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THE INCIDENTAL CREDIT AGREEMENT – A THEORETICAL AND PRACTICAL PERSPECTIVE

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Mini-dissertation in partial fulfilment of the LLM degree in Commercial Law

Supervisor: Prof SF du Toit

30 November 2012
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Summary

The National Credit Act replaced the Credit Agreements Act and the Usury Act and introduced new concepts and classifications with new parameters to South African credit law. One of these new concepts is the incidental credit agreement. Although the incidental credit agreement is novel to South African credit law, the underlying agreements that form the basis of an incidental credit agreement are well-known and part of our everyday existence. The underlying agreements often become subject to the National Credit Act without our realising this or intending them to be subject to the act.

This mini-dissertation discusses the theoretical aspects of the incidental credit agreement and provides practical examples of such agreements, as found in legal precedent and in contracts procured or drafted by the writer.
CHAPTER 1

INTRODUCTION

1 Consumer protection and the development of credit law in South Africa

Legislation protecting debtors or in the wider sense, consumers, is an international phenomenon.\(^1\) Factors such as the needs, circumstances, political climate, history and economic philosophy of a country influence the extent of the protection afforded to consumers in such legislation.\(^2\) Consumers are generally a class of people who need the protection of the legislature from all the vultures of the business world and are typically individuals or small juristic persons with a value or turnover below a certain threshold or the relevant transaction value is below a certain threshold. Credit extended above the threshold is not regarded as consumer credit and it is left to the parties to determine the relationship, subject to the common law only. Variations on this theme are possible depending on the country in which you find yourself.\(^3\) However, it is not only the rights of consumers that are worthy of protection as credit grantors, their shareholders and investors are equally entitled to a fair profit. Consumer legislation is therefore a balancing act.

Although consumer legislation is a relatively modern concept it does not mean that legal rules protecting debtors have not existed over the centuries.\(^4\) Warranties that form part of contracts of sale, such as the warranty against latent defects and the \textit{ultra duplum} rule are some of these protective measures, but which are often excluded from agreements by the parties thereto. Consumer legislation attempts to strengthen the common law protection of consumers who often do not realise that these rights are excluded, or who realise it but are overpowered by the other contracting party. Try convincing a bank to change the terms of a credit agreement in terms of which you are the consumer!

\(^2\) South Africa is no exception in this regard. See Otto “The history of consumer credit legislation in South Africa” 2010 \textit{Fundamina Libellus ad Thomasion} 257 259.
\(^4\) Otto (n 1) par 1.2.1.
Legislation regulating usury is a prime example of consumer protection, going back to the Code of Hammurabi and the Twelve Tables. In South Africa usury was initially regulated by provincial legislation of the various provinces until the Usury Act was promulgated in 1926. The Usury Act was replaced and amended on various occasions and it would be the 1968 act which would govern usury in South Africa for over two decades.

In addition to the Usury Act, the Hire-Purchase Act was introduced in 1942 and was later replaced by the Credit Agreements Act. The Usury Act and the Credit Agreements Act had to be applied jointly as they together regulated consumer credit, which made consumer credit “an extremely difficult and confusing environment”. Credit law reform had been proposed to the South African Law Commission as early as 1993 in order to simplify and consolidate the legislation in order to ensure the balancing of interests of all parties.

Credit law reform finally came when the National Credit Act 34 of 2005 was enacted in 2006. The act changed South African consumer law in spectacular fashion by a wholesale replacement of the Credit Agreements Act and the Usury Act, introducing a completely new act bearing very little resemblance to its predecessors. The purposes of the National Credit Act are to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market by promoting equity in the market by inter alia ensuring consistent treatment of different credit products and credit providers, balancing rights and responsibilities of credit providers and consumers and addressing and correcting imbalances in negotiating power between credit

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5 Otto in Scholtz (n 1) par 1.2.1.
6 Act 37 of 1926.
7 Act 73 of 1968. Otto in Scholtz (n 1) par 1.3.1.
8 Act 36 of 1942.
9 Act 75 of 1980.
10 Otto in Scholtz (n 1) par 1.3.1.
12 For a discussion on the historical events, research and surveys which led to the enactment of the act, see Kelly-Louw “The prevention and alleviation of consumer over-indebtedness” 2008 SA Merc LJ 205 207.
13 Otto in Scholtz (n 1) par 1.3.6.
14 s 3.
15 s 3(b).
16 s 3(d).
providers and consumers.\textsuperscript{17} From the outset it declares the noble intentions of the legislature in balancing the rights of the role players in the credit market.

The act has been described as “… a bold and no doubt timely effort to make a clean break from the past”.\textsuperscript{18} The act and its regulations are by no means a concise piece of legislation, nor are they user-friendly for consumers or credit providers. The art of interpreting the act has been described by our courts as “… go[ing] round and round in loops from subsection to subsection, much like a dog chasing its tail.”\textsuperscript{19} Interpretational difficulties are discussed in chapter 3 below.

2 \textit{The incidental credit agreement}

The act contains new concepts and classifications with new parameters to the South African law. One of these new concepts is the incidental credit agreement.

“Incidental credit” is not a concept known to or established in consumer credit law in South Africa or, for that matter, elsewhere in the world. The concept “incidental credit agreement” is in fact fairly meaningless.\textsuperscript{20} However, Otto mentions that name-giving is not only a very common and popular human activity, but also a sensible one as it \textit{inter alia} makes it easy to distinguish between classes of things and as a result identifying the rules attached to the concept.\textsuperscript{21}

Incidental credit in terms of the National Credit Act is, loosely described, an agreement where an account is tendered for goods or services that have been or will be provided to the consumer over a period of time and a fee, charge or interest becomes payable if the account is not paid on time, or a higher price applies. The nature of an incidental credit agreement would not historically have been considered to be the granting of interest bearing credit.

The ordinary meaning of incidental is “happening in connection with something else, but not as important as it or not intended” or “something happening as a natural result of something”.\textsuperscript{22} The incidental credit agreement can therefore be described as a credit agreement which comes into

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{17} s 3(e).
\item \textsuperscript{18} \textit{ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors} 2009 2 SA 513 (D) par 15.
\item \textsuperscript{19} \textit{Firststrand Bank Ltd t/a First National Bank v Seyffert and another and three similar cases} 2010 6 SA 429 (GSJ) 434 per Willis J.
\item \textsuperscript{20} The choice of the expression “incidental credit agreement” has also been called “an unhappy one”. See \textit{JMV Textiles (Pty) Ltd v De Chalain Spareinvest} 2010 6 SA 173 (KZD) par 19.
\item \textsuperscript{21} Otto “The incidental credit agreement” 2010 \textit{THRHR} 637.
\item \textsuperscript{22} \textit{The Oxford Advanced Learner’s Dictionary} (2001) sv “incidental”.
\end{itemize}
\end{footnotesize}
being, although not intended by the parties to be a credit agreement. It is a natural result (albeit a legislative creation) of something else, in this case, an agreement of some kind.

Although the incidental credit agreement is a newcomer introduced by the act, the types of agreements covered by the definitions are well-known and part of our everyday existence, as will become clear below.

It must be pointed out at this stage that to date, very little has been written and very few cases reported on the incidental credit agreement, which make the sources and legal precedent few and far between. It was therefore necessary to conceive new interpretations and applications which was a challenging task.
CHAPTER 2
THE SCOPE OF THE APPLICATION OF THE NATIONAL CREDIT ACT

The National Credit Act undoubtedly has a much wider field of application than its predecessors. The act applies to all credit agreements between parties dealing at arm’s length and concluded or having an effect within the Republic.\(^{23}\) There is no monetary limit to the value of the transaction, nor does the act only apply to certain goods or services, as was the case in the previous dispensation. However, where the consumer is a juristic person whose asset value or annual turnover, together with that of all its related juristic persons equals or exceeds R1 million\(^{24}\) or the credit agreement is a large agreement\(^{25}\) in terms of which the consumer is a juristic person whose asset value or annual turnover is less than R1 million,\(^{26}\) the act does not apply by virtue of section 4(1). The act therefore protects the small business person and all natural persons in its dealings with credit providers.

“Credit agreement” is the umbrella term in the act and can broadly be described as an agreement where credit is extended and a fee, charge or interest is payable on the deferred amount.\(^{27}\) An agreement constitutes a credit agreement if it is a credit facility, a credit transaction, a credit guarantee or any combination of these transactions.\(^{28}\) Credit transactions include pawn transactions, discount transactions, incidental credit agreements, instalment agreements, mortgage agreements, secured loans, leases and any other agreement where payment is deferred and a fee charge or interest is payable (the “catch-all”-section 8(4)(f) credit agreement).\(^{29}\)

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\(^{23}\) s 4(1). For examples of contracts not at arms’ length see Van Zyl in Scholtz (n 1) par 4.2 and s 4(2)(b) of the act.

\(^{24}\) s 4(1)(a)(i) read with GN 713 in GG 28893(1 June 2006).

\(^{25}\) Mortgage agreements or credit transactions (other than a pawn transaction or credit guarantee) and the principal debt equals or exceeds R250 000. S 9(4) read with GN 713 in GG 28893(1 June 2006).

\(^{26}\) s 4(1)(b).

\(^{27}\) Exceptions hereto include for example credit guarantees and mortgage agreements where payment of a fee, charge or interest is not a prerequisite for the act to apply.

\(^{28}\) s 8(1).

\(^{29}\) s 8(4). The term “catch-all” is used by JM Otto and R-L Otto (n 3) 24.
Schematically credit agreements can be explained as follows:\textsuperscript{30}

\begin{itemize}
  \item \textbf{CREDIT AGREEMENTS}
  \begin{itemize}
    \item \textbf{CREDIT FACILITIES}
      \begin{itemize}
        \item (a) Supply of goods or service
        \item or
        \item (b) Payments to consumer
      \end{itemize}
    \item or
    \begin{itemize}
      \item (b) Payment on behalf of or at direction of consumer
    \end{itemize}
    \item (eg credit cards and overdrawn cheque accounts)
    \item \textbf{CREDIT GUARANTEES}
      \begin{itemize}
        \item (eg suretyships providing security for another consumer’s credit facility or credit transaction)
      \end{itemize}
    \item \textbf{CREDIT TRANSACTIONS}
      \begin{itemize}
        \item (a) Pawn transactions
          \begin{itemize}
            \item (eg goods serve as security for loan)
          \end{itemize}
        \item (b) Discount transactions
          \begin{itemize}
            \item (eg goods or services provided to consumer over period of time and lower price applies if paid within certain period, eg cash price if paid in six months)
          \end{itemize}
        \item (c) Incidental credit agreements
          \begin{itemize}
            \item (eg goods or services provided to consumer, account tendered)
            \item lower price if paid within certain period (eg “cash if paid within six months”)
            \item fee, charge or interest payable if not paid before certain date
          \end{itemize}
        \item (d) Instalment agreements
          \begin{itemize}
            \item (eg sale of movables on instalments with reservation of ownership or right to repossession)
          \end{itemize}
        \item (e) Mortgages
          \begin{itemize}
            \item (eg money loan secured by mortgage over immovable property)
          \end{itemize}
        \item (f) Secured loans
          \begin{itemize}
            \item (eg money loan secured by pledge of movable)
          \end{itemize}
        \item (g) Leases
          \begin{itemize}
            \item (of movables where ownership passes at the end of the agreement)
          \end{itemize}
        \item (h) Credit agreements where payment is deferred
          \begin{itemize}
            \item (eg direct loan)
          \end{itemize}
      \end{itemize}
  \end{itemize}
\end{itemize}

\textsuperscript{30} Nagel \textit{Kommersiële Reg} (2011) par 20.09. The act also regulates altruistic agreements, being developmental credit agreements and public interest credit agreements which both have a public interest component, but which are not relevant for purposes of this dissertation.
Only a few of the above credit agreements are relevant to this dissertation and an in-depth discussion can be found on those agreements below.

The act further distinguishes between small, intermediate and large agreements, each with its own rules and thresholds.\textsuperscript{31} The importance of the distinction between them lies \textit{inter alia} in the different forms and contents prescribed for the written agreement,\textsuperscript{32} the protection of juristic persons\textsuperscript{33} and the conditions regarding advanced settlement of a debt.\textsuperscript{34} A small agreement is a credit transaction or credit facility below R15 000 and any pawn transaction.\textsuperscript{35} An intermediate agreement is a credit transaction where the principal debt is between R15 000 and R250 000, or a credit facility with a limit in excess of R15 000 and pawn transactions and mortgage agreements are excluded from this classification.\textsuperscript{36} Large agreements are credit transactions where the principal debt exceeds R250 000 and all mortgage agreements regardless of their size.\textsuperscript{37}

Even in the event of the particular agreement falling within the definition of a credit agreement, the act may not apply due to one of the exemptions of section 4(1) being applicable. These exemptions include the following: a credit agreement in terms of which the consumer is the state or an organ of state;\textsuperscript{38} where the credit provider is the Reserve Bank;\textsuperscript{39} where the credit provider is located outside South Africa and the consumer applied to the Minister of Finance for exemption;\textsuperscript{40} an insurance policy or credit extended by an insurer solely to maintain the payment of premiums on a policy;\textsuperscript{41} a lease of immovable property\textsuperscript{42} and a transaction between a stokvel and its members.\textsuperscript{43} Furthermore, if a person sells goods or services and accepts payment by cheque or a similar instrument which is dishonoured, or if a charge against a credit facility is refused by a third party (such as a bank), with the result that the seller is not paid by the

\textsuperscript{31} See ss 9(2)-(4) read with GN 713 in \textit{GG} 28893(1 June 2006) for the classification of each agreement.
\textsuperscript{32} regs 30 and 31.
\textsuperscript{33} s 4(1)(b).
\textsuperscript{34} s 125(2)(c).
\textsuperscript{35} s 9(2) read with GN 713 in \textit{GG} 28893(1 June 2006).
\textsuperscript{36} s 9(3).
\textsuperscript{37} s 9(4).
\textsuperscript{38} s 4(1)(a)(ii) and (iii).
\textsuperscript{39} s 4(1)(c).
\textsuperscript{40} s (4)(1)(d).
\textsuperscript{41} s 8(2)(a).
\textsuperscript{42} s 8(2)(b).
\textsuperscript{43} s 8(2)(c).
purchaser, no credit agreement as defined by the act will exist between the parties.\textsuperscript{44} If a consumer pays for goods or services through a charge against a credit facility provided by a third party (such as a credit card), no credit agreement is concluded between the seller and purchaser. A credit agreement is concluded between the purchaser, being the user of the facility and the third party effecting payment to the seller.\textsuperscript{45}

Even after establishing that an agreement is in fact a credit agreement to which the act applies, the act may only have limited application thereto, as is the case with incidental credit agreements,\textsuperscript{46} credit guarantees and agreements where the consumer is a juristic person.\textsuperscript{47}

\textsuperscript{44} s 4(5).
\textsuperscript{45} s 4(6)(a).
\textsuperscript{46} s 5.
\textsuperscript{47} s 6.
CHAPTER 3

THE INCIDENTAL CREDIT AGREEMENT IN THEORY

1 Statutory definitions

An incidental credit agreement is a type of credit transaction\(^{48}\) and is defined in section 1 of the act as:

“… an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply:

a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or

b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date.”

Two other definitions require mentioning at this stage, namely the discount transaction and the credit facility.

The discount transaction is also a credit transaction and is defined as:

“… an agreement, irrespective of its form, in terms of which -

a) goods or services are to be provided to a consumer over a period of time; and

b) more than one price is quoted for the goods or service, the lower price being applicable if the account is paid on or before a determined date, and a higher price or prices being applicable if the price is paid after that date, or is paid periodically during the period.\(^{49}\)

A credit facility is:

“… an agreement, irrespective of its form [in terms of which] -

\(^{48}\) s 8(4)(b).

\(^{49}\) s 1.
a) a credit provider undertakes -

   i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from
time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

   ii) either to -

      aa) defer the consumer’s obligation to pay any part of the cost of goods or services, or to
      repay to the credit provider any part of an amount contemplated in subparagraph (i); or

      bb) bill the consumer periodically for any part of the cost of goods or services, or any part of
      an amount, contemplated in subparagraph (i); and

b) any charge, fee or interest is payable to the credit provider in respect of -

   i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or

   ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided
   in the agreement.\(^{50}\)

The definition of the incidental credit agreement clearly overlaps with those of the discount
transaction and the credit facility and the similarities and differences are discussed hereinbelow.
The overlaps make interpretation of the act difficult and close to an art. Willis J remarked in a
full-bench appeal recently that “[i]t has become a notorious fact that cases requiring the
interpretation of the [National Credit Act] result in a scarcely muffled cry of exasperation from
the leathered benches of the judiciary.”\(^{51}\)

The importance of the classification of a certain agreement to be the correct type of credit
agreement lies therein that different provisions of the act apply to different credit agreements. In
particular, the act only applies to incidental credit agreements to a limited extent but credit
facilities and discount transactions are subjected to a full onslaught.

2 The discount transaction and the incidental credit agreement

The discount transaction is so similar to the incidental credit agreement (more particularly
subsection (b) thereof), that it is hard to spot the difference. Leaving aside the requirement that a

\(^{50}\) s 8(3).

\(^{51}\) Renier Nel Inc and Another v Cash On Demand (KZN)(Pty)Ltd 2011 5 SA 239 (GSJ) par 15.
fee, charge or interest may be payable, both definitions envisage an agreement for the provision of goods or services over a period of time, for which goods or services a lower price applies if the account is paid before a specific date (the settlement date), whereafter a higher price applies. The only substantial difference between the incidental credit agreement and the discount transaction seems to be that an account is tendered or rendered in the case of an incidental credit agreement.52

Although a debate regarding the overlap of the definitions may seem purely academic, it is not. The fact that the definitions are so much the same may have catastrophic results. It may for instance result in “agreement shopping”. In other words, a person fits the particular credit agreement into a mould that suits him, in order to circumvent the provisions of the act and escape liability. An example would be where a debtor raises a defence in legal proceedings against the claim of an unregistered credit provider that the particular agreement is a discount transaction and therefore the credit provider had to have been registered in order to grant credit and in reply to which the credit provider claims that the agreement is an incidental credit agreement as a result of which it (the credit provider) was exempt from the registration requirements of the act.53 The general burden on the credit provider is much heavier in the case of a discount transaction than in the case of an incidental credit agreement as the act only applies to a limited extent to the latter which is why a party would want to ensure that its agreements are classified as being incidental rather than discount transactions. In the example, a credit provider who was obliged to be registered but was not registered when it granted credit will have concluded an unlawful agreement, which is void.54

Incidental credit agreements come into being by operation of law twenty days after the settlement date passed without payment by the debtor55 and often without the parties realising or intending to conclude a credit agreement which is subject to the act. Is it possible that a discount transaction can come into being without the parties intending to conclude a credit agreement subject to the act, thus incidentally? For example, a purchaser orders goods periodically from a supplier and on receiving an account the purchaser notes a payment structure similar to subsection (b) of the

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52 See Otto (n 21) 640 where it is suggested that the word “tender” may have been a printing error for “render”.
53 See the discussion in par 5.2 below regarding registration.
54 s 40(4). The consequences of an unlawful agreement are discussed in par 5.1.3 below.
55 s 5(2). The deemed conclusion of the incidental credit agreement is discussed in par 4 below.
definition of an incidental credit agreement (in other words two prices for settlement are quoted) and the purchaser then pays in accordance with the payment structure one way or another. Will the agreement be an incidental credit agreement or a discount transaction? Can a discount transaction come into being incidentally? To establish what type of agreement was concluded one needs to consider the definitions carefully together with the surrounding circumstances.

Firstly, the definition of a discount transaction refers to goods or services that “are to be provided” whereas an incidental credit agreement also includes goods that have been provided already. Both definitions require an agreement to be concluded between the parties in advance, however the agreement in terms of a discount transaction is a credit agreement and the agreement in terms of an incidental credit agreement will initially be another type of agreement such as an agreement for the supply of goods or services and only later become an incidental credit agreement. In the case of the discount transaction the nature of the agreement will from inception or conclusion be a credit agreement. The parties need to adhere to all the requirements of the act from the outset and even before the credit agreement is concluded, e.g. registration of the credit provider and credit assessments. Therefore, conclusion of the discount transaction must take place prior to delivery of the goods or services as a party needs to comply with the act in its entirety prior to delivery.

Secondly, the definition of an incidental credit agreement states that an account is tendered for the goods or services. Only one account seems to be envisaged. No reference is made to an account to be rendered in the case of discount transactions. However, accounts, or rather statements, must be rendered in terms of section 108 of the act in the case of discount transactions. Periodic accounts seem to be envisaged.

The courts will have to carefully consider the terms of the particular agreement in dispute and all the circumstances, such as the type of business of the seller (credit provider), whether the agreement was concluded prior to delivery of the goods or services, the time periods provided for payment, whether it is a running account on which goods or services are bought regularly as discount transactions may not be conducive to trading efficiently, whether a single account is tendered on conclusion of the contract or whether a statement is sent monthly, etc. Despite the

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56 when payment is not made by the settlement date and the deeming provisions of s 5(2) kick in.
theory above, however, it may still happen that the parties did not intend to conclude a discount transaction, but, due to the wording of their agreement, a discount transaction is in actual fact concluded, with the parties thereto oblivious to the meaning. This will of course only become a problem in reality if a party breaches the agreement and legal action is instituted.

Some are of the view that the difference between the definitions is that for discount transactions two different prices are quoted for the goods or services while for incidental credit agreements a single price is quoted for the goods or services, but different prices apply depending on how the account is settled.\(^{57}\) I do not understand how this conclusion is arrived at as the definition of an incidental credit agreement clearly refers to “two prices [being] quoted”. However, more than two prices may be quoted in discount transactions,\(^{58}\) which may distinguish it from an incidental credit agreement.

Of course, if a fee, charge or interest is agreed to be payable on overdue amounts from the settlement date, the agreement will no doubt be an incidental credit agreement\(^ {59}\) and the act will have limited application.

Another minor difference between the two types of agreements is that the one is defined as an agreement and the other as a transaction. Although “agreement” is defined in section 1 of the act and “transaction” not, the legislature uses the terms interchangeably in the act and therefore nothing turns on this.

3 *The credit facility and the incidental credit agreement*

The incidental credit agreement and the credit facility also have much in common. Both are credit agreements which provide for the delivery of goods or services, the granting of credit and payment of a fee, charge or interest. The main difference, leaving aside that a lower and higher price may apply, is that an incidental credit agreement is subject to a condition that if the account is not paid before a determined date (the settlement date), a fee, charge or interest is payable on


\(^{58}\) according to the definition in s 1.

\(^{59}\) provided of course that the other requirements of the definition are satisfied.
the overdue amount. However, if the fee, charge or interest is charged *ab initio*, the agreement is a credit facility. The only inference that one can draw from this is that a deliberate distinction was made by the legislature. Another distinction is that a single account is tendered in the case of an incidental credit agreement (although later accounts may follow) whereas periodic bills are sent in the case of a credit facility. It has also been pointed out in case law that in the case of a credit facility only a part of the payment is deferred. The consumer decides how much to pay each month, subject to a stipulated minimum, and interest on the shortfall or a charge for the use of the card is payable. However, in the case of an incidental credit agreement payment of the full amount is deferred and there is no entitlement to pay less than the amount due. The obligation to pay interest flows from the default in making timeous payment, not from a legitimate decision not to pay the full amount that is due each month.

Wallis J decided on and explained the differences between the two definitions in the matter of *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC*. The court stated that although it may at first sight seem that an agreement could constitute both an incidental credit agreement and a credit facility it could not be possible as the act lays down vastly different consequences for the two types of agreements. The court further found as stated above that the basic difference between the incidental credit agreement and the credit facility is whether interest (or the fee or charge) is payable *ab initio*. The court stated that it is not the intention of a credit provider in

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60 The definition in s 1 specifically uses the word “condition”.
61 Otto (n 21) 640.
62 Otto (n 21) 640.
63 *Nelson Mandela Bay Metropolitan Municipality v Nobumba* 2010 1 SA 579 (ECG).
64 *Seaworld Frozen Foods (Pty) Ltd v The Butcher’s Block* 2011 JDR 1614 (ECG) par 16.
65 See n 20 above. The facts of this matter are discussed below. For criticism of the decision see Tennant “The incorrect understanding of an incidental credit agreement leads to undesirable consequences: JMV Textiles (Pty) Ltd v De Chalain Spareinvest” 2011 *SA Merc LJ* 123. Tennant’s main criticism relates to a statement by the court that an incidental credit agreement is not a credit agreement, which of course it is. See also Otto “The distinction between a credit facility and an incidental credit agreement in terms of the National Credit Act, and an afterthought on credit guarantees and registration” 2011 *TSAR* 557 who is of the view that a typing error may have slipped in and that the court meant to state that an incidental credit agreement is not a *credit facility*, bearing in mind that the whole case turned on the difference between the two definitions.
66 par 13.
67 These differences were first discussed by Otto (n 21) 640 and Wallis J seemed to agree although not specifically referring to Otto’s writings.
terms of an incidental credit agreement to profit from the interest charged, but rather that an amount is levied in order to compensate the credit provider for non-receipt of payment due to it.\textsuperscript{68}

This (the view of the court regarding the intention to profit) is rejected outright by Tennant who states that:\textsuperscript{69}

“… there is no provision in the [National Credit Act] to support the court’s view (at 16) that the thrust and purpose of the [National Credit Act] is concerned with the activities of those whose business it is to provide credit to the public and who seek to profit from that business by way of fees, charges and interest which includes a credit facility and excludes an incidental credit agreement…”

She warns that this statement should not be employed as a yardstick to determine the purpose or application of the National Credit Act. Otto\textsuperscript{70} on the other hand, states that “the case rightly emphasised the fact that the [parties’] underlying intention in arranging credit between them, and particularly the credit provider’s motive in this regard, is of paramount importance” and agreed with the view that the credit provider’s aim (and the parties underlying intention) under a credit facility is to make money or profit out of the credit granting as such, whereas in the case of the incidental credit agreement, the aim is the sale of the goods or services.\textsuperscript{71} The profit in the case of a credit facility may consist of interest \textit{ab initio}, a fee for the use of the facility on a per transaction basis, a fixed monthly charge, interest if the debt is not paid in whole or in part or a return obtained from a third party such as a dealer where the dealer pays or forfeits a certain percentage of the purchase price paid by the credit card issuer on the instructions of the credit card holder (consumer) to the credit card issuer.\textsuperscript{72}

At first glance one may be misled into including credit card transactions in the definition of incidental credit agreements. This would not be correct as the definition of credit facility accommodates credit cards. The court confirmed this in the \textit{JMV Textiles}-case,\textsuperscript{73} but did not
provide full reasons. According to Otto the reason the definition of an incidental credit agreement does not include credit cards is that:74

“… the operative words of the definition refer to an account (which) was tendered for goods and services that have been provided. The issuer of a credit card (for example a bank) renders an account for credit that the bank has extended to the consumer by paying his debt owed [to] the supplier of goods or services. The account is not tendered by the bank for the goods or services as such, nor does the supplier of the goods or services ever submit an account to the cardholder.”

In the case of Pirelli Tyre (Pty) Ltd v AIE Tyre Distributors Johannesburg CC75 the court also had to establish whether the agreement was an incidental credit agreement or credit facility.76 The court classified the agreement as one of incidental credit. In coming to this conclusion the court considered the nature, intent and substance of the agreement77 and also the fact that there was no periodic billing of the consumer.78

An agreement in terms of which the supplier of a utility or other continuous service will defer payment by the consumer until the supplier has provided a periodic statement of account for the utility or continuous service and interest, fees or charges on the amount deferred will only be imposed if the consumer fails to pay the amount due within at least 30 days after delivery of the periodic statement, constitutes an incidental credit agreement and not a credit facility.79 A utility is defined as the supply to the public of an essential commodity such as electricity, water or gas or the supply of a service such as waste removal, access to sewage lines, telecommunication networks or transportation infrastructure.80 “Continuous service” is defined as the supply for compensation of a utility or service (other than credit or access to credit) or the supply of a utility or service combined with the supply of goods essential for the utilisation of the utility or service.81 Examples are discussed in chapter 4 below. It is important to note that the consumer must be allowed 30 days to pay his debt according to section 4(6)(b) and if not, the agreement

74 (n 65) 552.
75 case no 22033/2009 (SGJ) (unreported).
76 See the discussion of this case in ch 4 below.
77 par 50.
78 par 49.
79 s 4(6)(b).
80 s 1.
81 s 1.
will be considered to be a credit facility. Otto notes that the distinction is important as the 30 day-rule does not otherwise apply to incidental credit agreements other than for the supply of a utility or continuous service. It is up to the parties to agree on the period.

4 Conclusion of an incidental credit agreement

The parties to an incidental credit agreement are deemed to have concluded the agreement on the date that is 20 business days after:

a) the supplier of the goods or services first charges a late payment fee or interest in respect of that account; or

b) a pre-determined higher price for settlement of the account becomes applicable, unless the consumer paid prior to that date.

In essence, the agreement is deemed to be concluded 20 days after the parties have reached consensus about the agreement, in other words after a 20 days’ gestation period (“the 20 day gestation period”). However, the wording in section 5(2) is formulated ad hominem and not ad actus: the parties are deemed to have made the agreement after 20 days; the agreement itself is not deemed to have been concluded after 20 days. Otto is of the view that nothing turns on this and that it is probably just an example of untidy drafting.

Let us pause for a moment and consider consensus in the conclusion of the incidental credit agreement. According to the South African law of contract consensus between the parties is a requirement for a contract to be valid and enforceable. The elements of consensus are that the contractants must agree on the consequences they wish to create, they must intend to bind themselves legally and they must be aware of their agreement. Parties to an incidental credit agreement may very well not know the consequences they are creating when concluding an incidental credit agreement. Most consumers are laymen as far as the law is concerned (not even

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82 Nelson Mandela Bay Metropolitan Municipality v Nobumba (n 63). See the discussion and criticism of this case in ch 4 below.
83 (n 21) 642.
84 s 5(2).
85 (n 21) 647.
87 Van der Merwe Kontraktereg Algemene Beginsels (2007) 23.
to mention credit law) and may not have been educated in the consequences that will be created by conclusion of the particular agreement. Lack of fulfilment of this requirement could then mean that no valid contract is concluded.\textsuperscript{88} Section 5(2) prevents this by introducing a statutorily deemed consensus. The incidental credit agreement is therefore a credit agreement concluded by operation of law and not intention.\textsuperscript{89}

Subsection 5(2) could not have simply fallen from the sky and although a good reason must exist for its inclusion in the act, the reason has escaped academic writers.\textsuperscript{90} It has been considered that a credit transaction in terms of the catch-all section 8(4)(f) comes into existence for the 20 day gestation period, but this suggestion has been rejected as “downright wrong”\textsuperscript{91} and “unthinkable and impracticable”\textsuperscript{92} as it would mean, amongst other things, that a credit provider will have to register as a credit provider for purposes of the 20 day gestation period whereas it was the legislature’s intention that a credit provider need not register with the conclusion of incidental credit agreements. Other examples would include that a credit provider would have to adhere to the provisions regarding reckless credit (which do not apply to incidental credit agreements) for a short while, whereafter it will become irrelevant. This would clearly be unfeasible and burdensome for the parties, particularly the credit provider.

Although the 20 day provision is relevant for purposes of the application of Parts D (statements of account) and E (alteration of agreements) of Chapter 5 in that these parts only apply once the incidental credit agreement is deemed to have been made,\textsuperscript{93} there is no indication of the purpose of the 20 day gestation period. The act may just as well have provided that the agreement is concluded on the day the late payment fee or interest or the pre-determined higher price for settlement becomes applicable. Renke opines that because section 5(1)(f) states that parts D and E of Chapter 5 only apply once the agreement is deemed to have been made, one can deduce...

\textsuperscript{88} Mould “Tacit responsibilities assigned to the drafter of a credit agreement by the National Credit Act 34 of 2005 with the particular emphasis on contractual consensus: A critical analysis” 2008 \textit{Journal for Juridical Science} 109 113.
\textsuperscript{89} Mohamed “A trap for the unwary” September 2007 \textit{Without Prejudice} 22.
\textsuperscript{90} Otto (n 21) 647. Mohamed (n 89) also states that the reason is unclear but, having regard to the purpose of the act, and the fact that the incidental credit provider should know that an incidental credit agreement could potentially come into effect, it can be argued that a credit provider may not do anything within the 20 day period that conflicts with the act.
\textsuperscript{91} Otto (n 21) 647.
\textsuperscript{92} Renke “Aspects of incidental credit in terms of the National Credit Act 34 of 2005” 2011 \textit{THRHR} 472.
\textsuperscript{93} s 5(1)(f).
therefrom that the other chapters and sections mentioned in section 5(1)(a)-(e) and (g) already apply to an incidental credit agreement before expiry of the 20 day gestation period.\(^\text{94}\) He states that had it been the intention of the legislature that all the sections in section 5(1) have to apply to an incidental credit agreement only once the agreement is deemed to have been made in terms of section 5(2), a specific provision to that effect would have been included by the act. The result of this theory is that a large number of the act’s provisions would apply to an incidental credit agreement even before the agreement is deemed to have been made,\(^\text{95}\) for example, the consumer has the right to information in a plain and understandable language,\(^\text{96}\) to confidential treatment,\(^\text{97}\) to access and challenge credit records,\(^\text{98}\) to apply for debt review should he become over-indebted\(^\text{99}\) and for interest to be limited to the prescribed rate.\(^\text{100}\) On the other hand one may argue that the wording pertaining to Parts D and E is simply another example of untidy drafting in the act.\(^\text{101}\) If the legislature intended to keep incidental credit agreements outside of the scope of the act to a large extent why would the act be applicable to incidental credit agreements at all prior to expiry of the 20 day gestation period as the incidental credit agreement does not yet “exist” in terms of the act?

In practice, the significance of the 20 day gestation period is perhaps that in the case where a late payment fee or interest becomes payable, that fee or interest will only reflect on a much later statement of account. If the consumer purchases goods on 1 March which is payable by 31 March, the agreement will only be an incidental credit agreement by the end of April and although interest will start running from the beginning of April, it will only reflect on the supplier of the goods’ statement delivered at the end of April, and coincidentally, just in time for the agreement to manifest into an incidental credit agreement as per the deeming provisions.

This begs the question of when the notice required by section 129(1)(a) must be sent to the consumer.

\(^94\) (n 92) 469.
\(^95\) which is discussed in detail by Renke (n 92) 470.
\(^96\) s 64
\(^97\) s 68.
\(^98\) s 72.
\(^99\) s 86.
\(^100\) s 105 read together with reg 42(1).
\(^101\) There are many such examples of untidy drafting. See for example Otto “Die par delictum-rëel en die National Credit Act” 2009 TSAR 417.
If a consumer is in default under a credit agreement the credit provider must draw the default to the notice of the consumer in writing and propose that the consumer refer the agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction with the intent that the parties resolve the dispute or agree on a payment plan. If the credit provider wants to enforce the credit agreement by proceeding with legal action the consumer must have been in default for 20 business days ("the 20 day default period") under that credit agreement and 10 days must have expired since delivery of the notice. Technically an incidental credit agreement only comes into existence on expiry of the 20 day gestation period. Section 129(1)(a) specifically refers to the default of a consumer under a credit agreement. If literal effect is given to section 129(1)(a) it would mean that the notice can only be sent to the consumer at the end of April in the example above (as it only then becomes a credit agreement), and a further 20 business days have to expire after delivery of the notice during which the consumer must be in default under the credit agreement (which only came into existence at the end of April), which would bring us to the end of May. Effectively summons can only be issued against the consumer in June. Clearly this result would be absurd. Any consumer could then run a 90-day account without much consequence. It is submitted that the notice can be sent to the consumer immediately on default and not only once there has been a deemed conclusion of an incidental credit agreement. The 20 day gestation period and the 20 day default period can run concurrently.

However, the above are simply practical results of section 5(2) and not the reason for it unless one argues that the legislature intended to keep incidental credit agreements outside of the ambit of the act for as long as possible in order to give parties ample opportunity to resolve the matter privately, failing which the act provides avenues of relief (which mostly benefit the consumer).

The fact that the agreement is only deemed to have been concluded after the 20 day gestation period has transpired does not mean that the parties have no contractual relationship up until day 20. The deemed provision of 20 days is clearly subject to an existing contract between the parties for the provision of goods or services and a further agreement\(^\text{102}\) to either pay a fee, charge or interest, or a higher price in the event of non-payment.\(^\text{103}\) However, only after expiry of the 20

\(^{102}\) The further agreement is required by s 5(3)(b) and is subject to the limitations set by the act regarding maximum fees, interest and charges.

\(^{103}\) Otto (n 21) 647.
day gestation period (and on the other requirements in section 5(2) being met) will the agreement become a credit agreement for purposes of the act.

5 The limited application of the act to the incidental credit agreement

As mentioned earlier in this dissertation, the incidental credit agreement is a credit agreement which comes into being, which was not initially intended by the parties to be an agreement for the extension of credit at a profit for the credit provider. The act acknowledges the unique and unintended consequences for the parties to such an agreement by exempting such agreements from some of the more burdensome sections of the act. It would simply be impractical\textsuperscript{104} and unrealistic\textsuperscript{105} to, for example conduct a credit assessment of a purchaser of goods to avoid reckless credit being granted or to ensure compliance of the form and content of the agreement with the act, when the agreement may in fact never gestate into an incidental credit agreement.\textsuperscript{106} It is not the intention of the act to regulate all transactions for the sale of goods and services.\textsuperscript{107}

Section 5(1) provides that only the following provisions of the act apply to an incidental credit agreement:

\begin{enumerate}
\item Chapters 1, 2, 7, 8 and 9;
\item Chapter 2, sections 54 and 59;
\item Chapter 4, Parts A and B;
\item Chapter 4, Part D, except to the extent that it deals with reckless credit;
\item Chapter 5, Part C, subject to subsection (3)(a);
\item Chapter 5, Parts D and E, once the incidental credit agreement is deemed to have been made in terms of subsection (2); and
\item Chapter 6, Parts A and C.
\end{enumerate}

\textsuperscript{104} Van Zyl in Scholtz (n 1) par 4.4.1.
\textsuperscript{105} Kelly-Louw “Consumer Credit” LAWSA vol 5(1) 2ed (ed WA Joubert) par 9.
\textsuperscript{106} where the consumer pays timeously, in other words, by the settlement date.
\textsuperscript{107} See the JMV Textiles case (n 20) above regarding the types of transactions the act seeks to regulate.
This means that the following sections apply to incidental credit agreements: Sections 1-38; 54 and 59; 60-73; 78-88 (except to the extent that it deals with reckless credit); 100-120; 124-126 and 129-173. These sections include, for example, the interpretation, purpose and application of the act; consumer credit institutions such as the National Credit Regulator and the National Consumer Tribunal; dispute settlement and enforcement of agreements; enforcement of the act; the rights to apply for credit, protection against discrimination, to information in an official language and in plain and understandable language and the right to receive certain documents; rights regarding credit bureaux; the right to receive statements of account; over-indebtedness and many more.

Notwithstanding that the majority of the act’s sections apply to these agreements, some of the most burdensome and important sections do not find application. These sections are discussed below.

5.1 Pre-agreement and agreement formalities

The first category of sections that do not apply to incidental credit agreements all relate to the act of conclusion of the agreement. An incidental credit agreement may never come into existence if the parties perform in accordance with the underlying agreement. In all instances mentioned pertaining to the agreement formalities a heavy burden would have been imposed on the parties to ensure compliance, had the act applied and it would simply be unpractical. The fact that the act applies is an unintended consequence. To use the example of a doctor providing medical treatment and whose account was not paid and interest was charged (by agreement), one can safely say that neither the doctor nor the patient intended to conclude a credit agreement when the patient entered the consulting rooms. The contract was one for the delivery of medical services (treatment).

5.1.1 Pre-agreement statement and quotation

Section 92 stipulates that a credit provider must give a consumer a pre-agreement statement in the prescribed form (in the case of small agreements) or in the form of the proposed agreement (in the case of intermediate and large agreements) and a quotation containing the financial details of
the credit agreement. The statement or quotation is binding on the credit provider for five days. These pre-agreement disclosures need not be made in the case of incidental credit agreements.

5.1.2 Form and content of agreement

The form and content of credit agreements are prescribed by the regulations. The contents to be included are substantial and detailed (except in the case of small agreements). The financial aspects of the agreement and just about every conceivable right the act confers on the consumer must be included in the agreement. According to Otto “… the underlying idea is a sound one, namely full disclosure to consumers of what they are letting themselves in for”. The form and content of the incidental credit agreement is not prescribed and the parties are free to agree the terms of their agreement. In practice, however, this means that consumers will be faced with standard form contracts.

5.1.3 Unlawful provisions and unlawful credit agreements

Sections 89 and 90 pertain to unlawful credit agreements and unlawful provisions. Section 89 lists credit agreements that are prohibited such as agreements with unregistered credit providers and agreements with unemancipated minors. Section 90 contains a list of approximately 30 prohibited terms in credit agreements such as the exclusion of common-law warranties (which renders for instance a voetstoots clause void), the waiver of the consumer’s statutory rights and provisions defeating the purpose or policies of the act. Unlawful credit agreements or unlawful provisions in an agreement have severe and far-reaching consequences, namely that the agreement or provision is unlawful and therefore void. Unlawful provisions must either be severed from the agreement by a court or the court will alter the provision to render it lawful. Alternatively the court may declare the entire agreement unlawful. If the agreement is unlawful, the credit provider must refund the consumer all payments made in terms of the agreement, together with interest at the rate applicable to the agreement. All of the credit provider’s contractual rights to recover the money paid or goods delivered are, by court order, either cancelled (unless the court decides that the consumer will be unjustly enriched), or

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108 s 93(2) and (3) read together with regs 30 and 31.
109 JM Otto and R-L Otto (n 3) 45.
110 Otto (n 21) 648.
111 s 90(4).
forfeited to the state (if the court concludes that cancelling the said rights would enrich the consumer).\textsuperscript{112} Neither the prohibitions nor the consequences apply to incidental credit agreements.

5.1.4 Over-indebtedness and reckless credit

Incidental credit agreements are subject to Part D of Chapter 4 dealing with over-indebtedness and reckless credit, except to the extent that it deals with reckless credit.\textsuperscript{113} This exclusion is of the utmost importance. Over-indebtedness and reckless credit are new concepts in our credit law.\textsuperscript{114} Although they are different concepts there may be an overlap between them. A consumer is over-indebted when he is or will be unable to satisfy all his obligations under all his credit agreements in a timely manner having regard to his financial means, prospects, obligations and history of debt repayment.\textsuperscript{115} A consumer may become over-indebted immediately if credit was granted recklessly or if not granted recklessly, may run into financial difficulties at a later stage. If a court declares a consumer over-indebted his obligations may be re-arranged by, for example postponing dates for payment.

Credit providers may not grant credit recklessly. To prevent reckless credit, a credit provider must, prior to concluding the credit agreement, conduct a risk assessment.\textsuperscript{116} During a risk assessment, a credit provider must assess the consumer’s understanding and appreciation of the risks and costs of credit and his rights and obligations involved, his debt repayment history and his existing financial means, prospects and obligations.\textsuperscript{117} If credit was granted recklessly by not conducting a credit assessment, or conducting an assessment but the consumer does not understand the risk and cost of the credit or if the mere entering into the agreement caused the

\textsuperscript{112} S 89(5). See Cherangani Trade and Investment 107\textit{( Edms) Bpk v Mason} case no 6712/2008 (O) (unreported) in which the court made a forfeiture order in favour of the state as the credit provider was not registered. See the discussion in par 5.1.5 below. An application for leave to appeal in the Cherangani-case was dismissed and the constitutionality of s 89(5) was not adjudicated upon by the Constitutional Court (Cherangani Trade and Investment 107\textit{(Edms)Bpk v Mason} (2011) ZACC 12). However, s 89(5)(c) (the forfeiture provision) was declared unconstitutional on 17 April 2012 in Opperman v Boonzaaier case no 24887/2010 (WCC) (unreported). The order of inconstitutionality must, of course, be confirmed by the Constitutional Court and although argument has been presented to the Constitutional Court, judgment had not been handed down at the time of writing this dissertation.

\textsuperscript{113} s 5(1)(d).

\textsuperscript{114} For a full discussion see \textit{inter alia} Van Heerden in Scholtz (n 1) ch 11; JM Otto and R-L Otto (n 3) par 30.9 and 34.2; Kelly-Louw (n 12) 200; Vessio “Beware the provider of reckless credit” 2009 \textit{TSAR} 274.

\textsuperscript{115} s 79(1).

\textsuperscript{116} s 81.

\textsuperscript{117} s 81(2).
consumer to become over-indebted, the court may set aside or suspend the agreement. An order to this effect has far-reaching consequences for a credit provider, namely that the court may set aside all or part of the consumer’s rights and obligations or suspend the agreement. The burdensome and unnecessary process of credit assessment and the far reaching consequences of granting reckless credit do not apply to incidental credit agreements.

This makes sense, considering the nature of incidental credit agreements. It is safe to say that a doctor will not have the time, or the resources (and it would simply be impractical) to conduct a credit assessment on a patient prior to emergency surgery. Similarly, the patient may not physically be able to understand the risks, costs or obligations under the agreement, as required by the act. Imagine a doctor asking you (or a relative on your behalf) questions about your credit history, instead of your medical history as you are wheeled into the operating room for your emergency procedure!

5.2 Registration requirements

The whole of Chapter 3 does not apply to incidental credit agreements save for sections 54 and 59. Chapter 3 includes the provisions regulating the registration of all role players, namely debt counsellors, credit providers and credit bureaux. It further stipulates the process and conditions for registration, the disqualification of certain persons and the compliance procedures laid down by the act. Credit providers who wish to grant credit must be registered to do so. Any person with more than 100 credit agreements on his books, or agreements in terms of which the principal debt owed to him is in excess of R500,000, must register as a credit provider. If the credit provider fails to register, but continues to grant credit, it will result in the agreement being unlawful. The credit provider will not be entitled to enforce the

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118 s 80(1).
119 s 83.
120 s 83(2).
121 s 44.
122 s 40.
123 s 43.
124 s 45; s 48-52.
125 s 46-47.
126 s 54-59
127 s 40(1).
128 s 89(2)(d).
agreement as it is void *ab initio* and the rights of the credit provider under that agreement to recover money will either be cancelled, unless the court concludes that doing so would unjustly enrich the consumer, or be forfeited to the state. In the case of *Cherangani Trade and Investment 107 (Edms) Bpk v Mason* such a forfeiture order was indeed made as the credit provider was not registered when granting loans which were subject to the act.

However, incidental credit agreements are specifically excluded by section 40(1). In other words, a credit provider with more than 100 credit agreements or credit agreements of which the principle debt exceeds R500 000 need not register if the credit agreements are incidental credit agreements.

In the case of *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and Others* the defence was raised by the defendants that the plaintiff was obliged to register as a credit provider and because it was not registered the credit agreement was unlawful and therefore void and the plaintiff was precluded from recovering the purchase price of the goods from the defendants.

Wallis J stated that the key to whether the plaintiff was obliged to register, was whether the agreement was an incidental credit agreement, as a credit provider under an incidental credit agreement is not obliged to register in terms of section 40(1). It was considered whether the agreement could be a credit facility and found that it was not. The learned judge stated that the fact that the fee, charge or interest only arises when the consumer is in default under an incidental credit agreement, but in the case of a credit facility, interest is payable from inception, distinguishes the types of credit agreements.

Only sections 54 and 59 of Chapter 3 apply to incidental credit agreements. Section 54 authorises the National Credit Regulator to issue a notice to a person who engages in activities which require registration to stop those activities. However, a credit provider who concludes incidental credit agreements is not engaged in activities that require registration. One may then wonder why section 54 applies to such credit providers at all. Otto says that the reason may be that the

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129 s 89(5)(a).
130 s 89(5)(c).
131 See however n 112 above.
132 n 20 above.
133 par 6.
134 par 16.
legislature *ex abundanti cautela* wanted to equip the Regulator with this power in case a credit provider entering into incidental credit agreements concludes other credit agreements as well.\(^{135}\) Section 59 provides for a review process of the decisions of the Regulator.

5.3 Credit marketing practices

The act protects consumers in Part C of Chapter 4\(^ {136}\) against unscrupulous marketing practices and unsolicited credit agreements at consumers’ homes or places of employment and sets requirements and standards for advertisements relating to the availability of credit or goods or services to be purchased on credit.

Negative option marketing is when a credit provider induces a person to enter into a credit agreement\(^ {137}\) or increase his credit limit\(^ {138}\) on the basis that it will automatically come into place unless the consumer declines the offer. Any such provision will be an unlawful provision and therefore void to the extent provided for in section 90.\(^ {139}\) It is not clear why the incidental credit agreement is exempt from this section, but since this is also a general common-law principle, it does not really matter.

The credit provider is obliged in terms of the act to provide the consumer with the option to decline pre-approved credit limit increases;\(^ {140}\) to be excluded from marketing campaigns\(^ {141}\) and to maintain a register of the options selected by the consumer.\(^ {142}\) The act further regulates in what circumstances a credit provider may attend at the home or place of employment of a consumer to enter into a credit agreement\(^ {143}\) and further regulates advertisements of the availability of credit or goods or services to be purchased on credit.\(^ {144}\)

\(^{135}\) (n 21) 643.

\(^{136}\) s 74-77.

\(^{137}\) s 74(1).

\(^{138}\) s 74(2).

\(^{139}\) s 74(5).

\(^{140}\) as provided for in s 119(4).

\(^{141}\) s 74(6)(b).

\(^{142}\) s 74(7).

\(^{143}\) s 75.

\(^{144}\) s 76.
These sections are not applicable to incidental credit agreements. In certain instances it would simply not be applicable as, for example the advertising of credit would not be relevant in the case of an incidental credit agreement; it would be goods or services that would be advertised, if advertised at all. A consumer may, however, have these rights available to him, albeit in a slightly different form, under the Consumer Protection Act.\textsuperscript{145}

5.4 Termination of the agreement

The National Credit Act provides the consumer with a few unique remedies to terminate a credit agreement: the consumer can surrender the goods,\textsuperscript{146} exercise a cooling-off right\textsuperscript{147} or settle the debt in advance.\textsuperscript{148}

The surrender of goods is a new concept in South African credit law. It allows a consumer to return the goods at any time to the credit provider who must then sell the goods as soon as practicable for the best price reasonably obtainable. The consumer’s account is then settled and he remains liable for the shortfall, or the excess will be paid to him. The right of the consumer to surrender the goods under a credit agreement is not a right afforded to the consumer under an incidental credit agreement.\textsuperscript{149} It is only applicable to an instalment agreement, a secured loan or lease.\textsuperscript{150}

The cooling-off right afforded to consumers by section 121 is only available to consumers under a lease or instalment agreement entered into at a location other than the registered business premises of the credit provider. These rights of termination are only available to a consumer in limited circumstances and the fact that it does not apply to incidental credit agreements is therefore not surprising. This right may however be available to a consumer under the Consumer Protection Act. This is discussed in Chapter 5 below.

The right to settle a debt in advance is available to a consumer under an incidental credit agreement.

\textsuperscript{145} 68 of 2008. See the discussion in ch 5 below.
\textsuperscript{146} s 127.
\textsuperscript{147} s 121.
\textsuperscript{148} s 125.
\textsuperscript{149} As a result, the related s 128 is also not applicable to incidental credit agreements.
\textsuperscript{150} s 127.
Section 123 provides a credit provider with the right to terminate a credit agreement. This section does not apply to incidental credit agreements, but since it deals with credit facilities, it is of no consequence.

5.5 Interest, fees and charges

Part C of Chapter 5 deals with interest, fees, charges and insurance premiums that a credit provider may charge a consumer. This section applies to incidental credit agreements and therefore the maximum rates and fees prescribed in the act will apply to incidental credit agreements. However, Part C applies subject to section 5(3)(a) which states that only the items in sections 101(d), (f) and (g) may be charged in the case of incidental credit agreements. These sections refer to interest, default administration charges and collection costs. These items may only be charged if the parties agreed that it would become payable. This confirms the requirement of there being an underlying agreement for an incidental credit agreement to ever come into existence. The maximum interest rate allowed in the case of incidental credit agreements is 2% per month.\(^{153}\)

5.6 Other sections that do not apply to incidental credit agreements.

Section 94 pertains to liability for lost or stolen cards under a credit facility and clearly does not relate to incidental credit agreements. Section 95 states that the provision of credit as a result of a change to an existing credit agreement, or a deferral or waiver of an amount under an existing credit agreement should not be treated as creating a new credit agreement.

Section 96 provides that when a party is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, the party giving notice must deliver the notice at the address chosen in the agreement or the most recent address if notice was given of a change of address. It is assumed that the legislature wanted to give parties the opportunity to agree the terms regarding the service of notices themselves. It is noteworthy though that section 65 regarding the delivery of documents and the ways in which it must be done, does apply to incidental credit agreements.

\(^{151}\) The charges excluded are the principal debt, initiation fees, service fees and credit insurance premiums.

\(^{152}\) s 5(3)(b).

\(^{153}\) Table A to reg 42(1) in GN R489 GG 28864 of 31 May 2006.
Section 97 obliges a consumer to disclose the location of the goods under a credit agreement if he is in possession thereof and he is not the owner, or the credit provider has a right to take possession thereof. This section will be very impractical considering the types of agreements that may become incidental credit agreements. An example would be a businesswoman who buys a range of detergents from a company on a weekly basis on account (in terms of which she must pay within 30 days where after interest is payable) to sell to various informal traders, who would then be required to inform the credit provider of the location of the goods. This would simply be unfeasible as the goods will change hands often or will soon be finished.

Section 98 relates to goods substituted under a credit agreement and is not applicable to incidental credit agreements, probably for the same reason as provided above.

Section 99 sets out the obligations of pawn brokers, which is clearly not relevant to incidental credit agreements.

6 The incidental credit agreement and credit guarantees

If a person undertakes to satisfy upon demand any obligation of another consumer in terms of a credit facility or credit transaction to which the act applies, such agreement is a credit guarantee for purposes of the act.\(^{154}\) The act will only apply to the credit guarantee if the act applies to the credit facility or credit transaction in respect of which the credit guarantee is granted.\(^{155}\) Incidental credit agreements are credit transactions to which the act applies (assuming of course that all the requirements have been met). A credit guarantee, such as a suretyship, signed by a person to guarantee the fulfilment of the obligations of the consumer under the incidental credit agreement, would then also be regulated by the act.\(^{156}\) Presumably the credit guarantee will only become regulated by the act at the time that the incidental credit agreement is deemed to have been concluded. Until such time as the incidental credit agreement is deemed to be concluded, a

\(^{154}\) s 8(5).

\(^{155}\) s 4(2)(c).

\(^{156}\) In *FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2006 3 SA (T) 390A-B it was found that a suretyship falls squarely within the definition of a credit guarantee. See also Boraine and Renke “Some practical aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005” 2007 *DJ* 233 n 105.
suretyship will only be a suretyship, governed by the law of contract and the General Laws Amendment Act.\textsuperscript{157}

As mentioned above any person with more than 100 credit agreements on his books, or agreements in terms of which the principal debt owed to him is in excess of R500,000 must register as a credit provider, except if they provide incidental credit.\textsuperscript{158}

In \textit{JMV Textiles (Pty) Ltd v De Chalain Spareinvest and two others}\textsuperscript{159} the court had to establish whether the agreement was an incidental credit agreement or credit facility and make a finding regarding the requirement of the credit provider to have registered. The court concluded that the arrangement between the parties

“… constituted an incidental credit agreement and not a credit agreement [sic] as defined in s 8 of the NCA, [which] has the consequence that the deed of suretyship executed by the second and third defendants is not a credit guarantee. This flows from the provisions of s 8(5) of the NCA.”

Otto states that the fact that a contract constitutes an incidental credit agreement cannot have the result that the suretyship does not qualify as a credit guarantee. The fact that a credit provider who enters into an incidental credit agreement does not have to register does not mean that the act does not otherwise apply to the incidental credit agreement. If the act does apply to the incidental credit agreement it will perforce apply to the credit guarantee covering the obligations arising from the incidental credit agreement.\textsuperscript{160}

\textsuperscript{157} 50 of 1956.
\textsuperscript{158} s 40(1).
\textsuperscript{159} n 20 par 23.
\textsuperscript{160} (n 65) 553.
CHAPTER 4

THE INCIDENTAL CREDIT AGREEMENT IN PRACTICE

The incidental credit agreement is not limited to any specific industry, for example the banking industry or the retail industry. A wide variety of contracts (in terms of which goods or services are provided) can be the underlying agreement, which may or may not become an incidental credit agreement when it moves into the parameters of the definition in the act. Many of the credit providers under these agreements grant only incidental credit and do not generally grant interest-bearing credit from which they will profit.

In *JMV Textiles (Pty) Ltd v De Chalain Spareinvest and two others* the court stated that in a broad sense the National Credit Act is concerned with the activities of those whose business it is to provide credit to the public and seek to profit from that business by way of fees, charges and interest. However certain types of businesses do not seek to profit from the fees, charges and interest, but the sale of a good or service itself. In this regard the court stated as follows:¹⁶¹

> “… it is common place to find that people have an account with their pharmacy or in poorer communities with the local general dealer’s or trader’s store. School children may have accounts at the school shop and students may run accounts at a student bookshop. It would be surprising to discover that all these institutions are credit providers required to register in terms of the NCA. Their focus is not the provision of credit and the securing of profit therefrom, but the simple task of profiting from the buying and selling of goods.”

The *dictum* above shows just how diverse the incidental credit market is and specifically mentions examples of where incidental credit agreements can typically be found, some of which are discussed below.

The examples mentioned below are my own interpretation or have been obtained from the writings of academics, my colleagues at the side-bar and in case law and are by no means a closed category of examples as, no doubt, new examples will surface from the benches of the judiciary in times to come.

¹⁶¹ (n 20) par 18.
Businesses often trade on the basis that a purchaser must apply to open an account with the seller and the seller then approves a purchase facility (also referred to as “credit facility” or “credit limit”) which represents the maximum amount of goods or services that a purchaser may purchase at any one time from the seller. The agreement (which could either be termed a “sale agreement”, “supply agreement” or “credit application” with standard terms and conditions attached or incorporated) would contain the details of the parties, it would stipulate the terms of the sale and the terms of payment. These types of arrangements are often found where the purchaser buys from the seller on a regular basis and being able to buy it “on account” would certainly make the administrative burden on the parties much easier as written agreements need not be concluded with every sale and the purchaser need not pay cash on every delivery on each occasion. It also leads to the establishment of a relationship between the parties. Often it is the requirement of the seller’s credit insurer that such an agreement be in place. Since the enactment of the National Credit Act, businesses have been wary of using the terms “account”, “purchase facility” or “credit facility” for fear that it may render the agreement a credit facility as defined in the act. Of course the use of these terms alone will not render the agreement a credit facility, but it often causes confusion and appealable judgments (which of course leads to notoriously expensive legal costs being incurred).\footnote{See Seaworld Frozen Foods (Pty) Ltd v The Butcher’s Block (n 64).}

A typical example of an account application form with standard terms and conditions of sale is annexed hereto as annex A.\footnote{The writer hereof, together with a legal team drafted this agreement for a client and the client’s details have therefore been obscured.} The standard terms and conditions state that payment must be made within the payment period as agreed (which will either be 30, 45 or 60 days, as approved) and that “the Supplier shall be entitled to levy interest on all overdue amounts (that is amounts not paid on the due date...) at a rate of 2,0% per month, or such other maximum rate that may be
prescribed from time to time in terms of the National Credit Act...”

This agreement is an incidental credit agreement.

Another example of an incidental credit agreement is the Credit Application attached as annex B, which was obtained from the internet. This supplier goes as far as to define the “incidental credit facility” as a facility in terms of which the supplying company affords the customer incidental credit. It stipulates that payment must be made within 30 days of the end of the month in which the goods were delivered and that interest is payable on all overdue amounts at the maximum rate possible under the National Credit Act.

Depending on how an agreement is worded, it could be either an incidental credit agreement, or a credit facility or an agreement not subject to the act at all. In the case of Voltex (Pty) Ltd v Chenleza CC and others the first defendant lodged an application with the plaintiff for credit facilities. The plaintiff accepted the application and as a consequence a written agreement of sale was entered into in terms of which the first defendant would purchase goods from the plaintiff from time to time. An essential term of the agreement was that the purchase price would be payable within 30 days of the date of delivery or date of statement. The first defendant purchased goods which it failed to pay for and the plaintiff instituted action against it and the sureties. The defendants raised inter alia the defence that the agreement is a credit facility as a consequence of which the credit provider had to have been registered with the National Credit Regulator.

The court stated that in determining whether the act applies to the agreement, one must consider the definitions in section 8 of the act as well as the nature, the subject-matter, substance, purpose and the function of a particular agreement, as well as the intention of the parties gathered from their conduct. The court considered the definitions of the credit agreements set out in section 8 of the act and found that the agreement of sale did not satisfy the criteria set out in the act and that the agreement was therefore not a credit agreement at all and the

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164 par 3.1 and 3.3 of the standard terms and conditions of sale.
166 clauses 7 and 15 of the terms and conditions of sale. See the discussion and criticism of the recent case of Voltex (Pty) Ltd v SWP Projects CC and another 2012 6 SA 60 (SGJ) below which would have the effect that this agreement (annex B) will not be an incidental credit agreement on clauses 7 and 15 alone.
167 2010 5 SA 267 (KZP).
168 par 9 and 10.
169 par 18.
plaintiff was not obliged to register.\footnote{par 43.} The agreement was found not to be a credit facility because the purchase price was payable in full and not in parts and as a result of which there would be no periodic billing. The court also considered whether the agreement could constitute a credit agreement under the catch-all section 8(4)(f). However, no charge, fee or interest was payable on the deferred amount in terms of the agreement. The interest payable was damages in consequence of the breach of contract, being a fixed amount payable by operation of law and not as determined in the agreement.\footnote{par 39.} As there was no interest, fee or charge payable on the overdue amount, the agreement could also not be an incidental credit agreement.

In the case of \textit{JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and Others}\footnote{n 20.} the defence was also raised by the defendants (two of which were sureties) that the plaintiff was obliged to register as a credit provider and because it failed to do so the credit agreement was unlawful and therefore void. The agreement between the parties was one where the plaintiff sold fabric on credit to the first defendant and payment was to be made within 60 days, failing which interest at 2\% per month was payable on the overdue amount. Wallis J stated that the key to whether the plaintiff was obliged to register was whether the agreement was an incidental credit agreement, as a credit provider under an incidental credit agreement is not obliged to register in terms of section 40(1).\footnote{par 6.} It was considered whether the agreement could be a credit facility and found that it was not. The learned judge stated that the fact that the fee, charge or interest only arises when the consumer is in default under an incidental credit agreement, but in the case of a credit facility, interest is payable from inception, distinguishes the types of credit agreements.\footnote{par 16.} It is further distinguished by the fact that part payment of the deferred amount is not possible in terms of an incidental credit agreement.\footnote{See the discussion of this case in ch 3 above.}

Soon after the \textit{JMV Textiles} case followed \textit{Pirelli Tyre (Pty) Ltd v AIE Tyre Distributors Johannesburg CC}\footnote{n 75 above.} where the court, once again, had to consider what type of credit agreement formed the basis of the relationship between the parties in order to establish the extent of the
application of the act. The credit application (in terms whereof tyres were sold) referred to the plaintiff’s standard terms and conditions, which stated that the debtor was entitled to a 2.5% discount if the account was paid prior to the settlement date, which was 30 days from date of statement. If the debtor failed to pay on the settlement date, the discount would be reversed and interest would then be charged on the outstanding amount. The court found that the agreement satisfied both the requirements of the definition of an incidental credit agreement in section 1 in that both the conditions in paragraph (a) and (b) of the definition were applicable.\(^\text{178}\)

The matter of *Seaworld Frozen Foods (Pty) Ltd v The Butcher’s Block*\(^\text{179}\) pertained to a credit application in terms of which food products were sold from time to time. Payment was deferred for 30 days and interest was payable if the amount payable was not paid timeously. The appeal court found that, although the agreement was headed “Application for Credit Facilities” it did not constitute a credit facility, but that it was clearly an incidental credit agreement. The court followed the reasoning of Wallis J in the *JMV Textiles*-case.\(^\text{180}\) In the case of a credit facility only a part of the payment is deferred. The consumer decides how much to pay each month, subject to a stipulated minimum, and interest on the shortfall or a charge for the use of the card is payable. However, in the case of an incidental credit agreement payment of the full amount is deferred and there is no entitlement to pay less than the amount due. The obligation to pay interest flows from the default in making timeous payment, not from a legitimate decision not to pay the full amount that is due each month.\(^\text{181}\) Revelas J (Beshe J concurring) also agreed with the view regarding the credit provider’s intention to profit as discussed in chapter 3 above.

In the recent matter of *Voltex (Pty) Ltd v SWP Projects CC and another*\(^\text{182}\) the agreement between the parties was embodied in an Application for Credit Facilities. The court had to consider if the agreement was an incidental credit agreement. Payment for goods delivered was due within 30 days of date of delivery. The agreement further stipulated that “all overdue sums/amounts shall bear interest at the maximum permissible rate of interest as determined by the Usury Act...from time to time, such interest to be reckoned monthly in advance from due date to date of actual

\(^{178}\) S 1 states that either or both (a) and (b) may apply.

\(^{179}\) n 64.

\(^{180}\) n 20.

\(^{181}\) par 19-20.

\(^{182}\) 2012 6 SA 60 (SGJ).
payment”. The court found that the first defendant was not liable to pay interest in terms of the agreement, but as damages in consequence of breach of the agreement. The court states that further credence to this view lies in the fact that the Usury Act was repealed by the National Credit Act. The plaintiff claimed interest at the *mora* rate of interest being 15.5% per annum which is prescribed in terms of the Prescribed Rate of Interest Act which the court interprets to mean that the plaintiff waived its right in terms of the agreement to rely upon the Usury Act, insofar it may be able to do so and relies instead only on the damages claimed as interest at a rate prescribed by the Prescribed Rate of Interest Act.

I respectfully disagree with the view expressed in paragraph 27 of the decision that an agreement between the parties that the maximum interest applicable under the National Credit Act (which repealed the Usury Act) may be claimed in the event of default, constitutes a claim for damages as a consequence of breach of contract and that it is not an agreed term of the agreement, but rather interest levied by operation of law. Had the parties not agreed on this interest to be applicable, the agreement would in any event not have been an incidental credit agreement as there is no agreed interest (or fee or charge) component. The practical result of this judgment is that parties will be able to claim the maximum interest rate allowed under the National Credit Act, without the agreement actually being subject to the National Credit Act, in other words, the act can be circumvented, which is simply ludicrous.

The court seems to support the view that in order to comply with the definition of an incidental credit agreement an account must be tendered, or it must be a term of the agreement that an account must be tendered in the case of incidental credit agreements. If no account is tendered, or agreed to be tendered, the agreement can not be an incidental credit agreement. *In casu* an invoice (which also served as delivery note) was delivered to the defendant which, it seems, did not suffice, nor did the delivery of a statement at the end of the month as it is stated to be merely a notice recording the delivery, the sales for a certain period and the amount due within a fixed

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183 par 27.
184 par 28.
185 55 of 1975. The rate is prescribed by GN R1814 of *GG* 15143 (1 October 1993).
186 par 29.
187 par 14-20.
period. It is not clear why an invoice or, in some cases a statement, can not satisfy the requirement of an account if the terms of the agreement is stated thereon.

The court was also of the view that payment could be made by a consumer under an incidental credit agreement “in whole or in part”, which is contrary to the findings in the *JMV Textiles* or *Seaworld* cases.\(^\text{188}\)

2  *Educational loans*

School or educational loans could also be incidental credit agreements, depending on the agreement. Generally when a student registers at a university a registration fee is paid and the student commences his studies. The agreement between the parties is that payment of the fees will be made in two instalments at two or more determined dates during the year (such as the beginning of every semester or quarter). The determined amounts are not interest-bearing but if payment is not made on the determined future dates, interest will be charged. This will render the agreement an incidental credit agreement.\(^\text{189}\)

In the same vein school loans could be incidental credit agreements if the agreement makes provision for a late payment fee or higher price in the event of late payment. However, school fee agreements are often worded to be discount transactions which would mean that the act is applicable in its totality and the school will be liable to register as a credit provider.\(^\text{190}\) Schools need to be cautious when entering into such agreements as it would impose a large administrative burden on a school to have to comply with the act, with an infrastructure that is not geared for compliance.

It is to be noted that educational loans and student loans are defined in the act\(^\text{191}\) and fall under developmental credit agreements\(^\text{192}\) if the credit provider holds a supplementary credit provider registration certificate.\(^\text{193}\) Educational loans, school loans and student loans would be developmental credit where, for example, an interest-bearing loan granted by a bank to a student

\(^{188}\) par 23.
\(^{189}\) Otto in Scholtz (n 1) par 8.2.3.3; Otto (n 21) 641.
\(^{190}\) Stoop “The impact of the National Credit Act 34 of 2005 on school fees charged by public schools” 2010 *THRHR* 451.
\(^{191}\) s 1.
\(^{192}\) s 10(1).
\(^{193}\) s 41.
is paid directly to the university to disburse the tuition fees.\textsuperscript{194} However, if the requirements of the definition are met, these loans may be incidental credit agreements.

3 \textit{Utilities and continuous services}

As mentioned above, an agreement in terms of which the supplier of a utility or other continuous service will defer payment by the consumer until the supplier has provided a periodic statement of account for the utility or continuous service and interest, fees or charges on the amount deferred will only be imposed if the consumer fails to pay the amount due within at least 30 days after delivery of the periodic statement constitutes an incidental credit agreement and not a credit facility.\textsuperscript{195} The consumer must be allowed 30 days to pay his debt according to section 4(6)(b) and if not, the agreement will be considered to be a credit facility. In the case of \textit{Nelson Mandela Bay Metropolitan Municipality v Nobumba}\textsuperscript{196} the municipality was of the view that the National Credit Act does not apply to it. The municipality did not advance reasons for this view. The court found that the duty to supply municipal services may be statutory in origin, but were ultimately based on a service agreement entered into between the municipality and the individual consumer.\textsuperscript{197} Depending on the wording of the service agreement the agreement could be a credit facility or an incidental credit agreement. The court states that section 4(6)(b) creates an exemption for credit providers from the most onerous provisions of the act.\textsuperscript{198} The court found that the requirements of section 4(6)(b) are cumulative: in order for a supplier of a utility to be exempted the agreement must provide that payment is deferred until periodical statements of account are rendered \textit{and} that no interest is charged on the deferred payment unless the consumer, having at least 30 days in which to pay, fails to do so. If these conditions are present, says the court, then the agreement is neither a credit facility nor an incidental credit agreement, but \textit{the interest charged will be incidental credit.}\textsuperscript{199} Otto does not agree with this interpretation as it is not the interest charged that forms the incidental credit agreement, but the entire overdue

\begin{footnotes}
\item[194] Otto in Scholtz (n 1) par 8.5.1.
\item[195] s 4(6)(b).
\item[196] n 63.
\item[197] par 34.
\item[198] See Otto “Rekeninge vir munisipale dienste en die National Credit Act” 2011 \textit{DJ} 44. Otto is of the view that it is not correct to label the section as an exemption as the act will still be applicable to the credit agreement being an incidental credit agreement.
\item[199] Par 40. My emphasis.
\end{footnotes}
amount. If the legislature intended only for the interest to be incidental credit, section 4(6)(b) would have used the word “interest” instead of “overdue amount”.

The definition of “utility” and “continuous service” mentions various examples of where section 4(6)(b) may apply. “Utility” is defined as the supply to the public of an essential commodity such as electricity, water or gas or the supply of a service such as waste removal, access to sewage lines, telecommunication networks or transportation infrastructure. The credit provider need not necessarily be the state and could, for example be Telkom that provides telecommunication services or Metrobus that provide transportation services. “Continuous service” is defined as the supply for compensation of a utility or service (other than credit or access to credit) or the supply of a utility or service combined with the supply of goods essential for the utilisation of the utility or service. Examples would be a company that provides security services accompanied by an alarm system supplied by the security company to the consumer.

Attached as annex C is the writer’s utility bill for services rendered (and rates) for a property in Cape Town. The account stipulates that payment must be made by a determined date in the future, which is 25 days (calculated from 13 August to 7 September) from the date of statement, and (in clause 2) that “interest will be charged on all amounts outstanding after the due date”. On the face of it the agreement seems to be an incidental credit agreement. However, if one applies the principles of section 4(6)(b), one may find that it is not. As discussed above, section 4(6)(b) applies if a utility or continuous service is rendered to a consumer. The consumer must be allowed 30 days to pay his debt and if not, the agreement will be considered to be a credit facility, notwithstanding the fact that the agreement may seem to have the nature of an incidental credit agreement due to the whole amount deferred being payable at once (as opposed to the consumer electing to pay a lesser amount) and interest only being payable on the overdue amount. Of course this will have far-reaching (and somewhat catastrophic) consequences for municipalities. If the agreement is a credit facility, it means that the entire act applies. The municipality will have to register as a credit provider (or should have done so already) and will have to conduct credit

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200 s 1.
201 s 1.
202 Van Zyl in Scholtz (n 1) par 4.3.
203 My personal information has been obscured from the account for security purposes.
assessments on consumers in order to prevent reckless credit being granted by them.\textsuperscript{204} If the municipality did not conduct such assessment (or conducted an assessment and entered into the agreement despite the fact that the consumer did not understand the risks, costs or obligations, or the mere entering into the agreement made the consumer over-indebted), the municipality granted credit recklessly.\textsuperscript{205} Should a consumer aver in future court proceedings that the municipal contract does not fall within the “exemption” created by section 4(6)(b) and raise the granting of reckless credit as a defence, then (as Otto aptly put it) “gaan die vullis die waaier tref.” If a court finds that the agreement must be set aside or suspended, such a judgment could potentially affect a vast amount of municipal contracts and will cause financial chaos.\textsuperscript{206}

Utility charges such as electricity charges payable by a tenant to a landlord under a lease agreement will not make the agreement an incidental credit agreement.\textsuperscript{207} Leases of immovable property are specifically excluded from the ambit of the act.\textsuperscript{208}

4 \textit{Accounts for professional services rendered}

It may be that accounts rendered by professional persons such as medical practitioners,\textsuperscript{209} attorneys\textsuperscript{210} and accountants will be incidental credit agreements, provided of course that such agreements comply with the definition thereof. They often do. Some are of the view that it impacts negatively on the professional image of such persons to negotiate or even mention the payment of interest on an account which may never fall in arrears.\textsuperscript{211} However, in practice the interest is neither negotiated, nor mentioned. The interest is often stipulated on the information sheet that you fill out in the reception area while waiting for your appointment. If you have to undergo an operation, you often only meet the anaesthetist a few minutes before the procedure, when you are required to complete the forms detailing your physical condition and medical history, and of course your personal information. The truth is that a consumer often does not have

\textsuperscript{204} See the article of Otto (n 198).
\textsuperscript{205} s 80(1).
\textsuperscript{206} n 198.
\textsuperscript{207} Pareto Ltd and two others v Kalnisha Sigaban t/a KS Flowers N More case no A3096/09 (GSJ) (unreported).
\textsuperscript{208} s 8(2)(b).
\textsuperscript{209} Govan “Dentists’ Accounts and the National Credit Act of South Africa, 2005 (NCA) – (Incidental Credit Agreements)” August 2009 South African Dental Journal 292.
\textsuperscript{210} See De Kock “Attorney accounts and the nature of an incidental credit (sic)” April 2010 DR 26. De Kock argues that retainer agreements may not be incidental credit agreements.
\textsuperscript{211} Otto (n 21) 646.
a choice in the matter, or the opportunity to negotiate, or may not be aware that he may have rights in this regard. Attached hereto is an example marked annex D.\textsuperscript{212} The terms of payment (stipulated in clause 3) are 30 days from date of service and with regards to interest it stipulates that “interest at the margin of 2\% per month shall be charged by The Practice at its discretion on any amount not paid by the patient on due date”. The agreement goes one step further by stipulating that “Twenty Business Days after the raising of interest on any overdue amount, the unpaid invoice on which interest is charged will become an Incidental Credit Agreement in terms of the National Credit Act.” The agreement then very clearly sets out what interest, fees and charges may be levied once the agreement becomes an incidental credit agreement. One does not find incidental credit agreements as detailed as this often.

Of course, if subsection (b) of the definition of an incidental credit agreement is applicable, no agreement regarding interest (or a fee or charge) is necessary. A recent trip to an ear, nose and throat specialist resulted in minor surgery. Subsequent thereto an account was received which stated, “If this account is settled within 60 days of surgery you may deduct 25\% discount from the fee” and at the bottom it was stamped, “Discount of R540,10 may be deducted if paid before 9/1/2013”. This account would also form an incidental credit agreement once the higher amount becomes applicable. The account is annexed hereto as annex E.\textsuperscript{213}

5 \hspace{1em} \textit{Levies}

Initially it was thought that the National Credit Act applied to sectional title levy obligations and that they constituted incidental credit agreements. The act was applied to these agreements by the lower courts.\textsuperscript{214} However in the matter of \textit{Body Corporate of Frenoleen v TS Dlamini}\textsuperscript{215} it was decided that levies payable to a body corporate under section 37 of the Sectional Titles Act\textsuperscript{216} are not subject to the National Credit Act despite the charging of arrear interest. This was confirmed in the case of \textit{Mitchell v Beheerligaam RNS Mansions}.\textsuperscript{217} The court found that the interest charged on the levies is not payable by the members by virtue of an agreement, but by virtue of

\begin{footnotes}
\begin{enumerate}
\item[213] My personal information and that of the doctor have been obscured for security purposes.
\item[215] case no AR 611/09 (KZP) (unreported).
\item[216] 95 of 1986.
\item[217] 2010 5 SA 75 (GNP).
\end{enumerate}
\end{footnotes}
an obligation imposed by the provisions of the Sectional Titles Act and its regulations.\(^{218}\) Moreover, a body corporate does not supply goods or services to its members, nor does it advance money or credit.\(^{219}\)

6 \textit{Cell phone contracts}

A cell phone contract, where telecommunication services, and often goods such as a handset as well, are provided could be an incidental credit agreement. If the contract states that payment is deferred for 30 days of date of invoice and interest will become payable on arrear accounts, the contract may become an incidental credit agreement in the event of the consumer not paying the amount due by the settlement date and interest is charged by the credit provider.\(^{220}\) However, whether the agreement is an incidental credit agreement will depend on the terms of the agreement.

Annexed hereto as annex F is the standard Subscriber Agreement Terms and Conditions of a telecommunications provider.\(^{221}\) The agreement stipulates that payments must be made on or before the due date set out in the invoice and that if you do not pay on time “we will deliver a notice to you and may charge interest on the overdue amount at the interest rate notified to you and calculated from the due date of payment to the actual payment to us”.\(^{222}\) This means that the credit provider may determine interest unilaterally in terms of the agreement (unless the credit provider notified the consumer of the interest rate in other documentation upfront).

Prior to the National Credit Act it was a principle of our law that the unilateral determination of interest rates is in principle valid and enforceable but the party who has the discretion to determine the interest rate, has to exercise this discretion reasonably.\(^{223}\) This position has been changed by the National Credit Act, where the act applies to the particular agreement, except

\(^{218}\) Levies due to a body corporate and the interest and costs payable on overdue levies are dealt with in s 47 of the Sectional Titles Act read with Management Rules 30 and 31(1) of annexure 8 to the regulations of the act.

\(^{219}\) par 20. See also Mills “Applicability of the National Credit Act to Sectional Title Levies” 2010 May \textit{DR} 61.

\(^{220}\) Otto in Scholtz (n 1) par 8.2.3.3; Otto (n 21) 641.


\(^{222}\) par 9.1.1.1 of the agreement.

\(^{223}\) \textit{NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of South Africa Ltd} 1999 4 \textit{SA} 928 (SCA). This decision finally brought certainty after conflicting judgments caused quite a stir. For a detailed discussion and the history see Otto “Unilateral determination of interest rates by creditors: The Supreme Court of Appeal (almost) settles the matter” 2000 \textit{SALJ} 1.
where the consumer is a juristic person (in which case the common law principles will still apply).\footnote{Ch 5 part C regarding interest, fees and charges does not apply to juristic persons by virtue of s 6.} The National Credit Act stipulates that a credit agreement may provide for the interest rate to be variable only if the variation is by fixed relationship to a reference rate.\footnote{s 103(4).} The credit provider may unilaterally increase interest rates if a variable interest rate applies to the agreement.\footnote{s 104.} If the agreement states or implies a variable interest rate that is not linked to a reference rate, the clause will be unlawful and therefore void.\footnote{s 90(2)(o).} The interest rate pertaining to incidental credit agreements may be agreed or may be variable (as long as it is linked to a reference rate) but is limited to a maximum amount of 2\% per month. The reference rate for many a credit agreement is the prime interest rate.
CHAPTER 5

THE INCIDENTAL CREDIT AGREEMENT AND THE CONSUMER PROTECTION ACT

Prior to the enactment of the Consumer Protection Act, consumer protection in South Africa was fragmented and outdated. A consumer could find protection in a number of industry specific acts which dealt with matters such as finance charges, weights and measures, food, trade description on goods, and false or misleading advertising, by approaching a court or various different regulating bodies. The Consumer Protection Act was enacted in April 2009 and provides comprehensive protection to consumers, although it has been criticised that it is not the overarching framework for consumer protection that it was originally intended to be.

The Consumer Protection Act applies to all transactions in terms of which goods or services are promoted or supplied. “Transaction” is defined in sections 1 and 5(6) of the act and is as wide as can be expected for a general term like “transaction”. In a nutshell, a transaction entails any agreement for the supply of goods or services for consideration and includes a franchise agreement.

The Consumer Protection Act provides for certain exemptions in section 5(2), such as transactions where the consumer is the state or where a juristic person whose annual turnover or asset value equals or exceeds the threshold value determined by the minister (currently R2 million). The act also does not apply to any transaction that constitutes a credit agreement.

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228 68 of 2008.
229 Woker “Why the need for Consumer Protection Legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act” 2010 Obiter 217 230.
230 (n 229) 218.
232 s 5(1).
233 s 5(2)(a).
234 s 5(2)(b) and GN 34181 in GG 34181 (1 April 2011).
under the National Credit Act, but the *goods or services* that are the subject of the credit agreement are not excluded from its ambit.\(^{235}\)

It has been said that there was much indecision before the enactment of the Consumer Protection Act about whether the act should apply to matters falling under the National Credit Act as it appeared to be a duplication of regulation and expenditure.\(^{236}\) Some argue that any person who says that the legislation will burden the economy ignores reality and that carefully structured safety nets are required to make the free market work in a way that considers the interests of all parties.\(^{237}\) Since both acts constitute consumer legislation, overlapping is undeniably unavoidable, but the vagueness and uncertainty created in the process will no doubt lead to litigation.

It has been proposed that the first step in establishing which act will apply is to ascertain whether the agreement constitutes both a *transaction* as defined in the Consumer Protection Act and a *credit agreement* defined in the National Credit Act.\(^{238}\) Once it is established that the Consumer Protection Act applies to the credit agreement, it remains to be argued which sections of this act will apply. There is no indication in the act of the sections that will apply and therefore it is still a matter of interpretation of, on the one hand, the act and, on the other hand, the intention of the legislature. The following sections may apply to the goods or services that are the subject matter of the credit agreement:

a) The consumer’s right to choose or examine the goods;\(^{239}\)

b) The consumer’s right with respect to the delivery of goods or the supply of the service;\(^{240}\)

c) The consumer’s right to return goods;\(^{241}\)

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\(^{235}\) s 5(2)(d) of the Consumer Protection Act.


\(^{237}\) (n 229) 231.

\(^{238}\) See Van Eeden *A Guide to the Consumer Protection Act* (2009) 49-50. Melville and Palmer (n 231) 276 argues that, although the promotion of goods and services has not been included in the definition of “transaction”, the sections dealing with promotional activities have not been specifically excluded when it comes to credit agreements and the Consumer Protection Act states specifically in section 5(1)(b) that the act is indeed applicable to such activities.

\(^{239}\) s 18.

\(^{240}\) s 19.

\(^{241}\) s 20.
d) The consumer’s right to safe, good quality goods, which entails that every consumer has a right to receive goods that are reasonably suitable for the purposes for which they are intended, are of good quality, are in good working order and free of defects, will be usable and durable for a reasonable period of time and that comply with the standards set under the Standards Act;\textsuperscript{242} 

e) A statutory implied warranty that the goods are of the quality required by section 55;\textsuperscript{243} 

f) A statutory warranty on repaired goods;\textsuperscript{244} 

g) Strict liability for harm caused as a consequence of supplying unsafe goods or of the failure of or defect or hazard in goods or of providing consumers with inadequate instructions or warnings pertaining to any hazard arising or associated with the use of any goods. Consumers will have a claim against the producer, importer, distributor or retailer irrespective of whether the harm was as a result of negligence.\textsuperscript{245} 

If an agreement is, from inception, a “pure bred” credit agreement (with incidental credit agreements being a “mixed breed”) concluded between the parties, such as an instalment agreement, there is generally certainty about the nature of the agreement and the legal requirements regarding that agreement, even if it is complicated by the fact that another act applies to the goods and services. In the case of incidental credit agreements, the matter is complicated by various factors. For starters, the incidental credit agreement will initially not exist in law (although an agreement of another nature between the parties will exist). As mentioned above, an incidental credit agreement is an agreement in terms of which an account is tendered for goods or services that has been or will be supplied over a period of time and a fee, charge or interest becomes payable or a higher price applies if the account is not paid timeously.\textsuperscript{246} However, an incidental credit agreement is only deemed to be made 20 business days after the fee, charge or interest becomes payable or the higher price becomes applicable.\textsuperscript{247} 

\textsuperscript{242} s 55. 
\textsuperscript{243} s 56. 
\textsuperscript{244} s 57. 
\textsuperscript{245} s 61. See the in-depth discussion by Melville and Palmer (n 231) regarding which sections apply and which do not apply in their view. 
\textsuperscript{246} See the definition in s 1. 
\textsuperscript{247} s 5(2). See the detailed discussion in ch 3 above.
An agreement for the rendering of a service, such as the cleaning of a private residence by a cleaning company or dental procedures performed by a dentist may initially be a transaction subject to the Consumer Protection Act (only), but should the consumer not pay by the settlement date stipulated in the account or the agreement and a fee, charge or interest becomes applicable or the pre-determined higher price applies, the agreement suddenly (after 20 business days) transforms into an incidental credit agreement which is regulated by the National Credit Act. Which act would apply to the agreement in such circumstances? As mentioned on a previous occasion, it cannot be argued that the agreement was from inception subject to the Consumer Protection Act and therefore the National Credit Act can not apply as this reasoning would result in the incidental credit agreement becoming redundant, which can surely not be the case. One could argue that the Consumer Protection Act applies initially (if it is indeed a type of transaction that falls within the ambit of the Consumer Protection Act) and that section 5(2)(d) of the Consumer Protection Act kicks in the moment the agreement transforms into an incidental credit agreement (which in itself presents the problem as to whether this “moment” will be on the day that the penalty charge is first levied (or the predetermined higher price becomes applicable) or on the day of deemed conclusion of the incidental credit agreement). The answer probably lies in section 2(9) of the Consumer Protection Act which states that when there is an inconsistency between that act and another, the provisions of both acts will apply concurrently if possible, otherwise the provision that extends the greater protection to a consumer prevails. The incidental credit agreement is a unique creature created by the legislature for a specific purpose and therefore the National Credit Act (being lex specifica) should apply to the agreement. However, the Consumer Protection Act will apply to the goods and services when it will afford the consumer greater protection than does the National Credit Act. One should probably not view the application of both acts (and the confusion in this regard) as a problem, but rather as a very extensive (and wide) protection of the consumer.

If one considers for a moment how the Consumer Protection Act affects incidental credit agreements, it is clear that the consumer benefits from both acts being applicable. Since incidental credit agreements are by definition agreements in terms of which goods and services are sold, the Consumer Protection Act will apply to it to a large extent, added to which is the

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248 JM Otto and R-L Otto-Aucamp in Scholtz (n 1) par 20.11.
protection of the National Credit Act. Some are of the view that in order to identify those provisions of the Consumer Protection Act that will not apply to transactions falling within the ambit of the National Credit Act, one should distinguish between provisions relating to the transaction or agreement itself (to which the National Credit Act will apply) and provisions relating to the goods or services supplied (to which the Consumer Protection Act applies).\textsuperscript{249} This view is not necessarily correct and one should be loathe to state that certain provisions of the Consumer Protection Act will \textit{definitely} apply or not apply as it will depend on the type of agreement. For example, if the agreement is an instalment sale agreement, the view above may be correct and the National Credit Act regulates the terms of the agreement and the form and content thereof. In such a case the Consumer Protection Act will only apply to the goods and services and not the agreement. If the agreement is an incidental credit agreement, the provisions regarding the form and content and the provisions regarding unlawful terms in the National Credit Act do not apply as incidental credit agreements are exempt from those provisions.\textsuperscript{250} However, the incidental credit agreement may be a transaction for purposes of the Consumer Protection Act \textit{before} it becomes an incidental credit agreement, which means that the provisions regarding contract terms in the Consumer Protection Act may indeed apply.\textsuperscript{251}

In chapter 3 above the sections from which incidental credit agreements are exempt was discussed and it was mentioned that a consumer may be protected under the Consumer Protection Act where the National Credit Act is not applicable. An example hereof (apart from the example regarding the contract terms mentioned above) is the exemption from the marketing practices in the National Credit Act. Although those provisions\textsuperscript{252} of the National Credit Act do not apply to incidental credit agreements, the Consumer Protection Act protects the right of the consumer to fair and responsible marketing by \textit{inter alia} stipulating general standards for marketing of goods and services and prohibiting negative option marketing. Technically speaking these terms do not relate to the goods or services, but if one applies section 2(9), the court may decide that a consumer should be afforded these rights. However, it remains to be seen how the courts will apply the two acts together as there is to date no legal precedent.

\textsuperscript{249} Melville and Palmer (n 231) 274.
\textsuperscript{250} by virtue of s 5(1).
\textsuperscript{251} part G of ch 2 which relates to the right to fair, just and reasonable contract terms.
\textsuperscript{252} s 74 outlawing negative option marketing and requiring opting out provisions; s 75 regarding marketing and sales of credit at the consumer’s home or work; s 76 regarding the advertising of credit or goods on credit.
The incidental credit agreement is indeed a fascinating creature created by the legislature. It is a leopard that can in fact change its spots at the stage when the agreement metamorphoses into an incidental credit agreement. It will surprise many a consumer and credit provider in their day to day existence, whether it be at the pharmacy or at the university book shop. To a large extent, the consumer concluding incidental credit agreements, will not be aware of the legal nature of the agreement. This is precisely why the legislature created measures to provide the innocent and unsuspecting consumer with some measure of protection against the unscrupulous practices of some credit providers and suppliers of goods and services. One of the purposes of the act is addressing and correcting imbalances in negotiating power between consumers and credit providers by providing consumers with education about credit and consumer rights.\footnote{s 3(e)(i).} Although the National Credit Regulator has indeed put some effort into educating the public on the act, very little attention or exposure has been given to the incidental credit agreement, despite the fact that it is a foreign concept to not only consumers, but also, to some extent, to the legal fraternity as well. This should be corrected as a vast amount of incidental credit agreements are concluded daily.
ANNEXURES

A. Application
B. Credit Application Form: Proroof Steel Merchants
C. Utility Bill from the City of Cape Town
D. Anaesthesiologist Terms and Conditions
E. Doctor’s account statement for RL Aucamp
F. Cell C Service Provider Company (Pty) Ltd Subscriber Agreement Terms and Conditions
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Sectional Titles Act 95 of 1986

Usury Act 37 of 1926

Usury Act 73 of 1968
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Pro Roof Steel Merchants’ Credit Application: http://www.proroof.co.za/documents.html (21 November 2012)

Atlantic Anaesthetics Payment Terms and Conditions:

Cell C Subscriber Agreement Terms and Conditions:
APPLICATION

Registration Number and its successors and/or assigns including all subsidiaries or divisions and any other company which becomes a subsidiary of [ ]

"the Supplier"

COMPANY OR DIVISION TO WHICH YOU ARE APPLYING:

ALL THE COMPANIES REFLECTED ON ANNEXURE A HEREWITH
SECTION 1

THE CUSTOMER

1.1 Full Name or Registered Name: ________________________________

1.2 Business/Trading Name: ________________________________

1.3 Previous Name: ________________________________

1.4 Registration No / Identity No.: ________________________________

1.5 Date of Establishment: ________________________________

1.6 Date Business Acquired: ________________________________

1.7 VAT Registration No: ________________________________

1.8 Registered Address: ________________________________

1.9 Are you a(n):

<table>
<thead>
<tr>
<th>Public Company</th>
<th>Private Company</th>
<th>Partnership</th>
<th>Sole Proprietor</th>
<th>Individual</th>
<th>Close Corporation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trust with 3 or more trustees</td>
<td>Trust with less than 3 trustees</td>
<td>Trust with juristic person as trustee</td>
<td>Society</td>
<td>Association</td>
<td>Other</td>
</tr>
</tbody>
</table>

1.10 Addresses:

<table>
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<tr>
<th>Postal</th>
<th>Delivery</th>
<th>Physical</th>
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</thead>
<tbody>
<tr>
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<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

1.11 Telephone: ________________________________  Telefax: ________________________________

Cellphone: ________________________________  Contact person: ________________________________

Email: ________________________________

1.12 DIRECTORS/PARTNERS/OWNERS/MEMBERS/TRUSTEES/OFFICERS

1. Surname: ________________________________  First Names: ________________________________

Identity No.: ________________________________

Residential Address: ________________________________

Residential Telephone No.: ________________________________  Cellular No.: ________________________________
2. Surname: ___________________  First Names: ___________________
   Identity No.: ___________________
   Residential Address: ________________________________________________
   Residential Telephone No.: ________  Cellular No.: ___________________

3. Surname: ___________________  First Names: ___________________
   Identity No.: ___________________
   Residential Address: ________________________________________________
   Residential Telephone No.: ________  Cellular No.: ___________________

4. Surname: ___________________  First Names: ___________________
   Identity No.: ___________________
   Residential Address: ________________________________________________
   Residential Telephone No.: ________  Cellular No.: ___________________

SECTION 2

OTHER INFORMATION

2.1 Will security be provided by the Customer or by the directors/members of the Customer? ______

2.2 If yes to 2.1 of what nature (e.g. cessions and/or suretyships) and to what extent (quantum)?
   ____________________________________________  R __________________

2.3 Auditors or Accounting Officer: ________________________________________________
   Telephone No.: _________________________________________________________

2.4 Year End Date: __________________________

2.5 Holding Company: _______________________

2.6 Associated Businesses/Subsidiaries: ___________________________________________

2.7 Type of Business: _______________________________________________________

2.8 To the extent applicable, the following documentation must be attached to this Application:

2.8.1 Cancelled cheque (original) bearing the Customer's bank details or a letter from the Customer's bank confirming the Customer's account and bank details; and
2.8.2 proof of registration of business name; and

2.8.3 if a company or close corporation, relevant registration forms and a resolution authorising the signatory to this Application; or

2.8.4 if a trust, certified copies of the letters of authority and deed of trust; or

2.8.5 if a natural person, a certified copy of your green bar-coded identity document. The Supplier may also require spousal consent in the prescribed form; or

2.8.6 if an association or society, a certified copy of its constitution; or

2.8.7 if a partnership, a certified copy of the partnership agreement and a certified copy of the green bar-coded identity documents of each of the partners. If the partners are companies, close corporations or trusts, the documents required in terms of 2.8.3 and/or 2.8.4.

SECTION 3
FINANCIAL INFORMATION

3.1 What is the asset value of your business in Rand combined with the asset value of all related juristic persons R________________________;*

3.2 What is the annual turnover of your business combined with the annual turnover of all related juristic persons? R________________________;*

*(A juristic person is related to another juristic person if one of them has direct or indirect control over the whole or part of the business of the other or if a person has direct or indirect control over both of them).

3.3 Trade References:

<table>
<thead>
<tr>
<th>Name of Supplier:</th>
<th>1.</th>
<th>2.</th>
<th>3.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Telephone No.:</td>
<td>( )</td>
<td>( )</td>
<td>( )</td>
</tr>
<tr>
<td>Monthly Purchase Amount:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Years with this Supplier:</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

3.4 Customer's bank account details:

<table>
<thead>
<tr>
<th>Name of Banker:</th>
<th>Account No.:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Branch:</td>
<td>Branch Code:</td>
</tr>
<tr>
<td>Name in which account is operated:</td>
<td></td>
</tr>
<tr>
<td>Date account opened:</td>
<td></td>
</tr>
</tbody>
</table>
3.5 The Customer undertakes and will make available to the Supplier the audited financial statements and balance sheets for any period/s which may be requested by it.

3.6 The Customer gives permission to the Supplier to obtain any information deemed necessary by the Supplier from any source for consideration and assessment of this Application.

3.7 Value of purchases and payment terms:

3.7.1 The Customer applies to purchase goods/services up to an amount not exceeding R_________________________, to be paid within-

☐ 30 days ☐ 45 days ☐ 60 days

of the date of the statement or invoice delivered to the Customer.

3.7.2 The Customer acknowledges and agrees that the value of purchases and the payment terms as applied for in 3.7.1 above are subject to approval and assessment by the Supplier. The purchase value and payment terms will only be effective as soon as they are confirmed in writing by the Supplier.

SECTION 4
INFORMATION AND MARKETING CONSENT

The Supplier acknowledges the Customer’s right to privacy. The Supplier needs to process the Customer’s personal information in order to offer to the Customer the best possible service and to keep the Customer updated with regard to products and services which may be of benefit to the Customer. The purposes for which the Supplier will use the Customer’s personal information will include marketing and promotional purposes, where the Customer has given the Supplier consent to do so.

4.1 INFORMATION CONSENT

4.1.1 By signing this Application, the Customer consents to –

4.1.1.1 the processing of its personal information by the Supplier or any of its operators or agents (who may be situated outside South Africa) including, but not limited to, subcontractors (including their agents), on the condition that they will keep the information confidential;

4.1.1.2 the collection of information by the Supplier from any other source to supplement the personal information which the Supplier has about the Customer;

4.1.1.3 the retention by the Supplier of records of the Customer’s personal information (even after the Customer is no longer the Supplier’s customer) for as long as permitted for legal, regulatory, fraud prevention, financial crime and marketing purposes;

4.1.1.4 the Supplier conducting a credit enquiry about the Customer with any credit bureau or credit provider and providing the Customer’s personal information, including the manner in which it conducts its account, to –

4.1.1.4.1 credit risk management services (including credit bureaux); and/or

4.1.1.4.2 crime prevention agencies.
4.2 MARKETING CONSENT

4.2.1 ☐ The Customer consents to the Supplier using its personal information and communicating with the Customer from time to time regarding products, services, research and special offers that the Supplier believes may be of interest to the Customer.

The Customer agrees to receive such communications via the following communication methods:

☐ post ☐ telephone ☐ sms / mms ☐ email

(The Customer may select all or any combination of the above)

or

☐ the Customer does not consent to receiving any communications from the Supplier on products, services or special offers (and the Customer understands that this means that the Customer will not be kept informed of products and services that may be of value to the Customer.)

4.2.2 The Customer acknowledges and agrees that any election as set out above will not limit the Supplier’s right to communicate with the Customer in terms of any agreement concluded with the Customer or as may be required by applicable legislation.

4.2.3 If the Customer chooses to be excluded from direct marketing campaigns, the Customer must advise the Supplier in writing or register a block on any registry which the Supplier is bound by law to recognise. The Supplier will not charge the Customer a fee to update its request on its systems. The Supplier will give effect to any changes requested by the Customer as soon as reasonably possible.

4.2.4 Subject to applicable law, the Customer may access the personal information the Supplier has about the Customer and request that applicable corrections be made.

SECTION 5

DECLARATION BY THE CUSTOMER

5.1 The Customer hereby acknowledges that the information supplied will constitute the basis on which this Application is to be considered and that all such information is of material importance and directly relevant to the consideration of this Application.

5.2 The Customer warrants that all information supplied is true and correct and that it is not aware of any other information which, should it become known to the Supplier, would affect the consideration of this Application.

5.3 The Customer hereby declares that:

5.3.1 the Customer has fully and truthfully disclosed its income, assets and expenditure as well as all and any other material information that may affect the outcome hereof prior to the Supplier approving the Application;

5.3.2 the Customer is not subject to an administration order, judicial management or sequestration or liquidation proceedings;
5.3.3 the Customer is not under debt counselling or subject to debt review;

5.3.4 the Customer will not, by entering into an agreement with the Supplier on the terms and conditions as set out below, become over-indebted as contemplated in the NCA;

5.3.5 the Customer is not subject to business rescue proceedings as contemplated in Chapter 6 of the Companies Act 71 of 2008;

5.3.6 the Customer will pay all amounts due as set out in 3.7.1 above;

5.3.7 the Customer will be able to pay an amount not exceeding the amount contemplated in 3.7.1 above;

5.3.8 there were no blank spaces on any page of this Application on the date that this Application was signed;

5.3.9 the Customer has the legal capacity to enter into an agreement with the Supplier and has obtained all requisite consents from third parties;

5.3.10 apart from any security document contemplated for purposes of the Application, the Customer was not asked to sign any extra documents other than this Application;

5.3.11 the Customer by its signature thereto, accepts the terms and conditions attached to this Application; and

5.3.12 the Customer has been given an adequate opportunity to read and understand the terms and conditions and is aware of all terms printed in bold;

5.3.13 the Customer will immediately notify the Supplier in writing of any change in the Customer, including change of ownership of the Customer’s business and change in shareholding or membership, if the Customer is a company or close corporation.

SIGNED AT __________________________ ON THIS _________ DAY OF __________________________ 20________.

CUSTOMER:

Signature: __________________________

Full Names: __________________________

Capacity: __________________________

Identity No: __________________________

On behalf of the Customer, who warrants his authority.

AS WITNESSES:

1. __________________________
   (Sign and print name)

2. __________________________
   (Sign and print name)
Signature: ______________________
Full Names: ______________________
Capacity: ______________________
Identity No: ______________________
On behalf of the Customer, who warrants his authority.

1. ______________________
   (Sign and print name)

2. ______________________
   (Sign and print name)

Signature: ______________________
Full Names: ______________________
Capacity: ______________________
Identity No: ______________________
On behalf of the Customer, who warrants his authority.

1. ______________________
   (Sign and print name)

2. ______________________
   (Sign and print name)
STANDARD TERMS AND CONDITIONS

1. INTRODUCTION

1.1 The “Supplier” referred to in this agreement is [Redacted] and its successors and/or assignees including all subsidiaries or divisions or any other company which becomes a subsidiary of [Redacted] and identified as “the Supplier” on the front page hereof.

1.2 Once the Application has been approved by the Supplier, the Application and the terms and conditions set out below, including all notices sent to the Customer and annexures attached hereto ("the Agreement"), shall apply to the sale of any goods or the rendering of services by the Supplier to the Customer.

1.3 The Customer acknowledges and agrees that the Supplier will only be able to commence with its services or deliver any goods under this Agreement, once the Supplier has approved the Customer’s Application, and any further conditions imposed by law have been complied with.

1.4 Reference to –

1.4.1 one gender includes all the genders;

1.4.2 the singular form of a word includes the plural and the plural form of a word includes the singular; and

1.4.3 a law or regulation is a reference to that law or regulation on the date the customer entered into this Agreement.

2. AGREEMENT FOR THE SUPPLY OF GOODS AND/OR SERVICES

This Agreement is only valid and the parties are only obliged to comply with it if it is reduced to writing and signed by or on behalf of all the parties.

3. PAYMENTS

3.1 Unless otherwise agreed, the Customer must pay the Supplier in accordance with the payment terms confirmed by the Supplier as contemplated in 3.7.2 of the Application ("due date").

3.2 Payments may be made by way of electronic transfer or any other means acceptable to the Supplier.

3.3 The Supplier shall be entitled to levy interest on all overdue amounts (i.e. amounts not paid on the due date as contemplated in 3.1 above) at a rate of 2.0% per month, or such other maximum rate that may be prescribed from time to time in terms of the National Credit Act 34 of 2005 ("NCA"). Interest shall be reckoned from the day upon which such amount becomes overdue of the amount concerned until the date of payment, both days inclusive, and shall be-

3.3.1 calculated on a compounded basis on the amount owing at the end of each month; and

3.3.2 payable on demand.

3.4 The Supplier will credit each payment made under this Agreement to the Customer on the date of receipt of the payment as follows –
3.4.1 firstly, to satisfy any due or unpaid interest charges (if any);
3.4.2 secondly, to satisfy any due or unpaid fees or charges (if any);
3.4.3 thirdly, to reduce the amount of the principal debt.

4. **PRICE OF GOODS AND PRICE VARIATIONS**

4.1 The price of goods and/or services shall be as set out in —

4.1.1 the Supplier’s official price list, which is available on request; or

4.1.2 the invoice provided to the Customer.

4.2 The Supplier may amend the price of goods and services from time to time and will provide the Customer with reasonable prior written notice, if required.

5. **DISCOUNTS**

5.1 The price of goods and services is strictly net (i.e. exclusive of value-added tax leviable in terms of the Value-Added Tax Act 89 of 1991 ("VAT") and not subject to any deduction). These prices are not subject to any discounts, unless otherwise agreed.

5.2 If any discount is agreed to in writing, payment must be received on the due date as defined in clause 3.1 above and shall only apply to the actual price of the goods or the services (i.e. excluding VAT, transport costs, insurance and similar charges).

6. **DELIVERY**

6.1 The Customer may request the Supplier to engage a carrier to transport the goods for the Customer. The Customer hereby authorises the Supplier to engage a carrier on such terms and conditions as it deems fit.

6.2 The Supplier shall not be liable for any loss suffered by the Customer as a result of the transportation of the goods by the carrier engaged by the Supplier at the request of the Customer.

6.3 If a carrier has been engaged to transport the goods as contemplated in 6.1, the goods will be deemed to have been duly delivered to the Customer when the goods are delivered to the carrier.

6.4 Goods will be delivered to the address chosen by the Customer for purposes of delivery. If no such address has been specified, then the agreed place of delivery is the Supplier's place of business.

6.5 Goods to be delivered remain at the Supplier's risk until such goods have been delivered to the Customer in terms of 6.3.

6.6 The Supplier will do all that it reasonably can to meet the stipulated dates and time for delivery of goods and services. **The Supplier cannot be responsible for failure to perform or to deliver or delays in performance or delivery due to circumstances beyond the Supplier's control, such as adverse weather conditions, unpredictable delays caused by traffic congestion, diversions or road works, the unavailability of raw materials, strikes, power outages, industrial disputes and regulatory interference ("force majeure events"). The Supplier will not be liable to the Customer for any loss arising from any failure or delay in performance or providing services and/or goods resulting from force majeure events.** The Supplier will use reasonable endeavours to continue to perform in terms of this Agreement as soon as performance
becomes possible. The Supplier may contact the Customer to agree on alternative dates for
delivery, but will not require the Customer to accept delivery at an unreasonable time.

6.7 If the Supplier is unable to provide the services or the goods, the Supplier will inform the Customer
immediately and refund any payment made within 30 (thirty) days of this notice.

7. OWNERSHIP

Notwithstanding the delivery of any goods supplied or delivered by the Supplier to the Customer,
the Customer shall not become the owner until the Supplier has received payment of the full
contract price and/or amounts payable in respect thereof under this Agreement.

8. TRANSFERRING RIGHTS OR OBLIGATIONS

8.1 The Customer may not transfer any of the Customer's rights or obligations under this Agreement to
anyone else without the Supplier's prior written consent.

8.2 The Supplier may transfer all or some of the Supplier's rights and obligations under this Agreement
to any other person without the Customer's consent, provided that the transfer is not to the
Customer's detriment.

9. THE CUSTOMER'S RIGHT TO TERMINATE

9.1 The Customer may cancel or terminate this Agreement at any time by paying an amount
("settlement amount") equal to the aggregate of –

9.1.1 the unpaid balance of the outstanding amount on the Customer's account(s) with the Supplier
as at that date ("settlement date"); and

9.1.2 all unpaid interest and all other fees and charges due or payable by the Customer in terms of
this Agreement up to and including the settlement date.

9.2 The Customer may demand to be furnished with a statement specifying the settlement amount, in
which event the Supplier will be obliged to provide such statement, in writing, within 5 (five) business
days of the Customer's request.

9.3 The statement reflected in clause 9.2 above will only be binding for the date stated and will not
include any transactions effected or processed on or after this date and for which the Customer will
also be liable.

10. DECLARATIONS AND WARRANTIES BY THE CUSTOMER

10.1 The Customer warrants and declares that

10.1.1 the Customer has been given an adequate opportunity to read and understand the
terms and conditions of this Agreement and is aware of all the terms thereof,
particularly those printed in bold. The Customer understands and accepts its risks and
costs as well as its rights and obligations under this Agreement;

10.1.2 the Customer has full power and authorisation to effect and carry out the obligations in
terms of this Agreement and, if the Customer is a corporate entity, association,
partnership or a trust, that all necessary corporate and/or other actions were taken to
authorise the execution of this Agreement and the Customer will provide the Supplier
with the originals or certified copies of all documents confirming such authorisation;
all the information the Customer provided to the Supplier in connection with the conclusion of this Agreement is true, complete and accurate and the Customer is not aware of any material facts or circumstances not disclosed to the Supplier and which, if disclosed, may adversely affect the decision to enter into this Agreement;

no default event specified below in clause 12 has occurred or is occurring;

entering into this agreement will not cause it to become over-indebted as contemplated in the NCA;

the Customer has fully and truthfully answered all and any requests for information addressed to it by or on behalf of the Supplier leading up to the conclusion of this Agreement;

the Customer has the necessary legal capacity to enter into this agreement and is not subject to an administration order referred to in section 74(1) of the Magistrates Court Act, any sequestration, liquidation or judicial management order or any business rescue proceedings;

the Supplier did not make an offer to the Customer which would automatically have resulted in an agreement if the Customer had not declined the offer;

the Supplier has not induced, harassed or forced the Customer to enter into this Agreement; and

this Agreement was completed in full at the time of the Customer signing the Agreement.

11. **ADDRESSES FOR NOTICES**

11.1 The Customer hereby chooses as the Customer's domicilium citandi et executandi ("domicile address") for all purposes the physical address as set out in 1.10 of the Application. The Customer authorises the Supplier to deliver notices, statements or invoices by hand, e-mail, facsimile or post to the addresses provided in Section 1 of the Application.

11.2 For purposes of this Agreement all notices shall be in writing. Any notice given by either party to the other (the addressee):

11.2.1 which is delivered by hand shall be presumed to have been received at the time of delivery;

11.2.2 if transmitted by telefax, one hour after the time of transmission;

11.2.3 if sent by e-mail, on the date received by the addressee’s server;

11.2.4 if sent by ordinary or pre-paid registered post, 7 days after the date of posting.

11.3 A notice actually received by a party shall be an adequate notice to it notwithstanding that it was not delivered to its domicile address.

11.4 The parties may at any time by written notice vary their respective domicile addresses to any address within the Republic of South Africa.

12. **RIGHTS TO RETURN**

If the Consumer Protection Act 68 of 2008 ("CPA") applies to the Agreement because the Customer is either a natural person or a juristic person (i.e. a company, close corporation, association,
partnership or trust) and the asset value or annual turnover of the juristic person does not exceed the threshold set in terms of the CPA, the following terms and conditions will apply to the Agreement with the Customer:

12.1 The Customer has the right to rescind any transaction or agreement resulting from direct marketing without reason or penalty by written notice to the Supplier within 5 (five) business days after the later of the date on which the Agreement was concluded or the goods were delivered to the Customer. If the Customer chooses to terminate the Agreement, the Customer must comply with 9 above, if applicable.

12.2 When the goods are delivered to the Customer, the Customer may request a reasonable opportunity to examine those goods for the purpose of ascertaining whether the Customer is satisfied that the goods -

12.2.1 are in accordance with the type and quality ordered by the Customer;

12.2.2 the goods correspond in all material respects and characteristics with samples and/or description;

12.2.3 in the case of a special order, reasonably conform to the material specifications of the special order; or

12.2.4 are suitable for the purpose for which they have been bought.

12.3 If the Customer returns the goods for any lawful reason other than a product failure or defect, the Customer must do so within 10 (ten) business days after the goods have been delivered to the Customer, together with proof of payment. Subject to applicable law, the Supplier retains the right to charge the Customer a reasonable amount for use of the goods during the time they were in the Customer’s possession, for any consumption or depletion of the goods and for necessary restoration costs to render the goods fit for re-stocking. The Customer will not be entitled to return the goods and receive a refund if –

12.3.1 for reasons of public health or otherwise, a public regulation prohibits the return of those goods; or

12.3.2 after having been supplied to the Customer, the goods have been partially or entirely disassembled, physically altered, permanently installed, affixed, attached, joined or added to, blended or combined with, or embedded within, other goods or property.

12.4 If the Customer returns the goods due to a product failure or defect, the Customer should do so within 6 (six) months after the goods have been delivered to the Customer, provided that the Customer is able to provide proof of payment. The Supplier will, at the Customer’s direction repair or replace the goods, or refund the amount paid for the goods. The Customer will not be able to return the goods if the product failure or defect is attributable to non-compliance by the Customer with the instructions provided by the Supplier.

13. **DEFAULT, IMPLICATIONS OF DEFAULT AND PROCESS TO BE FOLLOWED**

13.1 The Customer will be in default of this Agreement if –

13.1.1 the Customer does not pay any amount payable to the Supplier under this Agreement on the due date as contemplated in 3.1 above; or

13.1.2 the Customer breaches any of the terms and conditions of this Agreement or any agreement in terms of which the Customer provided security to the Supplier, and the Customer fails to remedy the breach within (7) seven days of receiving written notice to do so;
13.1.3 any representation or warranty made in connection with this Agreement or any other documents supplied by the Customer is materially incorrect or false;

13.1.4 any person who furnished security to the Supplier in respect of this Agreement (e.g. as surety, guarantor or pledgor), commits any breach of its obligations to the Supplier in terms of that agreement;

13.1.5 the Customer or any person who furnished security in respect of this Agreement -

13.1.5.1 being an individual –

13.1.5.1.1 publishes notice of the voluntary surrender of his estate or dies;

13.1.5.1.2 is placed under administration or commits an act of insolvency as defined in the Insolvency Act 24 of 1936;

13.1.5.1.3 has any application or other proceedings brought against or in respect of him in terms of which he is sought to be sequestrated or placed under curatorship, in any event whether provisionally or finally and whether voluntarily or compulsory;

13.1.5.2 not being an individual –

13.1.5.2.1 is wound up, liquidated, dissolved, deregistered or placed under judicial management, in any event whether provisionally or finally and whether voluntarily or compulsory, or passes a resolution providing for any such event;

13.1.5.2.2 is deemed to be unable to pay its debts;

13.1.5.2.3 resolves that it voluntarily begin business rescue proceedings or has any business rescue proceedings commenced against it, as contemplated in section 132(1) of the Companies Act 71 of 2008;

13.1.5.2.4 has a judgment of a competent court against the Customer or any person who has furnished security for the Customer for the attachment of assets or for payment of any amount is not satisfied for more than seven (7) days after the date on which it is issued; or

13.1.5.2.5 compromises or attempts to compromise with the Customer's creditors generally or defer payment of debts owing by the Customer to the Customer's creditors.

13.2 If the Customer is in default and this Agreement is subject to the NCA, the Supplier may -

13.2.1 give the Customer written notice of such default and may propose that the Customer refer this Agreement to a debt counsellor; alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under this Agreement or develop and agree on a plan to bring repayments up to date;

13.2.2 commence legal proceedings to enforce this Agreement including exercising its rights in terms of any of the securities and recover collection costs and default administration charges as defined in the NCA if -

13.2.2.1 it has given the Customer notice as referred to in clause 13.2.1 above or it has given notice to terminate any debt review process under section 86 of the NCA which may then be underway in respect of this Agreement;
the Customer is and has been in default under this Agreement for at least 20 (twenty) business days; and

at least 10 (ten) business days have elapsed since the Supplier delivered the notice contemplated in clause 13.2.2.1; and

in the case of a notice in terms of clause 13.2.1, the Customer -

has not responded to that notice; or

responded to the notice by rejecting the Supplier's proposal.

If the Customer is in default of this Agreement and this Agreement is not subject to the NCA the Supplier may exercise its rights, as may be permissible in law and without prejudice to any of the Supplier's other rights, which include any one or more of the following -

suspending the delivery and provision of goods and services;

demanding immediate payment of overdue amounts;

terminating of this Agreement; and

enforcing any security furnished in respect of the Agreement.

The Customer will be liable for all legal costs, as may be permissible in law, in recovering any amount that the Customer owes the Supplier.

A certificate signed by a manager of the Supplier, specifying the amount owing by the Customer and further stating that such amount is due, owing and payable by the Customer, shall be sufficient (prima facie) proof of the amount thereof and of the fact that such amount is so due, owing and payable for the purpose of obtaining provisional sentence or other judgment against the Customer in any competent court. It shall not be necessary to prove the appointment of the person signing any such certificate.

LIMITATION OF LIABILITY

To the extent permissible in law, neither party shall, in any circumstances, be liable to the other party for any indirect or consequential loss or damages, including without limitation, loss of business or profit.

GOVERNING LAW AND JURISDICTION

This Agreement is in all respects governed by the laws of the Republic of South Africa.

In terms of section 45 of the Magistrates' Courts Act 32 of 1944, the Customer consents to the jurisdiction of any Magistrates' Court in the area which the Customer resides or works, notwithstanding the amount involved. This does not prevent the Supplier from bringing legal proceedings in a High Court that has jurisdiction.

INDULGENCE

No indulgence, latitude or extension of time which the Supplier may allow the Customer, shall be regarded to be a waiver of rights by the Supplier or a novation of the Customer's liabilities under this Agreement.
17. **SEVERABILITY**

If any term or condition of this Agreement becomes unenforceable for any reason whatsoever, that term or condition is severable from and shall not affect the validity of any other term or condition in this Agreement.

18. **WHOLE AGREEMENT**

The terms and conditions of this Agreement may not be amended, changed or cancelled unless it is reduced to writing and signed by both parties.

Signed at ______________________ on ______________________ 20____

for The Supplier

_______________________________
who warrants that he is duly authorised hereto

Signed at ______________________ on ______________________ 20____

for The Customer

_______________________________
who warrants that he is duly authorised hereto
Credit Application Form

Purchaser's Full Legal Entity:

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<thead>
<tr>
<th>Trading Name: (If Applicable)</th>
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<tr>
<td>Company/Closed Corporation Registration No:</td>
<td>(attach copy of cert.)</td>
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<tr>
<td>Vat Registration No:</td>
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State Names of the Directors/Members/Partners or the Sole Proprietor (please print)

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<tr>
<th>Full names and Surname</th>
<th>I.D Number</th>
<th>Residential Address</th>
<th>Marital Status</th>
<th>Home Telephone/Cell Number</th>
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Auditors name: Telephone No:

Kindly attach a copy of your latest management account or audited financial statements

Estimated monthly purchases from ourselves: R Requested Payment Terms:

Credit Limit Required:

Nature of Business:

Details of Premises (rented/Owned):

If not owned by purchaser please state details of owner and contact telephone number:

Associated Companies (If Any):

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<th>TRADE REFERENCES</th>
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<tr>
<td>Company Name:</td>
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Reg No.: 2000/022793/07  Vat No.: 466 019 2198

Steel Merchants and Manufacturers of a full range of allied Steel products.
1. INTERPRETATION
1.1 Definitions

"Acceptance of Order" means written confirmation from the Company confirming an order alternatively the performance by the Company in the supply of the goods in respect of the Customer’s order;

"Agent" means a person (corporate or unincorporated) that acts for or on behalf of the Customer;

"Agreement" includes -
(1) this document and the terms and conditions contained herein;
(2) payment terms specified in the Company’s “confirmation of credit” letter.

"Credit" means Incidental Credit as defined in section 1 of Act 34 of 2005.

"Incidental Credit Facility" is a facility in terms of which the Company affords the Customer Incidental Credit.

"Risk" means potential liability for loss, damage or injury, howsoever arising.

"The Company" means ................, and includes its successors-in-title and assigns, its agents and servants and such trade name/s and/or style/s as the Company may utilise from time to time.

"The Customer" means the party:
(i) Whose order is accepted by the Company or the Applicant for Incidental Credit, as the case may be; and
(ii) Includes agents and employees of such party.

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Steel Merchants and Manufacturers of a full range of allied Steel products.
“Vis Materia” includes, without limiting the generality hereof, the inability to secure electricity, water, transport, labour, materials, equipment, supplies, or by reason of an act of God, war, civil disturbance or insurrection, not, state of emergency, strike, lockout or other labour disputes, fire, flood, drought or legislation.

“Warranty” means an undertaking, material to the Agreement, the breach of which will render the defaulting party liable to the innocent party.

“Goods” means the materials, products and/or services, including the respective data-sheets and specifications, supplied by the Company.

1.2 The terms and conditions contained in this agreement (and as amended from time to time) supercede and take precedence over all terms and conditions as may be contained in the Customer’s documentation. None of the terms and conditions contained in the Customer’s documentation shall be binding upon the Company, nor shall they take precedence, nor amend, the Company’s terms and conditions.

2. APPLICATION
(1) The Company reserves the right to vary or amend the terms and conditions of the Agreement from time to time, and the Customer agrees to abide by such amendments.
(2) Notwithstanding such variations, the Customer accepts the responsibility of obtaining the latest version of the Agreement from the Company, either by visiting the Company’s website or by means of a request, in writing for same.
(3) These terms and conditions govern all existing and future contracts with the Company and are effective from the date of publication of each amendment, and supercede all and any terms proffered by the Customer;
(4) These terms and conditions are the Customer’s agreement with the Company and apply-
(a) to all orders accepted by the Company;
(b) to all contracts arising from the aforesaid acceptance; and
(c) to any Incidental Credit Facility that the Company may grant the Customer.

3. INCIDENTAL CREDIT FACILITY
(1) The grant of Incidental Credit, and the terms and conditions applicable thereto, shall be at the sole and exclusive discretion of the Company.
(2) The customer acknowledges that the representations made in the application form are material to such grant of Incidental Credit.
(3) In the event the Company agrees to grant the Customer an Incidental Credit Facility, the Customer shall be notified, in writing thereof, and of the terms and conditions applicable to such grant. Such written notification shall form part of the Agreement.
(4) The Company may, without incurring any form of liability, and at any time without notice to the Customer—
(a) withdraw the Customer’s incidental credit facilities; or
(b) amend or vary the terms of a Customer’s incidental credit facility.

4. DUTIES AND OBLIGATIONS
(1) In the terms of this Agreement,
(a) the Company will supply the Customer with the goods as requested by the Customer in its order;
(b) the Customer shall make payment for such in accordance with the terms set out in the Agreement;
(c) The Customer undertakes to comply strictly with the terms of the Agreement (including such amendments to the terms from time to time);
(d) The Customer shall not enjoy a right of set-off, nor a right to retain or withhold any monies due to the Company.

5. PRICE
(1) “Price” means the price stated on the Company’s invoices, which is the Company’s normal and usual price for the goods supplied to the Defendant at the time of the acceptance of the Customer’s order.
(2) The Customer acknowledges and agrees that the Company may vary its prices without notice.
(3) (a) The calculation of the price excludes, without limitation, fluctuations in the rate of exchange, Value Added Tax, labour, materials, packaging, insurance, freight, transport, surcharges and import duty between the date of the acceptance of the order and the and the date of delivery of goods;

Reg No.: 2000/022793/07 Vat No.: 466 019 2198

Steel Merchants and Manufacturers of a full range of allied Steel products.
6. DISCOUNT

(1) Any discounts shall only be granted at the sole and exclusive discretion of the Company.
(2) Any discount allowed -
(a) shall be recorded in writing, and signed by an authorised representative of the Company;
(b) shall be allowed only in the event that timeous payment is made of all amounts by the due date;
(c) where payment is made by means of Electronic Funds Transfer ("EFT"), cheques or any other
negotiable instruments, after the EFT, cheques or negotiable instruments have been cleared by the
Company's bank; and
(d) is calculated on the nett price of the goods supplied.

7. PAYMENTS

(1) Unless otherwise agreed with the Company, the Customer shall pay-
(a) the full price, in Rands, together with such amounts as may be applicable as referred to in clause
5(3)(a) above; and
(b) within 30 days of the end of the month in which goods were delivered; and
(c) at an address determined by the Company;
(2) Where goods are supplied piece-meal, payment of each invoice shall be effected as is described in
clauses 5 and 7(1) above.
(3) A Customer shall not set-off, nor deduct, any amount in respect of any monies due to the Customer by
the Company.
(4) If the event that the Customer makes payment by means of services by the Post Office, banking,
electronic or similar services, then-
(a) such service-providers are deemed to be the Customer's agents; and
(b) the Customer is liable for any risk or loss arising from such payment.
(5) In the event that the Customer fails to pay on due date-
(a) The whole amount in respect of all purchases made by the Customer will become due, owing and
payable immediately, irrespective of the dates when the goods were purchased; and
(b) the Company may suspend or cancel delivery to the Customer or any goods; and
(c) the Company may exercise any remedy for breach of contract as set out in clause 14.
(6) The Company may appropriate, at its sole discretion, any payments made by the Customer to the
oldest outstanding amounts due, firstly to interest and thereafter to capital.

8. ORDERS

(1) An order for goods constitutes an irrevocable offer to purchase.
(2) The order must-
(a) be in writing and addressed to the Company;
(b) provide the following details:
(i) a clear description of the goods required;
(ii) an address for delivery or provision of the goods;
(iii) the means of transporting the goods; and
(iv) an order number.
(3) The acceptance of an order is at the Company's discretion, and will be
confirmed by:
(a) delivering the goods ordered; or
(b) commencing work in response to the order;
(c) the despatch to the Customer of a written acceptance of the order alternatively an oral confirmation
from an authorised representative of the Company.
(4) Where the Customer wishes to vary an order that has been approved but not yet delivered, the
Customer must -
(a) Give written notification of its intention to vary the order in question;
(b) Give full and complete details of the intended variation.
(b) Should the Company approve such variation, such approval will be written, and sent to the Customer.
© The Company agrees to make payment of all wasted cost and expense incurred by the Company from
the variation of the order.
(5) Where the Customer utilises the services of an agent or broker when the order is placed with the
Company, all commissions, brokerage fees and the like shall be for the Customer's account.
9. DELIVERY
(1) The delivery of the goods is agreed to be complete when the goods are off-loaded at the address specified by the Customer in the order. In the event that a third-party carrier is appointed by either the Company and/or the Customer, then delivery of the goods to the address of the third party carrier shall be deemed to be delivery sufficient for the purposes of the Agreement.
(2) In case of delivery by the Company, the signature of an employee or agent of the Customer upon the Company’s delivery note or invoice shall constitute delivery sufficient for the purposes of this Agreement;
(3) Where a third party carrier is appointed then:
(a) The carrier shall be deemed to be the Customer’s agent;
(b) The Customer hereby authorises the Company to engage a third party carrier on such terms and conditions as the Company deems fit;
(c) The Customer indemnifies the Company against all claims of whatsoever nature arising out of the transportation of the goods.
(d) The Customer shall be liable for all insurances, taxes, duties and other levies and the third party carrier may charge.
(4) If the Company delivers in instalments -
(a) Each instalment shall be deemed to be the subject of a separate Agreement; and
(b) Defective delivery or delay in delivery of any instalments does not entitle the Customer to cancel of the Agreement.

10. DEFECTIVE DELIVERY
(1) Defective delivery includes discrepancies in quantity delivered, non-delivery and shortages.
(2) The Customer shall advise, in writing, of all defective delivery/ies. Such written notice shall be given to the Company within 3(THREE) working days from the date when the Customer received the goods. Where the Customer fails to give timeous written notice of such defective delivery, the Customer shall waive all rights and benefits contained in this clause 10.
(3) Such written notice shall contain specific reference to the relevant invoice, packing slip and batch numbers.
(4) The Company will, at its discretion:
(a) remedy such defective delivery within 30 (THIRTY) working days from the date of receipt of the written notice referred to above; or
(b) credit the Customer with the value of the defective delivery.
(5) The Company’s liability for defective delivery will be limited to remedying the defect where it is possible to do so and only after the Company, at its discretion, agrees that the delivery is defective.

11. DELAY IN DELIVERY
(1) Time is of the essence of the Agreement, nor of any performance by the Company of its obligations arising from the Agreement.
(2) If the event that delivery is delayed, which delay is caused by reasons beyond the Company’s control, including:
(a) Vis Maaior the Company will not be liable for any damages resulting from the delay; and the Customer will not be entitled to cancel and order by reason of the delay.
(3) Where the Customer’s conduct, including failure to take delivery of the goods ordered, is the cause of the delay, then-
(i) The risk in the goods shall immediately pass to the Customer; and
(ii) The Customer must pay reasonable costs of storing, insuring and handling the goods, until delivery.

12. RETURNED GOODS
(1) Delivered goods may only be returned with the prior written approval of the Company.
(2) If the Company approves the return of goods already delivered, the following conditions shall apply;
(a) The goods must be complete, clean, saleable, undamaged and in their original packaging; and
(b) The value of credit for the goods returned will be calculated at the invoice value when the goods were purchased, less a handling charge of 10% (excluding Value Added Tax thereon);
(c) All goods shall be returned at the Customer’s expense and all the risk to and in the goods remains with the Customer until the Company receives the goods.

13. OWNERSHIP AND RISK
(1) Upon delivery of goods, risk passes to the Customer.
(2) Until full payment of the contract price-
(a) Ownership of the goods vests with the Company;

Reg No.: 2000/022793/07  Vat No.: 456 019 2198

Steel Merchants and Manufacturers of a full range of allied Steel products.
(b) In the event of the cancellation of the Agreement, the Customer expressly agrees and consents to Company's repossession of the goods, and consequent thereupon, to the entering of the premises at which the goods are kept, without a Court Order, in order to repossess the goods, including any other goods in the possession of the Customer bearing the Company's name, trade-marks and labels.

(c) The Company may enter any premises, vehicles or vessels at which it reasonably thinks the goods are situated;

(d) The Customer shall insure the goods against loss or damage, and do all things to ensure that all benefits in terms of the insurance policy are ceded to the Company.

(e) The Customer shall inform the Landlord of the premises at which the goods are stored, that such goods are the property of the Company.

(f) for purposes of "acession" the goods;

(i) shall not accede to any other property, whether movable or immovable;

(ii) shall be deemed to be the principal items to any other goods or equipment.

3. The Company shall not be responsible for any loss, harm or damage caused by or arising out of the repossession of the goods and the Customer hereby indemnifies, and holds the Customer harmless in the event of such a claim arising.

14. VARIATION, CANCELLATION, BREACH

1. The Company may vary, amend or cancel the terms of this agreement for any reason, including the Customer's breach of this agreement.

2. The Customer shall be deemed to have breached the Agreement in the event that the Customer—

(a) makes a false representation in making application for the Incidental Credit Facility;

(b) fails to pay timeously;

(c) fails to comply with any terms of this agreement;

(d) fails to comply with any warranty given;

(e) if the Customer is a natural person, and the Customer dies, or is provisionally or finally sequestrated;

(f) if the Customer is a company, close corporation or trust, and is placed under provisional or final liquidation or judicial management;

(g) commits any act of insolvency;

(h) enters into any compromise with its creditors;

(i) fails to comply with any of the terms of this Agreement.

(j) changes the structure of its ownership without giving written notice of such change to the Company.

2. Requests the Company to furnish security in contravention of the provisions of clause 17(5).

3. The Company breaches any terms of this agreement, the Company shall be entitled, without prejudice to any of its rights arising from the Agreement, or in terms of the common law, to—

(a) forthwith cancel the Agreement, and claim immediate payment of all amounts outstanding, whether such amounts are due for payment or not;

(b) vary or amend the agreement;

(c) suspend further deliveries until a breach is remedied;

(d) charge interest according to the terms set out in paragraph 15;

(e) give the Customer notice to remedy the breach within 14 (FOURTEEN) days of receiving the notice.

4. Any variation or amendment to the Agreement must be in writing, signed by an authorised representative of the Company.

15. INTEREST

Interest, compounded and calculated monthly in advance on all overdue amounts, at the maximum rate possible in accordance with the provisions of Act 34 of 2005 (as amended) shall be payable by the Customer, without demand.

16. WARRANTIES AND INDEMNITIES

1. The Customer warrants that—

(a) the information contained in any application for an Incidental Credit Facility is true and correct;

(b) The Company shall receive written notification of any changes to such information within 7 (SEVEN) days of such change occurring;

(c) In purchasing the goods, the Customer has taken all reasonable steps to satisfy itself of the fitness and suitability of the goods for their intended purpose.

(d) The authority of the person who signs the Agreement on behalf of the Customer, to bind the Customer in terms of this Agreement.

2. The Company warrants that the goods are guaranteed according to the Company's product specific warranties only. All other warranties and guarantees, including all Common Law warranties, are expressly excluded. Such liability is limited, at the Company's sole and exclusive discretion, to the cost of replacing

Reg No.: 2000/02293/07 Vat No.: 466 019 2198

Steel Merchants and Manufacturers of a full range of allied Steel products.
the defective goods, or the passing of a credit in the invoiced-value of the defective goods. No claim shall
arise unless the Customer has given, by pre-paid registered post, written notification of the alleged breach,
within 3 (THREE) days of the occurrence of the alleged breach.
(3) Without derogating from the generality hereof, the Company shall not be liable for loss or damage
caused by, or arising out of, the following-
(a) workmanship, materials, fitness for purpose, merchantability or product liability;
(b) defects whether latent or patent;
(c) defects arising through fair wear and tear or neglect;
(d) any loss incurred by the Customer including profits, use, production, contracts, custom or goodwill, or
any special direct, indirect or consequential loss, howsoever arising;
(e) any damages incurred by the Customer as a result of advice given by the Company’s employees;
(f) Where the Company sub-contracts to a third party, any loss or damage caused by, or arising out of such
third-party’s conduct.
(4) Time is not of the essence in respect of any order placed by the Customer.

17. LEGAL PROCEEDINGS
(1) This agreement is governed by the laws of the Republic of South Africa.
(2) In the event of a dispute arising out of the Agreement, the Company may elect to institute legal action
out of the Magistrate’s Court having jurisdiction over the Customer, regardless of the amount forming the
subject-matter of the dispute.
(3) The Customer agrees to be liable for all legal costs and charges calculated on the attorney and client
scale plus collection commissions, tracing fees and the like.
(4) A certificate signed by any director or manager of the Company stating the Customer’s indebtedness,
shall be prima facie proof of such indebtedness, and sufficient for the purposes of Summary Judgement
and/or Provisional Sentence proceedings in any competent court.
(5) In the event of the Company instituting legal action against the Customer, and notwithstanding the
provisions of any relevant legislation and the Rules of the Courts, it is agreed that:
(i) The Company shall not be required to provide security in respect of such proceedings, in any form
whatsoever;
(ii) The Customer shall make payment of all of the Company’s legal expenses, on the attorney and own
client scale, including Counsel’s fees as on brief, tracing costs, collection commissions and all other outgoings incurred.

18. NOTICES AND SERVICE
(1) The address provided by the Customer on the front of this agreement will be used by the Company for
all communications with the Customer, including -
(a) Service of any court process;
(b) Notices;
(c) Payment of any amount; or
(d) Communication of any kind.

19. DISCLOSURE OF INFORMATION
(1) For purposes of this agreement, a Customer’s personal information includes-
(a) The addresses, both residential and place of business;
(b) Credit worthiness;
(c) Information regarding the monthly amounts purchased from other suppliers;
(d) Length of time Customer has dealt with those suppliers;
(e) Type of goods supplied;
(f) The manner and time of payment;
(2) The Customer is responsible to ensure that Company’s records of its personal details are accurate at all
times.
(3) The Company may, at any time, request, from Credit Bureaux, banks and the like, the Customer’s
personal information relevant to the Customer’s credit assessment. The personal information obtained from
a third party, shall not be disclosed to any third party.
(4) The Company may, upon request, provide trade references, credit information and personal information
to a third party seeking such.

20. GENERAL
(1) No warranties, representations or guarantees have been made by the Company or on its behalf to
induce the Customer to sign this document.

Steel Merchants and Manufacturers of a full range of allied Steel products.
(2) No relaxation or indulgence which the Company may give at any time in regard to the carrying out of the Customer's obligations in terms of the Agreement shall prejudice nor waive of any of the Company's rights arising from the Agreement or the Common Law (if applicable).

(3) The headings in this document are included for convenience and are not intended for the purpose of interpreting this Agreement.

(4) Each of the terms shall be separate and divisible, one from the other. In the event that any such term become unenforceable for any reason whatsoever, then such term shall be severable and shall not affect the validity of the remainder of the Agreement.

(5) No conduct by or on behalf of the Company shall operate as, or be deemed to constitute, a novation the terms of the Agreement or any part thereof.

(6) No amendment of any kind will be binding unless reduced to in writing and signed by duly authorised representative of the Company and the Customer.

21. NEGOTIABLE INSTRUMENTS

(1) Acceptance of a negotiable instrument by the Company shall not be deemed to be a waiver of the Company's rights under this agreement. In relation to the cheques furnished by the Customer to the Company, the Customer waives its rights to insist on a notice of dishonor or protest being given to it in the event that the cheque is dishonored.
Signature...........................................................
By his signature hereto, the representative of the Customer warrants that no impediments, legal or otherwise, exist which shall give rise to the inability of the Customer to fulfil all its obligations arising out of this Agreement.

Full Names (print)

ID No: Position/Capacity: 

Place Date:

Witness (Name and Signature)

1. (Sign) ID No: 

(Full Names)

Signature...........................................................
By his signature hereto, the representative of the Customer warrants that no impediments, legal or otherwise, exist which shall give rise to the inability of the Customer to fulfil all its obligations arising out of this Agreement.

Full Names (print)

ID No: Position/Capacity: 

Place Date:

Witness (Name and Signature)

1. (Sign) ID No: 

(Full Names)

For office use only
THE SELLER Date Place

Reg No.: 2000/022793/07 Vat No.: 466 019 2198

Steel Merchants and Manufacturers of a full range of allied Steel products.
CHECKLIST FOR APPLICANTS:  
PLEASE TICK WHERE APPLICABLE

1  IS THE NAME OF APPLICANT COMPLETED  
2  ARE ALL PAGES INITIALED  
3  IS THE WARRANTY COMPLETED  
4  IS THE APPLICATION WITNESSED  
5  IS THE SURETY WITNESSED  
6  HAVE YOU ATTACHED A LETTERHEAD  
7  HAVE YOU ATTACHED CK DOCS - (FOR A CC) - CK1 & CK2 SECTION AND A & B (CERTIFIED)  
8  HAVE YOU ATTACHED CM DOCS - (FOR A PTY LTD) - CM1, CM22 AND CM29 (CERTIFIED)  
9  HAVE YOU ATTACHED A COPY OF IDENTITY DOCUMENTS FOR ALL DIRECTORS/MEMBERS (CERTIFIED)  
10  HAVE YOU ATTACHED A COPY OF YOUR ID - (FOR A SOLE PROPRIETOR) (CERTIFIED)  
11  HAVE YOU ATTACHED MASTER'S CONFIRMATION - (FOR A TRUST) DEPARTMENT TRADE AND INDUSTRY CERTIFICATE  
12  HAVE YOU ATTACHED A RESOLUTION FROM THE TRUST STATING THAT YOU MAY TRADE ON BEHALF OF THE TRUST  
13  HAVE THE SURETIES ATTACHED COPIES OF IDENTITY DOCUMENTS (CERTIFIED)  
14  HAVE YOU ATTACHED A COPY OF YOUR VAT 103 CERTIFICATE (CERTIFIED)  
15  HAVE YOU ATTACHED A COPY OF YOUR PERSONAL BALANCE SHEET FOR PERSONAL SURETY SIGNED  
16  SURETY DOCUMENTS MUST BE RETURNED AS PART OF THE CONTRACT  
17  PLEASE ATTACH A COPY OF LATEST ANNUAL FINANCIAL STATEMENTS  
18  PLEASE ATTACH A COPY OF A BANK PROCESSED CHEQUE  
19  PLEASE ATTACH A RESOLUTION IF APPLICABLE  
20  PLEASE POST REGISTRATION MAIL OR ARRANGE FOR COLLECTION (ORIGINAL CREDIT APPLICATION, SURETY AND ALL SUPPORTING DOCUMENTATION)  
21  ACCOUNTS WILL NOT BE OPENED WITHOUT THE ABOVE MENTIONED DOCUMENTS  
22  PLEASE POST TO: PO BOX 1578 , PAROW , CAPE TOWN , 7499  
23  FOR COLLECTION: CONTACT ALLIE OR STACEY AT 021 959 9000

Steel Merchants and Manufacturers of a full range of allied Steel products.
## Account Summary as at 13/08/2012

**At:** [Woodstock] / [ ]

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Previous account balance</td>
<td>443.94</td>
</tr>
<tr>
<td>Less payments (19/07/2012)</td>
<td>443.94</td>
</tr>
<tr>
<td>(a)</td>
<td>0.00</td>
</tr>
<tr>
<td>Latest account - see overleaf</td>
<td>648.44</td>
</tr>
<tr>
<td>Current amount due (b)</td>
<td>Payable by 07/09/2012</td>
</tr>
<tr>
<td>Total (a) + (b) above</td>
<td>648.44</td>
</tr>
<tr>
<td>Total liability</td>
<td>648.44</td>
</tr>
</tbody>
</table>

### Please note:
1. Cheques must be made payable to the City of Cape Town. Post-dated cheques will not be accepted.
2. Interest will be charged on all amounts outstanding after the due date.
3. Failure to pay could result in your water and/or electricity supply being disconnected/restricted. Immediate reconnection of the supply after payment cannot be guaranteed. A disconnection fee will be charged and the amount of your deposit may be increased.
4. You may not withhold payment, even if you are engaged in a dispute with the City concerning this account.
5. A convenient debit order facility is available. For further details please phone 086 010 3089.
6. Bank charges on payment amounts in excess of R4 000.00 made by credit/debit card will be debited to your account.
7. When making a direct deposit at ABSA Bank, please state your account no. [ ]
8. Register at your bank for internet payments. Log onto your bank’s website and select ‘City of Cape Town Municipality’ and insert your nine-digit municipal account number. Kindly ensure that there are no spaces between the numbers.

### Payment:
At any City of Cape Town cash office or the following:

<table>
<thead>
<tr>
<th>Bank</th>
<th>Account number</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABSA</td>
<td>[ ]</td>
</tr>
<tr>
<td>Checkers</td>
<td>[ ]</td>
</tr>
<tr>
<td>Shoprite</td>
<td>[ ]</td>
</tr>
<tr>
<td>Post Office</td>
<td>[ ]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total due if not paid in cash</td>
<td>648.40</td>
</tr>
<tr>
<td>Amount due if paid in cash</td>
<td>648.40</td>
</tr>
<tr>
<td>Rounded down amount carried forward to next invoice</td>
<td>0.04</td>
</tr>
</tbody>
</table>
### PROPERTY RATES (Period 12/07/2012 to 13/08/2012) 33 Days

#### WOODSTOCK

- **Total value**
  - From 12/07/2012: R 950000.00 @ 0.0060620 x 365 x 33 = **520.67**
  - **Statutory rebate credit**
    - From 12/07/2012: R 15000.00 @ 0.0060620 x 365 x 33 = **8.22**
  - **Additional rebate credit**
    - From 12/07/2012: R 185000.00 @ 0.0060620 x 365 x 33 = **101.39**

- **Total**: **411.06**

### WATER (Period 06/07/2012 to 06/08/2012 - 32 Days) (Actual reading)

#### WOODSTOCK

- **Consumption** 15,000 kl / Daily average 0.469 kl
  - (1) 3,120 kl @ R 5.8300 = **18.50**
  - (2) 4,735 kl @ R 5.8300 = **27.58**
  - (3) 3,953 kl @ R 10.6000 = **42.00**

- **Total**: **69.51**

### REFUSE (Period 12/07/2012 to 13/08/2012) 33 Days

#### WOODSTOCK

- **Charge** (1 x 240l/bin x 1 removals) = **85.21**

### SEWERAGE (Period 06/07/2012 to 06/08/2012 - 32 Days) (Actual reading)

#### WOODSTOCK

- **Disposal charge**
  - (1) 4,419 kl @ R 5.8100 = **25.83**
  - (2) 3,314 kl @ R 5.8100 = **19.36**
  - (3) 2,767 kl @ R 12.3800 = **34.57**

- **Total**: **53.51**

Add 14% VAT on amounts marked with * above
0% VAT on amounts marked with # above

**Current account: Total due**: **648.44**

### Meter details

<table>
<thead>
<tr>
<th>WATER</th>
<th>Previous reading</th>
<th>New reading</th>
<th>Units used</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2164.000kl(Actual)</td>
<td>2179.000kl(Actual)</td>
<td>15.000kl</td>
</tr>
</tbody>
</table>
1. PATIENT DETAILS

<table>
<thead>
<tr>
<th>SURNAME</th>
<th>FIRST NAME</th>
<th>ID NUMBER</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>ADDRESS LINE 1</th>
<th>ADDRESS LINE 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>CITY</td>
<td>POSTAL CODE</td>
</tr>
<tr>
<td>HOME TELEPHONE</td>
<td>WORK TELEPHONE</td>
</tr>
<tr>
<td>CELL NUMBER</td>
<td>E-MAIL</td>
</tr>
<tr>
<td>HOME LANGUAGE</td>
<td></td>
</tr>
</tbody>
</table>

1. PERSON RESPONSIBLE FOR ACCOUNT – if not the patient

<table>
<thead>
<tr>
<th>SURNAME</th>
<th>FIRST NAME</th>
<th>ID NUMBER</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>ADDRESS LINE 1</th>
<th>ADDRESS LINE 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>CITY</td>
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<tr>
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<td>WORK TELEPHONE</td>
</tr>
<tr>
<td>CELL NUMBER</td>
<td>E-MAIL</td>
</tr>
<tr>
<td>HOME LANGUAGE</td>
<td></td>
</tr>
</tbody>
</table>

TERMS AND CONDITIONS

1 PARTIES: It is recorded that the doctors, partners and practices listed above ("the Practice") have concluded a co-operation agreement in terms of which they endeavour to standardise the relationship with their patients. Accordingly services rendered by any of the anaesthesiologists in the Practice described above will be subject to the terms and conditions set out below. 2 ACCEPTANCE: The undersigned, patient, legal guardian, responsible person or surety of the patient hereby assumes liability as the principal debtor, alternatively as co-debtor jointly and severally with the patient, for the payment of any claims arising from services rendered to the patient or to be rendered to the patient, notwithstanding the existence of medical aid or insurance covering the claim. Any reference to the Practice in this agreement includes a reference to the anaesthesiologist who rendered the service and vice versa. 3 TERMS OF PAYMENT: (3.1) Every payment by the patient arising out of or in connection herewith shall be made at the anaesthesiologist who rendered the service free of any deductions and without set-off on the due date and without demand.(3.2) Unless otherwise agreed in writing: (3.2.1) The Practice will bill the responsible person after the consultation or having affected the service; (3.2.2) Payment shall be made immediately in respect of any such bill but not later than 30 days from date of service; (3.2.3) Interest at the margin of 2% per month shall be charged by the Practice at its discretion on any amount not paid by the patient on due date. The amount shall be calculated daily on the outstanding balance due and shall be so calculated and capitalized on the last day of each and every month until the total amount due in terms hereof shall have been paid. (3.2.4) Twenty Business Days after the raising of interest on any overdue amount, the unpaid invoice upon which interest is charged will become an Incidental Credit Agreement in terms of the National Credit Act. Once an invoice becomes an Incidental Credit Agreement the Practice is entitled to charge and recover the following fees in respect of the Incidental Credit Agreement, provided that the amount of the fee charged and recovered does not exceed the legal maximum permissible (a) interest as described in clause 3.2.3 (b) default administration charges, being a charge that may be imposed to cover administration costs incurred as a result of the patient defaulting on an obligation; and (c) collection costs, being an amount that may be charged in respect of the enforcement of the patient's monetary obligations, but which does not include default administration charges. 4 BREACH: (4.1) Once an Incidental Credit Agreement has been formed (on the basis described in clause 3.2.4 above) and the patient defaults with his payments, the Practice shall: (a) provided it has not enforced debt collection procedures, provide the patient with a written notice of such default proposing that the patient refer the Incidental Credit Agreement to an alternative dispute resolution agent, consumer court or ombud with jurisdiction, with a view to resolving any dispute under the Incidental Credit Agreement or agreeing on a plan to bring the payments due under the Incidental Credit Agreement up to date; and (b) at its own discretion approach a court for an order to enforce the Incidental Credit Agreement if the patient is in default under the Incidental Credit Agreement for at least 20 (twenty) Business Days and at least 10 (ten) Business Days have elapsed since the delivery of the notice referred to in clause 4.1(a) above without the patient responding to such notice or rejecting the proposals in such notice. 5 GENERAL: This agreement constitutes the whole and entire agreement between the parties and there have not been and there are no agreements, representations or warranties between the parties other than those specifically set forth herein. No variation or modification of this agreement shall be of any force or effect unless the same shall be confirmed in writing and signed by the parties. 6 JURISDICTION: This agreement is subject to and shall be interpreted and construed in terms of the laws of the Republic of South Africa and is subject to the jurisdiction of a competent court in the Republic of South Africa. 7 CREDIT INFORMATION: The undersigned, patient, legal guardian or surety of the patient authorise the Practice to receive, share and exchange credit information concerning them with any credit bureau or any other person or corporation with whom they have or may have financial dealings including, where applicable, information requested pursuant to, or in any circumstances contemplated in the National Credit Act 34 of 2005: 8 LEGAL COSTS: Should the Practice commence legal proceedings, the patient undertakes to pay all legal costs relating to the recovery of the outstanding amounts in respect of professional services rendered, including attorney fees on an attorney own client scale, collection commission and tracing costs.

Signed at ........................................... on the ...................... day of ........................................ 200...

Patient ..........................................., Parent / guardian ........................................, Responsible person ........................................
**STATEMENT / STAAT**

- **Date:** 09/11/2012
- **Member:** MRS RL AUCAMP
- **Med Aid:**
- **Mem No:**
- **ID/DOB:**
- **Diag:**

---

**MRS RL AUCAMP**

**P O BOX**

---

OUR FEES ARE ABOVE N.R.P.L. RATES - PLEASE SETTLE ACCOUNT THEN SIGN AND SUBMIT TO YOUR MEDICAL AID

**Practitioner:**
- **Dr.**
- **Prac No:**
- **HPCSA No:**

---

**DATE** | **PATIENT** | **CODE** | **DESCRIPTION** | **ST** | **QTY** | **CLAIM** | **DISC** | **DEBIT** | **CREDIT** | **BALANCE** |
--- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
06/11/2012 | [Redacted] | [Redacted] | DIAG CONSERVATION | Pa | 1.00 | 600.00 | 0.00 | 0.00 | 0.00 | 0.00 |
06/11/2012 | [Redacted] | [Redacted] | DIAG TYPANOMETRY IMPEDANCE | Pa | 1.00 | 80.00 | 0.00 | 0.00 | 0.00 | 0.00 |
08/11/2012 | [Redacted] | [Redacted] | CREDIT CARD PAYMENT | | | | | | | |
09/11/2012 | [Redacted] | [Redacted] | DIAG SILMYRINGOTOMY AND VENT TUBE | | | | | | | |
| | | | AUTHORISATION NO: | | | | | | |

---

2160.40 | 0.00 | 2160.40 | 0.00 | 2160.40 |

---

**WE DO NOT SUBMIT ACCOUNTS TO MEDICAL AIDS**
**THIS IS YOUR RESPONSIBILITY!**

---

**REMITTANCE ADVICE**
**PLEASE ATTACH THIS PORTION TO YOUR PAYMENT**

<table>
<thead>
<tr>
<th>DR:</th>
<th>PSE FAX PROOF</th>
</tr>
</thead>
</table>

---

**CURRENT** | **30 DAYS** | **60 DAYS** | **90 DAYS** | **120 DAYS** | **TOTAL** |
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>PATIENT</td>
<td>2160.40</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>2160.40</td>
</tr>
<tr>
<td>MRS RL AUCAMP</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

**DATE:** 09/11/2012

**ACCOUNT:**
- **Patient:**
- **Credits:** 2160.40
- **Total:** 2160.40

---

**BANK DETAILS: BANK:**
CELL C SERVICE PROVIDER COMPANY (PROPRIETARY) LIMITED
SUBSCRIBER AGREEMENT TERMS AND CONDITIONS

1. WHAT IS THIS AGREEMENT FOR?

1.1. This Agreement is for the supply of our Services for the Initial Contract Period (which is the initial period of this Agreement according to your Application that is related to these terms and conditions).

1.2. This Agreement contains the general terms and conditions for all Cell C SP Subscriber Agreements.

1.3. These terms and conditions form part of the Agreement between Cell C SP and you, so please ensure that you understand all of them. Remember that you must always comply with these terms and conditions.

1.4. If you do not understand any of the terms and conditions, you should ask a Cell C SP employee to explain them to you.

1.5. Important clauses which may limit our responsibility or involve some risk for you are explained to you and may be in bold. You must pay special attention to these clauses.

1.6. We have defined some words that have special meaning. You can find the meaning of the words in in clause 2 of this Agreement.

2. DEFINITIONS AND INTERPRETATION

2.1. In this Agreement, unless stated otherwise, the following terms shall have the following meanings:

"Activation" means the activating of your SIM Card and/or Cellphone number to operate on the Cell C Network so that you can use our Services.

"Agreement" means your Application including these terms and conditions and/or your renewal application (if applicable) including any addition or amendment to this agreement or your renewal agreement authorised by us and includes any C-Cover. The Tariff Plan and any notice or directive issued by us form part of this Agreement.

"Application" means your completed application form and/or your renewal application form (if applicable).

"Cellphone" means the mobile cellular telephone handset in which your SIM Card and Cellphone number (also referred to as MSISDN number) referred to in this Agreement are installed.

"Cell C" means Cell C Proprietary Limited.

"Cell C Network" means the electronic communications network in South Africa operated by Cell C.

"Cell C SP" means Cell C Service Provider Company Proprietary Limited.

"Charges" means any applicable connection fee, Subscription Fee, Usage Charges, SIM Card fee, C-Cover Charge, Goods Fee, risk transfer charge and any other charge relating to the provision of our Services to you in terms of this Agreement.

"Connection Fee" means the charge for your connection to the Cell C Network which we charge you in terms of the Tariff Plan. The Tariff Plan is available on Cell C’s website at www.celco.co.za or at any of our stores. You only pay us this connection fee once. The prices at the date you start your contract may not be the same for the whole period of the contract. If the prices change we will let you know and you can tell us whether you want to carry on with the contract or cancel your contract in terms of this Agreement.

THE POWER IS IN YOUR HANDS
“C-Cover” means a separate C-Cover agreement to cover your Goods and SIM Card. The terms of the C-Cover are set out in the separate C-Cover agreement and application form (which you are required to complete and sign and agree to if you decide to take C-Cover). You do not have to take C-Cover on your Goods if you do not want to. But, if you do not take C-Cover or insure your goods with an insurer, you will still have to pay us for the Goods and our Services even if the Goods are stolen or lost.

“C-Cover Charge” means the applicable additional monthly charges payable by you.

“Electronic Communications Network Provider” means any person or organisation licensed in terms of the Electronic Communications Act, 2005 to provide electronic communications network services.

“Electronic Communications Service Provider” means a person or organisation licensed in terms of the Electronic Communications Act, 2005, to provide electronic communications services.

“Goods” means any tangible object supplied to you by us, Cell C, or any of our distribution partners in terms of this Agreement, including Cellphones, SIM Cards, routers, dongles, laptops or vouchers.

“Goods Fee” means any applicable charge relating to the Goods supplied to you in terms of this Agreement.

“ICASA” means the Independent Communications Authority of South Africa. This is a public body that regulates the way that Cell C and other electronic communications service and electronic communications network service providers carry on business and provide services to you.

“Inclusive Minutes” means any units that you use when you use and access the Cell C Network included as part of your contract and no extra charges are owed by you for those minutes. These are called inclusive minutes and these minutes give you access to use our Services on the Cell C Network. The inclusive minutes are the minutes that come with the Tariff Plan that you buy.

“Inclusive Data Units” means the data products or services supplied to you which are included as part of your contract and no extra charges are owed by you for these services. These are called inclusive data units and include SMS, MMS, GPRS or EDGE giving you access to use our Services on the Cell C Network. The inclusive data units are the data units that come with the Tariff Plan that you buy.

“Initial Contract Period” means the minimum number of uninterrupted months you choose, in your Application, to use our Services for the first period or for any Renewal Period for which you choose to have your contract renewed with us after the first period.

“International Roaming Charges” means the charges you incur while you are using our Services and/or your Goods outside the borders of South Africa. In other words, your Goods will be operating on the electronic communications network of an international roaming partner of Cell C and not the Cell C Network (also called “international roaming”). You will be liable for all calls and SMSs (both incoming and outgoing) as well as all data charges incurred while international roaming is activated, and all such charges will include the foreign network charge and a local roaming charge. For more information on International Roaming Charges and the applicable charges per foreign network, please visit www.cellc.co.za or ask in store.

“Licence” means any licence issued to Cell C in terms of the Electronic Communications Act, 2005.

“Monthly Usage Limit” means (if this option applies) the monthly amount that you can spend on all Usage Charges with your SIM Card. This means that you will have a monthly limit to talk, sms, or use data.

“MSISDN number” means Mobile Station Integrated Services Digital Network number, which is your Cellphone number.
"our Services" means the electronic communications services that are made available by us or an international roaming partner of Cell C (if applicable), to you through the Cell C Network and/or the electronic communications network of an international roaming partner of Cell C, including any services, products and promotions supplied by us or an international roaming partner of Cell C, whether chargeable or non-chargeable. You may find more information about our services and the terms and conditions for products and promotions on Cell C’s website (http://www.celcc.co.za) or contact us for an explanation of what is made available to you through the Cell C Network or an international roaming partner of Cell C, which may change over the period of your contract. You can also ask any Cell C or Cell C SP representative about such services, products and promotions.

"Port" or "Porting" means the ability to transfer your Cellphone number from one Electronic Communications Network Provider to another so that you become a subscriber of the other Electronic Communications Network Provider, but using the same Cellphone number.

"Price List" means the price list for our Services or Goods. You may find more information about our Price List on Cell C’s website (http://www.celcc.co.za) or contact us for an explanation of what all our prices are for our Services, which may change, on notice to you, over the period of your contract. You can also ask any Cell C or Cell C SP representative to help you find out more about our prices. You are entitled to cancel this Agreement if you are not happy with any changes to our price list provided you follow the cancellation terms and conditions set out in this Agreement.

"Renewal Period" means you have chosen to upgrade your Goods (if applicable) and you renew or enter into a new subscriber agreement with us for any period for which this Agreement is renewed after the Initial Contract Period expires.

"RICA" means the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002, as amended from time to time.

"SIM Card" is a Subscriber Identity Module, which you get with this Agreement. The SIM Card has your personal number programmed into it to allow you to access the Cell C Network.

"Subscription Fee" means the monthly subscriber charge payable by you to us. Our charges are set out in a Tariff Plan.

"Tariff Plan" means the various tariff (cost) plans published by us setting out:
(a) our charges to you for our Services;
(b) your rights to renew your contract;
(c) any billing increase;
(d) any Inclusive Minutes; and/or
(e) any other service whether we charge you for those other services or provide these other services as part of the Subscription Fee incorporated into the Tariff Plan.
(Our Tariff Plans are available on Cell C’s website at (http://www.celcc.co.za) or at any of our stores).

"Usage Charges" means the amount you will need to pay us in addition to the Subscription Fee for using our Services supplied either to you and/or any other person you have allowed to use our Services.

"Upgrade" is when your Initial Contract Period or Renewal Period is coming to an end and we offer you an opportunity to obtain new Goods (if applicable) and to renew your Agreement, or enter into a new subscriber agreement with us. The renewal will be decided on your rights to upgrade your Goods as stated in the Tariff Plan you choose, or designated in our business rules that we decide on from time to time, in respect of a new subscriber agreement.

"we", "us" and "our" refers to Cell C Service Provider Company Proprietary Limited.
"Working Day" means a day other than a Saturday, a Sunday or a South African public holiday.

"you" and "your" refers to the person (subscriber) whose particulars appear on the Application plus your successor or authorised representative (if applicable).

2.2. In this Agreement, if we use a singular word it can include the plural, a word of any gender includes the other genders and if we refer to an 'entity' it includes any entity that is seen in law as a separate legal person, such as a company, body corporate, a partnership, an association, and a trust, if it make sense to do so.

3. WHEN DOES THIS AGREEMENT BEGIN?

3.1. By making your Application to use our Services, you offer to enter into an agreement with us for the supply of our Services.

3.2. If you are first signing up with us, this Agreement will begin and be binding on you and us when we:
   3.2.1. accept your Application; and
   3.2.2. activate your SIM Card as soon as reasonably possible on the Cell C Network so you may use our Services.

3.3. If you are renewing your contract with us, the Renewal Period will begin the day after the Initial Contract Period has expired, or otherwise directed by us. The Renewal Period will only begin if your Upgrade is accepted by us.

3.4. For your understanding, the new subscriber agreement, together with the Tariff Plan or charges applicable to the new subscriber agreement (which you enter into with us when upgrading and renewing) will be effective from the expiry of the Initial Contract Period, or as otherwise agreed by us, and only if your application to Upgrade is accepted.

3.5. Once you sign the Application form and these terms and conditions you must comply with your obligations under this Agreement and you will be bound by the terms of this Agreement.

4. HOW LONG IS THE TERM OF THIS AGREEMENT?

4.1. If this Agreement is not cancelled during the Initial Contract Period or on expiry of the Initial Contract Period and is not renewed, then this Agreement will run for the Initial Contract Period and then on a month-to-month basis until you or we terminate the Agreement by giving 20 Working Days’ written notice, or notice in any other recordable form, to cancel this Agreement.

4.2. If you are upgrading or renewing this Agreement, then the Agreement will run for the Renewal Period (if not terminated during the Renewal Period or on expiry of the Renewal Period) and then on a month-to-month basis until you or we cancel the Agreement by giving 20 Working Days’ written notice, or notice in any other recordable form, to cancel this Agreement.

4.3. We will notify you any time between 40 and 80 Working Days before your Agreement (either the Initial Contract Period or the Renewal Period) will come to an end. In this notice, we will tell you the following:
   4.3.1. the date when the Agreement will end;
   4.3.2. any changes that will apply to the Agreement if the Agreement is renewed for a further period or will continue after the expiry of the Agreement. These changes will have to be accepted by you; and
   4.3.3. your right to cancel the Agreement or agree to a renewal for a further fixed period and if you don’t cancel the Agreement or renew the Agreement, then the agreement will continue on a month-to-month basis.

4.4. You may at any time during the Initial Contract Period cancel this Agreement by giving us 20 Working Days’ written notice or notice in any other recorded form of your intention to cancel this Agreement.

4.5. If you have selected a month-to-month contract in your Application and have not been supplied with any Goods, all references to Goods in these terms and conditions will not apply to you.
5. OUR SERVICES

5.1. We will take all reasonable steps within our control to make our Services available to you at all times in line with the terms and conditions of this Agreement.

5.2. Our Services are only available within the range of base stations that make up the Cell C Network and the signal may vary according to where you are at the time.

5.3. Although we take all reasonable measures to ensure that our Services are offered to you on a consistent and continuous basis, we cannot always guarantee a continuous fault free service.

5.4. The quality and availability of our Services may sometimes be affected by factors such as:
5.4.1. local physical obstructions;
5.4.2. bad weather;
5.4.3. other causes of radio interference;
5.4.4. the features or functionality of your particular goods; or
5.4.5. the number of people trying to use the Cell C Network at the same time, for instance in a national emergency, or if there are faults in other electronic communications networks to which the Cell C Network is connected.

5.5. You understand and agree that the SIM Card and the MSISDN number allocated to you may (if it becomes necessary) be changed by us.

I have had an opportunity to consider this clause 5, to ask questions and I understand what this clause means and the effect it has on my rights. Initials____________________

6. YOUR RESPONSIBILITIES

6.1. In return for the provision of our Services you agree to pay us:
6.1.1. the once-off SIM Card fee, the Connection Fee, an administration fee, the price of any Goods supplied including any accessories stated in the Application, on or before the date this Agreement begins or is renewed. If you are renewing your Agreement with us, you will not have to pay the Connection Fee or SIM Card fee again, but will need to pay a reasonable administration fee for the processing of your renewed contract;
6.1.2. the Subscription Fee which is billed to you monthly in advance. Monthly in advance means that the Subscription Fee that you pay at the end of a month is for the next month’s services;
6.1.3. the Goods Fee (if applicable), which is due monthly in advance;
6.1.4. the C-Cover Charges (if applicable) which are due monthly in advance;
6.1.5. the total Usage Charges, which may include any charges for using our Services including calls that you make, SMSs you send and data that you use during that month, which will be billed at the end of the month in which you have used our Services;
6.1.6. International Roaming Charges (if applicable, i.e. when international roaming is activated). Please note that Inclusive Minutes, Inclusive Data Units and the Monthly Usage Limit do not apply to international roaming and you remain liable for all calls made and received, SMS sent and received, as well as for all data used. There may be a delay of up to 3 (three) months before the International Roaming Charges are billed to you as we have to wait for the relevant foreign network to provide the necessary information to us;
6.1.7. the charges for any additional service which are billed at the end of the month in which you used the services; plus
6.1.8. applicable VAT or other taxes and/or duty that must by law be added to any prices and charges contained in this Agreement and/or contained in any Tariff Plan and/or contained in our Price List.

I have had an opportunity to consider this clause 6.1, to ask questions and I understand what this clause means and the effect it has on my rights. Initials____________________
6.2. Payments must be:

6.2.1. made on or before the due date set out on the invoice we issue to you;

6.2.2. of the total amount you owe us as set out on the invoice issued to you and you may not deduct any amount which we might owe you or which you claim is owed by us;

6.2.3. made by direct debit order against your valid current account or your credit card account or against the account of another named person (a “Third Party”) who has given their consent to pay on the Application, or by any other means previously agreed by us in writing. If the debit order fails for any reason, we have the right to subsequently use any legal means available to us (including early debit order facilities) to recover any and all amounts owing to us.

6.2.4. It is your responsibility to make sure that you have given us your correct banking details. If your banking details change for any reason, you must notify us of the change so that we can update our systems. You understand and agree that we cannot be held liable for any charges, damages or loss, if you do not notify us to change your banking details within a reasonable period. [This means that you must accept any loss that results from you failing to tell us of a change of bank details.]

I have had an opportunity to consider this clause 6.2, to ask questions and I understand what this clause means and the effect it has on my rights. Initials_____________________

6.3. Other payment issues

6.3.1. We have the option to require you to pay a reasonable amount as a deposit if:

6.3.1.1. we activate any SIM Card or any value added services that we supply to you; or

6.3.1.2. you default on any payment to us (we will give you written notice to pay a deposit if you default on payment).

6.3.2. If you do not pay us on time, if you materially breach this Agreement or if you do not pay us the requested reasonable deposit amount, then we may suspend activation of your SIM Card or value-added services until you have paid the deposit or any outstanding amounts owing to us.

6.3.3. We have the option of changing any of our Charges from time to time by means of publishing an amended Tariff Plan and by informing you in writing of these changes. We will notify you at least 20 Working Days before we vary our Charges. You have the option to cancel the Agreement in those 20 Working Days if you do not agree to our changes.

6.3.4. Where any Tariff Plan provides for Inclusive Minutes, or Inclusive Data Units and you do not use all these minutes or data units in the billing period in which they originally accrued, then those unused minutes or unused data units will automatically be carried over for a reasonable period, to be advised by us from time to time (the “Carry Over Period”). This provision includes SMS bundles.

6.3.5. Any unused inclusive minutes, inclusive data and unused SMS bundles will expire after the Carry-Over Period.

6.3.6. On cancellation of this Agreement for any reason, any unused Inclusive Minutes, Inclusive Data Units and unused SMS bundles will be forfeited and you will have no claim against us in respect of such unused Inclusive Minutes, Inclusive Data Units and unused SMS bundles. It is your responsibility to ensure that any unused Inclusive Minutes, Inclusive Data Units and unused SMS bundles are used up prior to cancellation, should you wish to use such unused Inclusive Minutes, Inclusive Data Units and unused SMS bundles.

6.3.7. You have 30 calendar days from the date of each invoice that we issue to you to query any amounts on that invoice. If you do not raise a query within 30 calendar days, then you will be assumed to have accepted the invoice as correct.

6.3.8. Even if you do not receive your invoice/s for any month/s you must pay all outstanding charges on the due date. Please notify us as soon as you realise that you have not received your invoice so we may take steps to assist you with this and advise you of the amount due. It is your responsibility to make sure that you have
given us your correct address details (whether electronic or physical). If your address details change for any reason, you must notify us of the change so that we can update our systems. You understand and agree that we cannot be held liable for any charges, damages or loss, if you do not notify us to change your address details within a reasonable period. [This means that you must accept any loss that results from you failing to tell us of a change of address details.]

I have had an opportunity to consider this clause 6.3 to ask questions and I understand what this clause means and the effect it has on my rights. Initials ______

7. SIM CARDS AND GOODS

7.1 You are responsible for the safekeeping of your Goods, including your SIM Card and you agree to notify us immediately if your Goods and/or SIM Card have been lost or stolen.

7.2 We remain the owner of any Goods supplied by us to you until this Agreement comes to an end. Ownership of the Goods will then pass to you if you have paid all amounts due to us by you in terms of this Agreement. This requirement may be waived in writing by us.

7.3 Any Goods supplied by us to you which do not function properly or are defective or faulty because of its design, material or workmanship may be covered by a warranty provided by the manufacturer for the period stated by the manufacturer. In certain instances an extended period of warranty may be given to you; however the period of this warranty will never exceed 24 months from the date the Goods are delivered to you.

7.4 In addition to any warranty on the Goods from the manufacturer, we warrant that any Goods supplied to you are not defective or faulty and you may return defective Goods within 6 months of delivery and you may choose to receive a refund, or replacement Goods or repairs to the Goods.

7.5 We do not warrant any Goods or accessory which has been damaged due to water (including dropping Goods in water, damage to Goods due to perspiration and humidity), disassembled, physically altered, permanently installed, affixed, attached, joined or added to, blended or combined with, or embedded within, other goods or property. Please refer to our returns and repairs terms and conditions for further details.

7.6 Once you return Goods on the basis that it is faulty, we will comply with our repairs, replacement and refunds policy.

7.7 You understand and agree that this Agreement will not come to an end if your Goods, including the SIM Card issued to you are lost, stolen or damaged. You remain liable and must continue to pay all Charges until you terminate the Agreement on 20 Working Days’ notice to us, or we blacklist and/or block your Goods and/or SIM Card in terms of clause 19. If you ask us to blacklist and/or block your Goods and/or SIM Card, the provisions of clause 19 will apply to you.

I have had an opportunity to consider this clause 7 to ask questions and I understand what this clause means and the effect it has on my rights. Initials ______

8. RISK TRANSFER

8.1 You accept all risks associated with your Goods, including the SIM Card (from the date of delivery to you) except for the risks we define and accept to cover in terms of a C-Cover agreement with us.

8.2 Your Goods, including the SIM Card will only be covered by C-Cover if:
8.2.1 expressly covered in terms of a specified Tariff Plan applicable to you; and
8.2.2 your C-Cover application has been accepted by us.

[This clause means that once the Goods are delivered to you, you must bear the loss if anything happens to the Goods except to the extent you have C-Cover.]
9. WHAT HAPPENS IF YOU DO NOT COMPLY WITH THIS AGREEMENT?

9.1. What happens if you don’t pay us on time?

9.1.1. If you do not pay all amounts due to us on or before the due date for payment then, subject to clause 9.2, we will deliver a notice to you and may:

9.1.1.1. charge interest on the overdue amount at the interest rate notified to you and calculated from the due date of payment to the date of actual payment to us;
9.1.1.2. take action in terms of clause 9.2;
9.1.1.3. inform any credit bureau of your payment default;
9.1.1.4. suspend our Services; and/or
9.1.1.5. blacklist the Goods supplied to you in terms of clause 19.

9.1.2. We will notify you before we suspend our Services. If our Services are suspended, you can cancel the Agreement in terms of clause 4.4 and clause 9.3.

9.1.3. If you have an arrangement where a Third Party pays any charges on your behalf and the Third Party has insufficient funds in their account to cover the amount owing to us, we have the right to debit your bank account for any shortfall. If neither you nor the Third Party pays any outstanding amounts owing to us, the provisions of clause 9.2 will apply.

9.1.4. We are entitled to charge you an administration fee which you agree to pay if any debit order or other form of payment is returned to us unpaid or if your credit card payment is rejected or insufficient payment is received for whatever reason, unless it is due to our own fault. The administration fee will not be more than the bank charges and bank administration fees that we will have to pay to the bank.

I have had an opportunity to consider this clause 9.1, to ask questions and I understand what this clause means and the effect it has on my rights. Initials:_________________.

9.2. When may we cancel this Agreement?

9.2.1. If you commit a breach of any of the terms and conditions of this Agreement and you remain in breach for a period of 20 Working Days after delivery of a written notice of breach to you by us requesting that you remedy the breach, we will be entitled to immediately:

9.2.1.1. cancel this Agreement;
9.2.1.2. charge you for the use of our Services up to the date of cancellation;
9.2.1.3. charge you all Charges outstanding for any of our Services (including your Subscription Fee) which would have continued for the Initial Contract Period or Renewal Period;
9.2.1.4. charge you for the outstanding value of the Goods supplied to you on the date of cancellation of the Agreement; and
9.2.1.5. blacklist the Goods in terms of clause 19.

9.2.2. In addition to the above remedies and any other rights we have in terms of law, if you do not remedy any material breach, we have the right to claim damages from you that we may suffer due to your breach.

9.2.3. All Inclusive Minutes, SMS bundles, and Inclusive Data Units will expire on cancellation of this Agreement.

I have had an opportunity to consider this clause 9.2, to ask questions and I understand what this clause means and the effect it has on my rights. Initials:_________________.

9.3. What happens if you cancel this Agreement?

9.3.1. If you cancel this Agreement before the expiry of the Initial Contract Period or the Renewal Period, then you will be liable to us and undertake to pay us on demand:
9.3.1.1. a reasonable cancellation penalty in respect of any of our Services which would have continued for the remaining contract period; and

9.3.1.2. the outstanding value of the Goods on the date of cancellation of the Agreement.

I have had an opportunity to consider this clause 9.3, to ask questions and I understand what this clause means and the effect it has on my rights. Initials:__________

10. WHEN WE MAY CANCEL THIS AGREEMENT FOR OTHER REASONS

10.1. If Cell C’s Licence to provide Network Services to us is cancelled, terminated or amended or if we terminate any agreement with any Electronic Communications Service Provider and/or any Electronic Communications Network Provider, then we may terminate this Agreement on written notice to you. We will not charge you a cancellation fee if we cancel the Agreement for these reasons.

10.2. If the Cell C Network remains unavailable for a continuous period of 60 days, we may cancel the Agreement and we will not charge you a cancellation fee.

11. SUSPENSION OF OUR SERVICES

11.1. Our Services may be suspended by disconnecting your Goods and/or your SIM Card from the Cell C Network, if:

11.1.1. the Cell C Network fails or becomes temporarily unavailable due to any modification and/or upgrade and/or maintenance and/or circumstance beyond our control;

11.1.2. you fail to comply with any of the terms and conditions of this Agreement;

11.1.3. you at any time exceed any credit limit or Monthly Usage Limit imposed by us on written notice to you; or

11.1.4. you use our Services unlawfully, or if you unlawfully tamper with or modify your Goods, including your SIM Card.

11.2. You will continue to be liable for payment of your Goods during any suspension period. You will still be liable to pay for any Subscription Fee under clauses 11.1.2 to 11.1.4.

11.3. We are entitled to charge you a reasonable administration fee if our Services are suspended and have to be reconnected due to the circumstances under clauses 11.1.2 or 11.1.3 or 11.4 above

11.4. You will still be able to call Cell C’s emergency response centre free of charge in the event of an emergency. I have had an opportunity to consider this clause 11, to ask questions and I understand what this clause means and the effect it has on my rights. Initials:__________

12. LIMITATION OF OUR LIABILITY

12.1. Neither we nor Cell C will be liable to you for any liability, loss(es) and/or damage and/or cost or expense whether direct, indirect and/or of a consequential nature including any loss of income and/or loss of profit and/or loss of anticipated savings suffered by you due to:

12.1.1. any reasonable suspension, termination or temporary unavailability of the Cell C Network, or any of our Services, or any unavoidable delay in the performance of our Services;

12.1.2. any change in your Cellphone number if we are obliged to do so in terms of law, or if you or your authorised representative requests us to change your Cellphone number; or

12.1.3. the Porting of the Cellphone number given to you by us at your request, or a request made on your behalf or as a result of any delays in effecting such Port.

(This clause means that we do not owe you any of your losses if our Services are suspended, terminated or unavailable for any reason that you should reasonably expect from that service, or if we have to change your Cellphone number, or if you ask us to Port your number, or if there is any reasonable delay in doing so.)
I have had an opportunity to consider this clause, to ask questions and I understand what this clause means and the effect it has on my rights. Initials:__________

12.2. In the event that we become aware of any suspension, termination or temporary unavailability of the Cell C Network, or any of our Services, or any unavoidable delay in the performance of our Services, we will make reasonable attempts to give you timely notice of such suspension, termination, temporary unavailability or unavoidable delay.

13. INTELLECTUAL PROPERTY RIGHTS

Nothing in this Agreement is a licence or transfer to you of any of our rights including copyright and/or trademarks relating to the name Cell C, our Services or the SIM Card (including any software or firmware incorporated in the SIM Card).

14. MOBILE NUMBER PORTABILITY

14.1. If this Agreement was concluded following the Porting in of your Cellphone number from another Electronic Communications Network Provider or Electronic Communications Service Provider, or if you are Porting your Cellphone number to another Electronic Communications Network Provider or Electronic Communications Service Provider, then this clause applies to you.

14.2. You agree and understand that the services, any third party services and any service credits provided to you by the other Electronic Communications Network Provider or Electronic Communications Service Provider are not transferable to us and that you will in turn only have access to our Services as provided for and defined in this Agreement.

14.3. You agree and understand that you have to pay all outstanding amounts due to the other Electronic Communications Network Provider or Electronic Communications Service Provider. We are not responsible for paying any amounts to the other Electronic Communications Network Provider or Electronic Communications Service Provider.

14.4. You agree and understand that you remain liable to pay all amounts due to us in the event that you want to Port your Cellphone number to another Electronic Communications Network Provider or Electronic Communications Service Provider. In the event that you Port your Cellphone number the provisions of the Number Portability Regulations will apply.

15. RICA

15.1. You accept that RICA is applicable to our Services and to you in terms of this Agreement and that:
15.1.1. in terms of RICA, we are required to be satisfied as to your identity which includes getting a copy of your ID and proof of your physical address from you;
15.1.2. we will not activate your SIM Card until all your details as required by RICA have been satisfactorily registered with us;
15.1.3. we will only disclose the information relating to you in accordance with RICA, to a law enforcement officer on receipt of a directive issued in terms of RICA;
15.1.4. you must immediately report any loss, theft or destruction of your SIM Card and/or Goods to the police, otherwise you will be committing an offence; and
15.1.5. if your SIM Card is transferred to another person (other than a family member or a dependant of yours) then you must ensure that the details of that person are registered with us.

15.2. Both parties (you and us) must abide by all requirements of RICA.

THE POWER IS IN YOUR HANDS
16. USE OF YOUR PERSONAL INFORMATION

16.1. You warrant and guarantee that all personal information supplied by you to us in the Application is true and correct.

16.2. You agree to immediately inform us in writing if there is any change of whatsoever nature in any of your personal information, including your physical address, previously supplied to us.

16.3. As and when necessary, you consent to us obtaining, using, storing and/or disclosing your personal information provided to us as follows:

16.3.1. to either credit grantors and/or credit bureaux and/or banks and/or other financial institutions in order to ascertain information relating to your creditworthiness (before we accept this Agreement) and for fraud prevention purposes and in order to process any payment transactions necessary for and relative to this Agreement;

16.3.2. to attorneys and/or debt collection agencies if you breach this Agreement;

16.3.3. to our agents and/or consultants and/or trade partners and/or Electronic Communications Service Providers and/or Cell C, but only to the extent necessary and in order to provide our Services to you;

16.3.4. to consumer research companies for the purposes of conducting research on improving our Services;

16.3.5. for the purposes of us publishing a directory containing the name, address, details and the applicable Cellphone number of our subscribers; and

16.3.6. for the purposes of us informing or sending information to you about any new services or products offered by us (and/or by any of our trade partners) which we consider may be of interest to you. We will comply with the direct marketing provisions of the Consumer Protection Act, 68 of 2008 ("CPA") and the CPA regulations, including the provisions relating to the direct marketing registry.

In this clause you consent to us using your private information for all the purposes set out in clauses 16.3.1 to 16.3.6.

I have had an opportunity to consider this clause 16.3, to ask questions and I understand what this clause means and the effect it has on my rights. Initials ___________

16.4. You are entitled to withdraw your consent to us using your personal information under clauses 16.3.5 and 16.3.6 above on written notice or notice in any other recorded form to us. In the event you decide to withdraw your consent we will not be able to use your information for the purposes listed under clauses 16.3.5 and 16.3.6 to the extent that you withdraw your consent from the date we receive your withdrawal notice.

16.5. We will not disclose your personal information to any other person or institution other than as stated under clause 16.3, or where we are compelled to do so in terms of the Licence and/or any law and/or in terms of a court order.

17. GENERAL

17.1. Notices

17.1.1. All notices given in terms of this Agreement will be in writing and both you and we choose as our address(es) for all purposes the address(es) specified in the Application form. Any change in your address will only be effective if and when we receive written notification of your change of address.

17.1.2. We will deliver short notices to you by SMS.

17.1.3. Normal notices that do not negatively affect you, will be delivered by you to us or by us to you and will be considered as received by either us or you:

17.1.3.1. if delivery is by hand, then on the date of delivery;

17.1.3.2. if delivery is by fax, then within 48 hours of transmission of the fax;

17.1.3.3. if delivery is by email, then when the message is capable of being retrieved and processed by the addressee from the information system, or server used by the addressee for the purposes of receiving
email messages as stated in section 23(b) of the Electronic Communications and Transactions Act, 2002.

17.1.4. Any notices given by us which is of a particular interest to you will be deemed to have reached you within 10 days of posting, only if it is sent by registered mail from an address within South Africa to your last known address.

17.2. Transfer of rights and obligations
17.2.1. You must not do any of the following at any time without our permission and we will not unreasonably withhold our permission:
17.2.1.1. transfer any of your rights under this Agreement to any other entity or person (sometimes known as ceding any of your rights); or
17.2.1.2. transfer any of your obligations or responsibilities under this Agreement to any other entity or person (sometimes known as delegating or handing-over any of your obligations or responsibilities).

17.2.2. To the extent that this is allowed by law, you agree that we can at any time do any of the following without your permission:
17.2.2.1. transfer any of your rights under this Agreement, to any one or more persons or entities; and/or
17.2.2.2. transfer any or all of our obligations or responsibilities under this Agreement to any one or more persons or entities (this is known as delegating or handing-over any or all of our obligations or responsibilities).

17.3. Extensions of time and indulgences
If we give you any leeway, or extension of time or other indulgence, it will not prevent us from enforcing any of our rights in the future, without notice, and requiring your strict and timely compliance with each term and condition of this Agreement.

17.4. Unenforceable provisions
If any term of this Agreement is unenforceable, illegal, void, or contrary to public policy then it will be deleted from this Agreement. The rest of this Agreement will however remain binding and in full force.

17.5. Amendments
We are entitled on written notice to you, to change the terms and conditions of this Agreement if necessary because of any new and/or amended law, tax, regulation and/or any change in the terms and conditions of Cell’s Licence and/or any change in our Tariff Plan or our Services. We are further entitled on written notice to you, to change the terms and conditions of any of our Services. If we change the terms and conditions, we will notify you of such amended terms and conditions. If you do not agree to the amendments, you may cancel the Agreement by giving 20 Working Days’ written notice of cancellation in any recorded form, but the notice must be given within 5 Working Days of the date you get notice of any change.

17.6. Whole agreement
Except for our right to change this Agreement described in clause 17.5 above, this is the whole agreement between you and us and no amendment, deletion or addition will be valid unless it is stipulated in writing and agreed to by both parties.

17.7. Legal Costs
To the extent allowed by law, if we elect to take any legal action against arising from breach of any terms and conditions of this Agreement where we have to hire the services of an attorney and/or advocate and/or tracing agent then you will be liable in respect of all relevant legal cost(s) and/or expense(s) incurred on the appropriate scale.

17.8. Warranty and Indemnity
You warrant that you have the necessary rights to enter into this Agreement and you undertake to indemnify us against any liability, claim, damage or loss that a third party might have arising out of this Agreement if you do not have the necessary rights. [This clause means that if you do not have authority
to sign this Agreement you will be personally liable to us for any loss that results from your lack of authority.

I have had an opportunity to consider this clause 17.8, to ask questions and I understand what this clause means and the effect it has on my rights. Initials:________

17.9. Evidence

A computerised account or a certificate signed by a manager of ours (whose authority we need not prove) will be proof on the face of it of any amount due by you to us in terms of this Agreement. You are entitled to challenge the correctness of any such certificate if you want to do so.

17.10. Resolving disputes

17.10.1. Any dispute relating to this Agreement can be resolved in accordance with our Customer Code of Conduct, a copy of which is available on Cell C’s website being www.cellc.co.za. You may also request such a copy from any of our Cell C’s stores.

17.10.2. Despite the above, you can refer any unresolved dispute between you and us to the National Consumer Commission established under the Consumer Protection Act, 2008, or to ICASA.

17.10.3. Nothing in this clause prevents you from taking legal action against us.

18. MONTHLY USAGE LIMIT

18.1. Where we implement a Monthly Usage Limit (either at your request or by our choice), then the chosen Monthly Usage Limit will be calculated in accordance with our billing cycle.

18.2. When you reach 70% of the Monthly Usage Limit, we will make reasonable efforts to send you an SMS advising that your Monthly Usage Limit has almost been reached.

18.3. If the Monthly Usage Limit is reached then we are entitled to use all reasonable efforts to prevent you from making further use of our Services, except for calls to emergency services numbers namely 140, 112 and for accessing your voice mail box.

18.4. You accept that we cannot guarantee to implement the Monthly Usage Limit and you remain responsible to pay for all Usage Charges spent on your SIM Card over and above the Monthly Usage Limit regardless whether or not we implement the Monthly Usage Limit.

I have had an opportunity to consider this clause 18.4, to ask questions and I understand what this term means and the effect it has on my rights. Initials:________

18.5. The Monthly Usage Limit cannot be applied when you are using your Cellphone or other Goods outside the borders of South Africa (also called "international roaming") as we may not receive information relating to International Roaming Charges during the period that international roaming is activated in a timely manner. You may reach your Monthly Usage Limit before we have had a reasonable opportunity to either notify you that you are nearing your Monthly Usage Limit or to impose the limit to prevent you from incurring additional International Roaming Charges. International Roaming Charges, including data charges, can lead to extremely high charges in a short period. We advise that you do not use data while you are roaming outside the borders of South Africa unless you are aware of the necessary data charges. You will remain liable for all International Roaming Charges, which include charges for all calls made and received, SMS sent and received, as well as all data used.

19. BLACKLISTING

19.1. If your SIM Card and/or Goods are lost or stolen during the Initial Contract Period or any Renewal Period then you must tell us immediately so that we can protect your interests and blacklist your Goods from further use and/or block the use of your SIM Card. You will remain liable for all Charges for our Services until you have