

When is registration as a credit provider under the National Credit Act required?

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The fallout between an elderly couple and their business partner, and the consequent lengthy legal battle, led to an interesting situation for anyone borrowing or lending money in South Africa.

The question that arose in this case was: Under which circumstances is registration as a credit provider in terms of the National Credit Act obligatory?

This question and the interpretation of section 40 of the National Credit Act 34 of 2005 (NCA) was dealt with by the Supreme Court of Appeal (SCA) in the case of *Du Bruyn NO & others v Karsten* (929/2017) [2018] ZASCA 143 (28 September 2018).

The latest court decision, after numerous court battles on this point, means that should anyone wish to lend money to an individual in South Africa on credit terms that are at arm's length (i.e. each person contracts on terms that are in their own self-interest), they would be required to register as a credit provider under the NCA.

The requirement to register as a credit provider is applicable to all credit agreements, irrespective of whether the credit provider is involved in the credit industry and irrespective of whether the credit agreement is a once-off transaction. There is no longer a minimum threshold that needs to be met for the NCA to kick in – even the lending of ZAR1 on credit terms that are at arm's length would mean that registration as a credit provider by the person lending the ZAR1 is necessary.

The *Du Bruyn* case involved an elderly couple (the Du Bruyns) and their business partner (Karsten), who were shareholders in three related entities. The parties agreed that Mr Du Bruyn would purchase Karsten's interests in each of the three entities. Mr Du Bruyn would have to pay Karsten a deposit and monthly instalments thereafter plus interest on the amount not paid upfront.

In addition, the Du Bruyns had to bind themselves as sureties and co-principal debtors and to register a covering bond over their property.

Karsten was not registered as a credit provider at the date on which the parties signed the agreements and accepted that he had to be registered as a credit provider to facilitate the registration of the covering bond over the Du Bruyns' property. Karsten's registration as a credit provider occurred seven months after the signature of the agreements.

The Du Bruyns then fell behind on their instalment payments and Karsten instituted proceedings for the balance of the purchase price owed to him under the agreements of sale.

The Du Bruyns' defence was that the agreements were null and void because Karsten was supposed to have been registered as a credit provider at the time the agreements were concluded and that Karsten's subsequent registration as a credit provider was insufficient.

The Gauteng Division of the High Court (which heard this matter initially) was bound by one of its previous decisions in the case of *Friend v Sendal* 2015 (1) SA 395 (GP) (*Friend*). In the case of *Friend*, the court decided that the NCA was directed only at those in the credit industry and did not apply to single transactions where credit was provided, irrespective of the amount involved.

The High Court found in favour of Karsten and the Du Bruyns appealed this decision in the SCA.

The SCA reasoned that it was difficult to reconcile the interpretation of the High Court with the clear meaning of the text of the NCA. It decided that the NCA makes it clear that a person must register as a credit provider if the total principal debt exceeds the prescribed threshold (which was ZAR500 000 at the time of conclusion of the agreements between the Du Bruyns and Karsten).

The SCA found in favour of the Du Bruyns and set aside the order of the High Court, i.e. Karsten was supposed to have been registered as a credit provider at the time the agreements were concluded.

The NCA applies to every credit agreement between parties dealing at arm's length and made in, or having an effect in, South Africa. However, a lender will not be required to register as a credit provider if the borrower is a company, partnership, a trust or an association that has an asset value or turnover of equal to or more than ZAR1 million (this is the current threshold).

On 11 May 2016, the Department of Trade and Industry announced that the new threshold for credit provider registration is reduced to nil (ZAR0), which means that the granting of smaller amounts of credit below the previous threshold of ZAR500 000 no longer excuses registration as a credit provider.

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