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Credit Providers as Accountable Institutions

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Incidental credit attracts renewed interest in the context of the Financial Intelligence Centre Act 38 of 2001

Incidental credit agreements have, to a certain extent, traditionally been regarded as somewhat ancillary or peripheral – perhaps even *incidental* – to the overall scheme of consumer credit legislation. Several key provisions of the National Credit Act 34 of 2005 ("**NC Act**") do not apply to incidental credit agreements, including those dealing with assessments of creditworthiness and reckless credit.

Notably, persons providing incidental credit are not required to register as credit providers in terms of section 40(1) of the NC Act. This stands to reason, given that incidental credit agreements, as defined in the NC Act, ordinarily arise during the course of any commercial transaction in which, *inter alia*, a fee, charge or interest becomes payable when payment of an amount charged in terms of an account rendered to a consumer is not made on or before a determined period or date. The definition of an incidental credit agreement is thus sufficiently broad to include any agreement that entitles a supplier to charge penalty or default interest on outstanding payments by the consumer.

Despite the limited application of the NC Act to incidental credit agreements, a person who supplies goods or services under such an agreement to which the NC Act applies is nonetheless a "credit provider" as defined in section 1 of the NC Act. Furthermore, an incidental credit agreement constitutes a "credit agreement" as contemplated in section 8 of the NC Act. The regulation of incidental credit thus falls squarely within the remit of that statute.

The terms "credit provider" and "credit agreement" have taken on new significance owing to their use in Schedule 1 of the Financial Intelligence Centre Act 38 of 2001 ("**FIC Act**"), which sets out those persons and organisations that are required to register as accountable institutions in terms of section 43B of the FIC Act. In this regard, Schedule 1 at item 11 refers to any person who–

- carries on the business of a credit provider as defined in the NC Act; or
- carries on the business of providing credit in terms of any credit agreement that is excluded from the application of the NC Act by virtue of the threshold provisions contained in section 4 of the NC Act.[1]

The meaning of the phrase "to carry on business" for purposes of item 11 of Schedule 1 is unclear, as that term is not defined in the FIC Act. However, the Financial Intelligence Centre ("**FIC**") in the Draft Public Compliance Communication No. 23A, dated 15 December 2022 ("**Draft PCC**") adopts a wide interpretation of "credit provider", stating that the provision of credit need not "form part of the core business" of an institution in order for that institution to be "deemed to be a credit provider specifically for purposes of the credit agreement". This diverges from the FIC's position in relation to high-value goods dealers, which requires that the trade of such goods must "form part of [the] ordinary course of business" of an entity for it to be regarded as an accountable institution.

It is important to note that item 11 of Schedule 1 is concerned solely with whether a person falls within the definition of a credit provider (or provides credit in terms of any credit agreement), and *not* with whether such person is required to be *registered* as a credit provider under the NC Act. In this regard, the courts have settled on the view that the inclusion of a

clause entitling a supplier to claim interest if a debt is not paid on or before the expiry of a determined period brings an agreement within the ambit of an incidental credit agreement.[2] Accordingly, a supplier will be regarded as an accountable institution in terms of the FIC Act if it concludes agreements with its customers that provide for penalty interest, notwithstanding the fact that the agreements themselves may be excluded from the application of the NC Act entirely by virtue of the threshold provisions in section 4 of that statute.

In light of the above, it can be concluded that the FIC's interpretation of item 11 in the Draft PCC, whilst arguably uncommercial and unbusinesslike, is one that is supported by the ordinary meaning of the FIC Act.[3] The implications of this approach are far-reaching, in so far as it imposes onerous obligations on entities beyond those that would ordinarily be expected to comply with the FIC Act.

Providers of incidental credit would, accordingly, be well advised to seek legal advice in respect of their obligations under the FIC Act so as to ensure compliance, particularly in light of the contents of the Draft PCC.

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[1] Sections 4(1)(a) and 4(1)(b) of the NC Act exclude (i) credit agreements concluded with a consumer that is a juristic person having an asset value or annual turnover in excess of R1,000,000, and (ii) large agreements concluded with juristic persons, from the ambit of the NC Act.

[2] *Independent Plumbing Suppliers (Pty) Ltd v Classen* 2014 JDR 1311 (GP) at paragraph 40. See also *Collotype Labels RSA (Pty) Ltd v Prinspark CC and Others* (6722/2016) [2016] ZAWCHC 159 (9 November 2016). These judgments, whilst unreported, signal a shift away from the reasoning of the court in the earlier case of *Voltex (Pty) Ltd v SWP Projects CC and Another* 2012 (6) SA 60 (GSJ), which construed interest charged upon failure to pay timeously as being payable "as a consequence of the breach of the agreement, as damages", and not "in terms of" the agreement, as contemplated in the definition of an incidental credit agreement in the NC Act.

[3] The Draft PCC, despite being in draft form and subject to change, provides an important indication of the strict approach adopted by the FIC in relation to the interpretation of item 11 of Schedule 1 of the FIC Act.



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