

## THE NATIONAL CREDIT ACT 34 OF 2005

### **A brief overview of the Act**

#### **PURPOSE OF THE ACT**

Until recently, the two most important Acts governing the credit law in South Africa were the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980. However, in June 2006, these two Acts were repealed to make way for the National Credit Act 35 of 2005. The Act codifies a number of basic rights that the consumer has with regard to the credit market. In the past, some consumers especially the illiterate were being unjustifiably exploited. This was due to the complicated nature of credit agreements, which often resulted in individuals entering into credit agreements with a large business and being rendered defenceless. The individual often found themselves in an unequal bargaining position vis-à-vis the business or legal person with whom the contract was concluded.

The South African population consists predominately of low income earners who have not had recourse to channels of credit-granting other than micro-financiers. These micro-financiers have earned themselves a negative market reputation for over-pricing debt repayments and capitalizing on this vulnerable market. This has resulted in a large number of consumers being heavily over indebted and unable to service their monthly debt repayments.

Some of the principle objectives of the Act are:

- To promote a fair and non-discriminating marketplace for the access of credit
- To prohibit unfair practices
- To promote responsible credit-granting practices by credit providers
- To prohibit reckless credit-granting
- To provide for the general regulation of consumer credit and improved standards of consumer information
- To promote black economic empowerment and ownership within the consumer credit industry
- To provide for debt restructuring in cases of over-indebtedness
- To establish national norms and standards relating to consumer credit
- To establish the National Credit Regulator and
- To establish the National Consumer Tribunal

#### **IMPLEMENTATION OF THE ACT**

The Act was planned to be phased into operation in 3 separate phases. Many of the provisions regulating the establishment of a National Credit Regulator and other administrative matters came into effect on 1 June 2006. The final phase for the implementation of the Act will become effective as of 1 June 2007. This will include the sections of the Act conferring certain rights on the consumer, sections relating to credit marketing practices, over-indebtedness, reckless credit lending and rearrangement of debt. Other sections include the regulation of unlawful agreements, pre-agreements, certain duties of the consumer, settlement of accounts, surrender of goods, debt enforcement procedures and collection practices. Training of employees and agents by the credit provider must be effected before 1 June 2007.

#### **TYPES OF CREDIT AGREEMENTS**

Three kinds of transactions are regarded as "credit agreements" for the purposes of the Act.

- Credit facility: e.g. credit card
- Credit transaction: e.g.
  - Pawn transactions
  - Discount transactions
  - Incidental credit agreements
  - Instalment agreements
  - Mortgages
  - Secured loans
  - Leases
  - Credit guarantees e.g. suretyships

or any combination of these transactions e.g.: instalment sale of goods where payments occur by credit card over a period of time.

Small, intermediate and large agreements

The NCA differentiates between small, intermediate and large agreements depending on monetary thresholds stipulated in the National Credit Regulations. Different rules apply to each category, such as the requirements regarding the contents of the agreement, protection of juristic persons and settlement of a debt by advance payment.

- A small agreement is one in which the credit limit is R15 000 or less
- An intermediate agreement is a credit facility (as defined) of which the credit limit falls above R15 000 or a credit transaction (as defined) of which the credit limit falls above R15 000 but is less than R250 000; and
- A large agreement is any mortgage agreement or a credit transaction of which the principal debt exceeds R250 000.

The Act requires all Credit Agreements to be in writing.

### **EXCLUSIONS UNDER THE ACT**

Specifically excluded from the definition of the Credit Agreement are:

- A policy of insurance
- A lease of immovable property
- A transaction between a stokvel and a member of that stokvel in terms of the rules of the stokvel.

Developmental credit agreements and public interest credit agreements are two classes of agreement that enjoy certain exemptions under the Act.

### **REGISTRATION**

Banks as well as other credit providers (those with either 100 agreements or more or with a book value of R500 000 or more) are required to register as an authorised credit provider with the National Credit Regulator. The Regulator will oversee the compliance of the Act and perform consumer education about the rights and obligations under this new legislation.

### **CONSUMER RIGHTS AND DUTIES**

The Act introduces new rights for the consumers as well as measures that allow consumers to make informed decisions before buying goods and services on credit.

Further consumer rights include:

- The right to apply for credit, free of discrimination against the borrower
- The right to be protected against discrimination on the granting of credit
- The right to plain and understandable language being used in the credit agreements
- The right to receive a copy of the credit agreement and a replacement copy when one is requested
- The right to privacy regarding your personal information
- The right to redress
- The right to a free Credit Bureaux record once a year
- The right to assistance by a Debt Counsellor to assist over-indebted consumers with restructuring debts to prevent unnecessary forfeiture of assets
- The right to reasons why the credit application may have been refused

The act also requires that the consumer be provided with pre-agreement documentation prior to any credit transaction. This document must contain certain prescribed information including the interest rate charged, the instalment repayment period and the monthly repayment amount.

The consumers' duties are predominately determined by the provisions of the agreement and common law dictates.

### **CREDIT MARKETING PRACTICES**

The Act aims to stamp out predatory marketing practices by credit providers to the consumer. There are sections of the Act dedicated to controlling various marketing and advertising methods. For example a credit provider is prohibited from harassing a consumer in attempting to persuade them to apply for credit or to enter into a credit agreement. Additionally, only registered credit providers may advertise the availability of credit, or of goods and services to be purchased on credit. Particular care must be taken by credit advertisers to include specific disclosures and avoid certain terminology.

The implementation of such credit marketing and advertising is fundamental in preventing consumers being coerced into entering into a credit transaction, which upon proper reflection they would otherwise not have done.

## **FEES AND CHARGES**

An important part of the Act deals with the maximum fees and interest rate charges. The Act contains a closed list of fees, charged interest and items a credit provider may recover from a consumer. The Usury Act operated on the same principle. The credit provider may not charge the consumer a higher price for goods and services than he would have charged in the ordinary course of business if it were a cash transaction.

Although the Act appears seemingly complex, it aims to simplify many of the grey areas of the South African credit market. Just like the other legislation such as FAIS and FICA that affected the financial service industry in recent years, it is expected that the NCA will tighten controls and enhance better and more responsible credit practices for all.

For a complete copy of the Act and Regulations and for further information: visit [www.ncr.org.za](http://www.ncr.org.za)

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