

TRANSACTIONS TO WHICH THE CREDIT AGREEMENTS ACT AND THE USURY ACT APPLY

1. It is important to know to which transactions the Credit Agreements Act 75 of 1980 and/or the Usury Act 73 of 1968 apply. For example, section 11 of the Credit Agreements Act prohibits a claim for the return of goods on account of the breach of a sale or lease regulated by that Act, unless 30 days' written notice has been given to the credit receiver to remedy the breach, and the Usury Act materially limits the amount of finance charges that may be claimed in terms of an agreement to which it applies.

Credit Agreements Act

2. The Credit Agreements Act came into operation in South Africa by Proclamation 30 of 1981 (SA) on 2 March 1981, and was made applicable to South West Africa by section 1 of Proclamation AG 17 of 1981 (SWA) with effect from 27 May 1981.
3. The Credit Agreements Act may apply to the following transactions in respect of movable goods, provided the Minister responsible for the administration thereof makes it applicable thereto:
 - 3.1. the genus of credit agreements consisting of two species:
 - 3.1.1. leasing transactions; and
 - 3.1.2. credit transactions comprising of;
 - 3.1.2.1. the sale of movable goods in terms of instalment sale transactions;
 - 3.1.2.2. the sale of movable goods in terms of credit transactions other than instalment sale transactions;
 - 3.1.2.3. the rendering of services in terms of credit transactions.
4. A credit transaction is defined as meaning the sale of movable goods, or the rendering of services, against payment of a stated or determinable sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future.
5. An instalment sale agreement means a transaction in terms of which:
 - 5.1. movable goods are sold as mentioned in paragraph 4 above; and
 - 5.2. the purchaser does not become the owner of the goods sold merely by the delivery to, or the use, possession or enjoyment by, the purchaser thereof; or
 - 5.3. the seller is entitled to the return of the goods if the purchaser fails to comply with any term of that transaction.

6. A leasing transaction is a transaction in terms of which a lessor leases moveable goods to a lessee against payment by the lessee to the lessor of a stated or determinable sum of money:
 - 6.1. at a stated or determinable future date; and
 - 6.2. in whole or in part in instalments over a period in the future

and includes a transaction by which it is agreed at the time of the conclusion of the transaction that the lessee or any person on behalf of the lessee shall at any stage:
 - 6.3. during, or after the expiry of, the lease; or
 - 6.4. after termination of the transaction, become the owner, or retain the possession or use or enjoyment, of those goods.
7. In *Sandoz Products (Pty) Ltd v Van Zyl NO 1996 (3) SA 726 (C)* the seller sold and delivered agricultural chemical products to Weskaap Landbou Chemikalië (Edms) Bpk in terms of a distributors agreement, which provided that the purchase price was payable in one lump sum within 30 days of the date of the seller's statement. Weskaap failed to pay the purchase price and was liquidated. The Insolvency Act 24 of 1936 applied to the winding up of Weskaap, section 84(1) of which gave the seller of movable goods in terms of an instalment sale transaction as defined in the Credit Agreements Act a hypothec over the goods on the sequestration of the purchaser's estate. The Court held that the sale of the chemicals was an instalment sale transaction, as defined in the Credit Agreements Act, and that the seller held a hypothec over the goods in the winding up of Weskaap. The decision was followed in *Ukubona 2000 Electrical CC and Another v City Power Johannesburg (Pty) Ltd 2004 (6) SA 323 (SCA)* [13].
8. By Contrast, the Credit Agreements Act does not apply to a lease of movable goods in terms of which the 'cash price' is payable at a future specified date in one lump sum, because the 'cash price' is not payable in whole or in part in instalments over a period in the future as mentioned in paragraph 6.2 above.
9. Section 2 of the Credit Agreement Act empowers the Minister to make that Act applicable to such credit agreements or categories of credit agreements as the Minister may determine by notice in the Government Gazette, provided the Minister shall not have the power to make the Credit Agreements Act applicable to credit agreements in terms of which:
 - 9.1. a person purchases or hires movable goods for the sole purpose of business activities;
 - 9.2. the State is the credit grantor.

10. To escape the application of the Credit Agreements Act by section 2(1)(a) thereof, the movable goods must be purchased or hired in terms of the credit agreement:
 - 10.1. One: for the purpose of business activities to be established as an objective fact.
 - 10.2. Two: that purpose must be the sole purpose, exclusive of all other purposes, at the time the credit agreement is concluded.
 - 10.3. Three: that must be the intended purpose of the purchaser or lessee, and no other person.
 - 10.4. Four: that purpose does not have to be conveyed to, or agreed with, the seller or lessor prior to or at the time of conclusion of the credit agreement. (*Oosthuizen and Another v Standard Credit Corporation Ltd* 1993 (3) SA 891 (A) 908E-H).
11. Certainty may be created by inserting an express term in the credit agreement that the parties agree that the purchaser or lessee purchases or hires the movable goods for the sole and exclusive purpose of using them for business activities, and that the purchaser or lessee shall be obliged to use the goods for that sole and exclusive purpose (Compare *Oosthuizen and Another v Standard Credit Corporation Ltd* 1993 (3) SA 891 (A) 900I-902D; *Parker v Dorbyl Finance (Pty) Ltd and Another* 1997 (1) SA 862 (A) 867C-I).
12. The Minister by Government Notice 141 of 2016, a copy of which is attached hereto, with effect from 1 July 2016 made the Credit Agreements Act applicable to:
 - 12.1. any instalment sale transactions in terms of which movable goods mentioned in the Schedule thereto are sold;
 - 12.2. any leasing transaction in terms of which movable goods mentioned in the Schedule thereto are leased,

against payment of a cash price over a period of longer than three months.
13. Regulation AG 68 of 1981 published in terms of section 3 of the Credit Agreements Act, as amended, prescribes for credit agreements governed by that Act the minimum initial payments and maximum payment periods as set out in the latest schedule thereto published by Government Notice 142 of 2016 on 28 June 2016, a copy of which is attached hereto.

Usury Act

14. The Usury Act came into operation in South Africa on 1 April 1969. Its application was extended with effect from 23 October 1974 to South West Africa by Act 62 of 1974 (SA) by the insertion of the following two definitions:
 - 14.1. "*Republic*" includes the territory; and

- 14.2. “*territory*” means the territory of South West Africa.
15. Section 3(5) of the Executive Powers Transfer (General Provisions) Proclamation AG 7 of 1977 (“*the General Proclamation*”) provides that no Act of the Republic of South Africa:
- 15.1. which repeals or amends any law:
- 15.1.1. passed by the South African Parliament and which applies in South Africa as well as in South West Africa; and
- 15.1.2. of which any or all the provisions are administered by or under the authority of the Administrator-General or the Council of Ministers of South West Africa in terms of a transfer proclamation or any other law; and
- 15.2. which is passed after the commencement of such transfer proclamation or other law,
- shall notwithstanding any provision of a law referred to paragraphs 15.1 to 15.1.2 above or any other law passed after the commencement referred to in paragraph 15.2 above that the law referred to in paragraphs 15.1 to 15.1.2 above or any amendment thereof applies in South West Africa, apply in South West Africa, unless it is expressly declared therein or in any other law that it shall apply in South West Africa.
16. Section 3(4) of the General Proclamation provides that any proclamation, regulation or rule which is issued or made after the commencement of any transfer proclamation by, or on authority or with the approval of the State President of South Africa or the relevant Minister of South Africa under a law which at such commencement applies both in South West Africa and in South Africa, and which is published in the Government Gazette of South Africa, shall, notwithstanding section 3(1) of the General Proclamation, apply in South West Africa if such proclamation, regulation or rule or the notice by which it is so published, contains a statement that it was or is issued or made with the consent of the Administrator-General, and applies also in South West Africa, provided that for the purposes of the application of such proclamation, regulation or rule in South West Africa, the provisions of section 3(1) of the General Proclamation [the section which interprets terminology in the relevant law so as to effect the transfer] shall apply.
17. The Usury Act was administered by the Minister of Finance of South Africa in the Department of Finance of that country. Acts administered by the Minister of Finance of South Africa in the Department of Inland Revenue of that country were transferred to South West Africa by the Executive Powers (Inland Revenue) Transfer Proclamation AG 18 of 1978, but the Usury Act was not one of those, because it fell under the Department of Finance of South Africa.
18. Thus, the administration of the Usury Act has never been transferred to the Administrator-General of South West Africa by a transfer proclamation or any other law. Accordingly, South African amendments thereto up to the Usury Amendment Act 91 of

1989 apply in Namibia, and South African Notices and Regulations promulgated thereunder which applied on 21 March 1990 apply in Namibia, subject to Namibian amendments thereto thereafter.

19. The Usury Act applies to:
 - 19.1. credit transactions;
 - 19.2. leasing transactions; and
 - 19.3. money lending transactions,
unless exempted from that Act.
20. In terms of the Usury Act a credit transaction means any transaction by which:
 - 20.1. movable property is sold or supplied, or services are sold or supplied, on credit against payment of a sum of money; or
 - 20.2. the use and enjoyment of movable property or services is transferred or granted on credit against payment of a sum of money.
21. The Usury Act defines a leasing transaction as any transaction by which:
 - 21.1. a lessor leases movable property to a lessee; and
 - 21.2. the amount which is owing or will be owed in connection with the transaction is payable or will be payable after the date of the conclusion thereof.
22. A money lending transaction is defined by the Usury Act as a transaction which is substantially one of money lending, and includes:
 - 22.1. any agreement in terms of which goods are sold under a condition of repurchase of such goods at a higher price, in which case the lower price is deemed the sum of money lent;
 - 22.2. any transaction under which goods are purchased, services are rendered or cash is obtained by a credit card, in which case the price at which the goods are purchased or such services are rendered or the cash obtained is deemed the sum of money lent;
 - 22.3. any transaction under which immovable property is sold against payment of a sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future, in which case such sum, excluding finance charges, is deemed the sum of money lent;
 - 22.4. any transaction in terms of which a sum of money owing for alternations or improvements to immovable property is to be paid by a debtor at a stated or

determinable future date or in whole or in part in instalments over a period in the future, in which case such sum of money is deemed the sum of money lent.

23. The Usury Act does not apply to:
 - 23.1. a money lending transaction, credit transaction or leasing transaction in terms of which the principal debt on the date of the transaction exceeds N\$500 000 (section 15(g) of the Usury Act read with regulation 5 of Regulation R943 of 5 May 1988 (SA) a copy of which is attached hereto);
 - 23.2. a sum of money deposited with a bank or building society;
 - 23.3. a leasing transaction expiring within three months, which is not renewed on expiry and in respect of which the principal debt and finance charges are payable before or on the date of expiry of the lease;
 - 23.4. debentures quoted on a stock exchange in Namibia;
 - 23.5. leasing transactions in terms of which the cash price or market value of the goods, less any deposit and less the present value of the book value of the goods, exceeds N\$100 000 and the lessee waives the protection of the Usury Act;
 - 23.6. leasing transactions according to which the lessee is entitled to terminate the lease by giving written notice of 90 days or less, without being held responsible for the payment of any increased or additional lease payments of any amount as compensation resulting from such termination;
 - 23.7. credit and leasing transactions in terms of which movable property representing assets of a business is sold or leased with all the assets of the business as a going concern;
 - 23.8. leasing transactions in terms of which:
 - 23.8.1. the lease payments are wholly or partially deductible from the income of the lessee for income tax purposes;
 - 23.8.2. the ownership of the leased goods shall not pass to the lessee at any time during or after the expiry of the lease period or after termination of the transaction; and
 - 23.8.3. the lessee is not liable for or guarantees any amount in respect of the value of the leased goods at any time during or after the expiry of the lease period or after termination of the transaction.
24. Micro loan transactions are exempted by section 2 of GN 189 of 25 August 2004 from the Usury Act, save sections 2, 13, 14 and 17 thereof, on condition that the micro lender (a) is registered as such with the Registrar and (b) at all times complies with that notice.

GN 189 defines a micro lending transaction as a money lending transaction in respect of which the loan amount:

- 24.1. does not exceed N\$50 000;
- 24.2. together with finance charges must be repaid, whether in instalments or otherwise, within 60 months after advance;
- 24.3. is not paid in terms of a credit card scheme or withdrawn from a cheque account with a bank so as to leave that cheque account with a debit balance.

Credit Agreements Act v Usury Act

25. The Credit Agreements Act applies only to credit and leasing transactions to which it has been made applicable, whereas the Usury Act applies to the sale and lease of all goods.
26. The Usury Act governs the provision of services, while the Credit Agreements Act may be made applicable to the provision of services, which the Minister has not done.
27. The Credit Agreements Act covers transactions at any cash price. The application of the Usury Act is restricted to principal debts of not more than N\$500 000.
28. The Credit Agreements Act applies only to movable goods, while the Usury Act governs, in addition, improvements and alternations to immovable property as well as the sales of immovable properties.
29. A credit transaction is only subject to the Credit Agreements Act where the duration of the transaction exceeds three months. There is no minimum period in the case of credit transactions governed by the Usury Act.
30. In addition to credit and leasing transactions the Usury Act applies also to money lending transactions. The Credit Agreements Act does not apply to money lending transactions.
31. The Credit Agreements Act cannot be made applicable to contracts in terms of which goods are purchased or hired for the sole purpose of business activities. The Usury Act does not have such limitation.
32. Various leasing transactions and a particular credit transactions were exempted from the application of the Usury Act as mentioned above, but are still subject to the Credit Agreements Act.

(Compare: Otto, *Credit Law Service*, Service Issue 13 (April 2004), 3-2 to 3-3)