

REGULATORY

No Interest, No Problem: The SCA confirms that the NCA applies to “credit agreements” only

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In the recent decision of *Nel & Others v Cilliers*, the SCA had to determine whether a sale of shares agreement which included financing provisions constituted a “credit agreement” for purposes of the National Credit Act: did the lender's failure to register as a credit provider render the agreement unenforceable, meaning that the amount which was advanced could not be recovered? In this article we discuss this decision and why it has important ramifications for those lending or receiving money.

Background

The decision of *Nel & Others v Cilliers* (197/2023) [2024] ZASCA 57 was heard by the Supreme Court of Appeal (“SCA”) on appeal from the full bench of the High Court. We briefly set out the background to the matter before discussing the Court's decision.

In 2006, Mr Cilliers (the “respondent”) was developing an upmarket golf estate. Mr Nel (the “first appellant”) purchased shares in the respondent's company which was developing the golf estate. Following the restructure of the company, shares were issued to new foreign investors, causing the first appellant to decide to exit as a shareholder. The respondent, confident of his venture's success, entered into an agreement (the “first agreement”) to purchase the first appellant's shares for R30 million over a period of three years with no interest being levied. The agreement provided that the amount was “interest free and tax friendly”.

After three years, the respondent had only managed to pay R6 million and defaulted on the rest. The parties entered into a second agreement (the “second agreement”), reducing the share purchase price to R12 million, to be paid by the respondent in three equal instalments, subject to interest being charged. The respondent paid R1 million and then defaulted on payment under the second agreement as well. This led to the first appellant and various of his companies (the “appellants”) approaching the High Court for relief.

To their detriment, the appellants made a number of damaging concessions during the pre-trial stage, including that the National Credit Act No 34 of 2005 (“NCA”) applied to the relevant provisions of the second agreement, that such provisions were not severable and that none of the appellants were registered credit providers as required by the NCA.

The court of first instance found that the parties abandoned the first agreement and that the second agreement was unlawful and unenforceable. On appeal, the full bench agreed and held that the agreements were unlawful and unenforceable for, amongst others, a failure to comply with the NCA.

The SCA's decision

The SCA first considered the second agreement, and it held that the concessions made by the appellants were binding on them: the agreement was unenforceable and unlawful due to lack of compliance with the NCA. The appellants' sole remaining hope rested on the validity of the first agreement.

The SCA assessed whether the first agreement was simulated, inchoate or abandoned, and it held that the facts indicated that the parties considered the first agreement valid and binding, which is why they entered into the second agreement when the

respondent defaulted on the first agreement.

On the issue of the applicability of the NCA to the first agreement, the Court referred to the section of the Act which deals specifically with what constitutes a credit agreement for purposes of the Act. This section says that included as a "**credit agreement**" is "*any other agreement...in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider*" (section 8(4)(f)).

The SCA held that the evidence indicated a sale of shares where the parties' intention was always for the amount advanced by the first appellants to be repaid by the respondent, but that there was no "*charge, fee or interest*" payable by the respondent on the purchase of shares. The first appellant had invested R8 million in the development and only received R7 million in return. The Court concluded that the first agreement was not a credit agreement for purposes of the Act; the agreement was not therefore invalid due to the first appellant's failure to register as a credit provider, no registration was required.

The Court ordered the respondent to repay the appellants certain of the amounts advanced in relation to the sale of shares.

The importance of the decision

The decision shows that a credit agreement for purposes of the NCA requires a deferral of payment and interest charged (and not just a deferral of payment).

Where a credit provider has entered into a credit agreement, is required to register as a credit provider in terms of the NCA and has failed to do so, that credit agreement is unlawful and void (section 40(4)). There is therefore a serious risk that a credit provider will not be able to recover outstanding amounts due under an agreement where this is the case (as is evident in this case). (The credit provider could attempt to rely on unjustified enrichment to recover its monies, but this is a much more difficult claim to succeed with.) This risk does not arise if the agreement is not a credit agreement for purposes of the NCA, i.e. where there is a deferral of payment with no interest being charged. The credit provider will therefore still be able to enforce the agreement (or cancel it and claim damages).

The decision also shows the converse, where interest is charged in relation to a deferred payment, the NCA will apply unless the credit provider can prove that another exclusion in the Act applies (see section 4).

When a party is not advancing credit to which the NCA is subject, it is not required to comply with the Act's numerous obligations, including credit provision and enforcement processes. This is little comfort for those who are in the business of providing credit, but is surely reassuring for those entering into once-off transactions where money is being advanced without any interest being levied.



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