

# Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005

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## OPSOMMING

### Vrywillige teruggawe, herinbesitneming en besitsherstel ingevolge die Nasionale Kredietwet 34 van 2005

Verbruikersbeskerming, synde een van die vernaamse doelstellings van die Nasionale Kredietwet 34 van 2005, is duidelik waarneembaar in vele bepalings van hierdie Wet. Dit is dus ook nie onverwags dat hierdie belangrike doelstelling ook op bestaande siviele skuldinvorderingsprosedures en verwante aangeleenthede 'n effek gehad het nie. In hierdie artikel word gepoog om die impak van die nuwe statutêr-voorgeskrewe prosedures ten aansien van vrywillige teruggawe, herinbesitneming en besitsherstel op bestaande sivileregtelike invorderingsprosedures in die besonder vas te stel. Daar word aangevoer dat die nuwe bepalings nie in die algemeen bestaande sivileregtelike beginsels vervang nie, maar dit eerder uitbrei deur aan verbruikers bykomende regte te verleen. In beperkte gevalle vind daar egter wel afwykings van die algemene prosedures plaas waarvan die ingrypendste moontlik die impak op die omvang van die eis vir skadevergoeding is. Voormelde aspekte, die minimumbeterings wat in pleitstukke gemaak moet word asook die moontlikheid van interim beslaglegging van eiendom met die doel om dit veilig te bewaar en te beskerm hangende kansellasië van 'n kredietooreenkoms word derhalwe ondersoek.

## 1 INTRODUCTION

The National Credit Act<sup>1</sup> lists consumer protection as one of its three major purposes. The NCA provides comprehensive consumer protection,<sup>2</sup> which, amongst other things, seeks to prevent and remedy over-indebtedness as well as reckless lending/credit.<sup>3</sup> These aspects cover a wide spectrum of issues throughout the NCA and debt enforcement is no exception.<sup>4</sup>

1 34 of 2005 (hereafter "the NCA") s 3.

2 Compared to the now repealed Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968. These Acts were repealed by s 172 of the NCA.

3 Ss 3(c) and 3(g); Scholtz, Otto, Van Zyl, Van Heerden and Campbell (hereafter Scholtz *et al*) *Guide to the National Credit Act* (2009) 12–1; Van Heerden and Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655; Renke, Roestoff and Haupt (hereafter Renke *et al*) "The National Credit Act: New parameters for the granting of credit in South Africa" 2007 *Obiter* 229 230; Van Loggerenberg, Dicker and Malan (hereafter Van Loggerenberg *et al*) "Aspects of debt enforcement under the National Credit Act" 2008 (Jan/Feb) *De Rebus* 40.

4 Scholtz *et al* (2009) 12–1; Van Heerden and Otto (fn 3) 655.

Sections 3(h) and (i) of the NCA, for instance, state that the purpose of the NCA and the manner in which it seeks to protect consumers, is *inter alia* the provision of a consistent and accessible system of consensual resolution of disputes arising from credit agreements and a consistent and harmonised system of debt restructuring, enforcement and judgment, that give priority to the eventual satisfaction of all responsible consumer obligations under credit agreements.

Far-reaching debt enforcement procedures could therefore be expected. These procedures attempt to provide enforcement mechanisms that are aligned with the purposes of the NCA.<sup>5</sup> The NCA further provides elaborate procedures to be followed by a credit provider whenever a consumer elects to utilise the statutory right of termination and surrendering of goods in terms of section 127.<sup>6</sup> Section 131 refers back to the same detailed prescribed procedure where a credit provider has repossessed property pursuant to an attachment order.

The new procedures are said to be far more complicated than those of the NCA's predecessors and they are much more stringent where a credit provider seeks to enforce obligations under a credit agreement to which the NCA applies.<sup>7</sup> This article therefore investigates the prescribed statutory procedures relating to a voluntary surrender by consumers on the one hand, and the repossession of goods by credit providers on the other. The impact of the latter procedure on aspects of ordinary civil execution procedures is analysed and the possibility of attachment of property for the safekeeping or protection of goods under the NCA is scrutinised. The right of a consumer to reinstate a credit agreement and to resume possession of property voluntarily surrendered or repossessed by the credit provider under certain circumstances is also considered.

## 2 TERMINATION BY WAY OF VOLUNTARY SURRENDER

### 2.1 Process in terms of section 127

As stated earlier, a consumer may voluntarily surrender goods forming the subject of an instalment agreement, a secured loan or lease and the NCA prescribes a specific procedure that a credit provider must follow subsequent to such surrender.<sup>8</sup> This procedure is provided for in section 127.<sup>9</sup>

The consumer sets the process in motion by delivering a written notice to the credit provider to terminate the agreement.<sup>10</sup> If the goods that are subject to the instalment agreement, secured loan or lease are in the credit provider's possession, the consumer merely requests the credit provider to sell the goods.<sup>11</sup> In the

5 Scholtz *et al* (2009) 12–1.

6 See Otto *The National Credit Act explained* (2006) 59; Scholtz *et al* (2009) 6–12.

7 Otto (2006) 85; Scholtz *et al* (2009) 2–1 to 2–2; Van Heerden and Otto (fn 3) 655. A discussion of the application of the NCA falls beyond the scope of this article – see Stoop “Kritiese evaluasie van die toepassingsveld van die ‘National Credit Act’” 2008 *De Jure* 352 in this regard.

8 Only instalment agreements, secured loans and leases are referred to in s 127 even though the NCA applies to a wider scope of agreements as set out in s 8.

9 See Otto (2006) 59–60; Scholtz *et al* (2009) 6–12 and 9–25 to 9–27; Boraine and Renke “Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005” (Part 2) 2008 *De Jure* 1 6 fn 160; Van Heerden and Otto (fn 3) 656–658; Van Loggerenberg *et al* (fn 3) 41.

10 S 127(1)(a).

11 S 127(1)(b)(i).

event that the goods are not in the possession of the credit provider, the consumer must return them to the credit provider within five business days after the date of notice, unless otherwise agreed between the parties.<sup>12</sup>

Within ten business days after the latter receipt of the notice<sup>13</sup> or receiving the goods from the consumer,<sup>14</sup> the credit provider must furnish the consumer with a written notice indicating the estimated value of the goods.<sup>15</sup> A non-defaulting consumer then has ten business days<sup>16</sup> to withdraw the notice of termination unconditionally and resume possession of the goods.<sup>17</sup> A consumer in default of the credit agreement is not entitled to withdraw the termination notice.<sup>18</sup>

The credit provider must return the goods to a non-defaulting consumer who has elected to exercise the right of withdrawal of the earlier termination notice.<sup>19</sup> In the case of a consumer in default or where a non-defaulting consumer has not responded to the valuation notice, the credit provider must sell the goods as soon as possible for the best price reasonably obtainable.<sup>20</sup>

After the sale of the goods, the credit provider must credit the consumer's account with the proceeds of the sale less reasonable expenses in connection with the sale, or debit the consumer's account with a charge.<sup>21</sup> The credit provider must further furnish a notice to the consumer setting out the settlement value prior to the sale,<sup>22</sup> the gross amount realised,<sup>23</sup> net proceeds of the sale,<sup>24</sup> as well as the amount credited or debited to the consumer's account.<sup>25</sup> If the amount credited to the consumer's account is less than the settlement value or an amount is debited to the account, the credit provider may further demand payment of the outstanding balance in the notice.<sup>26</sup>

In the event that a surplus remains after crediting the consumer's account and another credit provider has a registered agreement in respect of the same goods, the excess amount must be remitted to the National Consumer Tribunal which may order the distribution of this amount in a just and reasonable manner.<sup>27</sup> If no other credit provider has a registered agreement relating to the same goods, the balance must be remitted to the consumer when delivering the notice in terms of section 127(5)(b) and the agreement is terminated upon such remittance.<sup>28</sup>

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12 S 127(1)(b)(ii). Goods must be returned to the credit provider's place of business during ordinary business hours.

13 S 127(1)(b)(i).

14 S 127 (1)(b)(ii).

15 S 127(2).

16 After receiving the notice contemplated in s 127(2).

17 S 127(3).

18 S 127(3).

19 S 127(4)(a).

20 S 127(4)(b).

21 S 127(5)(a). The consumer's account will be debited where the proceeds of the sale could not entirely extinguish the costs of the sale; see Otto (2006) 60 fn 87; Scholtz *et al* (2009) 9–27.

22 S 127(5)(b)(i).

23 S 127(5)(b)(ii).

24 S 127(5)(b)(iii).

25 S 127(5)(b)(iv).

26 S 127(5) read with s 127(7).

27 S 127(6)(a).

28 S 127(6)(b).

If a shortfall remains after an amount was credited to the consumer's account or when an amount was debited to the consumer's account, the credit provider may demand payment of the outstanding amount when issuing the section 127(5)(b) notice.<sup>29</sup> This demand is in fact the section 127(7) notice that will further be referred to as such. In the event that the consumer fails to settle the demanded outstanding amount within ten business days from receiving the notice, the credit provider may commence with enforcement proceedings in terms of the Magistrates' Courts Act.<sup>30</sup> If the demanded amount is paid at any time before judgment is obtained, the agreement is terminated upon payment.<sup>31</sup>

Interest is payable on the outstanding amount at the rate applicable to the credit agreement, as from the time of the demand until the outstanding balance has been fully settled.<sup>32</sup> A credit provider who fails to follow the procedure as set out in section 127 is guilty of an offence.<sup>33</sup>

## 2.2 Perspectives on the section 127 procedure

Section 127 bestows a statutory right on a consumer to unilaterally terminate an instalment agreement, a secured loan or a lease by voluntarily surrendering goods forming the subject of such agreement to the credit provider concerned. The voluntary surrender of property is initiated by the consumer giving notice to terminate the agreement and surrendering the goods to the credit provider whereafter the credit provider is obliged to follow meticulously the prescribed procedure contained in section 127.

A critical issue that must be addressed is what exactly the legislature had in mind with the phrase "goods that are the subject of that agreement" in section 127(1)(b)(ii). The meaning of the word "goods" as well as the meaning thereof within the quoted phrase must be considered. As "goods" are neither defined in the NCA nor the regulations it is submitted that it should bear its ordinary meaning, being a referral to movable property.<sup>34</sup> This inference is strengthened by the usage of the word within its context as the section only applies to instalment agreements, secured loans and leases all of which concern only movable property. Section 1 defines the respective agreements as follows:

"**instalment agreement**" means a sale of movable property in terms of which –

- (a) all or part of the price is deferred and is to be paid by periodic payments;
- (b) possession and use of the property is transferred to the consumer;
- (c) ownership of the property either –
  - (i) passes to the consumer only when the agreement is fully complied with; or
  - (ii) passes to the consumer immediately subject to a right of the credit provider to re-possess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and

<sup>29</sup> S 127(7).

<sup>30</sup> 32 of 1944; s 127(8)(a).

<sup>31</sup> S 127(8)(b).

<sup>32</sup> S 127(9). It seems that by implication a credit provider's right to interest is suspended prior to such demand.

<sup>33</sup> S 127(10); see Otto (2006) 100; Scholtz *et al* (2009) 16–3.

<sup>34</sup> The most appropriate general definition of goods in a legal dictionary is to be found in Milne, Cooper and Burne *Bell's South African legal dictionary* (1951) 332, viz that "*Goods* shall mean goods, luggage or other movable property of any description".

(d) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred;

‘**secured loan**’ means an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person –

- (a) advances money or grants credit to another, and
- (b) retains, or receives a pledge or cession of the title to any movable property or other thing of value as security for all amounts due under that agreement;<sup>35</sup>

‘**lease**’ means an agreement in terms of which –

- (a) temporary possession of any movable property is delivered to or at the direction of the consumer, or the right to use any such property is granted to or at the direction of the consumer;
- (b) payment for the possession or use of that property is –
  - made on an agreed or determined periodic basis during the life of the agreement; or
  - deferred in whole or in part for any period during the life of the agreement;
- (c) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred; and
- (d) at the end of the term of the agreement, ownership of that property either –
  - (i) passes to the consumer absolutely; or
  - (ii) passes to the consumer upon satisfaction of specific conditions set out in the agreement.”

It is submitted that the phrase “goods that are the subject of that agreement” encompasses two instances, namely (a) where movable goods are financed under a credit agreement<sup>36</sup> irrespective of whether ownership passed or had been retained,<sup>37</sup> and (b) where movable goods are used as security for payment of amounts due under a credit agreement.<sup>38</sup>

It is to be noted that section 127(3) provides a specific statutory right to the consumer who provided a notice of termination to withdraw such notice and resume possession of any goods surrendered to the credit provider. This section provides as follows:

“Within 10 business days after receiving a notice under subsection (2), the consumer may unconditionally withdraw the notice to terminate the agreement in terms of subsection (1)(a), and resume possession of any goods that are in the credit provider’s possession, unless the consumer is in default under the credit agreement.”

It is submitted that the requirements to exercise this right by the consumer are that the consumer must have received a valuation notice and that the consumer must not be in default under the credit agreement. This right must be exercised within ten business days after the consumer has received the valuation notice.

35 This definition creates uncertainties with regard to the object of the security in the sense that it initially refers to movable property but then immediately states that it also applies to a pledge or session of another thing of value. In its ordinary context “thing” may include all types of property, also immovable property. Otto also refers to this apparent inaccurate construction by indicating that mortgage agreements are dealt with separately in the NCA – see Scholtz *et al* (2009) 8–9. It is submitted that it was not the intention of the legislature to include mortgage agreements in respect of immovable property in this context.

36 In the case of an instalment agreement or a lease.

37 Ownership can either pass or be retained under an instalment agreement.

38 In the case of a secured loan.

However, when section 127(3) is compared with section 129(4) and in particular section 129(4)(a)(ii) that also refers to the surrender of property in terms of section 127, it seems that a consumer will only be barred from reinstating the agreement where the goods were already sold. On face value section 127(3) and 129(4)(a)(ii) may seem contradictory, but such contradiction may possibly be explained by accepting that section 129(4)(a)(ii) may for instance apply in the event that a credit provider fails to adhere to the requirement of providing a valuation notice to the consumer following the latter's surrender of the property. In so far as a credit provider duly delivers a valuation notice and the consumer qualifies to withdraw the termination and resume possession of the goods surrendered, the consumer effectively has ten business days to exercise these consumer rights. However, in the event that section 129(4)(a)(ii) is applicable, the consumer will only be prohibited from reinstating the agreement once the goods have been sold.

When compared to the position under the Credit Agreements Act,<sup>39</sup> the point of view exists that section 127 of the NCA differs drastically from the previous position in this regard. In terms of section 12 of the Credit Agreements Act, the consumer could have been reinstated in the contract after goods had been returned to the credit provider if the consumer brought payments up to date within 30 days and the consumer did not terminate the agreement.<sup>40</sup> The situation under the Credit Agreements Act therefore provided for reinstatement even if the consumer was in default at some stage.<sup>41</sup> Otto submits that the position under the Credit Agreements Act differs from the position under section 127(3) of the NCA in that a consumer may consider the withdrawal of the consumer's notice of termination with the proviso that the consumer is not in default.<sup>42</sup>

However, it is arguable that section 127(3) can be construed to resemble section 12 of the Credit Agreements Act to some extent. The words "unless the consumer *is* in default"<sup>43</sup> in section 127(3) do not mean that such consumer was *never* in default. Section 127(3) could well be interpreted that if such consumer was in default, the default was remedied in that the consumer brought payments up to date and has thereby cancelled the default. It is, however, clear that a consumer may not withdraw the consumer's notice of termination whilst the consumer *is* in default. It is further submitted that the agreement is not terminated upon the provision of the consumer's written notice of termination as sections 127(6)(b) and 127(8)(b) clearly provide that the agreement is only terminated upon remittance of a surplus amount to the consumer in the case where section 127(6)(b) is applicable, or when the consumer remits the shortfall to the credit provider in circumstances to which section 127(8)(b) applies.

In terms of the former Credit Agreements Act, it frequently happened that a consumer surrendered property to a credit provider, who then sold the goods for much lower than their market value. The consumer had to settle the difference between the price realised and the outstanding balance on the account. The NCA

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39 75 of 1980; Otto (2006) 60; Scholtz *et al* (2009) 9–26; see also Sawyer "Interim attachment orders unwisely made easier by the NCA" 2008 (July) *Without Prejudice* 44.

40 See in general Otto "Right of credit receiver to reinstatement after return of goods to credit grantor" 1981 *SALJ* 516.

41 Otto (2006) 60.

42 Scholtz *et al* (2009) 9–26; Van Heerden and Otto (fn 3) 657.

43 My emphasis.

has improved this situation by providing that if a consumer did not withdraw the notice of termination or when a consumer is still in default after the ten-day period has lapsed, a credit provider must sell surrendered property as soon as practicable for the best price reasonably obtainable. Whether a credit provider has complied with the direction that goods must be sold “as soon as practicable for the best price reasonably obtainable”, will depend on *inter alia* the type of goods, market conditions, the condition of the goods as well as customs and practice in the specific industry.<sup>44</sup> Even though consumers must still settle a shortfall, credit providers may clearly not sell the goods for just any price.<sup>45</sup>

If after the property was sold an amount is credited to the consumer’s account and a shortfall remains, or where the consumer’s account is debited, the credit provider may demand payment of the outstanding amount in terms of section 127(7). It is clear that the section 127(7) notice is a prerequisite for enforcement of the remaining obligations under the agreement. In light of *inter alia* the aforesaid, Boraine and Renke submit that a section 129(1)(a) notice need not be sent where the credit provider approaches a court for an order enforcing remaining obligations following a voluntary surrender in terms of section 127.<sup>46</sup> Support for the argument can *inter alia* be found in section 129(1)(b), that provides that the provision of the section 129(1)(a) notice is subject to section 130(2). Section 130(2) deals with the enforcement of remaining obligations pursuant to either an attachment order or surrender of property in terms of section 127. It could also be argued that a section 129(1)(a) notice would be superfluous as section 127(7) read together with section 127(8)(a) prescribes a notice demanding fulfilment of remaining obligations prior to enforcement. In support of Boraine and Renke’s point of view, it is submitted that if the legislature intended the section 129(1)(a) information to be included in the section 127(7) notice, it would have implicated same. However, it is submitted that until a clear practice has emerged or case law has clarified the position, litigants should rather combine the two notices under these circumstances by including the prescribed content of the section 129(1)(a) notice, and especially the consumer’s rights contained therein, in the section 127(7) notice.

The last issue under a voluntary surrender of goods in terms of section 127 that deserves attention is the fact that section 127(8) specifically provides that a credit provider may only commence enforcement proceedings in terms of the Magistrates’ Courts Act if the consumer fails to pay a shortfall within ten business days from *receiving* the section 127(7) notice. The evidential problems that will inevitably arise are of concern to credit providers attempting to enforce remaining obligations under credit agreements.<sup>47</sup>

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44 Van Heerden and Otto (fn 3) 657 fn 28; see also para 2.3 for a discussion of s 128 which provides a remedy to a consumer who is not satisfied that goods were sold as soon as practicable for the best reasonably obtainable price.

45 Campbell and Logan *The credit guide – Manage your money with the National Credit Act* (2008) 112.

46 Boraine and Renke (fn 9) 6 fn 160; cf Scholtz *et al* (2009) 12–25 to 12–26 for a contrary view.

47 See Van Heerden and Otto (fn 3) 655 fn 34.

### 2.3 Disputed sale of goods

In terms of section 128,<sup>48</sup> the National Consumer Tribunal may review a disputed sale of goods in terms of section 127 if a consumer could not resolve the dispute directly or through alternative dispute resolution with the credit provider.<sup>49</sup> The Tribunal may order the credit provider to pay the consumer an amount exceeding the net proceeds of the sale if the Tribunal is not satisfied that the goods have been sold as soon as practical for the best reasonably obtainable price.<sup>50</sup> Such a decision by the Tribunal is subject to appeal or review by the High Court to the extent permitted by section 148.<sup>51</sup>

## 3 REPOSSESSION PURSUANT TO AN ATTACHMENT ORDER

### 3.1 Process in terms of section 131

Section 131 of the NCA forms part of Chapter 6 Part C dealing with debt enforcement by repossession or judgement and is titled "Repossession of goods".<sup>52</sup> This section provides as follows:

"If a court makes an attachment order with respect to property that is the subject of a credit agreement, section 127(2) to (9) and section 128, read with the changes required by the context, apply with respect to any goods attached in terms of that order."<sup>53</sup>

### 3.2 Perspectives on the section 131 procedure

In the event that a credit provider seeks cancellation of a credit agreement, as opposed to specific performance, the particulars of claim will typically include prayers for cancellation of the agreement and restitution of property forming the subject of such agreement.<sup>54</sup> Section 131 provides prescriptions regarding aspects of the execution and realisation process after property had been attached pursuant to an attachment order by incorporating the provisions of sections 127(2) to (9) and 128 of the NCA.<sup>55</sup>

As in the case of the discussion on voluntary surrender, the wording in section 131 should be analysed to ascertain exactly what types of property the legislature had in mind when drafting section 131. It is of paramount importance to determine the intention of the legislature as the credit provider should follow the section 127 procedure after attachment of property as referred to by section 131.

48 See Otto (2006) 60–61; Scholtz *et al* (2009) 9–27; Borraine and Renke (fn 9) 6 fn 160; Van Heerden and Otto (fn 3) 672; Van Loggerenberg *et al* (fn 3) 42.

49 S 128(1); alternative dispute resolution in terms of the NCA is provided for in Ch 7 part A.

50 S 128(2); see Otto (2006) 33.

51 S 128(3); s 148 falls under Ch 7 part D and deals with appeals and reviews.

52 Erasmus and Van Loggerenberg *Jones & Buckle The civil practice of the Magistrates' Courts in South Africa* (1996) 240C; Scholtz *et al* (2009) 12–28; Borraine and Renke (fn 9) 8; Van Heerden and Otto (fn 3) 671–673; Van Loggerenberg *et al* (fn 3) 42.

53 The NCA's detailed prescriptions in this regard inevitably have an impact on general execution procedures.

54 Borraine and Renke (fn 9) 8. In *ABSA Bank v De Villiers* 2009 5 SA 40 (C) 52H it was held that s 131 of the NCA does not abolish the common-law requirement of cancellation of an agreement prior to applying for an attachment order. See also Otto "Attachment of goods sold in terms of instalment agreement without cancellation of contract – sanctioned by National Credit Act?" 2009 *THRHR* 473 for a discussion of the decision.

55 *Ibid.*



The relevant part of the phrase quoted and analysed under section 127, namely, “*goods* that are the subject of that agreement”<sup>56</sup> should be compared and contrasted with the phrase, “*property* that is the subject of a credit agreement,”<sup>57</sup> in section 131. Even though the heading of section 131 refers to “*goods*” and the word is again used in the particular section, the legislature chose to deviate from the wording used in section 127 by referring specifically to “*property*” under the quoted phrase. This despite the fact that the rest of the quoted phrases under sections 127 and 131 are almost exactly the same and can be attributed the same meaning. Therefore, the question is if an inference can be drawn that the two words should not merely be awarded the same meaning and that it can also therefore not be assumed that the legislature only had movable property in mind under section 131? Unfortunately, as was the case with “*goods*”, “*property*” is not defined in the NCA or the regulations. It was established that the word “*goods*” refers to movable property specifically, by *inter alia* referring to the definitions of the agreements listed in section 127(1). Section 131 refers back to the procedure contained in section 127(2) to (9), thereby specifically excluding section 127(1) and therefore also the limitation placed on agreements to which that procedure applies. Section 131 does not refer to specific types of credit agreements, which could have shed some light on the meaning of “*property*”. It is a further question if the legislature really intended to exclude immovable property that is the object of a credit agreement in terms of the NCA and that could therefore also be subject to an attachment? If this was the case, the legislature would have denied such a consumer the protective measures provided for in section 131 of the NCA and it is not clear what the reason would have been for such a denial. In light of the above, it is thus submitted that there is good reason that “*property*” should be read within this particular context, to include both movable and immovable property for the purposes of section 131.<sup>58</sup> The reference in section 131 to “*a credit agreement*” strengthens this submission as section 8, dealing with the classification of credit agreements, also uses the phrase “*a credit agreement*” whereafter the classes of agreements regulated by the NCA are dealt with. Mortgage agreements are specifically listed in section 8 and are defined in section 1 as meaning “*a credit agreement that is secured by a pledge of immovable property*”. It would also be incomprehensible that the NCA should regulate mortgage agreements in all instances with the proviso that the protective measures in favour of the consumer as prescribed by sections 127(2) to 127(9) do not apply to such agreements. It is finally submitted that if the legislature intended immovable property to be excluded from the ambit of section 131 it should have made it clear by specifically excluding such property. The later use of the word “*goods*” in the section may raise the question if the term “*property*” is not limited by the use of the former and that the section therefore only applies to movable property.

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56 My emphasis.

57 My emphasis.

58 The current notion in the law of property is to attribute a wider meaning to the word “*property*” thereby referring to “*everything which can form part of a person’s estate, including corporeal things and incorporeal interests and rights*” – Van der Walt and Pienaar *Introduction to the law of property* (2006) 8. See also Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The law of property* (2006) 2 where property is defined as “*referring to a wide variety of assets that make up a person’s estate or belongings and which serve as objects of the rights that such a person exercises in respect thereof*”.

It is submitted that this is probably the result of inaccurate drafting and is not in line with the purposes of consumer protection.

A further issue that should be investigated is what is meant with the word “re-possession” in particular. This term is also not defined in the NCA or the regulations. Usually, the expression is used to refer to an act by a credit provider to cancel an agreement and claim back possession of property where such credit provider has retained ownership of the property. There may also be instances of statutory rights of repossession like in the case of an instalment agreement where ownership has passed to the consumer, but where the credit provider enjoys such a statutory right.<sup>59</sup> Repossession is therefore not readily used when referring to the attachment of property forming the basis of real security. However, as already indicated it seems that “repossession” may be attributed a wider meaning, to include instances where ownership has passed to the buyer. This could be interpreted as either a specific statutory revival of ownership under instalment agreements, or the inference can be drawn that the legislature referred to repossession in a wider context throughout the NCA, thereby including both repossession of property by the true owner and attachment of property forming the basis of contractually negotiated securities. It is submitted that the latter, however inelegantly stated, is what was intended with repossession as used by the legislature, in that it would be unthinkable that the NCA would provide an elaborate procedure for instances where a true owner wishes to cancel an agreement and reclaim property, but not where a credit provider seeks attachment of property forming the basis of a security. In light of the above discussion it is submitted that section 131 refers to the attachment of both movable and immovable property irrespective of whether the credit provider retained ownership thereof or whether the goods formed part of contractually agreed securities.<sup>60</sup>

A proper attachment order for the purposes of execution under section 131 presupposes that the agreement was cancelled by the credit provider.<sup>61</sup> However, it should be noted that section 129(3)(a) provides that a consumer who is in default may reinstate a credit agreement before a credit provider has cancelled the agreement by making certain payments as provided for in the section. “Reinstate” in this context can be construed to mean that the consumer thus has the right to reinstate an already cancelled agreement. Such an interpretation would, however, not make sense since the first part of the section clearly states that the consumer may only exercise this right before the credit provider has cancelled the agreement. It is thus submitted that the section had the situation in mind where the consumer brings his or her payments up to date in general, or under circumstances where the credit provider already acquired the right to cancel the agreement, but has not yet exercised such right. Clearly the consumer, by making the prescribed payments, will prevent the credit provider from exercising the right to cancel the agreement and thereafter to continue with such an agreement. But the latter proposed construction is clouded when section 129(3)(a) is read

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59 See the definition of instalment agreement as defined in s 1 and discussed in para 2 2.

60 See in general Brown *Dictionary on historical principles* (1993) 2552 in the following context: “1 Regain or recover possession of (a place, property, a right, etc.); reoccupy. Also (*spec.*), regain or retake possession of (property or goods being paid for by instalments) when a purchaser defaults on the payments. L15. 2 Restore (a person) *to* or reinstate *in* possession of something. *Sc.* L16. 3 Put (a person) in possession of something again. L16.”

61 See also the discussion in para 3 4.

with section 129(3)(b) that allows the consumer to resume possession of any property that had been repossessed by the credit provider pursuant to an “attachment order” and after complying with section 129(3)(a). In the latter instance it seems impossible that repossessed property pursuant to an attachment order could have been attached for the purposes of execution if the contract has not been cancelled.<sup>62</sup>

It was argued above that mortgage agreements are included under section 131 as property should bear its ordinary meaning, thereby including both movable and immovable property. Based on this argument, the procedure set out in terms of section 127(2) to (9) should therefore also apply pursuant to the attachment of immovable property. Otto argues rather convincingly that a credit provider cannot claim the shortfall under a mortgage agreement with reference to section 130(2),<sup>63</sup> since this deals with the enforcement of remaining obligations and lists the same agreements as those mentioned in section 127(1), namely, instalment agreements, secured loans and leases. It is, however, submitted that the exclusion of mortgage bonds in section 130(2) could have been a mere oversight by the legislature. Some support for this argument may be found in the fact that section 131 did not exclude subsections 127(7),<sup>64</sup> 127(8)<sup>65</sup> and 127(9)<sup>66</sup> when referring to the procedures contained in section 127. It is nevertheless submitted that the legislature should clarify its intention as far as section 130(2) is concerned by expressly including or excluding mortgage agreements.

Much has been said above about the exclusion of section 127(1) from the section 131 procedure. Section 127(10) is, however, also excluded thereby not rendering non-compliance with the process an offence as opposed to non-compliance in the case of a voluntary surrender.<sup>67</sup>

The last issue that should be addressed in the realm of section 131 read together with the section 127 procedure, is whether this procedure substitutes the general civil execution procedures. Section 131 commences with the words: “If a court makes an attachment order”, and ends with “goods attached in terms of that order”. In light of the quoted phrases it is submitted that the general execution rules will fully apply up to the actual attachment of property forming the subject of a credit agreement. Thereafter, it is submitted, the section 127 procedure does not substitute the general civil execution procedure, but supplements it. Section 127 does not contain elaborate execution procedures but rather points to consumer protection, by providing for additional consumer rights. These rights include keeping consumers informed during each step of the process and further that property should be sold as soon as practicable for the best price reasonably obtainable. There are, however, slight deviations from the general execution

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62 See para 3.5 regarding interim attachment orders and interdicts where s 129(3) is also considered.

63 Otto (2006) 96.

64 This subsection deals with the notice that a credit provider may send to a consumer when a deficit remains after the sale of the property.

65 This subsection refers to enforcement proceedings that may commence within ten business days subsequent to the demand in terms of s 127(7). It further provides that the agreement will be terminated upon payment of the demanded shortfall.

66 This subsection provides that the interest payable on the demanded shortfall is at the rate applicable to the credit agreement.

67 Van Heerden and Otto (fn 3) 672 fn 107.

process. The first deviation is the direction that a surplus should be remitted to the Tribunal if another credit provider has a registered credit agreement in respect of the same property, and the second that the credit provider will only be able to claim damages after the section 127 process was completed *in toto*.<sup>68</sup> The last deviation is derived from section 127(6) that specifically provides that the surplus amount should be remitted to the consumer or the Tribunal depending on the specific circumstances at hand. Up to that stage the credit provider is only allowed the amount due in terms of the agreement together with default charges and reasonable costs incurred in relation to the sale of the property.<sup>69</sup>

### 3.3 Dispute over costs of attachment

Section 132 provides for compensation for a credit provider in relation to disputed costs of attachment.<sup>70</sup> Section 132(1) provides that if a dispute arises relating to the costs of attachment of property in terms of sections 129 to 131, a credit provider must firstly attempt to resolve same directly with the consumer or through alternative dispute resolution.<sup>71</sup> If the dispute could not be resolved, a credit provider may turn to the court to claim compensation from the consumer in excess of the costs of repossession that is permitted under section 131.<sup>72</sup>

Section 132(2) provides that the court may<sup>73</sup> grant an order as contemplated in section 132(1) if the court is satisfied that

- “(a) the consumer knowingly –
  - (i) provided false or misleading information to the credit provider in terms of section 97;<sup>74</sup> or
  - (ii) engaged in a pattern of behaviour that was reasonably likely to frustrate or impede the exercise of the credit provider’s right to repossess property under section 129 to 131; and
- (b) as a result, the credit provider experienced unreasonable delay or incurred exceptional costs in the exercise of those rights.”

Otto submits that a credit provider who experiences delays in the attachment of goods may or may not incur extra costs.<sup>75</sup> He argues that a credit provider will find it difficult to recover a loss, such as deterioration or a decrease in value, due to a delay and that the court may “apparently” make a cost order purely on delay caused by the consumer.<sup>76</sup> On the other hand, he argues, section 132(1) specifically refers to the cost of attachment and submits that the legislature should have drafted the section more carefully. Lastly, he mentions the possibility that section 132(2)(b) can be construed to provide for compensation in two instances, namely, when “exceptional costs” have been incurred or on grounds of

68 Van Loggerenberg *et al* (fn 3) 42.

69 *Ibid.*

70 Erasmus and Van Loggerenberg (1996) 240C; Otto (2006) 63–64; Van Loggerenberg *et al* (fn 3) 42; Boraine and Renke (fn 9) 13.

71 S 132(1); alternative dispute resolution is provided for in Ch 7 part A.

72 S 132(1).

73 The court has a discretion to award compensation to a credit provider.

74 S 97 forms part of Ch 5 part B, namely, disclosure, form and effect of credit agreements and specifically deal with the consumer’s obligation to disclose the location of goods.

75 Otto (2006) 64.

76 *Ibid.*

“unreasonable delay”.<sup>77</sup> In support of Otto, it is submitted that the legislature should intervene so as to clarify its intention in terms of section 132.

Erasmus and Van Loggerenberg submit that a credit provider claiming such compensation must prove the aspects contained in section 132 by means of credible testimony before an order for compensation will be made.<sup>78</sup> Van Heerden states that a credit provider will have to satisfy the court as regards both sections 130(2)(a) and (b).<sup>79</sup>

### **3 4 Further perspectives on reinstatement in terms of section 129(3) and section 129(4)**

Section 129(3)(a) deserves some further attention as it allows for the consumer who is in default to be reinstated by paying to the credit provider all amounts due, subject to section 129(4). When exercising this right, the consumer will basically prevent the credit provider from continuing with a debt enforcement procedure as envisaged in section 129. It is to be noted that section 129(4), however, prohibits reinstatement of the credit agreement after the sale of any property pursuant to an attachment order or surrender of the property in terms of section 127, the execution of any other court order or the termination thereof by the credit provider in accordance with section 123.

It is clear from these provisions that the legislature intended to place the consumer in the optimum position, in that the latter will only be barred from bringing payments up to date and thereby remedying the default once the goods have been sold in all the instances as indicated in section 129(4) that follow *inter alia* an attachment order or the surrender of property as referred to in section 129(4).<sup>80</sup> On this basis it can therefore be said that the sale of the property marks the final point of no return for the consumer. Thereafter the consumer may not reinstate the credit agreement and resume possession of surrendered goods.

As discussed in paragraphs 2 2 and 3 2 and as will be seen from the discussion in paragraph 3 5, section 129(3) read together with section 129(4) is not without interpretational difficulties.

### **3 5 Interim attachment of goods and interdicts**

The NCA does not expressly provide for interim attachment orders intended for the safekeeping or protection from deterioration of goods as opposed to an order for permanent attachment by way of legal recourse.<sup>81</sup> Such orders are, however, not prohibited either. A clear need exists for such orders especially where a credit provider intends to ask for cancellation and permanent return of goods forming the subject of a credit agreement and where the goods are at risk.<sup>82</sup> In order to determine whether such a possibility exists under the NCA, previous legislation and decisions in terms thereof should at least be considered.<sup>83</sup>

<sup>77</sup> *Ibid*; see also Scholtz *et al* (2009) 12–38.

<sup>78</sup> Erasmus and Van Loggerenberg (1996) 240C; Van Loggerenberg *et al* (fn 3) 42.

<sup>79</sup> Scholtz *et al* (2009) 12–38.

<sup>80</sup> Although not altogether clear, it is argued below at para 3 5 that “attachment order” in this context may refer to an interim attachment order.

<sup>81</sup> Otto (2006) 95; Boraine and Renke (fn 9) 12; Erasmus and Van Loggerenberg (1996) 87.

<sup>82</sup> Boraine and Renke (fn 9) 12.

<sup>83</sup> See Scholtz *et al* (2009) 12–28.

Section 17(2) of the Credit Agreements Act made it possible for a court, *after institution of proceedings* for the return of goods,<sup>84</sup> to make an order to have goods valued or protected from damage or depreciation on application by the credit grantor.<sup>85</sup> These orders included the restriction or prohibition of the use of the goods or custody thereof. The subsection only applied to instalment sale transactions regulated by the Credit Agreements Act.<sup>86</sup> Section 18(1) of the Credit Agreements Act contained an additional safety measure and provided that a credit provider, issuing summons on any credit agreement, could have included a notice in the summons prohibiting the use of the goods or the removal thereof.<sup>87</sup> This notice had the effect of an automatic interdict.<sup>88</sup> However, section 11 of the Credit Agreements Act provided that a credit provider could only claim the return of goods after a period of 30 days had elapsed since the consumer was notified of the default and failed to rectify the breach within the stated period.<sup>89</sup> The question that arose under the Credit Agreements Act was whether an interim attachment order could be granted for the purposes of protection from damage or depreciation, pending the expiry of the above notice period. Various diverging opinions and judgments emerged, the roots of which in some instances stemmed from the former Hire- Purchase Act.<sup>90</sup> It is thus necessary to refer briefly to the development of interim attachment orders under both the Hire-Purchase Act and the Credit Agreements Act.<sup>91</sup>

In *Fil Investments v Levinson*<sup>92</sup> the Witwatersrand Local Division held that an interim attachment order was not possible when considering the wording of section 12(b) of the Hire-Purchase Act. Section 12(b) provided that

“no seller shall, by reason of any failure on the part of the buyer to carry out any obligation under any agreement, be entitled to enforce any provisions in the agreement for the payment of any amount as damages or for any *forfeiture* or penalty or for the acceleration of the payment of any instalment, unless he has made written demand to the buyer to carry out the obligation in question within a period stated in such demand, not being less than ten days, and the buyer has failed to comply with such demand”.<sup>93</sup>

The Hire-Purchase Act provided for a ten-day notice period that must have been adhered to before a credit provider could

84 The credit provider must already have issued summons before an application under s 17(2) can be brought.

85 See Grové and Otto *Basic principles of consumer credit law* (2002) 52–53; Otto *Credit law service* (1991) para 38.

86 S 30 of the Magistrates’ Courts Act was used to obtain interim attachment of goods pertaining to lease agreements.

87 See Grové and Otto (2002) 52; Otto (1991) para 38.

88 S 18(2).

89 Otto (2006) 94. For a further discussion of the decisions see Steyn “Interim attachment of goods sold in terms of a credit agreement: Has the issue been resolved?” 2000 *SALJ* 661; Steyn “Interim attachment of goods in a credit agreement: More clarity required” 2004 *SA Merc LJ* 77; Otto “*BMW Financial Services (Pty) Ltd v Mogosi* 1999 3 SA 384 (W) – Tussentydse bewaarneming van ’n koop – of huursaak hangende kansellarie van ’n krediet-ooreenkoms” 2000 *De Jure* 181.

90 36 of 1942; see Otto (1991) para 29(g); Otto (2006) 94; Scholtz *et al* (2009) 12–29 fn 144; Van Heerden and Otto (fn 3) 678 fn 137 and 138; Boraïne and Renke (fn 9) 12.

91 Otto discusses the historical development of the case law that follow in Otto (1991) para 29(g). See also Van Heerden and Otto (fn 3) 678 fn 137.

92 1949 4 SA 482 (W).

93 My emphasis; see also Scholtz *et al* (2009) 12–30 fn 145.

“enforce any provision in the agreement for the payment of any amount as damages or for any forfeiture or penalty or for the acceleration of payment of any instalment”.

The meaning of “forfeiture” was considered and it was decided that the word is wide enough to include loss of possession.<sup>94</sup> In a Free State decision, *Santam Bpk v Dempers*,<sup>95</sup> the court arrived at a contrary conclusion when considering the wording of the Credit Agreements Act. The court decided that section 11 of the Credit Agreements Act differed in a material aspect from section 12(b) of the Hire-Purchase Act.<sup>96</sup> Section 11 provided that a credit provider may not “claim the return of the goods” before first notifying the consumer of his breach of contract and demanding performance. The court held that the application for an interim attachment order cannot be equated to the return of goods. It was, however, decided that the goods must remain in the possession of the sheriff in the meantime and an action for the permanent return of the goods should follow shortly.<sup>97</sup> *Dempers* was not followed in the Witwatersrand Local Division in *First Consolidated Leasing and Finance Corp Ltd v NM Plant Hire*<sup>98</sup> as the court preferred its previous decision in *Fil Investments*.<sup>99</sup> Hereafter, the Witwatersrand Local Division in *BMW Financial Services (Pty) Ltd v Mogotsi*,<sup>100</sup> however, followed *Dempers*.

*Dempers* is preferred as the objective in applying for an interim order is that of safekeeping pending a final attachment order. The intention is not the permanent return of such goods and cannot be seen as enforcement as such.<sup>101</sup> It is submitted that the approach in *Dempers* should be followed when considering interim attachment orders for safekeeping and prohibition of depreciation in terms of the NCA, but the courts may favour the approach that crystallised within their respective divisions prior to the NCA.<sup>102</sup> Boraine and Renke argue that the common law will prescribe the substance of a right to an interim attachment order whilst the procedures of the relevant courts will prescribe the procedures to be followed.<sup>103</sup> In the Magistrates’ Courts, section 30(1) of the Magistrates’ Courts Act read together with rule 56 of the Magistrates’ Courts Rules need to be followed.<sup>104</sup>

Finally, section 129(3) also deserves some attention in this regard.<sup>105</sup> The section provides as follows:

“Subject to subsection (4), a consumer may –

- (a) at any time before the credit provider has cancelled the agreement reinstate a credit agreement that is in default by paying to the credit provider all amounts

94 *Fil Investments* 486.

95 *Santambank Bpk v Dempers* 1987 4 SA 639 (O).

96 644.

97 645–646 648.

98 1988 4 SA 924 (W).

99 925.

100 1999 3 SA 384 (W) 387 388.

101 Otto (2006) 95; Scholtz *et al* (2009) 12–29 to 12–30; Boraine and Renke (fn 9) 12–13; Van Loggerenberg *et al* (fn 3) 42; Van Heerden and Otto (fn 3) 679.

102 Otto (2006) 95; Boraine and Renke (fn 9) 12; Van Loggerenberg *et al* (fn 3) 42.

103 Boraine and Renke (fn 9) 12.

104 Van Loggerenberg *et al* (fn 3) 42; Boraine and Renke (fn 9) 13.

105 Van Heerden and Otto (fn 3) 683–684.

that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement; and

- (b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.”

As was submitted previously, section 129(3) is unclear and may even be contradictory.<sup>106</sup> Van Heerden submits that section 129(3) may be construed to refer to interim attachment orders.<sup>107</sup> She further states that section 129(4)(a) in contrast seems to refer to a final attachment order.<sup>108</sup> Otto states that section 129(3) may even lead one to believe that a genuine attachment order is possible prior to cancellation, but that the matter is not altogether clear.<sup>109</sup> It is submitted that section 129(3) should be redrafted in order to provide clearly for interim attachment orders with the object of safekeeping pending a final attachment order.<sup>110</sup>

## 4 PLEADINGS AND PROOF OF COMPLIANCE

### 4.1 Cancellation and return

When drafting particulars of claim it is important to ascertain whether the credit provider has cancelled the agreement prior to the institution of the action or if cancellation as such will be sought by means of a court order. Depending on the circumstances at hand, the particulars of claim and the prayers need to be adjusted accordingly. By way of example, it is submitted that the following minimum allegations need to be included in the particulars of claim where a credit provider has cancelled the agreement and seeks mere affirmation of cancellation as well as an attachment order:<sup>111</sup>

- (a) Citation of the parties and an allegation that the consumer enjoys protection under the NCA.<sup>112</sup>
- (b) That the relevant court has jurisdiction to entertain the matter.
- (c) Date on which and place where the credit agreement was concluded.
- (d) That the agreement is in writing and a reference to such agreement as an annexure to the pleading.<sup>113</sup>
- (e) Material terms of the credit agreement and particulars of the property forming the subject of such agreement.
- (f) That the credit agreement is governed by the NCA.
- (g) That the credit provider complied with the prescriptions contained in the NCA.

106 See the discussion in para 3.2.

107 Scholtz *et al* (2009) 12–30; see also Otto (2006) 95.

108 Scholtz *et al* (2009) 12–30.

109 Otto (2006) 95.

110 See also Boraine and Renke (fn 9) 14.

111 See also Scholtz *et al* (2009) 12–24; Boraine and Renke (fn 9) 10; Van Loggerenberg *et al* (fn 3) 44. See also fn 54.

112 The credit provider will be the plaintiff and the consumer the defendant.

113 The NCA requires a written agreement in terms of s 93 and High Court Rule 18(7) requires a written agreement to be attached to a summons. No similar rule exists in the Magistrate's Court, but a copy of the agreement should be attached as good practice.



- (h) Details as to the breach of the contract.
- (i) Compliance with section 129(1)(a) and (b) or compliance with section 86(10).
- (j) Prescribed time periods as contemplated in section 130(1) has been complied with.
- (k) Compliance with prescriptions contained in section 130(3) and allegations that the court has not been approached during circumstances prohibited in the subsection.
- (l) Cancellation of the credit agreement on account of the consumer's default.

#### *Prayers*

- (m) Affirmation of cancellation of the agreement.<sup>114</sup>
- (n) Return of the property.
- (o) Interest *a tempore morae*.
- (p) Legal costs.
- (q) Further and/or alternative relief.<sup>115</sup>

#### **4.2 Enforcing remaining obligations pursuant to a voluntary surrender or attachment order**

In terms of section 130(2) a credit provider will only be entitled to claim fulfilment of remaining obligations under a credit agreement if such credit provider followed the procedure as set out in section 127 and a shortfall remains. Van Heerden submits that the very nature of a voluntary surrender presupposes that a credit provider approaches the court for the first time when seeking enforcement of the shortfall and therefore pre-enforcement procedures as well as enforcement procedures in a court should be adhered to in addition to the section 127 procedure.<sup>116</sup> However, it has already been argued that the section 129(1)(a) notice is not a prerequisite under these circumstances.<sup>117</sup> It is submitted that the following allegations should be made in the particulars of claim where a credit provider seeks enforcement of a shortfall pursuant to a voluntary surrender:

- (a) Citation of the parties and an allegation that the consumer enjoys protection under the NCA.<sup>118</sup>
- (b) That the relevant court has jurisdiction to entertain the matter.
- (c) Date on which and place where the credit agreement was concluded.

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114 A distinction must be drawn between the case where a credit agreement has already been cancelled prior to the institution of the claim and where the court is requested to grant a cancellation order. It is submitted that in the former instance, cancellation need not be requested as such or at most the prayer may include a request for affirmation of the prior cancellation. In other instances the prayers must include a prayer for cancellation. If the credit provider is uncertain with regard to the prior cancellation of the credit agreement, cancellation should be asked for in the alternative and the particulars of claim should be adjusted accordingly.

115 This prayer will only be included in proceedings in the High Court.

116 Scholtz *et al* (2009) 12–26.

117 See para 2.2.

118 The credit provider will be the plaintiff and the consumer the defendant.

- (d) That the agreement is in writing and a reference to such agreement as an annexure to the pleading.<sup>119</sup>
- (e) That the credit agreement is an instalment agreement, secured loan or lease governed by the NCA.
- (f) Material terms of the credit agreement and particulars of the property forming the subject of such agreement.
- (g) That the credit provider complied with the prescriptions contained in the NCA.
- (h) Details as to the voluntary surrender of the goods by the consumer.
- (i) Compliance with section 127(2), 127(4), 127(5), 127(7)<sup>120</sup> and 127(8).
- (j) Compliance with section 130(2).
- (k) Compliance with prescriptions contained in section 130(3) and allegations that the court has not been approached during circumstances prohibited in the subsection.

#### *Prayers*

- (l) Payment of the outstanding amount.
- (m) Interest at the rate applicable to the credit agreement.<sup>121</sup>
- (n) Legal costs.
- (o) Further and/or alternative relief.<sup>122</sup>

In the event that a credit provider seeks enforcement of remaining obligations where property has been attached in terms of section 131, it will not be the first time that the court is approached so as to enforce the particular agreement. As section 127(2) to (8) should have been followed prior to approaching the court once again, in this instance for the enforcement of remaining obligations, compliance with section 127(2), 127(4), 127(5), 127(7) and 127(8) needs to be specifically alleged in the particulars of claim.<sup>123</sup>

Section 130(3)(a) provides that a court may only determine the matter if satisfied that the prescriptions contained in sections 127, 129 and 131 have been complied with. However, particulars of claim should only include facts material to the cause of action (*facta probanda*) and should therefore not contain facts presented as evidence of such facts (*facta probantia*). In light of this distinction, it is clear that compliance with section 130(3)(a) should be alleged in the particulars of claim to complete the cause of action, but compliance therewith should be presented by way of an affidavit when applying for default judgment relating to the enforcement of remaining obligations pursuant to either a voluntary surrender or an attachment order. An exception may be raised against the pleading if it does not contain allegations of compliance with the prescribed procedure. If the

119 The NCA requires a written agreement in terms of s 93 and High Court Rule 18(7) requires a written agreement to be attached to a summons. No similar rule exists in the Magistrate's Court, but a copy of the agreement should be attached as good practice.

120 It was previously submitted that the s 129(1)(a) notice should be combined with the s 127(7) notice; Scholtz *et al* (2009) 12–26 fn 132.

121 S 127(9).

122 This prayer will only be included in proceedings in the High Court.

123 See also Scholtz *et al* (2009) 12–27.

credit provider did in actual fact not follow the prescribed procedures, a special plea may be raised on the merits.

## 5 CONCLUSION

It has been established that the NCA's procedural prescriptions following a termination and surrender of goods by a consumer as well as an attachment order applied for by a credit provider are aligned with one of the major purposes of the NCA, namely, consumer protection at large. It was submitted that, subject to contextual changes, section 127(2) to (9) should be followed subsequent to any attachment order in respect of property, encompassing both movable and immovable property that are the subject of a credit agreement to which the NCA applies, whereas the section 127 procedure pursuant to a voluntary surrender should only apply to instalment agreements, secured loans and leases governed by the NCA, all of which concern only movable property. It was further submitted that a voluntary surrender will be possible in two instances, namely, where movable goods are financed under a credit agreement, irrespective of whether ownership passed or has been retained, and where movable goods are the object of security for amounts due under a credit agreement.

It was further argued that the legislature attributes a wide meaning to the word "repossession" under section 131, thereby referring to both instances where a credit provider attaches property (movable and immovable) of which ownership was retained or where goods forming part of contractually agreed securities are attached. The section 127(2) to section 127(9) procedures should therefore be followed subsequent to both of the mentioned instances.

Section 127(3) provides that a consumer may withdraw the notice of termination and resume possession of goods surrendered, provided that the consumer has received a valuation notice and is not in default at the time of withdrawal. The consumer may exercise this right within ten business days pursuant to the valuation notice. This situation must, however, be distinguished from that under section 129(4)(a)(ii) under which a consumer may reinstate an agreement provided that the property has not been sold as yet. It was submitted that the latter instance *inter alia* refers to the situation where the credit provider did not adhere to the valuation notice requirement or where the consumer withdrew the termination notice prior to the permitted ten business-day period within which the credit provider should provide the valuation notice.

It was established that reinstatement of a credit agreement, specifically provided for in section 129(3), creates interpretational problems as sections 129(3)(a) and 129(3)(b) contradict one another in that it is impossible to repossess property pursuant to an attachment order for the purposes of execution if the credit agreement has not been cancelled. It is submitted that the legislature should rectify this untenable situation. Section 129(3) read in conjunction with section 129(4) was also considered as the NCA renders the former subject to the latter and it was ascertained that when a consumer exercises the right to reinstate a credit agreement in terms of section 129(3)(a) read with section 129(4), the consumer basically prevents the credit provider from continuing a debt enforcement procedure as envisaged in section 129.

In conclusion, it is submitted that the section 127 procedure significantly improves consumers' rights under both a voluntary surrender and a true attachment order. These procedures have some impact on general civil execution procedures

by supplementing the latter with additional consumer rights from the time that an attachment order is made by a competent court. These rights *inter alia* entail that the consumer should be kept informed of each step of the process and that property should be sold as soon as possible for the best price reasonably obtainable. Important deviations from the general execution process are that a surplus should be remitted to the Tribunal if another credit provider has a registered credit agreement in respect of the same property and that the credit provider will only be able to claim damages after the section 127 process has been completed.

As section 130(3)(a) provides that a court may only entertain a matter if satisfied that, *inter alia*, the prescriptions contained in sections 127 and 131 have been complied with, it is finally submitted in conclusion that a litigant should allege compliance therewith in the particulars of claim to complete the cause of action and should file an affidavit to prove compliance therewith when applying for default judgment.