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WHEN IN DOUBT - REGISTER AS A CREDIT PROVIDER

There has been a lot of uncertainty amongst the courts in respect of the interpretation and application of the National Credit Act 34 of 2005 (the “NCA”) as to amongst other aspects, whether once off credit providers are required to register as credit providers or not.

The Supreme Court of Appeal handed down a decisive judgment on 28 September 2018 in this regard in the matter of Du Bruyn NO and Others v Karsten (929/2017) ZASCA 143. In this case various sale agreements were entered into between the parties, in order for the Du Bruyn’s to exit the businesses that they were all a party to, when there was a breakdown in the relationship between the parties. Interest was charged at a rate of 5% on the purchase price. The parties although not family, at one time had a very close relationship akin to that of “parent and child”. Karsten (the “credit provider”) argued that (i) as this was a once off transaction; (ii) further that the parties were not acting at arm’s length, were not independent of each other and based on the fact that he’d only charged 5% and had not sought to obtain the utmost commercial advantage in terms of the agreements, that the NCA did not apply in this instance.

The courts evaluated the facts and found that there was a breakdown in the relationship between the parties. At the time of entering into the sale agreements, it was evident that attorneys were involved in the negotiations and it was clear that at that time of entering into the agreements the parties were dealing at arm’s length.

The Court stated that on the correct interpretation of the NCA when a credit agreement is entered into the credit provider is required to be registered as a credit provider with the National Credit Regulator failing which the agreement will be declared null and void. In the Du Bruyn case the agreements were declared null and void on this basis.

In our view, given the broad ambit of transactions which constitute credit agreements, the application of the NCA and the requirement of registering as a credit provider for once off transactions, is unfortunate. This is given the unnecessary cost and delay associated therewith and the severe consequences of non-compliance with the NCA.

It is worth noting in the Du Bruyn case the creditor had applied to be registered as a credit provider before the agreements were entered into, but that such registration only occurred after the agreements were concluded. The Court still found the agreements to be in contravention of the requirements of the NCA and to be null and void. It is unfortunate that the Supreme Court of Appeal did not discuss section 89(4) of the NCA which section allows for a credit provider to apply as a credit provider within 30 days of entering into the agreement.

This is a fairly intricate topic, which we are only discussing at a very high level, but in each instance the parties would need to look at:

1. Whether or not the agreement is a credit agreement that is regulated by the NCA. **Generally** speaking if interest is charged on an outstanding payment, the agreement will be a credit agreement.
2. Whether or not the NCA applies to the transaction. There are a number of circumstances in which the NCA will not apply even if the agreement is a credit agreement. For example, if the consumer is a juristic person with an asset value or annual turnover in excess of the threshold – currently R1 000 000.00, if the parties are not acting at arm’s length and are nor seeking to obtain a commercial advantage in terms of the agreement.

3. If the agreement is a credit agreement and none of the exceptions apply you will need to register as a credit provider before entering into the credit agreement. Please note that previously the credit agreement had to exceed a monetary threshold/ a number of agreements had to be concluded by a credit provider before they were required to register, however as from May 2016 the threshold of the credit agreement is R0.00.

If the agreement in question is a sale of immovable property, please note that if the purchase price is payable in two or more instalments and over a period of 12 or more months, the agreement will be a “contract” (an instalment sale agreement) in terms of the Alienation of Land Act and the formalities of this Act will need to be complied with (in addition to the provisions of the NCA if applicable).

In summary we recommend obtaining advice from an attorney whether an intended transaction will fall within the ambit of the NCA or not. If it does, you must register as a credit provider before entering into the agreement. If in doubt, for instance when an agreement is being entered into between extended family or friends, you should register as a credit provider as the Court has taken a narrow approach to determining whether in terms of an arrangement parties are “dependent” on each other and as such are not seeking to obtain a commercial advantage. The consequences of a declaration of invalidity are just too severe in our view to risk non-compliance.

This newsflash has been prepared for information purposes only and does not constitute legal advice, or a legal opinion, the practical application of the provisions of this newsflash will vary depending on the facts of each case.

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