

The National Credit Act Fixed interest rate agreements



Consumer Tribunal overturns previous rulings

The National Consumer Tribunal recently overturned its earlier ruling pertaining to the effect of fixed interest rate credit agreements. Until now, there existed uncertainty as to the interpretation of those provisions of the National Credit Act (“NCA”) that relate to “fixed interest rate credit agreements”.

Although the Act does not provide specifically for fixed interest rate agreements, it does provide for the following, which lead us to conclude that one can have a fixed interest rate agreement:

Section 103(4) A credit agreement may provide for the interest rate to vary during the term of the agreement only if the variation is by fixed relationship to a reference rate stipulated in the agreement, which reference rate must be the same as that used by that credit provider in respect of any similar credit agreements currently being issued by it.

Section 90(2) A provision of a credit agreement is unlawful if— (o) it states or implies that the rate of interest is variable, except to the extent permitted by section 103(4).

Even though it is accepted that the agreement between a credit provider and a consumer may provide for either a fixed or a variable interest rate, it was never clear how a fixed interest rate is affected by a change in the prescribed maximum interest rate. The question relates to the treatment of fixed interest rate agreements when the fixed interest rate exceeds the prescribed maximum interest rate as determined in terms of Regulation 42:

View 1: The fixed interest rate is determined on the day that the agreement is entered into (it may not be higher than the prescribed maximum interest rate on that day), and should be applied unchanged for the full term of the agreement (regardless of any change to the maximum interest rate);

View2: Although the fixed interest rate is determined on the day that the agreement is entered

into, the credit provider may not *charge* the consumer more than the prescribed maximum interest rate, regardless of the agreed fixed interest rate (e.g. on the date of entering into an agreement the prescribed maximum interest rate is 40% and the parties agree to a fixed rate of 40%. However when prescribed maximum interest rate is lowered to 38%, the consumer should be charged only 38% regardless of the agreed fixed interest rate).

The National Consumer Tribunal has previously ruled in favour of View 2. However, this **ruling has now been over-turned on appeal.**

In **Jones and Another v Absa Bank and Others (NCT/4901/2012/148(1)(P)NCA) [2013] ZANCT 2** the Tribunal (three members hearing the appeal) concluded that when determining whether or not the interest rate in a fixed interest rate agreement is lawful, one should consider the prescribed maximum interest rate that applied on the date on which the agreement was reached. The Tribunal confirmed the common law rule that there is a general presumption against retrospectivity. It is presumed that a statute does not operate retrospectively, unless the contrary intention is indicated, either expressly or by clear implication. The NCA makes no reference to the retrospective application of the prescribed maximum interest rate. As such, the fixed interest rate will be lawful (for the full term of the agreement) if it is equal to or lower than the prescribed maximum interest rate on the date when the agreement was reached. The Tribunal stated that “a change in the repo rate, which is beyond the control of the parties, should not suddenly render an agreement or consent order, initially lawful and enforceable, suddenly unlawful”.

In order to ensure compliance with the relevant provisions of the NCA, the credit provider should calculate the prescribed maximum interest rate on the day that the agreement is reached. The interest rate applicable to any agreement may not exceed the maximum interest rate (with respect to a fixed interest rate agreement) at the time of entering into the agreement (a subsequent change in the maximum interest rate will not impact the lawfulness of the agreement). The maximum rate is determined per product group as follows:

Sub-sector	Maximum Prescribed Interest Rate
Mortgage agreements	[(RR x 2.2) + 5%] per year
Credit facilities	[(RR x 2.2) + 10%] per year
Unsecured credit transactions	[(RR x 2.2) + 20%] per year
Developmental credit agreements	
for the development of a small business	[(RR x 2.2) + 20%] per year
for low income housing (unsecured)	[(RR x 2.2) + 20%] per year
Short term credit transactions	5% per month
Other credit agreements	[(RR x 2.2) + 10%] per year
Incidental credit agreements	2% per month

[RR indicates the reference rate, being the ruling SA Reserve Bank Repurchase Rate]

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