt at the time of the default.

The purpose of highlighting the above is to draw attention to the fact that only the amounts that accrue during the period of default are taken into consideration and needs to be calculated with the unpaid balance in mind.

⁵³ Sharrock, Robert *Business Transactions Law* Sixth Edition 2002 p 301

⁵⁴ See *Standard Bank of South Africa Ltd v Oeanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA)

⁵⁵ See *Ethekwini Municipality v Verulam Medicentre (Pty) Ltd* 2004 SCA

In other words: *A debtor signs a credit agreement with a credit provider for an amount of R10000.00 credit. Interest is charged in the lawful manner during the course of the existence of the credit agreement. The credit agreement stipulates that the debtor will repay the debtor in 20 equal installments of R500.00 each. (Please bear in mind the amounts mentioned here are just an example and should in no way be construed as an accurate reflection of the content of credit agreements) The debtor proceeds to pay the first five installments, which equals a total of R2500.00.*

The debtor defaults on the sixth installment and receives a notification from the credit provider in terms of section 129 of the NCA, but refuses and or neglects to respond to the notification. The credit provider now hands the debtor over to an attorney or debt collector for recovery. The unpaid balance of the principal debt is R 7500.00. Interest charged up to date amounts to, let's say for arguments sake, R1500.00.

*This is however irrelevant, because the rule is quite clear: **Only “....the collective of the interest and an initiation fee, service fees, credit insurance, default administration charges and collections costs, which ensue during the time of a consumer's default....” should be taken into consideration. Remember, the in duplum rule is only applicable to arrear interest.***

In other words, the **collective of the interest and an initiation fee, service fees, credit insurance, default administration charges and collections costs, WHICH ENSUE DURING THE TIME OF A CONSUMER'S DEFAULT,** may, in terms of this example not exceed the amount of R7500.00.

I am of the opinion that collection costs mentioned in the NCA refers to any costs that the credit provider may incur to recover their debt and include collection costs as prescribed by the *Debt Collectors Act*, 114 of 1998 and legal costs as prescribed in terms of the *Magistrate's Court Act*, 32 of 1944.

I believe that this is a very reasonable provision and are many a debt recovery agent, attorney and credit provider petrified of this provision, because same is not correctly interpreted.

There will however be instances where this provision will make it very difficult for debt recovery agents and attorneys to recover collection costs from debtors as the amount handed over by the credit provider for collection will just be too small to include legal costs or collection costs. I foresee that, in these instances, and probably more so in the case of attorneys' legal costs, same will have to be borne by the credit providers themselves.

But bear in mind that if a debtor makes a payment which reduces the arrear interest and collection costs to an amount less than the amount of the capital, interest and collection costs, may be charged again until it is equal to the capital.

I would furthermore suggest that credit providers who do hand debts over to debt collectors and attorneys for collection, will have to break down the debt so handed over and will have to specify to the attorney and or debt collector inter alia the following amounts: the capital, the interest accrued before default, the interest accrued after default, any charges, credit insurance etc., to enable the debt collector or attorney to effectively and most importantly, lawfully, collect the credit providers debt.

A further point of interest is, whether or not this provision is in fact a codification of the *in duplum* rule or whether an old rule, similar in its characteristic and aim to that of the *in duplum* rule, is actually being replicated by this provision of the NCA.

In duplum, directly translated means: *double the amount*. No where is interest mentioned.

If one looks at the codes of the Roman law and some of the phrases referring to the principle that interest may not exceed the capital:

“Usurae non currunt ultra duplum” and “Cusum insuper usurarum ultra duplum minime procedure concedimus”

In both these instances the words “*ultra duplum*” is used. Ultra, directly translated means: *beyond or exceeding*.

I am therefore of the opinion that the provision contained in section 103 (5) of the NCA is an extension of the *ultra duplum* rule. This is my view and is mentioned here only for the sake of interest.

The restriction placed on the credit provider by the provision contained in section 103 (5) is however nothing new as far as South African legislation is concerned. Section 5 (1) of the Usury Act, 73 of 1968, also contains a restriction as far as the amounts recoverable by a *credit grantor* is concerned.

3.5 UNLAWFUL PROVISIONS

Section 90 and 91 of the NCA provides that no credit agreement may contain any unlawful provisions which purports to dispossess a debtor of its common law rights and that this provision applies *mutatis mutandis* to all supplementary agreements and supplementary documents.

This in my opinion includes documents such as section 57 Acknowledgements of debt and section 58 Consents to judgments. Debt collectors and attorneys will have to ensure that their documentation adheres to abovementioned provisions and if the debt collectors or attorneys utilize agents to get these documents signed, they will have to ensure that these documents are also on par as far as the provisions of the NCA is concerned.

One example, which I know is being utilized by many debt collectors, attorneys and their sub-agents, is the clause inserted in section 57 and 58 documents whereby a debtor consents to the jurisdiction of a specific court, for example the Randburg Magistrate's Court, although the debtor resides or works in the jurisdiction of another court. This will no longer be allowed, even if the credit provider, debt collector or attorney has obtained the debtor's consent. This is an unlawful provision and is an offence in terms of the NCA.

Furthermore, a debtor may consent to the jurisdiction of the Magistrates court even if the amount claimed by the credit provider falls within the jurisdiction of the High Court, but it will be an unlawful provision for a debtor to consent to the jurisdiction of the High Court if the amount claimed falls within the jurisdiction of the Magistrate's Court.

It should be clear that these sections' aim are to protect the rights and interest of the debtor, because, as we are well aware, and as the legislature is even better aware, the majority of the people in our country are illiterate and is this disadvantage often exploited by a few unruly credit providers, debt collectors, attorneys and the like.

4. CONCLUSION

The NCA will most definitely bring about a swift transformation to the credit industry in South Africa.

The banks in South Africa will undoubtedly be affected the most by the introduction of this new piece of legislation as the major credit providers and will it in all probability cost them a lot of money. It was reported recently that First National Bank said that it expected to forgo R788 million in fees after the introduction of the NCA in June of 2007. These fees will include charges applied on returned cheques and overdrawn accounts.⁵⁶

The introduction of the NCA has also seen banks aggressively issue more credit. This is ironic, as the NCA was actually introduced to restrain reckless credit granting. The National Credit Regulator recently reported that household credit extension by banks amounted to R680bn. This is an increase of 81% since January 2004.⁵⁷

⁵⁶ *The Business Report*, 26th of January 2007

⁵⁷ *The Business Day*, 20th of March 2007 p2 Sapa

Whether the implementation of the NCA will be detrimental to our economy or not, remains a question to be answered and will only be answered as time goes by. There will obviously be teething pains, and especially so with the introduction of this act, as it does not merely attempt to amend certain credit provisions laid down by law, but seeks to entirely transform the entire industry, hopefully for the better.

It also seems that most of the companies affected by the NCA takes the implications thereof on their business very seriously and will give their full cooperation to the regulating bodies to ensure the smooth implementation of the NCA.

The Registration Manager of the National Credit Regulator recently reported that approximately 3267 businesses already registered in terms of the NCA.

The Banking Association has also recently released a code of conduct for selling credit to consumers and Mr. Cas Coovadia, MD of the Banking Association said at the release of the code of conduct that the initiative to introduce a code of conduct was taken by the banks themselves and shows their commitment, as credit providers, to the soon to be fully enacted National Credit Act.⁵⁸

The affects of the NCA is undoubtedly going to be massive, and should all parties affected by it ensure that they are prepared to deal with every issue that may arise once the full NCA has become operative.

The NCA will definitely impact the credit bureau industry, which should be evident from the content of this opinion. The NCA will also have an influence on the debt collection industry.

It will most definitely have an affect on the clients of the debt collection industry, the credit provider and will most assuredly alter the manner in which debts are handed over, why they are handed over and when they are handed over.

⁵⁸ *Sunday Times*, 4th of March 2007, *Chris Needham*

This may actually benefit debt collectors, as credit providers will only handover debts that are actually meant to be handed over, which will result in a significant decrease in erroneous debts being handed over, but ultimately the NCA was brought into operation to regulate the credit industry and not the debt collection industry, which is inevitably regulated by the Debt Collectors Act, 114 of 1998. Be this as it may, the NCA will definitely impact the way in which debt recovery companies approach debt recovery in future.