

A CRITICAL ANALYSIS OF THE NATIONAL CREDIT ACT IN THE CONTEXT OF MEDICAL SCHEMES BUSINESS

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EXECUTIVE SUMMARY

- A Medical schemes are not automatically or expressly exempt from the provisions of the National Credit Act.
- B Medical schemes can be affected by the provisions of this Act not only in their relationships with their members but also in their relationships with providers of health care services.
- C The National Credit Act sets out a number of principles and criteria which, if satisfied, bring an agreement or arrangement within the scope of the Act.
- D Medical schemes are unlikely to see significant application of the National Credit Act to their relationships with their members. There are two main areas which could be affected by the National Credit Act

namely medical savings accounts and loans to members. These will only fall within the ambit of the National Credit Act if interest or fees or charges are levied for debit balances on savings accounts or in respect of the loan.

- E Since many medical schemes do not seem to charge interest or fees for medical savings accounts in debit or for payment of co-payments on behalf of members to health service providers it would seem that it will be the exception rather than the rule if any aspect of a medical scheme's operations is governed by the National Credit Act with regard to its relationship to its members.
- F The National Credit Act is more likely to find application in the relationships between medical schemes and providers of health care services. The latter are more likely, as a result of their business practices, to fall within the ambit of the Act as credit providers. Medical schemes or members of schemes would be consumers of such credit.
- H It is important for medical schemes to assess their contractual relationships with providers of health care services as well as providers of other kinds of services in order to establish whether or not such contracts constitute credit agreements for purposes of the National Credit Act. Since each contract is different and there are many different kinds of contracts that medical schemes can potentially engage in with providers of different types of services it is not possible to state with any certainty which of these contracts will constitute credit agreements and which will not.
- I The National Credit Act requires persons who enter into 100 or more credit agreements to register as credit providers where they satisfy the definition of this term in the Act. Failure on the part of such persons to register can result in the contract being illegal and unenforceable. This can have a significant impact on the business of a medical scheme when a scheme seeks to enforce a contract against a service provider.
- J Certain clauses that are commonly included in commercial contracts are prohibited in credit agreements. These clauses include exemption clauses in terms of which the credit provider is absolved of liability for any act, omission or representation by a person acting on behalf of the credit provider or absolved of liability in respect of any guarantee or warranty that would be implied in a credit agreement.
- K The National Credit Act requires statements of account to take a specific format and reflect specific particulars. It may be necessary for medical schemes and their administrators to adjust their systems so as to take into account such statutory obligations on the part of credit providers.

- L It is not possible to predict the stance that health care providers will take towards the National Credit Act due to their diversity. It may be that private hospitals could lean in favour of the Act because otherwise they would not be able to charge interest on overdue accounts. General medical practitioners on the other hand may find that it is simply not worth their while to charge interest on overdue accounts given the administrative costs involved in implementing the Act.
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Introduction

The National Credit Act (NCA) No 34 of 2005 is designed to achieve a number of objectives most of which are to benefit and protect the consumer. It regulates consumer credit and seeks to ensure fair and non-discriminatory access to consumer credit and improved standards of consumer information. It also seeks to promote responsible granting of credit and provides for debt re-organisation in cases of over-indebtedness. Those credit providers who provide credit recklessly can find their agreements with consumers suspended and the credit provider's rights under the agreement or under any law in respect of that agreement are unenforceable. Some agreements may be unlawful in terms of the NCA.

In terms of section 89 of the NCA, if a credit agreement is unlawful, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that-

- (a) the credit agreement is void as from the date the agreement was entered into;
- (b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated-
 - (i) at the rate set out in that agreement; and
 - (ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer; and
- (c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either-
 - (i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or
 - (ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.

This can have a significant impact upon the business of the credit provider especially if large numbers of credit agreements are involved.

1 Interpretation

There appears to be a number of drafting errors in the NCA which render interpretation difficult and cumbersome. Detailed reference is made to these below.

1.1 Are Medical Schemes Credit Providers?

If one attempts to ascertain whether a medical scheme is a credit provider as defined in the NCA one looks to the definition of this term in section 1. Under this section a credit provider, in respect of a credit agreement to which the NCA applies, is *inter alia* the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement, the party who extends credit under a credit facility, the party to whom an assurance or promise is made under a credit guarantee or a party who advances money or credit to another under any other credit agreement.

the term "credit agreement" is itself, however, a defined term in the NCA. This means that wherever it is used, one must attribute to it the definition given to it by the Act. It is defined in section 1 as "an agreement that satisfies *all* the criteria set out in section 8". One must thus turn to section 8. Subsection (1) of section 8 stipulates that an agreement constitutes a credit agreement for the purposes of the Act if it is -

- (a) a credit facility as described in subsection (3);
- (b) a credit transaction as described in subsection (4);
- (c) a credit guarantee as described in subsection 5;
- (d) any combination of the above.

One possible interpretation therefore of section 8 when read together with the definitions referred to above is that a credit agreement is only such for the purposes of the NCA if it is a credit facility *as well as* a credit transaction *as well as* a credit guarantee and meets the specific criteria for all three of these concepts set out in subsections (3),(4) and (5). This would mean that the NCA applies only to a very narrow range of credit agreements and therefore a party is only a credit provider if one of this narrow range of credit agreements exists. This interpretation is contrary to section 8(1) which suggests that a credit facility alone can constitute a credit agreement as can a credit transaction and a credit guarantee.

This is not, however, the only possible interpretation of section 8(1) because if one looks at the criteria for a credit guarantee in section 8(5) it is an agreement irrespective of its form in which a person undertakes or promises to satisfy on demand any obligation of another consumer *in terms of a credit*

facility or a credit transaction to which the Act applies. Therefore a credit guarantee has to be associated with a credit facility or a credit transaction before it is a credit guarantee for purposes of the NCA.

In passing it is noted that in terms of the definition of "credit provider" in section 1, a credit provider is the party "to whom an assurance or promise is made under a credit guarantee" (writer's italics). Admittedly a credit provider e.g. a seller of goods under a credit agreement, can be supplied with a guarantee that the customer has credit (in terms of a credit facility) but this interpretation of the definition is illogical in view of the wording of section 8(5).

The latter clearly states the criteria for a credit guarantee as being an undertaking or promise to satisfy upon demand any *obligation* of another consumer in terms of a credit facility or credit transaction. It is more than just a reassurance that a customer has the funds (credit) available. It is a promise to use them to discharge the obligation of the purchaser of the goods or services to the seller. The credit guarantee should therefore be issued *by* the credit provider to the seller. The seller might be a credit provider and might even be able to issue a guarantee in the sense that he will not require payment within the first 30 days of the sale but this kind of credit guarantee is not the one envisaged in section 8(5).

For purposes of interpretation of section 8(1) therefore a credit guarantee can be ignored for the moment since it is dependent upon the existence of a credit facility or a credit transaction in terms of section 8(5). This leaves a credit facility and a credit transaction which, one is told in section 8(4) is any other agreement *other than a credit facility or credit guarantee*, in terms of which payment of an amount owed by one person to another is deferred and any charge, fee or interest is payable to the credit provider in respect of the agreement or amount that has been deferred. Thus a credit facility and a credit transaction can exist independently of each other.

The question still remains whether section 8(1) must be interpreted as though the word "and" appears after each of the listed concepts as opposed to the word "or". The definition of "credit agreement" in section 1 of the NCA suggests that the word "and" should be read as appearing after each semicolon in section 8(1) except of course, for subparagraph (c) in which the word "or" has been included. The fact that subparagraph (d) allows for "any combination of the above" however, suggests that the concepts of credit facility, credit transaction and credit guarantee can exist independently of each other and still comprise a credit agreement for purposes of the Act – but can they? The criteria for a credit guarantee at least suggests otherwise and so does the definition of "credit agreement" in section 1. The word "all" in the definition of "credit agreement" in section 1 of the NCA means *all*. If an agreement satisfies only *some* of the criteria in section 8 then it is not a credit agreement for purposes of the Act.

1.2 Broad vs Narrow Interpretation of "Credit Agreement"

To further confuse the issue, section 4 of the NCA states that subject to sections 5 and 6, the Act applies to "*every credit agreement* between parties dealing at arms length and made within, or having an effect within the Republic" (writer's italics) *except* those listed in section 4(1). The term "credit agreement" is a defined term and so must be interpreted as provided for in the Act. If the narrow definition of a credit agreement was intended then why specify only the narrow range of exceptions in section 4(1)?

It would appear that the wider definition of credit agreement was intended in the sense that a credit facility alone, or a credit transaction alone or a combination of the two could be a credit agreement for purposes of the Act. This view is not, however, consistent with the fact that a credit guarantee cannot on its own be a credit agreement due to the manner in which the criteria for a credit guarantee have been worded in section 8(5). This said, section 8(5) is itself ambiguous since it is not clear whether the word "in terms of a credit facility or credit transaction to which this Act applies" relate to the obligations of the consumer to a credit facility or under a credit transaction on the one hand or to the actual credit facility or credit transaction that is the basis for the credit guarantee on the other. One is inclined to prefer the latter given the criteria for a credit guarantee in section 8(5) but if one takes into account subparagraph (g) of the definition of "credit provider" then this preference may be wrong.

As a matter of interest although "credit provider" is defined in section 1 of the NCA with reference to "credit facility" and "credit guarantee", there is no explicit reference to the third concept – "credit transaction". The reason for this omission is not clear. The definition does refer to "the party who advances money or credit to another under any other credit agreement" which would undoubtedly cover a "credit transaction" as contemplated in section 8(4) but this wording seems to defeat the object of the introductory phrase in the definition which reads "credit provider", in respect of a credit agreement *to which this Act applies* means ..." The words "to which this Act applies" are -

- (a) unnecessary given the fact that "credit agreement" is already defined as an agreement that meets all the criteria set out in section 8 and section 8(1) says that an agreement constitutes a credit agreement for the purposes of the Act if it is a credit facility, credit transaction or credit guarantee or any combination of these; and secondly
- (b) confusing given that the predefined term "credit agreement" is already used in subparagraph (h) of the definition of "credit provider" when referring to "any other credit agreement".

The definition in the NCA of the term "credit" is very wide. However, it is only credit agreements that satisfy all the criteria in section 8 that fall within the ambit of the Act.

From the foregoing it is clear that there is a great deal of lemniscate logic within the NCA which leads the analyst around in circles when attempting to interpret and understand it.

1.3 Business of a Medical Scheme and the NCA

In the Medical Schemes Act (Act No 131 of 1991 (MSA) the definition of 'business of a medical scheme' is as follows -

"the business of undertaking liability in return for a premium or contribution-

- (a) to make provision for the obtaining of any relevant health service;
- (b) to grant assistance in defraying expenditure incurred in connection with the rendering of any relevant health service; and
- (c) where applicable, to render a relevant health service, either by the medical scheme itself, or by any supplier or group of suppliers of a relevant health service or by any person, in association with or in terms of an agreement with a medical scheme;

The core purpose of a medical scheme is clearly not to lend money or provide credit but to assist with and create access to relevant health services.

Section 26(2) of the MSA provides that –

"No-one has any claim on the assets or rights or is responsible for any liabilities or obligations of a medical scheme, except in so far as the claim has arisen or the responsibility has been incurred in connection with transactions relating to the business of the scheme."

The business of the scheme is medical schemes business as defined in the MSA. Therefore any transaction which falls outside of the definition of medical schemes business cannot ground a claim of any kind against the scheme. Any transaction between a member and a scheme that falls outside of the ambit of the MSA or its regulations is unlawful since it does not lie within the power of a medical scheme to enter into such a transaction.

Since medical schemes business is the making of provision for obtaining a relevant health service, the granting of assistance in defraying expenditure incurred in connection with the rendering of a relevant health service and the rendering of a relevant health service one must ask at what point the question of interest, fees or charges for credit enters the picture?

The business of a medical scheme is not to generate income from the granting of credit. In the interests of sound corporate governance a scheme would at most have to cover its own costs in granting credit so as not to prejudice other members. The question is whether the passing of such costs on to the person to whom the credit is given would constitute a fee, charge or interest as contemplated in the NCA.

The NCA does not for the most part, expressly distinguish between not for profit and for profit entities. However, it does state in section 10(1) that a credit agreement, irrespective of its form, type or category, is a developmental credit agreement if –

- (a) at the time the agreement is entered into, the credit provider holds a supplementary registration certificate issued in terms of an application contemplated in section 41; and
- (b) the credit agreement is-
 - (i) between a credit co-operative as credit provider, and a member of that credit co-operative as consumer, if profit is not the dominant purpose for entering into the agreement, and the principal debt under that agreement does not exceed the prescribed maximum amount; or...

for a prescribed purpose prescribed in terms of subsection 2(a) by the Minister of Trade and Industry.

In terms of subsection 2(a) the Minister may prescribe additional purposes, as contemplated in subsection (1) (b) (iii) (cc), that are designed to promote the socio-economic development and welfare of persons contemplated in section 13 (a).

These persons are –

- (i) historically disadvantaged persons;
- (ii) low income persons and communities; and
- (iii) remote, isolated or low density populations and communities.

They therefore do not cover the full range of persons catered for by the medical schemes industry. Some schemes would fall into one or more of these categories but many would not.

Section 11 of the NCA allows the Minister to declare that credit agreements entered into in specified circumstances, or for specified purposes, during a specific period or until the declaration or regulation is repealed, are public interest credit agreements. The significance of this is that a public interest

credit agreement is exempt from the application of Part D of Chapter 4 to the extent that it concerns reckless credit.

If the NCA did apply to the majority of medical schemes, it would be advisable to lobby for the contractual relationships between medical schemes and members to be public interest agreements on the basis of the constitutional right of access to health care services which medical schemes facilitate in providing funding and also on the basis that it is not only the creditworthy that are deserving of health care services.

Although it could be argued that such people could go to the public health sector to obtain health care services, the public sector is already overstretched and these people as earners would have to pay the public sector for such services in any event albeit at lower rates than in the private sector. It is not desirable or constitutional to deny people access to health care services simply because they are unable to pay cash for health services whether in the public or the private sector. The object of membership of a medical scheme is to avoid a situation in which one has to pay cash for health care services and cannot do so, not necessarily because one cannot manage one's financial affairs but because health services can be so expensive as to be outside of reach of all but the extremely wealthy in many circumstances.

2. Application

Section 4 deals expressly with the application of the NCA. One of the most important exemptions to the application of the Act for current purposes is contained in subsection 2(d) which effectively states that any arrangement in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction or that is of a type that has been held in law to be between parties who are not dealing at armslength is not a credit agreement for purposes of the Act.

The term "utmost possible advantage" is subjective and therefore open to interpretation. Medical schemes, as not for profit entities, are unlikely to strive to obtain the utmost possible advantage out of a loan to a member or out of medical schemes business generally. This is especially the case in restricted membership schemes as opposed to open schemes which compete in the open market for members and advantages in terms of health services but even open schemes exist for the benefit of their members and are not for profit entities. Their main objective is not to obtain the utmost possible advantage" from their members.

One could argue quite convincingly, particularly in the case of restricted membership schemes, that medical scheme membership is an employment benefit and that the medical scheme and the member are not negotiating at armslength because the member's membership is a condition of his

employment. Employees are often given very limited choices as to which medical scheme they must join and most of the time they have no say in the rules of that scheme, its contributions and its benefits. Even in the case of open schemes, membership may be a condition of employment in which the same argument would apply. This coupled with the fact that medical schemes are not for profit entities and that their rules, including benefits and contributions, are required to be approved and registered by the Registrar of Medical Schemes suggests that there is very little room for negotiation at all let alone at armslength.

2.1 Refusal of Payment Does Not Give Rise To A Credit Agreement

Section 4(5) of the NCA states expressly that if a person sells any goods or services and accepts as full payment for those goods or services –

- (a) a cheque or similar instrument upon which payment is subsequently refused for any reason;
- (b) a charge by or on behalf of the buyer against a credit facility in terms of which a third person is the credit provider, and that credit provider subsequently refuses that charge for any reason,

the resulting debt owed to the seller by the issuer of that cheque or charge does not constitute a credit agreement for any purpose of this Act.

In effect this means that if a patient pays a health service provider with a cheque and the cheque bounces, the transaction does not then become a credit agreement for purposes of the Act. If a patient pays with his credit card and the Bank refuses payment this also does not constitute a credit agreement between the patient and the provider.

If the health service provider agrees to claim payment from the patient's medical scheme what is the position if the medical scheme refuses such payment for some reason? It is submitted that the position is the same. The fact that a medical scheme does not pay a claim does not necessarily mean that the medical practitioner has extended credit to the medical scheme member. It would take more than just this fact to bring the arrangement between the medical practitioner and the member within the scope of the NCA.

2.2 Credit Facility

Section 8(3) of the Act sets out the criteria for a credit facility. An agreement constitutes a credit facility for the purposes of the Act -

- (a) If 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.

A medical scheme does pay amounts as determined by the consumer from time to time. It can also pay amounts to the consumer or on behalf of or at the direction of the consumer. It therefore satisfies the first condition for a credit facility. However, it does not necessarily defer the consumer’s obligation to repay any part of these amounts because the consumer is not generally speaking under an obligation to repay these amounts to the medical scheme.

Therefore the second condition is not satisfied. Medical scheme benefits are not generally paid out on a loan basis in terms of which repayment is expected from the member.

The third and last condition to be satisfied is that a charge or fee is payable to the credit provider in respect of the amount in respect of which payment is deferred. This condition is also not generally applicable to medical schemes business because it tends to flow out of the second condition which is itself not applicable. It is only where repayment is required, where such repayment is deferred and where an interest or fee or charge is levied in respect of this arrangement, that medical schemes can become credit providers for purposes of the NCA.

Health service providers can also structure their operations so as to satisfy the criteria for a credit facility. Those that charge interest on overdue accounts for instance, or impose a penalty fee of some kind when payment occurs after a certain period may well satisfy the criteria for a credit facility,

particularly where payment is regarded as being due immediately after the health service has been rendered.

In summary therefore, all three conditions must prevail before a credit agreement satisfies the criteria for a credit facility namely that not only must credit be given but the obligation to repay it must be deferred and a charge, fee or interest must be payable in respect of the deferral or where payment is overdue.

2.3 Credit Provider

In order to satisfy the criteria for a credit facility in section 8(3) of the NCA, a medical scheme must be a credit provider as therein defined. This is where the interpretation of the NCA becomes problematic as discussed previously. The Act defines a credit provider with reference inter alia to a credit facility. It states that "credit provider" in respect of a credit agreement to which this Act applies means –

- (a) the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement;
- (b) the party who advances money or credit under a pawn transaction;
- (c) the party who extends credit under a credit facility;...
- (g) the party to whom an assurance or promise is made under a credit guarantee;
- (h) the party who advances money or credit to another under any other credit agreement; or
- (i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into.

The way in which section 8(3) is drafted it means that an agreement can only constitute a credit facility where the facility is provided by a credit provider. However in order to determine if one is a credit provider one must look at the criteria for a credit facility. One therefore ends up chasing one's own tail. The definition of "credit facility" in section 1 does not help. It defines a credit facility as "an agreement that meets all the criteria set out in section 8(3).

If a medical scheme does not satisfy the definition of a "credit provider" then it cannot satisfy the criteria of a "credit facility" and therefore medical schemes business falls outside of the scope of section 8(3) of the NCA. The predicament is that in order to determine if a medical scheme is a credit provider one must ascertain if it provides a credit facility as defined

To make matters even more complicated the definition of credit provider in the NCA uses the term "credit agreement". If one consults the definition of "credit agreement" in the Act it says that it means an agreement that meets all the criteria set out in section 8. Section 8 contains criteria for many

different kinds of agreements namely, credit facilities, credit transactions and credit guarantees.

It must be emphasised that the NCA does not govern all credit agreements. Section 4, dealing with the application of the Act, states that subject to section 5 and 6, the Act applies to every "credit agreement" (i.e. every agreement that meets *all* of the criteria in section 8) with the exception of those listed in section 4. It was clearly not the intention of the legislature to regulate only the very wide credit agreements that satisfy *all* of the criteria in section 8 but this is not what has been written in the NCA.

The courts do have ways of remedying by way of interpretational rules such drafting errors but unfortunately it is not the courts that are being called upon to at first blush to interpret and apply the legislation – it is the general public. Furthermore, there is a limit to the capacity of even the courts to correct legislation for the legislature where its meaning is unclear since, constitutionally speaking, it is not a function of the judiciary to write legislation.

Setting aside the interpretation difficulties referred to above, it is noted that there are two situations in the context of medical schemes business in which the criteria in section 8 of the NCA for a credit facility are most likely to be fulfilled -

1. Where a medical scheme grants an interest bearing loan to a member in terms of its rules as contemplated in section 30(1)(b) of the MSA;
2. Where members have immediate access upon joining the scheme, to the full benefit limit of a medical savings account intended for use throughout a benefit year and interest or some other fee or charge is levied in respect of a debit balance in the savings account.

2.3.1 Loans to Members

A loan is likely to constitute a separate agreement between the member and the medical scheme over and above the contractual arrangement between them for membership of the scheme. A member does not have to take a loan from the scheme simply by virtue of his membership and the scheme is not obliged to grant one by virtue of his membership so the consent of both parties to the loan would be required. Hence it is a separate agreement predicated upon the membership of the scheme of the person requiring the loan.

2.3.2 Medical Savings Accounts

Medical savings accounts are unlikely to constitute a separate agreement between the medical scheme and the member since it is usually an integral part of the contract between the member and the scheme. The question then arises as to whether this aspect of the contract can be severed from the rest of it so that the NCA applies only to the medical savings fund arrangement.

Technically speaking medical schemes are not obliged to offer medical savings accounts to members as an integral part of the scheme benefits. Section 30(1)(e) of the Medical Schemes Act provides that medical schemes *may* in their rules provide for the allocation to a member of a personal medical savings account, within the limit and in the manner prescribed from time to time, to be used for the payment of any relevant health service.

Schemes would not be in violation of the provisions of the MSA if they refused an applicant membership of the medical savings account element of benefits as long as there is access to membership of the scheme overall. Denial of access to a medical savings account need not be denial of access to scheme membership. It may be desirable therefore, for schemes to make the medical savings account component optional for members where interest is charged on debit balances. Then if savings accounts do satisfy the criteria of a credit agreement under the NCA, it is only the medical savings account which requires credit checks on potential members and not the bulk of scheme benefits.

There is no mention in the MSA of whether or not interest may be charged where the member uses up his savings limit before the end of the benefit year. Technically speaking there is thus no legal obligation to charge interest on a medical savings account. Regulation 10 of the General Regulations to the MSA also makes no mention of interest, charges or fees payable by a member in respect of a medical savings account. It would seem that many schemes do not in fact charge interest on debit balances in medical savings accounts.

2.4 Incidental Credit Agreement

The NCA also uses the concept of “incidental credit agreements”. It defines them as follows in section 1 –

An “incidental credit agreement” means an arrangement, 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 the 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.

Section 59(2) of the MSA may have a bearing on the question of whether or not an agreement between medical scheme member and a health care service provider is an incidental credit agreement or not. It stipulates that a medical scheme must, in the case where an account has been rendered, subject to the provisions of the MSA and the rules of the medical scheme concerned, pay to a member or a supplier of service, any benefit owing to that member or supplier of service within 30 days after the day on which the claim in respect of such benefit was received by the medical scheme.

The logic runs along the following lines: If a health service provider agrees to submit his account for services rendered to the patient's medical scheme for payment rather than asking for a cash payment from the patient immediately after the consultation, then he is consenting to payment within 30 days of submission of the account to the scheme and this does not constitute an incidental credit agreement because the legal position is such that a scheme is only obliged to pay within 30 days. If, however, the medical scheme takes longer than 30 days to pay the account and the provider charges interest on unpaid accounts that are older than 30 days, this would constitute an incidental credit agreement for purposes of the NCA. Even if the medical scheme refuses to pay the interest, the health service provider could hold the member liable therefor.

2.4.1 Limited Application of NCA to Incidental Credit Agreements

The NCA has limited application to incidental credit agreements. Section 5(1) lists the sections of the NCA that apply to incidental credit agreements. Section 5 sets out the rules that apply to incidental credit agreements as follows –

- (1) Only the following provisions of this Act apply with respect to an incidental credit agreement:
 - (a) Chapters 1, 2, 7, 8 and 9;
 - (b) Chapter 3, sections 54 and 59;
 - (c) Chapter 4, Parts A and B;
 - (d) Chapter 4, Part D, except to the extent that it deals with reckless credit;
 - (e) Chapter 5, Part C, subject to subsection (3) (a);
 - (f) Chapter 5, Parts D and E, once the incidental credit agreement is deemed to have been made in terms of subsection (2); and
 - (g) Chapter 6, Parts A and C.

- (2) The parties to an incidental credit agreement are deemed to have made that agreement on the date that is 20 business days after-
 - (a) the supplier of the goods or services that are the subject of that account, first charges a late payment fee or interest in respect of that account; or
 - (b) a pre-determined higher price for full settlement of the account first becomes applicable,unless the consumer has fully paid the settlement value before that date.

- (3) A person may only charge or recover a fee, charge or interest-
 - (a) in respect of a deferred amount under an incidental credit agreement as provided for in section 101 (d), (f) and (g) subject to any maximum rates of interest or fees imposed in terms of section 105; or
 - (b) in respect of an unpaid amount contemplated in paragraph (a) of the definition of 'incidental credit agreement' only if the credit provider has disclosed, and the consumer has accepted, the amount of such a fee, charge or interest, or the basis on which it may become payable, on or before the date on which the relevant goods or services were supplied.

Chapters 1,2,7,8 and 9 of the NCA deal with -

- Interpretation, Purpose and Application of the Act
- Consumer Credit Institutions
- Dispute Settlement Other Than Debt Enforcement
- Enforcement of the Act
- General Provisions – eg regulations and conflicting legislation

Section 54 in Chapter 3 of the NCA deals with restricted activities by unregistered persons and section 59 deals with review or appeal of decisions.

Parts A and B of Chapter 4 of the NCA deals with consumer rights and confidentiality, personal information and consumer credit records.

Part D of Chapter 4, excluding the provisions on reckless credit, relates to over indebtedness and measures that the courts may take to relieve it.

2.4.2 Statements of Account

Chapter 5 Part C of the NCA deals with statements of account, including form and content, dating and adjustment of debits and credits in accounts, disputes concerning statements etc. Where healthcare providers structure their operations so as to fall within the ambit of the NCA these provisions will have to be compared with those of the MSA and its regulations relating to accounts for relevant health services. Section 109 of the NCA stipulates with regard to form and content of statements of account that –

- (1) The opening balance shown in each successive statement of account must be the same as the closing balance shown in the immediately preceding statement of account.
- (2) A statement of account in respect of a small credit agreement must be in the prescribed form.
- (3) A statement of account in respect of an intermediate or large agreement may be in-
 - (a) the prescribed form, if any, for the category or type of credit agreement concerned; or
 - (b) a form determined by the credit provider, and which complies with any prescribed requirements for the category or type of credit agreement concerned.
- (4) The National Credit Regulator may publish guidelines for methods of assessing whether a statement satisfies any prescribed requirements contemplated in subsection (3).

Section 59 of the MSA states with regard to charges by suppliers of service that –

- (1) A supplier of a service who has rendered any service to a beneficiary in terms of which an account has been rendered, shall, notwithstanding the provisions of any other law, furnish to the member concerned an account or statement reflecting such particulars as may be prescribed.

If a medical savings account does satisfy the criteria for a credit agreement under the NCA, it is still more likely that the savings account will be regarded as a credit facility than an incidental credit agreement because the service provided is itself the provision of credit as opposed to some other service to which the credit is purely incidental.

Regulation 5 of the General Regulations to the Medical Schemes Act requires that –

The account or statement contemplated in section 59(1) of the Act must contain the following:

- (a) The surname and initials of the member;
- (b) the surname, first name and other initials, if any, of the patient;
- (c) the name of the medical scheme concerned;
- (d) the membership number of the member;
- (e) the practice code number, group practice number and individual provider registration number issued by the registering authorities for providers, if applicable, of the supplier of service and, in the case of a group practice, the name of the practitioner who provided the service;
- (f) the relevant diagnostic and such other item code numbers that relate to such relevant health service;
- (g) the date on which each relevant health service was rendered;

- (h) the nature and cost of each relevant health service rendered, including the supply of medicine to the member concerned or to a dependant of that member; and the name, quantity and dosage of and net amount payable by the member in respect of the medicine;
- (i) where a pharmacist supplies medicine according to a prescription to a member or to a dependant of a member of a medical scheme, a copy of the original prescription or a certified copy of such prescription, if the scheme requires it;
- (j) where mention is made in such account or statement of the use of a theatre-
 - (i) the name and relevant practice number and provider number contemplated in paragraph (e) of the medical practitioner or dentist who performed the operation;
 - (ii) the name or names and the relevant practice number and provider number contemplated in paragraph (e) of every medical practitioner or dentist who assisted in the performance of the operation; and
 - (iii) all procedures carried out together with the relevant item code number contemplated in paragraph (f); and
- (k) in the case of a first account or statement in respect of orthodontic treatment or other advanced dentistry, a treatment plan indicating-
 - (i) the expected total amount in respect of the treatment;
 - (ii) the expected duration of the treatment;
 - (iii) the initial amount payable; and the monthly amount payable.

These provisions are clearly highly specific to accounts for relevant health services as opposed to the provisions of the NCA which apply generally to all credit agreements covered by that Act.

Regulation 36 of the regulations under the NCA requires the following with regard to statements of account –

A statement of account in respect of a small agreement must be in Form 26 or must contain the following information:

- (a) The details of the credit provider, including:
 - (i) the name of the credit provider
 - (ii) the trading name of the credit provider, if any
 - (iii) the credit provider's registration number issued by the National Credit Regulator
 - (iv) the physical address and postal address of the credit provider
 - (v) the telephone number of the credit provider
 - (vi) where relevant, the details of the bank account into which the consumer's payment must be made, including name of bank, account number, branch code and reference number;
- (b) The details of the consumer, including
 - (i) the consumer's name
 - (ii) the consumer's account number or reference number

- (iii) the consumer's address;
- (c) The date of the statement;
- (d) The period covered by the statement;
- (e) Details of the agreement including (if applicable):
 - (i) the principal debt
 - (ii) the annual rate of interest
 - (iii) the installment amount
 - (iv) the frequency of the installment
 - (v) the balance outstanding at the date of statement
 - (vi) whether the account is in arrears, and if so, the amount of such arrears;
- (f) A summary of the transactions that occurred during the period of the statement, including the total amount debited or credited to the account in respect of the following:
 - (i) payments received
 - (ii) fees levied
 - (iii) interest accrued
 - (iv) insurance costs levied
 - (v) collection costs levied
 - (vi) default administration costs levied
 - (vii) legal fees incurred;
- (g) A detailed statement of each transaction that occurred during the period of the statement including the following:
 - (i) closing balance from the previous statement
 - (ii) the date of each transaction
 - (iii) a description of the transaction
 - (iv) the amount of the transaction and whether it is a debit or credit on the account
 - (v) a running total
 - (vi) the closing balance.

Where there is no conflict with the provisions of the MSA the provisions of the NCA will have to be applied in addition to those of the MSA. This will mean that where providers of health care services enter into credit agreements with members of medical schemes their accounts will have to be on Form 26 and contain the information stipulated above. This may have material impacts on health care providers in terms of their administrative costs and may also have an impact on medical schemes administration in the context of the processing of such statements of account from providers of healthcare services. Medical schemes and their administrators will be in a better position than anyone else to assess the impact if any there requirements may have on their claims processing operations with regard for instance to private hospital accounts, accounts from group practices etc.

Regulation 38 will also have an impact on those health service providers who are credit providers under the NCA. It requires that -

A notice to a consumer of a charge or series of charges to be made to another account as contemplated in section 124(2) of the Act must be given to the consumer in Form 27 before the charge or first charge of the series will be made, or must be recorded electromagnetically, transcribed and delivered to the consumer and must include the following information:

- (a) a reference to the written direction by the consumer authorising the charge or series of charges, as contemplated in sections 124(1) and 90(2)(n) of the Act;
- (b) the account against which the charge or series of charges will be made;
- (c) the obligation that the charge or series of charges is intended to satisfy;
- (d) the account to which that obligation relates;
- (e) whether the charge is a single charge or a series of charges;
- (f) the amount or amounts of the charge, and the method of calculation; and
- (g) the date on which the charge or first charge in the series will be effected.

2.4.3 Incidental Credit Agreements with Providers of Health Services

Providers of health services often engage in the practices listed in the definition of an incidental credit agreement. Where the criteria are satisfied the credit agreement will most likely be between the health service provider and the member. However, where a medical scheme contracts with a provide network or hospital group for example, careful consideration must be given to the terms of such a contract because it can be written in such a way as to constitute an incidental credit agreement for instance if there are penalties for late payment of accounts by the scheme or payment may be deferred in certain instances.

2.5 Credit Transactions

Even if a medical scheme does not satisfy the criteria for a credit facility, there is the possibility of its entering into credit transactions, as defined in the NCA, with members. A credit transaction is defined as an agreement that meets the criteria set out in section 8(4).

A credit transaction is –

- (a) a pawn transaction or discount transaction;
- (b) an incidental credit agreement, subject to s5(2);
- (c) an instalment agreement;
- (d) a mortgage agreement or a secured loan;
- (e) a lease; or

- (f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of –
 - (i) the agreement; or
 - (ii) the amount that has been deferred.

The most obvious example is that of a loan to a member in terms of the scheme rules. However, schemes do not only contract with members. They also contract with a wide range of consultants and service providers who may be natural or juristic persons.

2.5.1 Juristic Persons

It must be noted in passing that there are certain limitations in the NCA when it comes to contracting with juristic persons. In terms of section 1 of the Act "juristic person" includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if-

- (a) there are three or more individual trustees; or
- (b) the trustee is itself a juristic person,

The Act does not apply to a credit agreement in terms of which the consumer is a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1). There is the possibility therefore that contracts between schemes and health service providers or providers of other services may escape the ambit of the Act depending on the threshold value determined by the Minister.

The Act also does not apply to a large agreement, as described in section 9 (4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7 (1).

The Act does not apply where the parties are not dealing at arm's length. It gives the following examples in section 4 of non-arm's length arrangements –

- (j) a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider;
- (ii) a loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer.

For purposes of the NCA, a juristic person is related to another juristic person if-

- (i) one of them has direct or indirect control over the whole or part of the business of the other; or
- (ii) a person has direct or indirect control over both of them.

Section 6 lists the sections of the Act that do not apply when the consumer is a juristic person as follows –

The following provisions of this Act do not apply to a credit agreement or proposed credit agreement in terms of which the consumer is a juristic person:

- (a) Chapter 4 - Parts C and D;
- (b) Chapter 5 - Part A - section 89 (2) (b);
- (c) Chapter 5 - Part A - section 90 (2) (o); and
- (d) Chapter 5 - Part C.

Chapter 4, parts C and D relate to credit marketing practices and over-indebtedness and reckless credit.

Chapter 5 part A section 89(2)(b) states that a credit agreement is unlawful if the agreement results from an offer prohibited in terms of section 74(1).

Chapter 5 part A section 90(2)(o) states that a provision of a credit agreement is unlawful if it states or implies that the rate of interest is variable, except to the extent permitted by section 103(4).

Chapter 5, Part C deals with the consumer's liability, interest, charges and fees.

Schemes will have to take these provisions into consideration when contracting with juristic persons. Some medical practices are juristic persons whilst others are not.

2.5.2 Contracts with Health Service Providers

Schemes may contract with health service providers directly. Health service providers may be natural or juristic persons. Medical schemes are juristic persons in terms of the MSA. The term "consumer" is defined in the NCA in such a way as not to differentiate between natural and juristic persons, speaking of "the party".

Medical schemes can be consumers of some of the services provided in terms of credit agreements with third party contractors. An example of this would be a contract for actuarial services in term of which the actuaries are

commissioned to conduct a study on the membership of the scheme over a series of months and the medical scheme is required to pay for each phase of the project as it is completed failing which financial penalties are applied by the actuaries.

Companies such as Medikredit may satisfy the criteria in section 8 of the NCA where they grant credit to medical schemes by paying the provider directly and claiming back this payment, together with some form of interest or service fee, from the scheme. In this case, the scheme would be the consumer in the credit agreement

2.6 Credit Guarantees

The criteria for a credit guarantee appear in section 8(5) of the NCA. Where a person undertakes or promises in terms of a credit agreement to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the NCA applies the agreement constitutes a credit guarantee. From this it is evident that a credit guarantee need not be a standalone contract but could be a term in a broader contract that constitutes a credit facility or a credit transaction.

Where a medical scheme confirms to a health service provider that the member has medical scheme benefits and that the account will be paid. Incidentally, it is noted that in the case of prescribed minimum benefits there may be no need to confirm benefits – only membership. This is a fairly complex and controversial area, however, as most medical schemes use disclaimers on such confirmation letters and where the letter is sent by a scheme administrator on behalf of the scheme as opposed to the scheme itself, the principles of the law of agency can also come into play. There is a significant body of contract law dealing with issues of misrepresentation and mistake, unjust enrichment and estoppel and it is too wide to debate in detail for purposes of this opinion.

Suffice it to say that where a scheme officially undertakes to a member or to a provider of health services that the member is covered for a particular health service costing a specified amount of money and that the whole or a certain portion of the costs will be paid, this could constitute a credit guarantee in terms of the NCA if the scheme also satisfied the requirements for a credit facility or a credit transaction. It is expressly stated in section 4(2)(c) that the NCA applies to a credit guarantee only to the extent that the NCA applies to a credit facility or credit transaction in respect of which the credit guarantee is granted.

3. Relationship Between NCA and MSA

In terms of section 89 of the NCA, "a credit agreement is unlawful if-

- (a) at the time the agreement was made the consumer was an unemancipated minor unassisted by a guardian, or was subject to-
- (i) an order of a competent court holding that person to be mentally unfit; or
 - (ii) an administration order referred to in section 74 (1) of the Magistrates' Courts Act, and the administrator concerned did not consent to the agreement,
- and the credit provider knew, or could reasonably have determined, that the consumer was the subject of such an order.

This provision is problematic in the context of health care services in particular because whether a person is mentally unfit or not they have a right of access to health care services and a provider of health care services should not be able to turn them away merely because they are mentally unfit on the grounds that there is a court order to this effect.

The MSA in section 30(1)(f) allows medical schemes to provide in their rules for the membership of a minor who is assisted by his or her parent or guardian. It does not make any reference as to whether or not the minor is emancipated. If a medical scheme were to satisfy the criteria for a credit agreement under the NCA then the issue of whether or not the minor is emancipated would not necessarily arise because the requirement in the MSA is stricter. Any minor, emancipated or not, must be assisted by his or her parent or guardian in becoming a member of a medical scheme. Emancipation is a technically complex issue that is made more so by the fact that these days children in any event have a constitutional right of access to health care services and the question of their contractual capacity should not be permitted to interfere unduly with the realisation of this right. Due to the fact that most medical schemes would not satisfy the criteria for credit agreements under the NCA this line of discussion will therefore not be pursued further.

Similarly people who are under administration should be able to access health care services without the approval of the administrator of their estate since health care services are can be a matter that is highly personal to the patient and falls within his or her sphere of privacy. Requiring the consent of an administrator also effectively limits the person's right of access to health care services and the question is whether this would be a justifiable limitation in terms of section 36 of the Constitution. It seems clear enough that the application of the NCA to medical schemes and providers of health care services was not expressly contemplated by the legislator when this Act was passed and to limit a constitutional right by way of an unintended and incidental consequence of legislation that is not specifically directed at the limitation is likely to be unconstitutional if interpreted and applied in the manner postulated above.

Section 29(3) of the Medical Schemes Act provides that -

A medical scheme shall not provide in its rules—

- (a) for the exclusion of any applicant or a dependant of an applicant, subject to the conditions as may be prescribed, from membership except for a restricted membership scheme as provided for in this Act;
- (b) for the exclusion of any applicant or a dependant of an applicant who would otherwise be eligible for membership to a restricted membership scheme; and
- (c) for the imposition of waiting periods other than as provided for in section 29A.

In the present context this means that a medical scheme may not exclude someone from membership who has a bad credit record.

The NCA states in section 60(3) that, subject to sections 61 and 92(3), nothing in this Act (the NCA) establishes a right of any person to require a credit provider to enter into a credit agreement with that person. This is not inconsistent with the MSA because although there may be nothing in the NCA that can compel a credit provider to enter into a credit agreement with a person, even if a medical scheme does satisfy the definition of a credit provider in the NCA, the scheme is still governed by the MSA which prohibits it from rejecting a person as a member.

Credit agreements may not be entered into with unemancipated minors in terms of the NCA. This may impact to a very limited extent on medical schemes where a parent is paying for a child to be a principal member for some reason. This is likely to be a relatively rare situation and it assumes that the medical scheme is conducting its business in such a way that it is a credit provider.

Many medical schemes may not, in fact be credit providers under the NCA. However, providers of health care services may be credit providers under the NCA and this would pose a problem where they are required to render health services to an unemancipated minor on a credit basis. As stated previously the right of access to health care services could be inadvertently and unconstitutionally limited by provisions such as this in the NCA.

Section 81 stipulates that a credit provider must not enter into a credit agreement without first taking reasonable steps to assess –

- (a) the proposed consumer's –

- (i) general understanding and appreciation of the risks and costs of the proposed credit and of the rights and obligations of a consumer under a credit agreement;
 - (ii) debt repayment history as a consumer under credit agreements;
 - (iii) existing financial means, prospects and obligations; and
- (b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement;

There is more likely to be a problem with the reckless credit provisions of the NCA when a medical scheme member tries to access health care services from a health service provider who is also a credit provider under the NCA. If the health care provider has to do credit checks on the member before rendering health care services this could add to the cost of rendering health care services, delay access to health care services, impact adversely on the delivery of emergency medical services in which time is of the essence and put pressure on medical schemes to increase the benefits payable so as to cover the added costs of health service providers. This in turn would erode even further the portion of medical scheme funds available to pay for relevant health services unless the medical schemes increase their contributions. Either way the members of medical schemes will end up paying for the credit checks conducted by providers of health care services on themselves or their medical schemes.

In order to avoid the provisions of the NCA health care providers may try to ask for immediate cash payments from medical scheme members or schemes themselves. In other words they may try to avoid entering into credit agreements with scheme members. They could also do so by not charging interest on overdue accounts but the question is whether they would be prepared to do this.

The NCA defines credit as –

- “(a) a deferral of payment of money owed to a person or a promise to defer such a payment; or
- (b) a promise to advance or pay money to or at the direction of another person”.

Although this definition is wide enough to include the current practices of both medical schemes and health care providers it must be borne in mind that to fall within the ambit of the NCA one party must enter into a “credit agreement” as defined in the NCA with a consumer.

It is worth noting that in terms of section 35(6)(c) of the MSA, a medical scheme may not directly or indirectly borrow money without the prior approval of the Council and subject to such directives as the Council may

issue. It is not entirely clear whether credit granted to a medical scheme constitutes the borrowing of money by the scheme in the language of the MSA.

A medical scheme is expressly prohibited from granting loans to-

- (a) an employer who participates in the medical scheme or any administrator or any arrangement associated with the medical scheme;
- (b) any other medical scheme;
- (c) any administrator; and
- (d) any person associated with any of the abovementioned

by section 35(8) of the MSA. In fact to do so is an offence under the MSA.

Under the general regulations to the MSA, a medical scheme may not prohibit, or enter into an arrangement or contract that prohibits, the initiation of an appropriate intervention by a health care provider prior to receiving authorisation from the medical scheme or any other party, in respect of an emergency medical condition.

4. Consequences of the National Credit Act

Medical schemes need to take stock of their rules and contractual relationships with their members in order to determine whether or not they need to register as credit providers in terms of the NCA and if not, whether the provision of the NCA will nonetheless apply to certain of their activities or transactions. They also need to analyse their contracts with provider networks, hospital groups, managed care organisations and the like in order to establish whether these contracts are credit agreements for purposes of the NCA.

Since the position of each scheme is unique it is not possible to answer this question in a generic manner except to give examples of areas that are likely to fall within the scope of the definition of a credit agreement for NCA purposes.

Schemes may choose to structure their contractual arrangements with members and others so that they do not constitute credit agreements in terms of the NCA and their relationships will not fall within its scope. It is unlikely, however, that schemes will be able to entirely avoid the impact of the NCA because schemes are not merely suppliers of goods and services they are also consumers of same.

If large hospital groups are required to register as credit providers as a result of the provisions of the NCA this may have an impact on the manner in which scheme members are treated by these hospitals. If the contract for treatment is between the hospital and the member, depending on when payment for such services becomes due, hospitals may have to perform credit checks on members as required by the NCA in order to avoid recklessly granting credit

to members. If the contract is between the medical scheme and the hospital to provide health care services to the scheme's members, then the hospital may have to perform credit checks on the medical scheme itself if the agreement falls to be defined as a credit agreement under the NCA.

An important factor for private hospitals in deciding as to whether or not they should structure their operations as credit providers may be provisions in the NCA (section 90(2) (g)) that prohibit clauses exempting the credit provider from liability, or limiting such liability for any act or omission or representation by a person acting on behalf of the credit provider. Depending on the value to private hospitals of the ability to include exemption clauses in contracts such as the one upheld by the Supreme Court of Appeal in the case of *Afrox Healthcare v Strydom*¹, they may or may not structure their operations so that they are credit providers in terms of the NCA. If they are not credit providers under the NCA then it is unlikely that they will be able to charge interest on overdue accounts.

The NCA in section 90 contains a long list of contractual provisions that are unlawful in credit agreements. Many of these contractual provisions have in the past afforded a significant degree of protection to credit providers and have swayed the power balance considerably in their favour. The NCA puts an end to this and so greatly increases the scope of the risk to which credit providers will be exposed. The individual organisations within the health industry that contract with medical schemes will have to assess their business in the light of the NCA and taking into account the risks to which they will be exposed as a consequence of the Act, conduct their operations accordingly. It is not possible at this stage to predict what line they are likely to follow since they are many and varied and their decision depends on the impact that the NCA will have on their business.

If a medical scheme contracts with a health service provider or a provider network to render health services to its members then such an agreement could potentially be a credit agreement in terms of the NCA. This would depend on the terms of the contract. For instance if a medical scheme capitates a provider network to provide specified services each quarter to its members this might constitute the granting of credit by the medical scheme depending on how the capitation agreement is structured and implemented. Given the definition of "capitation" in the General Regulations to the MSA however, it seems unlikely that capitation agreements could be construed as credit agreements for purposes of the NCA. In the General Regulations to the MSA, 'capitation agreement' means an arrangement entered into between a medical scheme and a person whereby the medical scheme pays to such person a pre-negotiated fixed fee in return for the delivery or arrangement for the delivery of specified benefits to some or all of the members of the medical

¹ Afox 2002 (6) 21 (SCA).

scheme. This indicates that a capitation fee is not credit as such but simply a fee for services to be rendered.

Alternatively if a provider network undertakes to service medical scheme members and bill the scheme monthly on a fee for service basis provided that if the account is not paid within a specified period interest or some kind of penalty fee becomes payable, this might constitute an incidental credit agreement where the credit provider is the provider network.

Many providers of health care services such as medical specialists and general practitioners charge interest on overdue accounts or quote the patient two prices, the lower 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. These arrangements could constitute incidental credit agreements. Even if medical schemes are not party to these agreements, their members will be and medical schemes may be required to advise and inform their members of their rights in terms of the NCA with regard in particular to incidental credit agreements with health professionals. It is not clear at this time to what extent medical professionals are aware of these provisions and whether or not they will be adjusting their trade practices in order to avoid the provisions of the NCA.

Section 5 of the NCA lists the sections of the Act that apply to incidental credit agreements – namely chapters 1, 2, 7, 8 and 9; chapter 3, sections 54 and 59, chapter 4 parts A and B, chapter 4, part D except to the extent that it deals with reckless credit; chapter 5, part C subject to subsection 3 (a); chapter 5 parts D and E once the incidental credit agreement is deemed to have been made in terms of subsection (2); and chapter 6 parts A and C. There is thus a significant portion of the NCA that applies to incidental credit agreements and it is highly likely that many providers of health care services may find themselves party to incidental credit agreements in terms of the NCA.

In general terms it is important for medical schemes as consumers to ensure that those entities with whom they enter into credit agreements have complied with all of the applicable provisions of the NCA.

A person must apply to be registered as a credit provider if –

That person, alone or in conjunction with any associated person is the credit provider under at least 100 credit agreements, other than incidental credit agreements; or

The total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).

The registration must remain current at all times because the Act requires a registrant whose registration has been cancelled not to engage in any formerly registered activities after the date on which the cancellation takes effect.

A credit agreement with a person that has not registered as a credit provider, and was required to do so in terms of the Act, is unlawful and therefore unenforceable in terms of section 84(2)(d). It may prove disastrous for a medical scheme that has entered into a credit agreement with for example MediKredit, to find as a consumer, that the contract cannot be enforced because MediKredit was required to register as a credit provider and did not do so.

Similarly where medical scheme administrators act as credit providers to medical schemes or as credit bureaux they may have to register as such in terms of the NCA depending on the terms of the contracts they have with the schemes they administer.

Section 43 of the NCA deals with credit bureaux. A person must apply to be registered as a credit bureau if that person engages for payment, other than as a credit provider or an employee of a credit provider, in the business of-

- (a) receiving reports of, or investigating –
 - (c) credit applications;
 - (d) credit agreements;
 - (e) payment history or patterns; or
 - (f) consumer credit information as defined in section 70(1) relating to consumers or prospective consumers, other than reports of court orders or reasons for judgment or similar information that is in the public domain;
 - (g) compiling and maintaining data from reports contemplated in subparagraph (i); and
 - (h) issuing reports concerning consumers or other natural persons based on information or data referred to in this paragraph.

The NCA prohibits the offering of services customarily offered by a credit bureau unless the offeror of such services is registered as a credit bureau in terms of Chapter 3 of the Act.

5. Conflicts Between the NCA and the MSA

Certain comments are necessary with regard to concerns around an alleged conflict between section 29(3) of the Medical Schemes Act and section 81 of the NCA. It is the view of the BHF that the provisions of the MSA will prevail over those of the NCA for the following reasons:

1. The constitutional court has repeatedly endorsed a purposive approach to legislative interpretation which means that one does not narrow one's analysis to such a degree that the strict meanings of individual words are the only key to unlocking the meaning of the section. The intention behind section 2(1) of the Medical Schemes Act was clearly to ensure that the provisions of this Act take precedence over those of other legislation. There is an express reference in section 2 of the MSA to the Constitution. All legislation must be interpreted with reference to it, including the Medical Schemes Act. The Medical Schemes Act was passed in 1998 after the Constitution was effected and it must be therefore be read with regard to the state's clearly delineated responsibility to respect, protect, promote and fulfil the right of access to health care services and to take legislative and other measures to ensure the progressive realisation of the right within its available resources. The constitutional right of access to health care services does not limit the application of the right to public sector health services neither does it limit the right on the basis of a person's creditworthiness.
2. The fact that the NCA expressly states in section 2(7) that except as specifically set out in, or necessarily implied by, the Act, the provisions of the Act are not to be construed as –
 - (a) limiting, amending or repealing or otherwise altering any provision of any other Act;
 - (b) *exempting any person from any duty or obligation imposed by any other Act;* (writer's italics) or
 - (c) prohibiting an person from complying with any provision of another Act

clearly indicates that it was not the purpose that any provisions of the NCA should override those of other legislation where the other legislation is not specifically indicated in the NCA. It cannot be said that it is necessarily implied anywhere in the NCA that medical schemes are exempt from provisions of the MSA that require them to accept members irrespective of their credit record.

3. It is a standard and much used rule of statutory interpretation to interpret two different pieces of legislation as being consistent as far as possible and to prefer an interpretation that harmonises them to one that highlights the conflict. The interpretation given above is the most rational way of harmonising any conflicts between them. The writer therefore concurs with the opinion obtained from attorneys Edward Nathan by the BHF earlier this year to the effect that the provisions of the Medical Schemes Act will take precedence over those of the NCA where there is a conflict.

4. It would not be open to a court of law to declare a credit agreement unlawful under the NCA where the provisions of another piece of legislation, the MSA, mandate it. This would be contrary to the rule of statutory interpretation referred to in paragraph 3 above.

This said, it is open to medical schemes to err on the side of caution and to adjust their rules so as to ensure that only creditworthy members are given medical savings accounts or to do away with medical savings accounts altogether or to structure benefits in some other way that avoids the provisions of the NCA.

6. In Summary

There are many medical schemes to whose business the NCA may not apply at all. There are others to whom it may apply in only some instances depending on the provisions of their rules. There are still others, such as those with medical savings accounts, to whom it is may to apply for as long as such accounts form an integral part of scheme benefits and interest or other fees are levied on debit balances.

Medical savings accounts satisfy the criteria for a credit facility where –

- (a) The medical scheme undertakes 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 directions of the consumer; and
- (b) The medical scheme agrees to defer the consumer's obligation to repay the amount in full and instead deducts it monthly from his contribution; and
- (c) the medical scheme charges interest or a fee with regard to the amounts owed by the member on the savings account.

Although medical schemes undoubtedly grant "credit" to members they do not claim its repayment as defined in the Act and therefore do not satisfy the criteria for a credit facility as contained in section 8 of the Act concerning their non medical savings account business.

The relationship between medical schemes and their members, is, however, only half of the picture. The other half is represented by suppliers of services to medical schemes. In this instance the medical scheme is the consumer. Medical schemes will also have to keep in mind the provisions of section 4 of the NCA in this regard in order to ascertain whether or not their asset value or annual turnover are equal to or above the thresholds determined by the Minister of Trade and Industry in which case such credit agreements may be exempt from application of the NCA.

Medical schemes will need to ensure, as a matter of sound corporate governance, that those with whom they contract for services are compliant

with the provisions of the NCA insofar as these provisions applicable to them. Failure to do so could result in unlawful contracts that are unenforceable against such suppliers of services and could result in losses for the scheme.

Providers of health care services may also satisfy the criteria for a credit facility, a credit transaction or both depending on how they structure their business. There is the distinct possibility that a number of them will enter into incidental credit agreements if not with schemes themselves then with members. This will have an impact on the manner in which schemes relate to these providers and may necessitate scheme support of members in incidental credit agreements with providers.

The mere fact that a member pays a provider of health services by means of a charge against his medical scheme does not mean, in the event of the scheme's refusal to pay the account, that the member has concluded a credit agreement with the provider.

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