

The world is a dangerous place to live - not because of the people who are evil but because of the people who don't do anything about it.

- Albert Einstein

Application of the National Credit Act 2005 (“the NCA”) on agreements for the sale of goods or rendering of services

The NCA applies, in varying degrees, to credit agreements. Agreements for the sale of goods or rendering of services, are classified as credit agreements (and more specifically credit facilities) if payment by the customer is deferred and interest, charges or fees are payable in respect of the deferred payment. The classic example would be an account at a clothing retailer.

An incidental credit agreement comes into existence where payment is deferred and either an interest or charge is levied in the event of late payment or a discount is granted in the event of early settlement. A doctor's bill, payable within 30 days and subject to interest on late payment would constitute an incidental credit agreement. The NCA has limited application to incidental credit agreements, the most notable being the requirement for enforcement of the agreement and collection of amounts owing, as well as the option of the customer (if he/she is a natural person) to approach a debt counsellor or consumer court.

In the event of goods being sold or services being delivered subject to the account being settled before a specific date, without agreement on a discount or penalty, the agreement

would constitute neither a credit agreement nor an incidental credit agreement. The NCA would subsequently not apply. In these circumstances the supplier would be entitled to levy interest, as from the date on which the account became payable, at a rate of 15.5% per year, as determined in terms of the Prescribed Rate of Interest Act.

In the event of an incidental credit agreement, the NCA regulations allow interest at a rate of 2% per month. Most suppliers usually require interest at a prime linked rate.

The advantages of higher interest in the event of incidental credit agreements, should therefore be weighed against the collection procedures prescribed by the NCA

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Directors Duties and Liabilities

The law regulating director's fiduciary duties is currently reflected in common law. At present, a director is obliged to act in good faith to the benefit of the company and to avoid a conflict between his/her personal interests and those of the company.

The new Companies Act 71 of 2008 introduces a "statutory standard" for directors' action. These "statutory standards" are as follows:

Director's personal financial interest

If a director's personal financial interests conflicts with those of the company, he/she is obliged to disclose the conflict to the shareholders, or the board of directors, of the company. The timing of disclosure differs in situations where the director has a financial interest before the company enters into the relevant agreement and situations where the director acquires a financial interest after the company has entered into the relevant agreement. A director's voting rights are also affected in these circumstances.

Director's abuse of position and/or information

A director must not use his/her position, or information obtained as a result of holding that position, for the gain or advantage of anyone else (including himself), other than the company. Furthermore, a director must disclose information that comes to his/her attention to the board of directors, unless he/she believes that the information is: i) Immaterial to the company, ii) generally available to the public, iii) known to the other directors.

Good faith and care, skill and diligence

A director must exercise his/her powers in good faith in the best interest of the company. An objective test, with subjective elements, is applied in that the reasonable director is considered to determine what would've been done by such reasonable director, whilst also considering the personal knowledge and experience of the particular director in question.

Business Judgement Rule

A director will not be liable for a breach of fiduciary duty and will have satisfied his/her obligations as director, if he/she can prove:

- i) he/she took reasonable diligent steps to become informed on the matter at hand;
- ii) he/she did not have a personal financial interest in the subject matter of a decision or he/she disclosed the interest as required;
he/she had a reasonable basis for believing (and did believe) that a decision was in the best interest of the company.

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