THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 445/2025

In the matter between:

THE PROFIT HUB (PTY) LTD **APPELLANT**

and

ZUWON CONSULTANTS (PTY) LTD **FIRST RESPONDENT**

THOKOZANI LLOYD NDAWONDE **SECOND RESPONDENT**

Neutral citation: *The Profit Hub (Pty) Ltd v Zuwon Consultants (Pty) Ltd and Another* (445/2025) [2026] ZASCA 88 (24 June 2026)

Coram: MAKGOKA, SMITH and UNTERHALTER JJA and NORMAN and MOOKI AJJA

Heard: 5 May 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 24 June 2026.

Summary: National Credit Act 34 of 2005 (the Act) – application of the Act – credit facility – s 8(3)*(a)* of the Act – the distinction between a discounting agreement and a loan – when is a loan a credit facility – exceptions to the application of the Act – s 4(1)*(a)*(i) and s 4(1)*(b)* read with s 9(4) of the Act – juristic person – annual turnover – large agreement.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Swanepoel J, sitting as court of first instance):

1 The appeal is upheld with no order as to costs.

2 The order granted by the high court, is set aside, and replaced with the following:

'(i) Judgment is granted against the first and second respondents, jointly and severally, the one paying the other to be absolved, in the amount of R785 292.91.

(ii) The first and second respondents are ordered to pay interest on the amount of R785 292.91 at a rate of 8% per month, from 1 May 2024, until date of final payment, both days inclusive.

(iii) The first and second respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs on an attorney-client scale.'

JUDGMENT

Unterhalter JA (Makgoka and Smith JJA and Mooki AJA concurring):

Introduction

[1] The appellant, The Profit Hub (Pty) Ltd (TPH), brought an application in the high court, seeking judgment in the amount of R785 292.91, together with interest, against the first and second respondents, Zuwon Consultants (Pty) Ltd (Zuwon) and Mr Ndawonde, jointly and severally, the one paying, the other to be absolved. Zuwon entered into two written agreements with TPH, which it styled as discounting agreements. Since the characterisation of these agreements is in

issue, I shall refer to them in a neutral way as 'the agreements'. Mr Ndawonde concluded two written suretyship agreements in favour of TPH. He bound himself as surety and co-principal debtor for the due repayment by Zuwon of all sums of money owed to TPH under the agreements. TPH alleged that Zuwon was in breach of the agreements. Zuwon and Mr Ndawonde concluded a written acknowledgement of debt and security agreement in terms of which they acknowledged their indebtedness to TPH under the agreements, and agreed to pay TPH by way of instalments.

[2] Zuwon and Mr Ndawonde were not able to pay TPH, despite demand, and TPH thus brought its application to secure payment. The application was not opposed by Zuwon or Mr Ndawonde. The matter was called in the unopposed motion court. Swanepoel J raised with counsel for TPH whether the agreements complied with the National Credit Act 34 of 2005 (the Act). After written heads of argument were submitted, the high court handed down its judgment. It found that the agreements were lending transactions, and not discounting agreements, falling within s 8(3)*(a)* of the Act, and hence the agreements were credit agreements to which the Act applies. The high court reasoned that since the founding affidavit contained no averments that the Act had been complied with, judgment in favour of TPH could not be granted. The application was accordingly dismissed. TPH sought leave to appeal to this Court, which application was granted by the high court. Neither Zuwon nor Mr Ndawonde sought to oppose the appeal.

[3] TPH's appeal raises the following issues. First, do the agreements, properly interpreted, fall within the remit of the Act as credit agreements? (the characterisation issue). Second, even if the agreements are credit agreements, is the application of the Act nevertheless excluded in terms of s 4(1)*(a)*(i) of the Act? (the threshold issue). Third, even if the characterisation issue and threshold

issue are decided against TPH, should the high court have given a different remedy, rather than dismissing the application? (the remedy issue).

The characterisation issue

[4] Section 4 of the Act provides that it applies to every credit agreement, subject to ss 5 and 6, but with certain exclusions, to which I will refer when I consider the threshold issue. One species of credit agreement is a credit facility. TPH contended that the agreements, properly interpreted and characterised, are discounting, and not loan, agreements. Hence, the agreements do not constitute a credit facility, as provided for in s 8(3)*(a)* of the Act. Once that is so, it was argued, the Act is not of application to the agreements.

[5] It is well understood that, to determine whether an agreement is one or other species of credit agreement, as defined in the Act, we must have regard to the substance of the agreement, and not merely its form or nominal description. Section 8 says as much. Whether an agreement constitutes a credit facility is decided 'irrespective of its form'.[1] We must, of course, interpret the agreements in accordance with the well-recognised triad of text, context and purpose. And then determine whether the agreements fall within what constitutes a credit facility in terms of s 8(3)*(a)* of the Act.

[6] TPH submitted that, properly interpreted, the agreements are discounting agreements. In *De Villiers v Roux*,[2] the court distinguished a discounting and loan agreement in the following way:

'Similarly, in the more recent case of the *London Financial Association v Kelk* (L.R. 26 Ch. Div. 107), Vice-Chancellor, BACON, in the course of a very learned judgment, deals with the distinction between lending and advancing money, and discounting, in the following manner. "The difference between 'advancing', 'lending money' and 'discounting' is distinct

[1] See the introductory language in s 8(3).
[2] *De Villiers v Roux* 1916 CPD 295 at 298.

and palpable. 'Discounting' is purchasing, not lending. The discounter, whether of a bill or bond, or any other security, becomes the owner. If the thing bought, turns out, when realised, to be of less value than the price paid for it, the loss falls upon the purchaser or discounter. If a profit or gain is made upon the transaction, it belongs wholly and exclusively to the discounter or purchaser." The view, therefore, which I expressed during the argument that the relation between the discounter of a bill or promissory note and the person who presents it for discount seems rather that of purchaser and seller than that of lender and borrower, is borne out by authority. The discounter becomes the owner of the note; it is his property and he in turn can discount it, pass it over to others, or deal with it in any other legitimate way; whereas, if the transaction were one of the loan of money against the security of the bill or note, the discounter would not be able to deal with the document in the way described.'

[7] The hallmarks of a discounting agreement of accounts receivables (invoices), when compared with an agreement for the loan of money, may be framed in the following way. First, a discounting agreement is a financial transaction in terms of which a creditor makes over its rights as against debtors to a third party, the discounter, in consideration of which, the discounter makes payment to the creditor. It is a disposal of an asset, here the incorporeal rights constituted by the debt. The original creditor divests itself of these rights in favour of the discounter in whom the rights vest. The discounter becomes the owner of the rights and may exercise the rights or, in turn, further discount the debt. A loan of money, by contrast, is an agreement in terms of which a lender lends an amount of money to a borrower who is required to repay a sum of money equal to the amount lent, usually, with interest. In a discounting agreement, the discounter pays an amount to acquire the debt from the original creditor. The original creditor is not required to repay this amount: the price paid is the consideration for the acquisition of the debt by the discounter.

[8] Second, in a discounting agreement, the risk attaching to the debt passes to the discounter. Its profit or loss is a function of what value the discounter can secure from the debt, as against the cost of acquiring the debt. That is, the price

paid by the discounter to acquire the debt. The loan of money by a lender also attracts risk. But here, the risk arises from the possibility that the borrower will not repay the loan, with interest. The discounter pays to acquire the debt. The lender lends money against the right to be repaid, with interest. Not only are the flows of money different, but the rights of a discounter and a lender are distinct.

[9] Third, in a discounting agreement, the asset acquired (the debt) is not security for the obligations of the original creditor. As we have observed, what is paid by the discounter to the original creditor is a price to acquire the asset. The asset is not security for repayment of monies by the original creditor to the discounter. In the case of a loan of money, the lender will often require security for the repayment of the loan, with interest. That security may take different forms, but it secures the performance by the borrower of its obligation to repay the loan.

[10] Plainly, financial transactions may often be complex. And they may be formulated in ways that involve hybrid derivatives of discounting or loan agreements. But for the purposes of legal analysis, it is important to be able to discern the essential characteristics that distinguish a loan from a discounting agreement.

[11] I turn next to consider the terms of the agreements. The agreements, in their introduction, describe the transaction as one in terms of which TPH purchases the invoices of Zuwon, 'embodied in an out-and-out cession of all right, title and interest in and to [Zuwon's] right to collect the proceeds due in terms of such invoice . . .'. The consideration for this purchase is the obligation of TPH 'to advance the Advance Amount . . . to the CLIENT' (that is Zuwon). And the Advance Amount is defined to mean 'the capital amount discounted by the TPH to [Zuwon] for the sale of the invoice . . .'. These terms of the agreements use

language of a piece with a discounting agreement. TPH purchases the invoices of Zuwon; the rights are acquired by TPH under an out-and-out cession; and payment is made to Zuwon by way of the Advance Amount.

[12] The agreements however go further. Zuwon is obliged to repay to TPH the entire Outstanding Amount. The Outstanding Amount is defined to mean: the amount paid by TPH to Zuwon (that is, the Advanced Amount), plus the factoring fee due to TPH (being, a minimum of 13% of the Advance Amount), plus any costs incurred by TPH, if any. Zuwon is obliged to repay the Outstanding Amount, upon receipt by it of payment of invoices by the debtors, and to do so within a defined repayment period, 'irrespective of whether it (Zuwon) has received payment from the Debtor in relation to the invoice(s) . . .'. Should Zuwon fail to do so, an additional penalty fee of 8% per month, calculated daily, is payable on the Advance Amount. The agreements provide for security for the due and punctual performance of Zuwon's obligations to TPH, which security includes the suretyships executed by Mr Ndawonde in favour of TPH.

[13] These provisions cast a different light upon the agreements. The Advance Amount is repayable by Zuwon to TPH, together with the factoring fee, which is calculated as a percentage of the Advance Amount. This means that Zuwon does not get paid the Advance Amount as the price of an asset sold to TPH. Rather, the Advance Amount must be repaid to TPH, together with the factoring fee, within the repayment period. That bears all the hallmarks of a loan, repayable, with interest. The risk does not lie with TPH in respect of the redemption of the debt. If debtors do not pay, Zuwon remains liable for the repayment of the Outstanding Amount. TPH enjoys security for that repayment. The cession of debts to TPH is simply an additional form of security for the repayment of the Outstanding Amount. Once all amounts have been paid to TPH under the agreements, only then does Zuwon become entitled 'to the remainder of the amount derived from

the invoice(s)'. This residual entitlement shows that TPH enjoys rights as a cessionary for so long as Zuwon is indebted to TPH; thereafter, Zuwon is entitled to whatever amounts are recovered from the debtors in respect of the invoices.

[14] Taken together, these provisions of the agreements indicate that the true relationship between TPH and Zuwon is that of a lender and a borrower for the loan of money. Those aspects of the agreements that are cast in the language of a discounting agreement do not perform that function. For the reasons given, what governs the relationship between TPH and Zuwon is the payment to Zuwon of the Advance Amount, which Zuwon is obliged to repay, with interest, within the repayment period. Upon analysis, the cession of the debt is not, a purchase by TPH of debt for a price, but a form of security in favour of TPH to secure the repayment by Zuwon of the Advance Amount. For these reasons, the agreements are properly characterised as loans and not discounting agreements. And the high court was correct to so find.

[15] That however is not the end of the enquiry. The agreements may be loans, but do they constitute a credit facility, as described in s 8(3)*(a)* of the Act? It is to this question that I now turn.

[16] Sections 8(1)*(a)* and (3)*(a)* read in relevant part as follows:

'**Credit agreements**

(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this 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); or

(d) any combination of the above.

. . .

(3) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4(6)*(b)*, constitutes a credit facility if, in terms of that agreement –

> *(a)* a credit provider undertakes –
>
> (i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and
>
> (ii) either to –
>
> *(aa)* defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or
>
> *(bb)* bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); . . ..'

[17] An agreement is a credit facility if a credit provider undertakes: (a) to supply goods or services; or (b) to pay amounts determined by the consumer either to the consumer or at the consumer's direction or on behalf of the consumer. Typically, as observed in *JMV Textile v De Chalain*,[3] these two types of credit facility have the following applications in commerce. The first concerns the supply of goods or services at the consumer's request, with the deferment of the obligation to pay the price. Store charge cards or accounts are examples. The second concerns payment to the consumer or on his or her behalf to a third party (usually a merchant who sells goods or services to the consumer), with the deferment of the obligation to repay. The widespread use of credit cards by consumers exemplifies this type of credit facility.

[18] I have found that the agreements are loans. TPH lends money to Zuwon by way of the Advance Amount. TPH does not supply goods or services to Zuwon. Nor can the agreements be understood to provide that TPH pays Zuwon the Advance Amount, 'as determined by the consumer from time to time' as s 8(3)*(a)*(i) stipulates. This provision contemplates that a consumer will draw upon

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[3] *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and Others* [2010] ZAKZDHC 34; 2010 (6) SA 173 (KZD); [2011] 1 All SA 318 (KZD) para 14.

a credit facility, and determine what amounts are required and when, within the limits of the facility granted by the credit provider. But that is not what the agreements provide. Under the agreements, Zuwon borrows a definite sum, the Advance Amount, and is required to repay the Outstanding amount. There is no credit facility granted to Zuwon, and no autonomy to decide from time to time how to make use of this facility.[4]

[19] It follows that the agreements do not qualify as a credit facility in terms of ss 8(1)*(a)* read with 8(3) of the Act. Nor are the agreements discounting transactions under s 8(4)*(a)*. The definition of a discounting transaction in s 1 concerns the provision of goods and services. As I have found, TPH does not provide goods or services under the agreements. No other basis was raised before the high court to suggest that the Act applies to the agreements, nor do I consider there to be one.

[20] Once that is so, although the high court correctly found that the agreements constituted loans, its conclusion that these loans 'fall squarely within the definition of a credit facility in s 8(3)*(a)*' was an error. For the reasons given, the loans made by TPH in terms of the agreements do not constitute a credit facility. The Act does not apply to the agreements, and hence the Act was no obstacle to the judgment that TPH sought before the high court.

[21] Norman AJA has written a concurring judgment (the second judgment) in which she disagrees with this conclusion. She finds that the agreements constitute a credit facility in terms of s 8(1)*(a)* read with s 8(3)*(a)*(i) of the Act. The second judgment reasons as follows. First, the amount to be advanced to Zuwon is

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[4] Something was made of the decisions in *Bridgeway Limited v Markam* [2008] ZAGPHC 251; 2008 (6) SA 123 (W); *Rodel Financial Services (Pty) Ltd v Naidoo and Another* [2011] ZAKZDHC 7; 2013 (3) SA 151 (KZD); *Renier Nel Inc and Another v Cash on Demand (KZN) (Pty) Ltd* 2011 (5) SA 239 (GSJ) in the judgment of the high court and by way of submission before us. These cases ultimately turn, as does the present matter, on the particular agreements in issue.

determined by Zuwon 'in that it is Zuwon that has the invoices to be 'purchased' by TPH'.[5] Second, under the agreements, Zuwon's obligation to repay the Advanced Amount or a portion thereof is deferred. By way of example, the second judgment observes 'the first discounting agreement was concluded on 13 October 2023 and the repayment period was on 13 November 2023. The second agreement was concluded on 28 November 2023, and the repayment period was on 24 December 2023'.[6] Third, the second judgment considers the agreements to be akin to store cards and credit cards. As with a store card, the credit provider, 'TPH may pay to Zuwon (for the benefit of Zuwon) a portion of or the full advanced amount'.[7] And, as with credit cards, 'if the advanced amount is not repaid in full within the repayment period there is an additional penalty fee of 8% per month calculated daily; legal fees and factoring fees that shall be added to the outstanding amount'.[8]

[22] I do not agree with this reasoning. As I have observed, in relevant part, in order to constitute a credit facility, the agreement must be one, in terms of which, the credit provider undertakes 'to pay an amount or amounts, *as determined by the consumer from time to time*'[9] (my emphasis). The undertaking as to deferment of the consumer's obligation to repay is a separate requirement that must be satisfied in order for an agreement to constitute a credit facility.

[23] Under the terms of the agreements, Zuwon does not determine 'from time to time' the amounts to be advanced to it. The Advanced Amount is determined by the parties to the agreements, upon concluding the agreements, and then advanced to Zuwon. Zuwon is not accorded any unilateral right to determine how much of the Advanced Amount to draw upon, if any, and when to do so. No such

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[5] The second judgment para 43.
[6] The second judgment para 43.
[7] The second judgment para 45.
[8] The second judgment para 45.
[9] Section 8(3)*(a)*(i).

term appears in the agreements. And this is so because the agreements do not provide a credit facility established in favour of Zuwon, upon which Zuwon may determine to draw, from time to time. Hence a central feature of what is meant by a credit facility is lacking from the agreements. The Advanced Amount will most certainly reflect the value that the invoices may have as security for the repayment of the Advanced Amount. But the provision of security by Zuwon, or to use the framing of the second judgment, that Zuwon has invoices to be purchased and used as security, does not confer upon it the right to enjoy a credit facility as that term is defined in s 8(3)*(a)*(i).

[24] That Zuwon is required to repay the Advanced Amount, together with other amounts, is a deferred obligation, but it is not a deferral in the sense contemplated in s 8(3)*(a)*(ii)*(aa)* because this provision references an undertaking by the credit provider to defer any part of the amount contemplated in s 8(3)*(a)*(i). That is to say, an amount determined by a consumer from time to time. For the reasons given, no such amount was ever paid to Zuwon. Hence, its obligation to repay TPH at a specified time in the future is not a deferred payment constitutive of a credit facility.

[25] Nor do I consider that the agreements are at all akin to store cards or credit cards. These commercial arrangements are based upon consumers making decisions as to what to buy and drawing upon an agreed credit facility to do so. Zuwon did nothing of the kind. It borrowed a fixed amount of money against the security of the invoices, and was required to repay this loan. Under the reasoning of the second judgment, every loan would become a credit facility and that cannot be reconciled with the Act's delineation of different species of credit agreements.

The threshold issue

[26] Section 4(1)*(a)*(i) of the Act reads as follows:

‘**Application of Act**

(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except –

(a) a credit agreement in terms of which the consumer is –

(i) 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).’

[27] The Act does not apply to a credit agreement where the party to the agreement is a juristic person with an asset value or annual turnover that equals or exceeds a threshold determined by the Minister (the threshold value).

[28] Sections 4(1)*(b)* and 9(4) of the Act read as follows:

‘**4 Application of Act**

(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except –

(b) 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).

. . .

9 Categories of credit agreements

(4) A credit agreement is a large agreement if it is-

(a) a mortgage agreement; or

(b) any other credit transaction except a pawn transaction or a credit guarantee, and the principal debt under that transaction or guarantee falls at or above the higher of the thresholds established in terms of section 7(1)*(b)*.’

[29] Where a consumer, as defined by the Act, is a juristic person and has an asset value or annual turnover below the threshold value, then if such a consumer enters into a large agreement, as determined in terms of s 9(4), the Act also does not apply. The threshold value determined by the Minister is R1 000 000. A large

agreement, as determined by the Minister in terms of s 7(1)*(b)*, is one where the principal debt exceeds R250 000.[10]

[30] TPH submitted that, *ex facie* the agreements, in 2023, Zuwon had invoiced two clients for a cumulative amount of R863 871.80. And if that was so for just two clients, it was overwhelmingly likely that in 2023 Zuwon's annual turnover exceeded R1 000 000. Alternatively, in terms of the agreements, TPH advanced to Zuwon R290 000 and R270 000. In each agreement, the principal debt exceeds the threshold determined by the Minister in terms of s 7(1)*(b)*. Thus, it was argued, the agreements are large agreements, and the Act is not of application to them.

[31] These matters were not traversed in TPH's founding affidavit. Quite understandably, given that the question of compliance with the Act arose from the high court's intervention in the unopposed motion court. No mention of it is made in the high court's judgment. However, if the threshold issue can be decided on the papers, it should be.

[32] Although I accept that, on the probabilities, Zuwon's annual turnover in 2023 was likely to have exceeded the threshold value, there is no direct evidence of its turnover from its accounts. However, the agreements are attached to the founding affidavit. The agreements disclose the amounts of the Advance Amount in each agreement. The Advance Amount is the loan made by TPH to Zuwon, and hence constitutes the principal debt. The amounts exceed the threshold determined by the Minister in terms of s 7(1)*(b)*. The agreements are thus large agreements. Zuwon is a juristic person. It is not possible to determine, on the papers, Zuwon's annual turnover in 2023. If it exceeded the threshold value, then the Act does not apply to the agreements in virtue of s 4(1)*(a)* of the Act. If Zuwon's annual turnover is less than the threshold value, then the Act does not apply to the

[10] Determination of Thresholds, GN 713, *GG* 28893, 1 June 2006.

agreements in virtue of s 4(1)*(b)* of the Act because the agreements are large agreements.

Conclusion

[33] It follows that the Act does not apply to the agreements, and hence the Act was not an obstacle to the judgment sought by TPH in its application. Given this conclusion, there is no warrant to consider the remedy issue.

[34] The application makes out a proper case for judgment against Zuwon in respect of its indebtedness to TPH. Mr Ndawonde, as surety and co-principal debtor, is jointly and severally liable for this indebtedness. As to the costs, TPH has prevailed on appeal. It was entitled to judgment in the high court, and the liability for the costs thereof is regulated by the agreements and falls upon TPH and Mr Ndawonde. The costs of the appeal stand on a different footing. Zuwon and Mr Ndawonde did not seek to oppose the appeal before this Court.

[35] The appeal arose from the issue raised by the high court as to the application of the Act to the agreements. TPH was required to appeal to reverse the high court's judgment and order, and the costs of the appeal, under the agreements, would fall within the class of costs for which Zuwon and Mr Ndawonde are liable. Nevertheless, counsel for TPH agreed that this issue falls within our discretion. I am inclined to think that it would be unfair to saddle Zuwon and Mr Ndawonde with the costs of the appeal, given that they arise from the entirely justified enquiry of the high court as to the application of the Act, and not from any opposition they advanced.

[36] In the result, the following order is made:

1 The appeal is upheld with no order as to costs.

2 The order granted by the high court, is set aside, and replaced with the following:

‘(i) Judgment is granted against the first and second respondents, jointly and severally, the one paying the other to be absolved, in the amount of R785 292.91.

(ii) The first and second respondents are ordered to pay interest on the amount of R785 292.91 at a rate of 8% per month, from 1 May 2024, until date of final payment, both days inclusive.

(iii) The first and second respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs on an attorney-client scale.’

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D N UNTERHALTER

JUDGE OF APPEAL

Norman AJA:

[37] I have read the first judgment by my colleague, Unterhalter JA. I agree with the exposition of the facts, the finding that the agreements were loans, his findings on the threshold issue and the order proposed. However, I part ways with the first judgment on a very narrow issue, namely, its finding that the agreements 'do not qualify as a credit facility in terms of s 8(1)*(a)* read with s 8(3) of the Act.'

[38] The issue of whether the agreement that served before the high court was a credit facility as defined in s 8(3)*(a)* of the Act is central to the appeal because of the finding of the high court that it falls within those provisions of the Act and is a credit agreement. I deal with the issue by referring to the relevant terms in the first and second discounting agreements (the agreements). Some of the material terms in the first and second agreements are similar. I shall refer to the first agreement which provides in relevant part:

'5.3.4 The Applicant further agreed to advance to the First Respondent and the First Respondent agreed to borrow from the Applicant a legal fee for drawing and completion of the agreement and other transactional agreements relating hereto in the amount of R2 000.00 (Two Thousand Rand) (Excl VAT) that would be withheld as determined in the agreement and added to the total amount advanced by the Applicant to the First Respondent, similarly due and payable before expiry of the Repayment Period.

. . .

5.3.7 The First Respondent unconditionally and irrevocably guaranteed the due and punctual payment by the Debtor of any and all payments to the Applicant and the First Respondent agreed to pay by the "Repayment Period", being at latest the 13th of November 2023, to the Applicant the full outstanding amount due to the Applicant.

. . .

5.3.9 If the amounts advanced by the Applicant with all applicable fees, charges and /or levies as determined in the agreement are not recovered in full prior to the expiration of the Repayment Period, the Invoices shall be regarded to be irrecoverable, and this shall constitute a "No Recovery Event".'

[39] Similar terms to those that appear in clause 5.3.4 are contained in clause 8.4.4 of the second discounting agreement. The terms appearing in clause 5.3.7 appear in clause 8.4.7 of the second agreement with a minor change in relation to the repayment period 'being at latest the 24th of December 2023'. Lastly the second discounting agreement also contains a clause similar to clause 5.3.9 in its clause 8.4.9. The first discounting agreement was concluded on 13 October 2023 and the second one on 28 November 2023. I shall revert to the significance of these dates later.

[40] The second agreement described the factoring fee, flat fee and repayment period as follows:

'Factoring Fee: A minimum flat fee of 13% (Thirteen Percent) of the Advance Amount, being R35 100.00 (Thirty-Five Thousand One Hundred Rand). In the event that the Outstanding Amount is not repaid in full within the Repayment Period, an additional Penalty Fee of 8% (Eight Percent) per month (calculated daily), on the Advance Amount shall incur until repayment of the entire Outstanding Amount to the TPH has been received.'

[41] The flat fee of 13% of the advanced amount of R270 000 is R35 100 in the second discount agreement. In respect of the first discounting agreement the advanced amount is R290 000 and the flat fee of 13% is R37 700.

'"Repayment period" means the maximum and latest period allowed for the repayment of the Advance Amount plus the Factoring Fee and Legal Fee thereon, by CLIENT to TPH and as determined in paragraph 7 of Schedule 1.'

[42] For context, s 8(1)*(a)* and s (3)*(a)* and *(b)* read, in relevant part, as follows:

'**Credit agreements**

(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this 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); or

(d) any combination of the above.

. . .

(3) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4 (6)*(b)*, constitutes a credit facility if, in terms of that agreement –

(a) a credit provider undertakes –

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

(ii) either to –

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

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

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

(i) *any amount deferred* as contemplated in paragraph (a)(ii)*(aa)*.' (My emphasis.)

[43] The Act also defines 'credit', when used as a noun, as meaning –

'(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.'

[44] The first judgment finds that: 'There is no credit facility granted to Zuwon, and no autonomy to decide from time to time how to make use of this facility.' I disagree.

[45] In terms of these agreements the amount to be paid is determined by Zuwon in that it is Zuwon that has the invoices to be 'purchased' by TPH. 'TPH shall advance the Advance Amount or first portion thereof to the CLIENT in relation to the invoice(s) being purchased by the TPH as determined herein.' The obligation to repay the advanced amount or a portion thereof is deferred. For

example, the first discounting agreement was concluded on 13 October 2023 and the repayment period was on 13 November 2023. The second agreement was concluded on 28 November 2023, and the repayment period was on 24 December 2023.

[46] I have had regard to the purpose of the Act, the relevant provisions, the terms of the agreements and the approach to interpretation set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[11] that:

> 'In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

[47] I find that these agreements are similar to store cards. I say so because the credit provider, TPH may pay to Zuwon (for the benefit of Zuwon) a portion of or the full advanced amount. Zuwon is afforded an option of deferment of the obligation to repay. Similar to credit cards, if the advanced amount is not repaid in full within the repayment period there is an additional penalty fee of 8% per month calculated daily; legal fees and factoring fees that shall be added to the outstanding amount.

[48] Simply put, once the advanced amount has been paid by TPH to Zuwon the obligation to repay is deferred. Deferment of an obligation to pay is a unique

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[11] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 26. See also *Long Beach Home Owners Association v Department of Agriculture, Forestry and Fisheries and Another* [2017] ZASCA 122; 2018 (2) SA 42 (SCA) para 15. *Mvoko v South African Broadcasting Corporation SOC Ltd* [2017] ZASCA 139; 2018 (2) SA 291 (SCA) para 32.

feature of credit facilities. Just like credit or store cards a consumer can pay the minimum repayment amount or the full amount owed. In this case Zuwon is granted a repayment period. Once it fails to pay the full outstanding amount during the repayment period, just like with credit cards or store cards, where payment is deferred there are certain charges that are levied, such as factoring fee (minimum flat fee of 13% of the advanced amount and additional penalty fee of 8% per month calculated daily); and legal fees. This fits squarely within the provisions of s 8(3)*(a)*(i) and s 8(3)*(a)*(ii)*(aa)* and s 8*(b)*(i) of the Act.

[49] I find that these agreements are credit facilities and thus constitute credit agreements. My view in this regard is fortified by the decision of this Court in *Asmal v Essa*,[12] where this Court when dealing with a similar issue stated:

'Common to all the forms of a credit agreement, including credit facilities and credit transactions, is the requirement of payment of a "charge", "fee" or "interest" as envisaged in s 8(3)*(a)*(ii) and s 8(4)*(f)*(ii), respectively. The terms "charge", "fee" and "interest" are, however, not defined in the Act. Bearing in mind that the statutory context of s 8 (and indeed all the provisions of the Act) is important in the interpretation of its provisions, it is clear from their ordinary meaning and the context in which the terms are used that they were meant to cover any consideration or payment to be made by a credit borrower to a credit provider for the use of credit under the auspices of the Act. Regard must also be had and effect given to the objects and purposes of the Act, set out in s 3, in interpreting its provisions.'

[50] The first judgment does not engage with the deferment of payment and the charges levied on the deferred amount including the penalty fees payable on the outstanding amount as envisaged in the above-mentioned provisions of the Act. I find that the high court was correct in its finding that the agreements fall within the definition of a credit facility in s 8(3)*(a)*; and are thus credit agreements.

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[12] *Asmal v Essa* [2014] ZASCA 62; 2016 (1) SA 95 (SCA); [2014] 3 All SA 115 (SCA) para 9.

[51] For the reasons advanced above, the loans made by TPH to Zuwon in terms of the agreements do constitute credit facilities and are credit agreements. However, because the agreements are large agreements, as found in the first judgment, the application of the Act is excluded.

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T V NORMAN

ACTING JUDGE OF APPEAL

Appearances:

For appellant:	M Louw (with him JH Lerm)
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