THE LAW OF PURCHASE AND SALE

DJ LÖTZ*

LEGISLATION

The implementation of the Consumer Protection Act 68 of 2008 was postponed from 24 October 2010 to 31 March 2011. The impact of this Act on the Law of Purchase and Sale will be assessed in the 2011 *Annual Survey*.

CASE LAW

PURCHASE AND SALE

Formalities

Compliance with s 2(1) of the Alienation of Land Act 68 of 1981

The principal issue in *Mills NO v Hoosen* 2010 (2) SA 316 (W) was whether a deed of alienation of land complied with section 2(1) of the Alienation of Land Act 68 of 1981. (Section 2(1) relates to the requirement that a deed of alienation of land must be in writing and signed by the parties thereto or their agents acting on their written authority.) The deed did not reveal the fact that the signatory (Kitshoff) had signed it as an agent, resulting in the non-disclosure of the true identity of the seller. Mills was the executor of the deceased estate of Smith. Mills authorized Kitshoff, by written power of attorney, to administer and liquidate the deceased estate as his agent. Kitshoff, through an auctioneering agency, sold certain immovable property of the deceased estate to Hoosen. The deed of alienation was signed by Kitshoff and Hoosen. In the deed of alienation, Kitshoff was cited as 'Andre Kitshoff the Provisional Trustee/Liquidator of/the Executor Deceased Estate Anna Johanna Catharina Smith'. Mills subsequently repudiated the agreement, contending that the deed of alienation did not comply with section 2(1), as the true seller of the property (Mills in his capacity as executor of the deceased estate) was not identified or identifiable through the agreement

* B Iur LLB (Pret) LLM (Wits) LLD (Pret). Attorney and Conveyancer of the High Court of South Africa, and Professor of Mercantile Law in the University of Pretoria.

itself or admissible evidence. Hence, Kitshoff, as the purported executor, was reflected as the seller and the contract did not indicate that he had accepted the offer in a representative capacity.

The trial court held that the deed of alienation complied with section 2(1). Gildenhuys J's reasoning was that although Kitshoff had erroneously signed the agreement as executor of the deceased estate without indicating that he was acting as Mills's agent, this error was not fatal to the validity of the contract. The foundation of this argument was that Kitshoff had Mills's written authority to liquidate the estate and also had the power to deal with the assets of the estate which, by implication, included the power to sell the property and sign the agreement under consideration.

Of appeal, before dealing with the underlying formality issue, Masipa J considered it necessary to analyse the legal nature of a deceased estate. The court confirmed that a deceased estate is not a legal person, but consists of an aggregate of assets and obligations which vest in the executor in the sense that dominium of the assets passes to him or her. Accordingly only the executor is empowered to deal with the assets and obligations of the estate. The court further referred to *Tabethe and Others v Mtetwa NO and Others* 1978 (1) SA 80 (D) in which it was held that signature of the deed by the appointed executor or an agent of the executor acting in terms of a written authority is a requirement for the validity of a deed of alienation of land dealing with the property of a deceased estate. Although *Tabethe* dealt with a precursor to section 2(1), the court held that this authority remained instructive and relevant to the present matter. The court accordingly held that any contention that it did not matter whether the agreement was signed by Mills (the executor) or his agent (Kitshoff) was without merit (para [12]).

The court held that in order to comply with section 2(1), the essential terms of the sale must appear ex facie the written document purporting to be the deed of alienation (para [13]). The identities of the seller and purchaser, including their principals' identities, if applicable, qualify as essentialia. If evidence is necessary to establish the identity of the seller and/or purchaser or their principals, the agreement is void. Section 2(1) does not permit an undisclosed or unidentified principal to be a party to the sale. Referring to *Grossman v Baruch and Another* 1978 (4) SA 340 (W), the court held that if an agreement is signed by an agent who does not indicate that he or she is signing as an agent on behalf of one of the parties to the agreement, the deed of alienation is void (ibid). The reason for nullity is that the identity of the seller or purchaser does not appear ex facie the deed of alienation and evidence to identify the true seller or purchaser is inadmissible.

However, the court further held that there is authority to the effect that if an agent purports to act on behalf of one of the parties to the agreement, the existence of the agency may be proved by extrinsic evidence, and that if it is clear from the agreement who the true seller or purchaser is, the agent's signature does not need to be qualified to render the document valid (para [14]).

In this case, Mills, as executor of the estate and true seller of the property, was not identified ex facie the deed of alienation (para [15]). Although Kitshoff was authorized to enter into and to sign the deed of alienation on behalf of Mills, he was obliged to disclose his principal's name and the fact of such agency. Hence, because extrinsic evidence was necessary to establish the identity of the true seller, the deed of alienation failed to comply with the provisions of section 2(1) and was accordingly invalid (ibid).

Hoosen's alternative argument, namely that if the deed of alienation and power of attorney were read together, it was clear that Mills was indeed the seller, was rejected by the court (para [16]). The reason for this rejection was that the power of attorney, as an extraneous document containing a material term to the agreement (the identity of a contractual party thereto), was not properly incorporated by reference thereto into the deed of alienation.

However, in *Ten Brink NO v Motala* 2001 (1) SA 1011 (D), Zane Investments (Pty) Ltd sold a building to X, the first respondent and thirteen-year-old daughter of M, the second respondent. X was cited as purchaser in her capacity as minor daughter of M in the deed of sale, but M signed the deed of sale. M's signature was not qualified to indicate that he signed the deed of sale in his capacity as father and natural guardian on behalf of his minor daughter. The plaintiff later alleged that the deed of sale was void, since the formalities prescribed by section 2(1) had not been complied with as X, who was cited as purchaser in the deed of sale, did not sign it. Furthermore, M's signature was not qualified ex facie the deed of sale to indicate that he signed the deed of sale in his capacity as father and natural guardian on behalf of X, and M, as representative of X, did not have written authority to do so. The court rejected this reasoning as a ground for voiding the deed of sale and held that a parent and natural guardian acting on behalf of a minor child does not qualify as the representative of such minor child and accordingly does not need any authority, written or otherwise, to act on behalf of his or her minor child.

Following *Cook v Aldred* 1909 TS 150 and *Van der Merwe v Kenkes (Edms) Bpk* 1983 (3) SA 909 (T), the court in *Ten Brink NO v Motala* (supra) held that the same principle applies if a parent or guardian enters into an agreement on behalf of a minor child. The court held that the deed of sale between Zane Investments (Pty) Ltd and X complied with the requirements in section 2(1) and that extrinsic evidence was admissible to qualify M's signature.

From the above authorities, it is apparent that our positive law relating to formal requirements looks at the broader picture. If the object of Parliament is not frustrated and the minimum formal requirements are complied with, a microscopic juridical dissection of the prima facie formalities will not affect the validity of a deed of sale. The positive law follows a holistic approach to contracts in accordance with the maxim interpretatio chartarum benigne facienda est ut res magis valeat quam pereat as confirmed in *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 (1) SA 842 (A). In other words, the interpretation of contracts should be done in a benign manner so that the parties' act should rather remain valid than be nullified. Alas, this vision was blurred in *Mills v Hoosen*.

However, in *Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Others* 2010 (4) SA 308 (LCC) a clear distinction was drawn between contractual agency and statutory delegation. In this case, deeds of alienation of land were signed by the Regional Land Claims Commissioner (second respondent) without written authority from the Minister of Rural Development (first respondent). The court held that there was merit in the argument that the second respondent had signed the offers not as an agent of the first respondent but as his substitute (para [13]). The crux of this argument hinged on the fact that the statutory power conferred on the first respondent was delegated to the second respondent, who substituted the Minister as a competent organ or functionary in entering into an agreement of sale in her own name by virtue of the Restitution of Land Rights Act 22 of 1994, thereby binding the state. Although these particulars were not apparent from the offers to purchase, this did not affect the validity of the agreements as contemplated in section 2(1) of the Alienation of Land Act, because the second respondent had acted entirely in her own name by virtue of her delegated powers. The court concluded that the peremptory provisions of section 2(1) were not contravened in this case, in that the second respondent, in signing the agreements, did not act as the first respondent's agent, but as a functionary of the state who had statutory authority conferred upon her, through delegation by the Minister, to bind the state in her own name (para [16]). For further discussion of this case, see the chapter on The General Principles of the Law of Contract.

Section 2(1) of the Alienation of Land Act was again under the spotlight in *Rockbreakers & Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd* 2010 (2) SA 400 (SCA). An offer to purchase land, described as 'Portion 54 of the Farm Roodekop No 139 IR measuring 49 408m^2', was signed by the appellant. The words '[t]his offer is accepted subject to the seller obtaining registration of the subdivision of the property' were added by the appellant. This insertion was neither initialled nor countersigned by the respondent. Apart from this insertion, there was no reference to the subdivision in the deed of alienation. However, the evidence indicated that both parties were aware of the need for subdivision of the property in order to give effect to the sale. The application for subdivision, described as 'Portion 124 (a portion of portion 29) of the farm Roodekop No 139 IR measuring 37 507m^2', was later approved. One of the conditions for subdivision was that a township should be established on the proposed subdivision and that no development of any nature may take place unless the township has been promulgated. As the appellant failed to proceed with the transfer of the property, the respondent successfully applied for an order for specific performance in the trial court.

The appellant appealed to the Supreme Court of Appeal. The success of the appeal hinged on the question whether the insertion into the manuscript was material and constituted a counter-offer which had to be in writing and had to be signed by or on behalf of the parties in compliance with section 2(1). Based on *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA), the respondent was of the view that the insertion was not a counter-offer. It argued that the insertion was superfluous because both parties were aware of the need to subdivide the property.

Referring to *Johnston v Leal* 1980 (3) SA 927 (A) and *Van Leeuwen Pipe & Tube (Pty) Ltd v Mulroy and Another* 1985 (3) SA 396 (D), the Supreme Court of Appeal held that if the insertion embodied a material alteration to the contractual terms and accordingly constituted a counter-offer which was not accepted in writing, such failure would render the deed of alienation void (para [8]). In the present case, the initial deed of alienation that had been signed by the respondent had made no mention of the subdivision, and the property described therein as 'Portion 54 of the Farm Roodekop No 139 IR measuring 49 408m^2' would not be separated from the rest of the farm to eventually form 'Portion 124 (a portion of portion 29) of the farm Roodekop No 139 IR' measuring 37 507m^2'. This omission, the Supreme Court of Appeal held, affected a material obligation of the appellant. Thus, the insertion by the appellant served to protect it from an action for damages if the application for subdivision were to be rejected. For this reason, the court found, referring to *Admin Estate Agents (Pty) Ltd t/a Larry Lambrou v Brennan* 1997 (2) SA 922 (E), that the insertion was material and amounted to a counter-offer which was not legally accepted by the respondent, thus rendering the deed of alienation null and void (para [9]).

Because 'the proposed subdivision' was expressly incorporated in *Stalwo v Wary Holdings* (supra), but completely omitted in the present case, the Supreme Court of Appeal held that the present case was distinguishable from *Stalwo* (para [10]). The basis for this distinction was that although 'the proposed subdivision', as expressly mentioned in the *Stalwo* documentation, was not explicitly incorporated in the deed of alienation as a suspensive condition, the parties intended it to be a term (suspensive condition) of their agreement. For this reason, the omission did not affect the validity of the deed of alienation in *Stalwo*.

In the 2008 *Annual Survey* (at 1062–3), the question was asked whether the approach in the *Stalwo* case promotes the legislature's aims when it comes to formalities. To endorse this concern, Wallis AJA in his minority judgment in *Rockbreakers*, made the following remarks:

> 'Other than *Stalwo*, which depends upon the unusual situation where the parties had in fact agreed on a suspensive condition and then not incorporated it in the written contract, I have found no South African case where that has been done. My researches in the English cases have only unearthed a single case where that was the result and that in an ex tempore judgment where the basic principles were not

canvassed. Fortunately, it is unnecessary to express a final view on that question' (para [24]).

In *Gibbs and Another v Vantyi and Others* 2010 (2) SA 606 (ECP), the first and second defendants put their property up for sale at a public auction on 8 September 2005. The property was knocked down to the plaintiffs on their bid of R1,6 million. The purchase was subject to the approval of the first and second defendants by noon on 19 September 2005. Clause 28 of the deed of alienation provided as follows:

> 'All offers for a higher purchase price made after the public auction but before acceptance by the seller, will be made to the auctioneer. No offers will be considered by the seller unless such offers are made to the auctioneer. The highest bidder at the auction will have the right of first refusal during the acceptance period.'

On 15 and 19 September 2005, during the acceptance period, the third defendant received two improved offers from Sizabantu Trust. These offers were referred by the third defendant to the plaintiffs to allow them to consider their right of first refusal, as provided for in terms of clause 28. The plaintiffs, in writing, on 19 September 2005 offered to purchase the property for R2,3 million. The parties are in agreement that no binding agreement was concluded as a consequence of any of these three offers.

On 19 September 2005, prior to the deadline, the first plaintiff orally increased his offer to R3,95 million during a teleconference with the defendants and Sizabantu Trust. This offer was accepted orally and confirmed by the third defendant on behalf of the first and second defendants. It is common cause that the conditions of sale were not signed at that point. Anticipating that a written agreement of sale was necessary, the plaintiffs, on 22 September 2005, submitted to the defendants a deed of alienation, duly signed by them. An addendum, providing for certain suspensive conditions, was annexed to the deed. The deed of alienation reflected that it was open for acceptance by the first and second defendants until 26 September 2005. On that date, the defendants returned the deed of alienation to the plaintiffs, duly signed, but with the addendum and all references to it deleted. The defendants did not demand specific performance from the plaintiffs and cancelled the agreement. It is common cause that the exchange of the documents on 22 and 26 September 2005 between the plaintiffs and the defendants did not constitute a written deed of alienation.

The plaintiffs contended that the oral agreement concluded on 19 September 2005 by the first and second defendants for R3,95 million did not form part of the public auction conducted on 8 September 2005. Thus, the provisions of section 3(1) of the Alienation of Land Act did not apply and the oral agreement of 19 September 2005 was accordingly invalid for want of compliance with section 2(1) of the Alienation of Land Act. However, the defendants argued that, in terms of the provisions of clause 28 of the agreement, the oral agreement of 19 September 2005 did form part of the public auction conducted on 8 September 2005. Accordingly, the provisions of section 3(1), not section 2(1), applied to the transaction. This resulted in the oral agreement of 19 September 2005 being valid.

The court reaffirmed that the reason for section 2(1) (the requirement that a deed of alienation of land must be in writing and signed by the parties thereto or their agents acting on their written authority) is to prevent uncertainties, disputes, and malpractices (at 609G; see also *Clements v Simpson* 1971 (3) SA 1 (A)). However, section 3(1) provides that the provisions of section 2(1) are not applicable to a sale of land by public auction. Jansen J held that the foundation for this exception to section 2(1) is that an agreement of sale at a public auction is concluded publicly at the fall of the hammer and there is little scope for uncertainties, disputes or malpractices (at 611A, with reference to *Schuurman v Davey* 1908 TS 665; *Sugden and Others v Beaconhurst Dairies (Pty) Ltd and Others* 1963 (2) SA 174 (E)). The 'rules of the game' at a public auction are governed by the conditions of sale displayed, announced or read out by the auctioneer at the auction and those rules bind all purchasers whether they are aware of them or not (at 610A–D, approving *Estate Francis v Land Sales (Pty) Ltd and Others* 1940 NPD 441; *Shandel v Jacobs and Another* 1949 (1) SA 320 (N); *Clark v CP Perks & Son* 1965 (3) SA 397 (E)). Furthermore, the contractual business of a public auction is concluded when the hammer falls.

On the facts, the court found that clause 28, which placed no restriction on the bidders entitled to make a higher offer, actually provided for a separate process of private bargaining after the fall of the hammer, which process was not exposed to public transparency (at 610F–H and 611E). However, the process in terms of clause 28 is distinguishable from the scenario where conditions of sale provide that the auctioneer is not obliged to accept the highest bid but the bidder is bound to keep his or her offer open for a certain period during which the auctioneer may convey the seller's acceptance of the bid by signing the memorandum attached to the conditions of sale (at 611C–E). No evidence was presented in this case that Sizabantu Trust was present at the auction or that it was aware of the conditions of sale and accordingly agreed that the auction sale could be extended beyond the actual day of the auction. Therefore, such extended auction sale would not be transparent or open to the public and could not qualify as a public auction as contemplated in section 3(1), for otherwise it would open the door to the very mischief which section 2(1) was designed to avoid (at 610I–J). Hence, the court held that any sale concluded pursuant to the process contemplated in clause 28 must comply with section 2(1) and that the exception provided for in section 3(1) was inapplicable in this case (at 611G).

In *Swanepoel v Nameng* 2010 (3) SA 124 (SCA), the res vendita was initially incorrectly described in the agreement. The Supreme Court of Appeal reaffirmed the principle that it was permissible to rectify the deed of alienation by substituting the correct description of the property sold (para [16]). It followed, so it was held, that the determination of the question whether the formalities prescribed by section 2(1) were complied with did not involve an enquiry into the intention of the parties as to the property sold. It was Mthiyane JA's view that, by omitting any reference to intention in respect of the property sold, Parliament was mindful of the fact that the parties could still amend their agreement by exercising their common-law right to rectify it. For a comprehensive discussion, see the chapter on The General Principles of the Law of Contract.

The requirement of a written authority vis-à-vis an agent, functionary and member of a close corporation regarding compliance with section 2(1) of the Alienation of Land Act was the focus in *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC and Another* 2010 (3) SA 630 (SCA). Mr Christelis, the husband of the sole member of the first respondent (Revelas Properties Johannesburg CC), signed a deed of alienation on behalf of the close corporation without written authority. In opposing the appellant's claim for specific performance, the first respondent argued that the sale was invalid for want of compliance with the required formalities. The appellant, in contrast, contended that written authority is not required when a close corporation is the principal. The issue was whether Christelis (second respondent) was duly authorized to sign the contract, as required by section 2(1).

In the trial court, Brett AJ held that if a person other than a member acts on behalf of a close corporation, that person is an agent within the meaning of section 2(1) and does not qualify as its functionary. Thus, such agent may not conclude a deed of alienation on behalf of the close corporation unless authorized to do so in writing.

On appeal, Lewis JA drew a distinction between a functionary and an agent of a legal entity (para [11]). A person authorized by law or by the internal rules of a juristic entity, is a 'functionary'. An 'agent', in contrast, is a person authorized by expression of will by the legal entity and is sometimes referred to as an 'outside agent'. She held that there is no difference in principle between a 'functionary' of a company and a 'functionary' of a close corporation in so far as it concerns the signing of a contract for the sale of land (ibid). A member of a close corporation who is authorized as such to sign, is in the same position as a functionary of a company who is authorized to sign, and such member, who by law represents a close corporation, need not have written authority (para [17]). Thus, the Supreme Court of Appeal overruled *Lombaard v Droprop CC and Others* 2009 (6) SA 150 (N) in which it was held that section 54 of the Close Corporations Act 69 of 1984 is not wide enough to exempt close corporations or its members, when acting as agents on behalf of a close corporation, from compliance with the provisions of section 2(1) (para [55]) (see 2009 *Annual Survey* 983).

Although it is commonly accepted that any agent of a company, whether or not he or she is a functionary of the company, is empowered by section 69 of the Companies Act 61 of 1973 to bind the company to a deed of alienation without written authority, Lewis JA expressed her concern in this case whether section 69 was intended to apply to a person who is not a functionary of a company and who is not authorized to act in terms of the company's articles of association or a resolution taken by the company (para [14]).

The Close Corporations Act does not contain an equivalent to section 69 of the Companies Act. However, section 54 of the Close Corporations Act provides that any member of a close corporation shall, in relation to third parties who deal with the close corporation, be regarded as an agent of the close corporation; and any act of a member shall bind the close corporation, unless such member has no power to act for the corporation and the person with whom such member deals knows, or ought reasonably to know, that the member has no authority to act.

The court held that section 54 simply confers authority on a member to act for a close corporation and that it simply reflects the usual rules relating to ostensible authority similar to the common-law right of a partner to bind the partnership (para [17]). As it is assumed that section 69 regulates the question of written authority for the purpose of section 2(1) of the Alienation of Land Act, section 54 does not address this aspect. The remaining question that had to be answered in *Northview Shopping Centre* was thus whether the *Potchefstroom Dairies* principle applies to an agent of a close corporation who is not a member of the close corporation.

The court held that where there is no implication of authority by law (in contrast to the position of functionaries of a juristic entity who obtain authority through the articles of association or membership of the juristic entity), written authority, as required for an agent under section 2(1) of the Alienation of Land Act, is necessary (paras [19]–[22]). The reason is that in the latter instance authority is conferred by the expression of will and not, as in the instance of a functionary, by operation of law. Lewis JA held:

> 'Authority arising by implication of law in this context is that conferred by statute, by the rules of the juristic entity or by the common law in relation to partners. An express authorization is one given to an agent by a principal who can act for him or herself. In the case of a close corporation the logical principle should in my view prevail: a member who is given authority by statute to bind it needs no written authority. But if a member authorizes an agent to enter into a contract for the sale of land on behalf of the close corporation he or she must do so in writing' (para [22]).

In support of this view, she held that a close corporation is intended to be a simple entity, akin to a partnership, but with limited liability, and the complex requirements of company law are not intended to apply to close corporations (para [25]). Thus, partnership principles, rather than company law principles, govern the relationship between members of a close corporation. Accordingly, a member, like a partner, need not have written authority to enter into a deed of alienation of land. However, if a partner or a member authorizes an 'outside agent' to conclude a deed of alienation of land, written authority as contemplated in section 2(1) is required.

Because there will be no uncertainty regarding a functionary's authority in the above scenario, the court, in conclusion, held that its judgment will not defeat the object of section 2(1) to ensure certainty (para [26]). This certainty is, however, absent if the authority arises from an expression of will ('express authorization'), and such authority must accordingly be in writing to curtail any uncertainty as to the source of the authority.

In *Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others and Van der Merwe NO and Others v Bosman and Others* 2010 (5) SA 555 (WCC), the respondents claimed that because only two of the three trustees had signed the deed of alienation, the agreement was void because the trust was not properly represented. There was no written authority from the trust, as required by section 2(1) of the Alienation of Land Act, to authorize the two (of three) trustees to sign the deed of alienation as agents of the trust.

Binns-Ward J held that unless a trust deed provides otherwise, trustees have to act jointly (paras [14]–[16]). This rule derives from the nature of the trustees' joint ownership of the property. Any provision in the trust deed allowing them to make decisions by majority vote does not amount to an exception to this rule. It follows that if a trustee, or some trustees, act as agents for the trust in the alienation of land, written authority as prescribed by section 2(1) is required to validate the deed of alienation (para [42]). However, the court concluded that:

> '[w]hen law and equity cannot concur, it is the law that must prevail. . . . The formalities legislation, on which the result of these applications has ultimately turned, was evidently intended to promote certainty in regard to contracts in respect of the alienation of interests in land. The apparent legislative hope was that the imposition of formalities would lessen the scope for dispute and reduce the amount of litigation between parties to such contracts. Successive legislatures have persisted with the belief in that ideal, despite the observations by judges and academic writers over many years that the effect of the formalities has often been to bring about greater evils than those which it was hoped thereby to avoid. These evils include the resort by the dishonest and the unscrupulous to the formalities in order to avoid obligations seriously undertaken, which would otherwise be enforceable against them at common law, and a hampering of the ability of the courts to do justice' (paras [42]–[45]).

(On this inadequacy, see further Lötz & Nagel (2010) 43 *De Jure* 169 at 174.)

In *Lombaard v Droprop CC and Others* 2010 (5) SA 1 (SCA), an appeal was lodged against *Lombaard v Droprop CC and Others* 2009 (6) SA 150 (N) (see 2009 *Annual Survey* 532–3). In the trial

}court, Ndlovu J had found for the respondents on two grounds. First, that the word 'certain' in the description of the property ('Certain portion 526 of Lot 432 of the farm Melk Houte Kraal No 789') created confusion and ambiguity as to the precise piece of land which formed the res vendita, and that the intention of the parties was of no relevance for the purpose of complying with section 2(1) (para [41]). The land sold could accordingly not be identified by reference to the contract without recourse to evidence from the parties to the contract as to their negotiations and consensus. The factual matrix thus failed the test set in *Clements v Simpson* 1971 (3) SA 1 (A), *Headerman (Vryburg) (Pty) Ltd v Ping Bai* 1997 (3) SA 1004 (SCA), and *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA). Hence, the trial court concluded that the word 'certain' could mean only that the property which was the subject-matter of the lease and sale was not the entire property as described in the title deed, but only a part of it. As a result, the res vendita was not clearly identifiable with reasonable certainty from the contract, disqualifying it from the requirements prescribed by section 2(1) which, in terms of section 28(1), resulted in nullity of the contract. Secondly, the trial court held that section 54 of the Close Corporations Act is not wide enough to exempt a close corporation or its members, when acting as agents on behalf of such close corporation, from compliance with the provisions of section 2(1) (para [57]). Thus, a member of a close corporation needs to have written authority when signing a deed of alienation of land as an agent on behalf of a close corporation in terms of section 54 of the Close Corporations Act. If written authority is absent, such act will be unlawful and will fall outside the scope of section 54, which permits only lawful acts. The deed of alienation was accordingly null and void for non-compliance with sections 54 and 2(1). The trial court held that acting without written authority in these circumstances is equivalent to an illicit drug smuggling or diamond transaction concluded by a member on behalf of a close corporation (ibid). However, this latter ruling was rejected by the Supreme Court of Appeal in *Northview Shopping Centre v Revelas Properties Johannesburg* (supra para [25]), where it was held that a close corporation is akin to a partnership and that partnership principles, rather than the principles of company law, govern the relationship between members. Thus, a member, like a partner, need not have written authority to enter into a deed of alienation of land.

The root of the problem regarding the property description in *Lombaard v Droprop* is the word 'certain' in the description. In contrast to the title deed description of the property as 'Portion 526 (of 432) of the farm Melk Houte Kraal No 789. . .', the lease described the property as a 'Certain portion 526 of Lot 432 of the farm Melk Houte Kraal No 789'.

Without taking *Lugtenborg v Nichols* 1936 TPD 76 and *Cromhout v Afrikaanse Handelaars en Agente (Edms) Bpk* 1943 TPD 302, on which the trial court relied, into account, and instead relying on *Van Niekerk v Smit and Others* 1952 (3) SA 17 (T) and *Bundell v Blom* 1950 (2) SA 627 (W) at 630, in which it was held that 'the primary meaning of the word "certain" is something definite, something prescribed, something determined, fixed or settled', Navsa and Malan JJA held (Heher, Shongwe, and Mhlantla JJA concurring) that —

> '[t]he fact that the description of the property in the lease, and consequently the deed of alienation, does not correspond precisely with the title deed description is of no consequence, just as the omission of the extent of the property does not affect the matter. The property was thus sufficiently described to render the agreement of sale concluded when the option was exercised, at least on the face of it, valid. To hold otherwise would mean that the words "of portion" must be read into the description of the property sold before the figures "526". There is no compelling reason to do so. The description of the property is unambiguous and speaks for itself. Thus, in this specific regard, no evidence ought to be admitted to interpret the wording' (para [11]).

The further issues in this case relating to the rectification of the agreement and procedural matters concerning admission of, or referral to, oral evidence are addressed in the chapter on Civil and Constitutional Procedure.

Transfer of Ownership

Transfer of immovable property in terms of waiver of ownership rights

The core questions for decision in *Meintjes NO v Coetzer and Others* 2010 (5) SA 186 (SCA) were, in the first instance, whether ownership of immovable property can be waived or abandoned and, secondly, whether transfer of such immovable property, without a deed of alienation complying with the provisions of section 2(1) of the Alienation of Land Act, is legally possible.

The facts were briefly that the appellant, the first and the second respondent are the children of the deceased, Mrs Meintjes. She had owned a farm, Mazunga, on which she and the appellant had lived. In 1993, she made a will in which she bequeathed Mazunga to her three children in equal shares. In 1998, she successfully applied for subdivision of Mazunga into three portions. During 2003, she drew up a new will and bequeathed portion 1 of Mazunga to the appellant and portions 2 and 3, respectively, to the first and second respondents. Before Mrs Meintjes died in January 2006, the first and second respondents had, without her knowledge, clandestinely transferred portions 2 and 3 of Mazunga into their names. All documents in this regard were falsified and Mrs Meintjes did not at any stage sign any deed of sale or transfer documents. Eventually, Mrs Meintjes and the appellant became aware that portions 2 and 3 of Mazunga had been fraudulently transferred and registered in the names of the first and second respondents. In his capacity as executor of the deceased's estate, the appellant sought the return of the fraudulently transferred portions of the farm. His claim was based on the rei vindicatio. Against this claim the first and second respondents put up a defence of waiver.

Referring to *Legator McKenna Inc and Another v Shea and Others* [2009] 2 All SA 45 (SCA) and *Du Plessis v Prophitius and Another* [2009] 4 All SA 302 (SCA), Shongwe JA held that Mrs Meintjes had never lost her right of ownership, despite the fact that portions 2 and 3 of Mazunga had been transferred and registered in the names of the first and second respondents by illegal means (para [8]).

In *Legator McKenna*, Brand JA held that the abstract theory, in preference to the causal theory, applies to transfer of ownership of both movables and immovables. The abstract theory entails that the requirements for the passing of ownership are twofold: in the first instance, delivery of the res vendita and, secondly, the existence of a real agreement between the seller and purchaser reflecting an intention to transfer and receive ownership respectively. (What the Supreme Court of Appeal failed to mention in *Legator McKenna* was that, to establish a real agreement, it is also required that the transferor is the owner of the res vendita, while this ownership requirement need not be met for the realization of an agreement that creates an obligation.) Brand JA also reaffirmed that the principles applicable to (obligatory) agreements generally apply also to real agreements (para [22]). Thus, although the abstract theory does not require a valid underlying obligatory agreement, ownership, notwithstanding delivery (registration of transfer), will not pass if there is a defect in the real agreement (see also *Mathenjwa NO and Others v Magudu Game Company (Pty) Ltd* [2009] 4 All SA 15 (SCA)).

In *Meintjes NO v Coetzer*, Shongwe JA endorsed the basic principles that real rights may be acquired by various modes, such as prescription or expropriation, and that real rights acquired under these circumstances are not reflected in the deeds office (para [9]). Consequently, under our adopted negative system of registration, the Registrar of Deeds plays a passive role, and mistakes and fraud, as was the case here, do happen. Thus, in the case or an error or fraud, a court is empowered to order rectification of the deeds registry in favour of the original owner, even though the acquirer of the real right was bona fide (*Preller v Jordaan* (supra); *Kristal v Rowell* 1904 TH 66). However, Shongwe JA also held that the mere fact that the property is registered in the name of a person does not translate into ownership and that registration does not afford proof of ownership (paras [13] and [16]).

Shongwe JA further held that, because no valid deed of alienation in terms of section (1) existed and the obligation creating agreement was falsified, any legal foundation to effect transfer to the first and second respondents was absent and Mrs Meintjes did not, and could not, lose her right of ownership (paras [10]–[13]). To sustain the argument that the respondents' ownership was established by way of Mrs Meintjes's waiver (abandonment) of her ownership, the first and second respondents bore the onus to show that Mrs Meintjes, with the full knowledge of her rights to portions 2 and 3 of Mazunga, had decided to abandon it 'whether expressly or by conduct plainly inconsistent with an intention to enforce it' (see *Laws v Rutherfurd* 1924 AD 261 at 263). For the abandonment of property, so it was held, an owner must have the intention to abandon the property (para [16]; see also *Union Free State Mining and Finance Corporation Ltd v Union Free State Gold and Diamond Corporation Ltd* 1960 (4) SA 547 (W); *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A)). What happened in this case was clearly inconsistent with such intention. It follows that section 28(2) of the Alienation of Land Act did not apply, because transfer had taken place in terms of a deed of sale which had not been signed by Mrs Meintjes and all related transfer documents had been falsified (para [12]). Referring to *Barkhuizen v Napier* 2007 (5) SA 323 (CC), the Supreme Court of Appeal held that the respondents' actions were contrary to public policy and that courts should not enforce contracts which violate constitutional values, as in this instance. Accordingly, contracts that are out of keeping with constitutional values are contra bones mores and, accordingly, per se unenforceable (paras [15]–[16]).

Leach JA arrived at the same conclusion as Shongwe JA, but by a somewhat different route. Referring to *Du Plessis* and *Legator McKenna*, Leach JA recognized the abstract theory of transfer of ownership as part of our law, but emphasized the caveat that if there is a defect in the real agreement, ownership will not pass even though registration of transfer has taken place (para [21]). In the present case, both the obligatory agreement (deed of sale) and the real agreement (transfer documents) were falsified. In these circumstances, despite the Registrar of Deeds having effected registration of transfer, there could be no doubt that the deceased never intended to transfer ownership of the two disputed portions of the farm. As a result, Mrs Meintjes remained the owner of portions 2 and 3 of Mazunga (para [22]).

Leach JA further held that if the first and second respondents were able to prove that Mrs Meintjes had waived her right to reclaim portions 2 and 3 of Mazunga after becoming aware of the fraudulent transfer, such waiver could constitute a valid real agreement for the transfer of ownership (para [23]). Furthermore, such waiver might also form the basis of a donation (obligatory agreement) which, in itself, would be ineffective if it did not comply with section 2(1) of the Alienation of Land Act.

Leach JA observed that waiver is a question of fact which is always difficult to establish and that it is an essential requirement that the waiver must be communicated to the person in whose favour the right is waived (paras [24]–[31]). In this case, the first and second respondents failed to show that Mrs Meintjes had communicated intent to waive her claim, which waiver they accepted during her lifetime. However, it is also inherently improbable that a person will lightly waive the right of ownership in valuable property he or she has been defrauded of. A delay in exercising a right is only one factor to be taken into account and does not necessarily lead to an inference that the right has been abandoned.

Duties of Seller

Warranty against latent defects

For the purpose of purchase and sale, the uncomplicated facts in *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2010 (1) SA 8 (GSJ) were that the plaintiff, a manufacturer of spices, sold spices which were contaminated with the banned artificial colorant Sudan Red 1 to the defendant (trading as Nando's), a chicken fast food retailer. These spices were unfit for human consumption. The plaintiff sued the defendant for payment of the purchase price of the spices. Although the defendant admitted the claim, it raised a defence by way of four counterclaims. The amounts claimed under these counterclaims exceeded the amount claimed by the plaintiff. The counterclaims were based on delictual damages suffered by the defendant as a result of the defect (the presence of Sudan Red 1) in the res vendita. The string in the plaintiff's defence bow against these counterclaims was a comprehensive contractual indemnity signed by the defendant with the following qualification: 'std conditions not checked'.

In this discussion, the emphasis is on the warranty against the latent defect in the res vendita vis-à-vis the *voetstoots* clause contained in the contractual indemnity. Matters relating to delictual (product) liability and the question whether the defendant was bound, due to the caveat subscriptor rule, by the standard terms and conditions in this case, are discussed in the chapters on The General Principles of the Law of Contract and the Law of Delict.

The problem in this case was not that there was a latent defect in the res vendita, but that the res that was delivered was different from that which had been purchased. Blieden J agreed with counsel's argument that a distinction should be drawn between cases where the res vendita was unfit for the purpose for which it had been bought owing to the absence of certain required attributes, and cases where the res vendita, notwithstanding the lack of such required attributes, was still fit for the purpose for which it had been bought (para [41]). In other words, there is a difference between instances where the purchaser receives something different from what he or she had bought, and instances where he or she receives exactly what he or she had bought, notwithstanding the latent defect. Thus, the present case was not based on defects in the res vendita, but on the seller's (plaintiff's) failure to perform in terms of the agreement. For this reason, the plaintiff was not entitled to rely on the *voetstoots* clause (ibid).

Blieden J held that an indemnity clause cannot be interpreted to mean that the person in whose favour the clause operates does not have to perform in terms of the contract and that any loss resulting from such failure justifies the indemnity claimed (para [42]). The protection claimed must be confined to defects that fall under the actio redhibitoria. In this case, the goods, which were meant for human consumption, were banned by legislation. This ban inter alia entails that if the goods are dangerous to human health, they must be removed from commerce and be destroyed. Thus, the sellers could not protect themselves against these consequences (para [53]). For further discussion of this case concerning 'express terms', see the chapter on The General Principles of the Law of Contract.

In *Odendaal v Ferraris* [2008] 4 All SA 529 (SCA), it was held that, in the broad sense, any imperfection in a res vendita may be described as a defect, but that the exclusionary scope of a *voetstoots* clause in any particular case must be decided on its own facts. Hence, it was held, the operational sphere of a *voetstoots* sale is wide enough to cover both physical defects and defects in the title or area of the property (para [24]). Any material imperfection preventing or hindering ordinary or common use of the res vendita is an aedilitian defect (para [25]). As a result, the court held that a *voetstoots* clause covers the absence of statutory authorizations (para [26]). In reaching this deduction, Cachalia JA effectively overruled *Van Nieuwkerk v McCrae* 2007 (5) SA 21 (W), confirming the whole purpose of a *voetstoots* clause — to exempt a seller from liability for defects of which he or she is unaware, including defects constituting statutory non-compliance (para [27]).

Risk and benefit

In *Southern Era Resources Ltd v Farndell NO* 2010 (4) SA 200 (SCA), the estate of the late Ms Dent, represented by the respondent in his capacity as executor, sold certain mineral rights 'in, on and under' the farm Deutschland to the appellant on 30 September 1995. After the conclusion of the agreement the appellant, in accordance with the agreement, furnished the required guarantee for payment of the purchase price against registration of cession of the mineral rights into the name of the appellant. However, due to uncertainty relating to the identity of heirs in the estate, there was a delay in the respondent obtaining the necessary consent to the sale from the Master of the High Court in terms of section 42(2) of the Administration of Estates Act 66 of 1965. Consequently, the guarantee was returned on the understanding that it would be refurnished within fourteen days after the Master of the High Court had consented to the sale. It was a condition of the amended agreement that the guarantees must be approved by the seller or the seller's attorney. On 21 April 2004, the Master consented to the sale. The next day, the appellant's attorney was advised accordingly and requested to furnish the necessary guarantees by 6 May 2004, which request was ignored by the appellant. In the meantime, on 1 May 2004, section 3(1)*(m)* of the Deeds Registries Act was repealed. The effect of this repeal was that registration of cessions of mineral rights could no longer be effected.

As a result of the failure to deliver the necessary guarantees, the respondent instituted action, claiming payment of the purchase price. The appellant opposed the application on the ground that the repeal of section 3(1)*(m)* rendered it impossible in law to effect registration of cessions in mineral rights as from 1 May 2004. In other words, the foundation of the appellant's defence was supervening impossibility of performance because the respondent could not effect delivery of the res vendita. However, the trial court held that the sale of the mineral rights was perfecta on 1 May 2004, and gave judgment in favour of the respondent. An appeal was lodged against this judgment.

On appeal, it was common cause that the repeal of section 3(1)*(m)* had resulted in supervening impossibility of performance by the respondent and that, as a rule, a party to a contract is discharged from his or her contractual obligations in the case of supervening impossibility (para [8]). Thus, the only issue before the Supreme Court of Appeal was whether or not the sale of the mineral rights was perfecta (complete; absolute). If it was, the benefit and risk passed to the purchaser (appellant), in which case the seller (respondent) would be entitled to payment of the purchase price without being obliged to deliver the res vendita.

Mpati P reaffirmed the trite principle that a sale is perfecta once there is agreement on the res vendita and the pretium and any resolutive or suspensive condition has been fulfilled (para [9]). Both the appellant and respondent accepted that the Master of the High Court's consent to the sale constituted a suspensive condition and that, until it had been given, the sale was not yet perfecta (it was incomplete). However, the appellant contended that the guarantee to be furnished for payment of the purchase price also qualified as a suspensive condition and that, until this suspensive condition had been fulfilled, the benefit and risk of supervening impossibility of contractual performance remained with the respondent (seller). It follows that the question to be answered in this case was whether the latter stipulation was a true condition, or a term of the contract.

The court held that in the event of a true suspensive or resolutive condition, the operation of the contract and its consequences depend upon an uncertain future event (para [11]). Referring to *Scott and Another v Poupard and Another* 1971 (2) SA 373 (A) at 378H, the court agreed with Holmes JA who held that the difference between a term of a contract (contractual obligation) and a condition is that '[a] contractual obligation can be enforced, but no action will lie to compel the performance of a condition' (para [12]).

The court held that the consent of the Master of the High Court to the sale was entirely dependent on the will of a third person (the Master) and was for this reason a casual condition (para [13]). However, in contrast, it was held that the stipulation to furnish the guarantee for the purchase price was an enforceable contractual obligation and, consequently, a term of the contract (para [14]; cf *Ingledew v Theodosiou* 2006 (5) SA 462 (W)).

It was further held that notwithstanding the fact that the guarantee was subject to the seller's approval, it did not alter the nature of the contractual obligation because the basis of such approval or rejection would have to be reasonable and the seller has to exercise his or her discretionary decision in accordance with the arbitrio boni viri principle (para [17]). Thus, when the appellant was informed in writing on 22 April 2004 that the Master had issued a certificate consenting to the sale of the mineral rights, the agreement between the parties became unconditional and perfecta.

It is worth observing that in *Gengan v Pathur* 1977 (1) SA 826 (D) it was held that in order to determine whether, in terms of the doctrine of risk, the seller would also be liable to the purchaser for damage to, or loss of, the res vendita it is necessary to distinguish between the following possibilities: *(a)* where there is total destruction of the res vendita through no fault of the seller, the purchaser has no recourse against the seller since the contract comes to an end by reason of impossibility or supervening impossibility of performance; and *(b)* where the res vendita is only partially destroyed, the purchaser has a common-law remedy against the seller. In the latter instance, the fact that such damage occurred through no fault of the seller will not necessarily frustrate the purchaser's claim as such an occurrence constitutes a material breach of contract in respect of which a purchaser has the normal contractual remedies for breach of contract.

Credit Agreements in terms of the National Credit Act

Declaring immovable property executable

In *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 (1) SA 143 (GSJ), the applicant, a commercial bank and credit provider who complied with all the provisions of section 129 of the National Credit Act 34 of 2005 ('NCA') (the requirements a notice to institute legal proceedings must comply with), applied for default judgments on certain mortgage bonds and orders declaring the properties executable. All three respondents were from a historically disadvantaged background. In each case, the respondents were residing on the property and the arrears were relatively small amounts. Since the amounts claimed fell within the jurisdiction of the magistrate's court, the Registrar referred these cases, in terms of rule 34(5)*(b)*(vi) of the Uniform Rules of Court, to open court for consideration.

Claassen J confirmed that the aim of the NCA is, inter alia, to protect debtors; to balance the inequalities arising from unequal bargaining power; and to render assistance to previously disadvantaged, indigent and unsophisticated consumers, levelling the playing field between them and well-advised credit providers (*Absa Bank Ltd v Myburgh* 2009 (3) SA 340 (T)). In deciding whether or not to grant an executable order in the present circumstances, the court took several factors into consideration: *(a)* the historically disadvantaged background of the defendants; *(b)* the period during which the instalments had been paid regularly (seventeen, fourteen, and nineteen years, respectively, in the present case; the court held that if the properties were declared executable, the substantial equity and accumulated capital growth in the market value of the properties would be unfairly lost to the detriment of the defendants); *(c)* the extent of the arrears, which in each case, was relatively minor and could have been easily addressed by a settlement agreement or in terms of sections 85 and 86 (declaration of over-indebtedness and debt review) (the prejudice suffered by the defendants by losing their properties as opposed to the prejudice suffered by the bank for not receiving immediate payment, would thus be disproportionately unfair); *(d)* the fact that the defendants could be classified as 'low income persons' as contemplated in section 13*(a)*(ii) of the NCA imposed a duty on the courts, in general, to reflect Parliament's aim to promote a fair credit market through the National Credit Regulator in their judgments; *(e)* the absence of a warning in the notice in terms of section 129 to the effect that, on failure to adhere to the payment demand, the defendants' properties might be sold in execution (although the NCA does not require such warning, it places an additional burden on courts to take extra care in their supervisory role before granting an execution order in circumstances that will be unjust); *(f)* the protection provided for consumers by the NCA, such as the assistance of an ADR agent, Consumer Court, ombud, or debt counsellor, is not well-known to consumers, particularly historically disadvantaged consumers, and this lack of knowledge is often the reason why they do not make use of the protection provided by the Act; *(g)* the lack of funds to seek legal advice or ignorance of the availability of free legal advice; *(h)* the inability to obtain free legal advice because the consumer owns immovable property and thus fails the 'means test' even though he or she is poor and disadvantaged; and *(i)* the deterrent effect of high litigation costs involved in opposing an application in the High Court (paras [5]–[6]).

The court held that should one or more of the above factors be ignored in granting a default judgment and execution order, a grave injustice could be inflicted, disregarding the purpose and spirit of the NCA (para [7]). Furthermore, the courts should in the above circumstances be particularly astute to protect the rights of historically disadvantaged persons when it comes to application of the NCA (para [9]).

Claassen J held that the court also has a duty in such circumstances to consider the constitutional implications of section 26 of the Constitution of the Republic of South Africa, 1996 (the right to adequate housing) (para [10]). After a thorough analysis of *Jaftha v Schoeman* (supra) and *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) (paras [11]–[14]), the court came to the conclusion that the granting of an execution order in this case would violate section 26. This section was qualified by several considerations in the *Jaftha* case:

'The circumstances in which the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular case before the court' (*Jaftha* para [60]).

However, in *Standard Bank of South Africa Ltd v Hales and Another* 2009 (3) SA 315 (D), section 26 was applied in favour of the credit provider due to the fact that the debt in that case was of a substantial amount (R790 000) (see further 2009 *Annual Survey* 1006; C van Heerden & DJ Lötz 'Over-indebtedness and discretion of court to refer to debt counsellor *Standard Bank of South Africa Ltd v Hales* 2009 (3) SA 315 (D)' 2010 (73) *THRHR* 502.)

For the above reasons, the court refused to grant an execution order (para [16]). It regarded the matter as ideally suited for debt counselling in terms of section 85 of the NCA (para [17]). The difficulty with the present situation is that in an application for default judgment no allegations of over-indebtedness are made. As a result, a court may not apply the remedies available in section 85 (para [19]; see also *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (W); 2009 *Annual Survey* 1004). However, in the absence of a default judgment and execution order in the High Court, the plaintiff may still recover his or her debt in a magistrate's court in terms of section 73 of the Magistrates' Courts Act 32 of 1944 (para [21]).

Claassen J held that the High Court still has a discretion to decline hearing a matter under the NCA, to terminate the proceedings in front of it, and to refer the case to a magistrate's court with jurisdiction (para [23]).

Application of the NCA to incidental credit and credit facilities

Acknowledgement of debt

The defendant in *Carter Trading (Pty) Ltd v Blignaut* 2010 (2) SA 46 (ECP) signed an acknowledgement of debt (which consisted of a standard roneoed form) in respect of goods purchased from the plaintiff. In terms of the acknowledgement of debt, payment of the debt was deferred and the defendant undertook to pay the costs pertaining to the drafting of the document, collection commission, legal fees, and interest on the owed amount. After the defendant failed to honour the acknowledgement of debt, the plaintiff instituted legal action against him. The defendant entered an appearance to defend.

The plaintiff then filed an application for summary judgment. This application was opposed by the defendant, who contended that the acknowledgement of debt was a credit agreement as contemplated in section 8(4)*(f)* of the NCA and that the plaintiff had failed to comply with the provisions of sections 129 and 130 of the Act (the requirements a notice to institute legal proceedings must meet and the requirements to be met before a credit agreement may be enforced).

Van der Byl AJ held that the question whether an acknowledgement of debt constitutes a credit agreement must be answered in the context of section 8(1)*(b)* read with section 8(4)*(f)* of the NCA (para [12]).

After analysing the contents of the acknowledgement of debt, the court came to the conclusion that the payment it provided for was deferred and that the debtor also undertook to pay, in addition to the amount owing, interest, and certain legal and collection fees (para [16]). These terms, so it was held, are exactly what is envisaged by section 8(4)*(f)* (para [17]). Hence, it was held that the acknowledgement of debt in this case falls within the scope of section 8(4)*(f)* and qualifies as a credit agreement (para [18]).

From the particulars of claim it also appeared that the acknowledgement of debt was concluded in respect of goods sold and delivered on credit. For this reason, the court further held that an agreement in terms of which a credit provider supplies goods to a consumer on the basis that payment is deferred, together with any charge, fee or interest payable to the credit provider in respect of the deferred payment, must be regarded as a credit facility which constitutes a credit agreement in terms of section 8(1)*(a)* read with section 8(3) (para [22]). Thus, notwithstanding the acknowledgement of debt, Van der Byl AJ held that the arrangement between the parties also fell within the ambit of section 8(1)*(a)* read with section 8(3) and would, in any event, have been a credit agreement (para [23]).

In conclusion it was held that because a credit agreement had come into existence, the plaintiff's failure to comply with sections 129 and 130 was fatal (para [26]). Accordingly, summons was prematurely issued and summary judgment could not be considered under these circumstances. However, referring to *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D), it was held that although sections 129 and 130 are not a defence on the merits to the plaintiff's claim for summary judgment, section 130(4)*(b)* is wide enough to authorize an order to the effect that the plaintiff may resume its application for summary judgment after the defendant has exhausted his remedies in terms of section 129(1)*(a)* (para [30]).

Municipal rates and service charges

The question whether the payment of municipal rates, on the one hand, and municipal service charges and interest, on the other hand, falls under the NCA was raised in *Nelson Mandela Bay Metropolitan Municipality v Nobumba NO and Others* 2010 (1) SA 579 (ECG). The court held that although the purposes of the NCA (s 3) appear to be focused on commercial credit, the application of the Act is wide enough to include credit agreements where the state and organs of the state are credit providers (s 4(3)*(b)*(i)) (para [22]).

Referring to case law and section 229(1)*(a)* of the Constitution, Plasket J held that the source of municipal rates is based on a form of tax and not on agreement. As the NCA concerns itself only with credit agreements, it does not apply to proceedings instituted by a municipality to recover unpaid rates (paras [30]–[32]). Hence, section 129 and section 130 of the NCA do not apply in this situation.

On the question whether municipal service charges fall under the NCA, the court held that although the duty to supply municipal services and the duty to pay for them are statutory in origin (ss 4(2)*(f)*, 5(1)*(g)* and 5(2)*(b)* of the Local Government: Municipal Systems Act 32 of 2000), they are still based on a service agreement between the municipality and the individual consumer, which may constitute a credit facility as contemplated in section 8(3) of the NCA (para [34]). However, the agreement cannot be an incidental credit agreement in terms of section 8(4)*(b)*, because it concerns payment of a periodic statement of account for consumed services and does not entail the payment of 'a fee, charge or interest' which becomes payable when payment of the initial account is not made on time.

However, section 4(6)*(b)* of the NCA exempts credit providers who provide utility or other continuous services (the supply to the public of essential commodities such as electricity, water, gas, waste removal and telecommunications) from the Act, provided the agreement with consumers provides for a deferred payment once a periodic statement of account has been delivered by the supplier of the services to the consumer, and no interest is charged in terms of section 103 of the NCA on any deferred amount unless the consumer fails to pay the full deferred amount due within at least thirty days after the date on which the periodic statement has been delivered to him or her. However, the court held in agreement with JW Scholtz et al (*Guide to the National Credit Act* (2008) 4), that for a supplier of a utility to be exempted from the NCA, the agreement in terms of which the utilities are supplied must comply with both of the above requirements (para [40]). If these conditions are present, the agreement is neither a credit facility nor an incidental credit agreement, but the interest charged in terms of section 4(6)*(b)*(ii) is incidental credit to which the NCA applies. The court found that the municipality had not established that its standard-form service agreement complied with the requirements of section 4(6)*(b)*. Consequently, the municipality failed to convince the court that the agreement was exempted from the NCA (para [46]). (See further JM Otto 'The incidental credit agreement' (2010) 73 *THRHR* 637.)

It is worth mentioning that the constitutionality of section 4(1)*(a)* (exemption of certain juristic persons with an asset value or annual turnover of more than R1 million from the NCA), section 4(1)*(b)* (exemption of large credit agreements as contemplated in section 9(4) in respect of certain juristic persons with an asset value or annual turnover of more than R1 million) and section 4(2)*(c)* (limited application of the NCA to credit guarantees) were under the spotlight in *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1)* 2010 (1) SA 627 (C). Steyn AJ held that these sections of the NCA are not unconstitutional. This case is discussed in more detail in the chapter on Constitutional Law.

Sale agreements

In *Voltex (Pty) Ltd v Chenleza CC and Others* 2010 (5) SA 267 (KZP), the essential terms of a written agreement between the parties were that the first defendant would from time to time purchase goods from the plaintiff at the agreed price, alternatively, at the plaintiff's usual price or a fair and reasonable price. The purchase price would be due and payable by the first defendant to the plaintiff within thirty days of the date of delivery, within thirty days of the date of the plaintiff's statement, within a reasonable time of delivery, or upon demand. The defences raised were that the agreement was a credit agreement as contemplated by section 8(3) and (5) of the NCA; that the plaintiff was a credit provider in terms of sections 40(1) and 42(1) and consequently had to be registered as such with the National Credit Regulator, but was not so registered, with the result that the agreements were void in terms of section 40(4) read with section 89; and that the defendants were not notified in terms of section 129.

The crux of the matter was whether the agreement of sale fell within the definitions set out in section 8(1) to (5) (para [26]). To determine this, Madondo J held that the nature, subject-matter, substance, purpose, and function of the particular agreement, as well as the intention of the parties gathered from their conduct should be taken into account (ibid).

As the whole payment (debt amount) was deferred for thirty days and the first defendant was, in terms of the agreement, required to pay the amount owed in full (not by instalments as is generally the case with credit agreements) on or before the specified date or period, the court held that the payment could not be construed as a deferred payment as envisaged in section 8(3)*(a)*(ii)*(aa)* (paras [27]–[33]). Furthermore, so it was held, although section 8(3)*(a)*(ii)*(bb)* entitles a credit provider to bill a consumer periodically for the balance of the purchase price, this did not happen in the present case due to the fact that there was no deposit or part payment on the balance of the purchase price (para [43]). It was also held that the sale agreement did not constitute a pawn transaction, an incidental credit agreement, an instalment sale agreement, a mortgage agreement or a lease in terms of section 8(4)*(a)* to *(e)* (paras [36]–[37]).

With regard to 'any other agreement' referred to in section 8(4)*(f)*, Madondo J held that such 'other agreement' constitutes a credit transaction if it is an agreement other than a credit facility or credit guarantee in terms of which the payment of the amount owed by one person to another is deferred and a charge, fee or interest is payable to the credit provider in terms of the agreement or on the amount that has been deferred (paras [38]–[39]). However, in the present matter, even though the purchase price was payable within thirty days of delivery of the goods, no charge, fee or interest was payable to the plaintiff in terms of the agreement, or on the deferred amount, save the interest which was payable as damages in consequence of the breach of the contract. The latter interest was determined by the operation of law and not by agreement. Thus, the sale agreement in this case did not qualify as 'any other agreement' referred to in section 8(4)*(f)*. The court concluded that the agreements in question did not fall within the ambit of sections 8(1) to (5) and were accordingly not credit agreements as defined in the NCA (para [43]).

This issue was raised again in *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and Others* 2010 (6) SA 173 (KZD) where the plaintiff sold fabric on credit to the first defendant, a close corporation, trading as Cuts. The monthly credit limit was described as 'R50 000/R100 000' and the agreement provided that payment should be made 'sixty days nett'. Because Cuts had gone into liquidation, the present action to recover the purchase price of goods supplied to it was against the second and third defendants as sureties and co-principal debtors of Cuts. One of the defences raised by the sureties was that the plaintiff was obliged to register as a credit provider in terms of section 40 and that, as it was not registered, the credit agreement was unlawful and void.

Wallis J held that the nub of this case was whether the plaintiffs was obliged to register as a credit provider (para [4]). If it was and did not do so, any credit agreement concluded by them would be an unlawful agreement and would be void to the extent provided for in section 89.

In terms of section 40(1), a person is obliged to register as a credit provider if he or she is the credit provider under at least 100 credit agreements, other than incidental credit agreements, or if the total principal debt owed to the credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the present threshold of R500 000 (s 42(1)). The court held that if the agreements between the plaintiff and Cuts were incidental credit agreements, the plaintiff was under no obligation to register as a credit provider in terms of section 40(1) (paras [6] and [13]). Section 1 defines an incidental credit agreement as:

> 'an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply:
>
> *(a)* a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or
>
> *(b)* two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a

> determined date, and the higher price being applicable due to the account not having been paid by that date.'

The plaintiff argued that the agreements under consideration fell within this definition. The defendants, however, contended that the agreements constituted a credit facility as defined in section 8(3).

Wallis J mentioned that, at first sight, both arguments concerning incidental credit (to which the NCA has limited application) and a credit facility (to which the NCA applies in full force) were plausible, but both could not be upheld (para [13]). He held that section 8(3) does not apply to conventional sales on credit, but is directed at the provision of charge cards, credit cards and similar arrangements by credit providers (para [15]). He found that the agreement with Cuts entailed the sale of goods on credit, with the expectation that payment of the goods would be effected each month as it fell due. A fee was not payable for this arrangement; nor was there an entitlement to pay less than the full amount due each month (ibid). Any obligation to pay interest flowed from default in making timeous payment. Accordingly, the transactions with Cuts fell outside the scope of section 8(3).

Wallis J further motivated his ruling by emphasizing that the NCA is concerned with the activities of those whose business it is to provide credit to the public and who seek to profit from that business by way of fees, charges and interest (paras [16]–[18]). Further, the distinction between an incidental credit agreement and a credit facility is that in the case of an incidental credit agreement a fee, charge or interest only becomes payable when the consumer is in default. Also, independent from any contractual term of an incidental credit agreement, a creditor will be entitled to charge interest on default payments by virtue of the provisions of the Prescribed Rate of Interest Act 55 of 1975. By contrast, in the case of a credit facility it is a term of the facility that the consumer is entitled to defer payment in full and to make lesser payments, subject to paying interest.

Thus, it was concluded that the transactions in this case were incidental credit agreements and that the plaintiff had no obligation to register as a credit provider in terms of section 40(1) (para [20]).

JM Otto ((2010) 73 *THRHR* 637) explains that since the definitions of an 'incidental credit agreement' and other credit agreements (for example, a 'discount transaction') overlap, incidental credit agreements will be exposed to much future litigation. However, a distinctive feature of an incidental credit agreement is that an account has to be tendered (rendered) to qualify as such and credit providers will be well-advised to tender an account in every possible instance to escape certain challenging provisions of the NCA (see s 5(1)). However, if periodic accounts are rendered, such transaction will not qualify as an 'incidental credit agreement' but as a 'credit facility' (*Nelson Mandela Bay Metropolitan Municipality v Nobumba* supra). Another distinguishing characteristic of an incidental credit agreement is that a 'fee, charge or interest' only becomes payable when payment of an amount charged in terms of an account is not made within the period or date determined in that account. Otto also observes that although it seems at first sight that a credit card transaction may fall within the ambit of the definition of an 'incidental credit agreement', this impression is incorrect (at 640). A credit card transaction qualifies as a 'credit facility' because a credit card represents an account for *credit* (not goods and services) rendered by a financial institution. This notion was confirmed in *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and Others* 2010 (6) SA 173 (KZD) and supported by Philip N Stoop ('The impact of the National Credit Act 34 of 2005 on school fees charged by public schools' 2010 (73) *THRHR* 451). Stoop is also of the opinion that an agreement regarding school fees may qualify as a credit agreement either in the form of a 'discount agreement' (ss 8(1)*(b)* and (4)*(a)*) or 'an incidental credit agreement' (ss 8(1)*(b)* and (4)*(b)*) depending on the drafting and circumstances of the agreement.

Commencement of proceedings as per sections 129 and 130

To establish whether the plaintiff's application for summary judgment and an order declaring the res vendita executable complied with section 130(1)*(a)*, the court in *Nedbank Ltd v Mokhonoana* 2010 (5) SA 551 (GNP) had to decide on the meaning to be ascribed to the words 'commence any legal proceedings to enforce the agreement' in section 129(1)*(b)* and 'approach the court for an order enforcing' in section 130(2).

Ellis AJ held (para [6]) that the process of enforcement of a credit agreement by legal action, as contemplated in sections 129(1) and 130(1), begins with the delivery of a notice in terms of section 129 (notice in which the consumer's attention is drawn to his or her default containing proposals regarding debt counselling and alternative dispute resolution).

The defendant submitted that, for purposes of section 129(1)*(b)*, legal proceedings commenced on the issue of summons and not on service of the summons. Although Ellis AJ held (para [11]) that some support for this submission is to be found in Andries Charles Cilliers, Cheryl Loots and Hendrik Christoffel Nel *Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5 ed (2009) vol 1 503) where it is argued (without reference to direct authority) that issue of a summons and not its service constitutes commencement of proceedings, the court disagreed with this submission. The court held that service of summons (not issue) should be determinative regarding commencement of proceedings (paras [13]–[14]).

This view was supported by Ellis AJ, because the commencement of legal proceedings has a distinct and far-reaching effect on the rights of a consumer in so far as he or she is, for example, precluded from applying to be declared over-indebted by a debt counsellor (s 86(2)) (para [14]). Legal uncertainty will be created if the consumer's ability to apply for debt review is determined by the date of issue of the summons, of which he or she may be unaware, as opposed to the date of service of the summons, of which he or she will be aware. Thus, as a matter of law, the court found that legal proceedings for purposes of section 129(1)*(b)* commence not on issue of summons, but on service of summons, and that once it has been established that ten business days have elapsed between delivery of the notice in terms of section 129 and service of the summons, the process cannot be faulted and the plaintiff is entitled to judgment in its favour (paras [14]–[15]).

Notice of default in terms of section 129

The applicant in *Starita v Absa Bank Ltd and Another* 2010 (3) SA 443 (GSJ) was granted a loan, secured by a first mortgage bond, by the respondent. The applicant subsequently experienced financial difficulties and was unable to meet her commitments to the respondent and other creditors. On 23 November 2007, the respondent sent a notice in terms of section 129 of the NCA to the applicant's chosen domicilium citandi et executandi by registered mail. There was no dispute that the notice was sent by registered mail and that it was sent to the applicant's chosen domicilium citandi et executandi. However, the applicant denied that the notice was at any stage delivered to that address. She blamed the Post Office for this fact. It was also not in contention that the NCA applies to the agreement and that the content of the notice complied with the provisions of section 129 of the Act. The respondent issued summons on 8 January 2008, to which the applicant failed to deliver a notice of intention to defend. Consequently, the respondent applied for default judgment. Because of an administrative error, default judgment was not granted. The respondent issued a second summons on 12 January 2009, without withdrawing the first summons. Default judgment was granted on this summons. On 8 May 2008, before the issue of the second summons, the applicant applied for a debt review in terms of section 86(1). At the time, she was unaware of the issue and service of the first summons. The debt review proceeded and was pending in the magistrate's court when the applicant sought rescission of the default judgment that had been granted against her.

The applicant's arguments for rescission of the default judgment rested mainly on *(a)* the existence of two summonses for the same debt, and *(b)* the effect that the existence of the two summonses had on the validity of the notice in terms of section 129. With regard to the first contention, the court held that the existence of two summonses did not render one or both of them invalid or inoperative and that if the special plea of lis pendens was never raised, there would be no adverse consequences to the plaintiff (respondent) other than it would not be entitled to obtain judgment in both actions but only in one (para [7]).

In respect of the effect the existence of the two summonses had on the validity of the notice in terms of section 129, it was contended that the notice, having formed the platform on which the first summons was based, could not be used again for the second summons, either per se, or because of the lapse of a period of time. The court held that the NCA does not specify a time period for the continued validity of a notice in terms of section 129 and that none can be implied (para [10]). Thus, the ongoing validity of a summons depends on the facts of the each case. Gautschi AJ held that if, for example, the arrears specified in a notice in terms of section 129 were fully extinguished after the notice had been given, the very same notice could not be used for arrears that arose afterwards (ibid; see also *BMW Financial Services (South Africa) (Pty) Ltd v Dr MB Mulaudzi Inc* 2009 (3) SA 348 (N); 2009 *Annual Survey* 999). However, if all arrears were not extinguished after the notice had been given in terms of section 129, no provision in the NCA required that a new notice must be given, with the result that the same notice may be used for more than one summons. The only imperative is that certain time periods have to elapse before the notice may be acted upon.

The court held that the present debt review was invalid because section 86(2) stipulates that an application for debt review is prohibited once a credit provider has proceeded to take the steps contemplated in section 129 to enforce a credit agreement (paras [11]–[12]). The court held that the steps taken under section 129, as referred to in section 86(2), are the steps that are taken after the notice has been given, starting with issue of summons. The court further held that knowledge on the part of the consumer of the steps taken is not required, as was the situation in the present case (para [13]).

Gautschi AJ confirmed that judicial authority was divided on whether a notice in terms of section 129 must be received by the consumer in order to be valid (para [17]). In *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010 (1) SA 549 (KZD), *First National Bank Ltd v Rossouw and Another* (GPN 6 August 2009 (case 30624/09) unreported), *Standard Bank of South Africa Ltd v Mellet and Another* [2009] ZAFSHC 110 and *Standard Bank of South Africa Ltd v Rockhill and Another* 2010 (5) SA 252 (GSJ), it was found that actual receipt of the notice is not required. On the opposite side are *FirstRand Bank Ltd v Dhlamini* 2010 (4) SA 531 (GNP) and *Absa Bank Ltd v Prochaska t/a Bianca Interiors* (supra; see 2009 *Annual Survey* 1000), which held that actual receipt of the notice is required.

Gautschi AJ declined to follow *Dhlamini* and *Prochaska* and supported *Munien* for various reasons (paras [18.1]–[8.11]).

In the first instance, the encapsulated and operative term to be analysed is the word 'delivered'.

Secondly, the requirements as to how the default is to be brought to the notice of the consumer are to be found in sections 65 and 168.

Thirdly, section 65 stipulates that every document that is required to be delivered to a consumer must be delivered in the prescribed ('prescribed by regulation': s 1) manner, if any. If no method has been prescribed, the consumer may choose that the credit provider make the document available to him or her through one or more of the following mechanisms: in person at the business premises of the credit provider or (at the consumer's expense) at any other location designated by the consumer, by ordinary mail, fax, e-mail, or printable web-page. Although regulation 1 defines 'delivered' as 'unless otherwise provided for, . . . sending a document by hand, by fax, by e-mail, or registered mail to an address chosen in the agreement by the proposed recipient, or, if no such address is available, then the recipient's registered address', it will be fallacious to apply a definition in the regulations to an expression used in the Act. Furthermore, the regulations do not prescribe how documents are to be delivered and the above definition also does not purport to contain a 'prescribed manner' for delivery. It is simply a definition and simply indicates the meaning to be ascribed to the word 'delivered' as used in the regulations. Thus, the definition of the word 'delivered' in the regulations cannot be adopted to interpret sections of the Act.

Fourthly, the 'prescribed manner of delivery of a document to a consumer' is best provided for in section 168. The court's view in this case is that there is no substantial difference between the words 'delivered' and 'served', and although the words 'delivered', 'deliver' and 'delivery' appear frequently in the Act, the words 'served' or 'serve' are, in contrast, absent from the Act. Section 168 thus applies to a notice which has to be 'delivered' which, in the context of the wording of section 130(1)*(a)*, includes a notice in terms of section 129(1). Thus, in terms of section 168, a notice in terms of section 129 will be properly served (delivered) when it has been sent by registered mail to the consumer's last known address. Alternatively, if section 168 does not constitute the 'prescribed manner' referred to in section 65(1), such notice in terms of section 129 may, in the absence of another statutorily prescribed method for delivery, be sent to the consumer 'by ordinary mail' in terms of section 65(2)*(a)*(i), provided no other manner was chosen by the consumer in terms of section 65(2)*(b)*.

Fifthly, there seems to be a conflict between sections 168*(b)* and 96(1). Section 168*(b)* requires the registered mail to be sent 'to that person's last known address'. Section 168*(b)* is accordingly a deeming provision, which in effect deems proper service to have taken place if the document has been sent by registered mail to the last known address. This provision appears to contradict section 96(1), which provides that a legal notice must be delivered to the other party's address as set out in the agreement, or (if applicable) to the address most recently provided by the recipient. Thus, section 96(1) prescribes, in peremptory terms, the address at which the notice must be delivered. According to Gautschi AJ, a notice in terms of section 129 is a 'legal notice' as envisaged in section 96(1), with the result that section 96(1) applies to it. The apparent conflict between section 96(1) and section 168*(b)* is all the more problematic if the addresses in terms of section 96(1) and section 168*(b)* are not the same. Logically, the last known address may be different from the address as set out in the agreement. Since section 65 does not stipulate the address to which the ordinary mail is to be sent, no similar conflict exists between sections 65 and 96(1).

Sixthly, because of poor drafting, no emphasis can be placed on specific terminology employed by the legislature, such as 'deliver', 'serve' or 'enforce' in section 129 (as was done in *Dhlamini* and *Prochaska*). A perusal of the NCA further shows that the expressions 'giving written notice', 'advise in writing', 'give notice', 'deliver' and 'serve' are used indiscriminately and without precision. Accordingly, no undue emphasis should be placed on the actual words used. However, all these expressions that are used in section 129 may be reduced to 'delivered,' which is the clearest indication of the legislature's intention with regard to the fate of the notice in terms of section 129.

Seventhly, although consumers' rights are of paramount importance, the legislature has not ignored the interests of credit providers and section 168 is an indication of the legislature's intention to balance the interests of credit providers and consumers. There is no imperative that credit providers should be put to the trouble and expense of ensuring actual receipt by consumers of a notice in terms of section 129. The NCA definitely does not require personal service on the consumer, as suggested in the *Dhlamini* and *Prochaska* cases. Thus, whether the intended recipient is a credit provider or a consumer, sending a notice by registered mail to that person's last known address is deemed to be proper service and this rule does not violate any purpose of the NCA.

Eighthly, this line of reasoning is reconcilable with Uniform Rule 4(1)*(a)*(iv), which provides that service of a summons (which is a far more drastic step and more detrimental than a notice in terms of section 129) on a consumer's chosen domicilium address may take place without proof of actual receipt of it.

The court concluded that a notice in terms of section 129 need not be actually received by the consumer and that it is sufficient if it was sent by registered post to his or her domicilium address (para [19]).

However, as briefly mentioned above, Murphy J came to the opposite conclusion in *FirstRand Bank v Dhlamini* (supra). In this case, the respondent admitted that a notice in terms of section 129 was correctly addressed and dispatched by registered post to him. For unknown reasons, no notification was sent to the respondent to inform him that the registered letter was awaiting collection at the Tembisa North Post Office. Since the letter was not collected, it was returned to the sender. The foundation of the respondent's defence was that because the notice did not come to his attention, the provisions of section 129(1) were not complied with and thus the summons was issued prematurely. Therefore, summary judgment should not have been granted.

The court held that, in terms of the wording of section 129(1)*(a)*, the correct question to ask when considering compliance with this section 'is not whether the notice has been "delivered" to the consumer, but is rather whether the credit provider has "drawn the default to the notice of the consumer in writing"' (para [23]). According to Murphy J, this critical question was ignored by Wallis J in *Munien v BMW Financial Services* (supra; see also 2009 *Annual Survey* 1001) when he equated the requirement to drawing 'the default to the notice of the consumer in writing'. Murphy J also disagreed with Wallis J by holding that Wallis J's finding that the concept 'delivery' as defined in section 65(2) and regulation 1 can be applied to section 129(1)*(a)* is flawed and unsustainable in view of the language and policy of the NCA.

Hence, Murphy J held that bringing something to a person's notice, as stipulated in section 129(1)*(a)*, requires that it be brought to his or her attention (para [24]). Delivering something, as required in section 130(1)*(a)* for example, means dispatching it in a manner that ensures that it will arrive at a physical or electronic address, irrespective of whether or not it comes to the notice of the addressee. Agreeing with the *Prochaska* case, Murphy J held that the requirement of drawing the default to the notice of the consumer in terms of section 129(1)*(a)* and prohibiting commencement of legal proceedings in terms of section 129(1)*(b)*(i) before 'first providing notice to the consumer', cumulatively reflect an intention on the part of Parliament to impose upon the credit provider an obligation which requires more than the mere dispatching of the notice to the consumer in the manner prescribed in the Act and regulations for delivery (ibid).

It was further held that section 65 regulates the right of a consumer to have documents delivered in a certain manner and that it does not per se constitute a rebuttable presumption of service, such as the one contained in section 7 of the Interpretation Act 33 of 1957 (para [25]). However, Murphy J found (ibid) that section 168 provides for a non-rebuttable presumption of service. As the term 'serve' is not defined in the NCA, the court interpreted it to mean 'to deliver a document to a person in the legally required manner' (ibid). Consequently, it was held that the difference between the terms 'deliver' and 'serve', as used in the NCA, is that the latter includes the former, but also allows for dispatch by registered post, and that 'service' in terms of the Act is the equivalent of 'delivery' under the regulations (ibid). Considering the drastic impact of section 168 on procedural fairness by providing for a non-rebuttable presumption of service, the court held that section 168 must be construed restrictively (ibid). It follows that Murphy J held that 'serving a notice' should not be seen as the same as 'drawing the default to the notice of the consumer in writing' and that section 129(1)*(a)* accordingly requires communication that goes beyond non-personal service (ibid).

The court also pointed out that the purpose of section 129(1)*(a)*, read with section 3*(h)*, is to provide for a consistent and accessible system of consensual resolution of disputes and debt restructuring arising from credit agreements and that section 129(1)*(a)* was deliberately designed to protect these aims (para [28]). A non-rebuttable presumption of service or notice on mere dispatch of a notice in terms of section 129 would defeat these aims.

To avoid unnecessary hardship and to comply with the objects of the NCA, the court concluded that section 129(1)*(a)* requires that a 'notice of any default by the consumer be brought to his or her actual attention; and that failure on the part of the credit provider to do so will bar the institution of legal proceedings, with the result that any action instituted before then will be premature' (para [31]) .

The notice issue was again raised in *Standard Bank of South Africa v Rockhill* (supra). In support of compliance with section 129, the plaintiff relied on copies of the letters (dated 25 November 2009) addressed to the defendants and the registration slips as proof of posting them to the defendants. Because the defendants had been in default for more than twenty business days (as stipulated in section 130) and ten business days had elapsed since the date of posting the notice in terms of section 129, summons was issued and served on 17 and 21 December 2009, respectively. In resisting summary judgment, the defendants alleged that they did not receive the notice in terms of section 129 and that the plaintiff thus had not complied with section 129.

Epstein AJ argued that although section 129 does not state how the default must be drawn to the consumer's attention, section 130(1)*(a)* provides the answer by referring to the term 'delivered' when addressing a notice in terms of section 129 (para [5]). The court held that although the term 'deliver' is not defined in the Act, it is defined by regulation 1 (see the definition above) (paras [5]–[6]). It follows that section 129(1)*(a)* does not require the consumer to receive the notice in terms of section 129 and that the credit provider discharges its obligation of delivering the notice in terms of section 129 by sending it to the postal address selected by the consumer (*Marques v Unibank Ltd* 2001 (1) SA 145 (W); *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* (supra)). However, Gautschi AJ held in *Starita v Absa Bank* (supra) that the definition of the word 'delivered' in the regulations cannot be used to interpret sections of the Act (para [18]).

Another point of contention was that summons had been issued prematurely. This dispute was based on certain provisions in the mortgage bond and loan agreement which provided that any letters and notices posted to the defendant's chosen address by registered post would be regarded as having been received within fourteen days after posting. The defendants argued that the effect of these contractual provisions were that the ten business days, provided for in section 130(1)*(a)*, would only commence after the fourteenth day from the date of posting of the notices and that the plaintiff had accordingly approached the court prematurely.

Referring to *Principal Immigration Officer v Hawabu and Another* 1936 AD 26, the court held that when interpreting a statute a court is entitled to take the language, objects, and purpose of Parliament as well as the history of the legislation and the circumstances applicable to the subject-matter into account (para [9]). Against this backdrop, the court held that the primary purpose of the NCA is to protect consumers and to provide a minimum standard for protection (paras [13]–[15]). However, this object does not disallow credit providers from incorporating additional contractual protection in favour of consumers into their credit agreements. Consequently, an extended period by which notices are deemed to have been received is not incompatible with the general purpose of the NCA and does not override the effect of section 129, read with section 130, which is concerned with specifying the least number of days that must have elapsed before a credit provider may approach the court. Thus, the legislature's purpose was not defeated by the parties' agreement in this case and the agreement was not in conflict with sections

129 and 130. As a result of this finding, effect had to be given to the agreement, which was valid, binding and lawful, and the ten business days provided for in section 130(1)*(a)* had accordingly not elapsed by the time summons was issued. The action was accordingly premature.

The final issue in this case was whether non-compliance with section 129 constituted a bona fide defence to an application for summary judgment. In *Standard Bank of South Africa Ltd v Van Vuuren* 2009 (5) SA 557 (T), Van Rooyen AJ held (para [11]) that non-compliance with section 129(1)*(b)* may qualify as a bona fide defence. Differing from this decision, Epstein AJ held that non-compliance with section 129(1)*(a)* is an impediment to commencing any legal proceedings to enforce a credit agreement and that it does not qualify as a bona fide defence envisaged by Uniform Rule 32(3)*(b)* (para [17]). This finding, so it was held, is endorsed by the procedural rule stipulated in section 130(4)*(b)* that once it is established at trial stage that a plaintiff has not complied with section 129(1)*(a)*, the trial must be adjourned and an order made setting out the steps the plaintiff has to complete before the trial is resumed (ibid). This resumption of the proceedings thus illustrates that non-compliance with section 129(1)*(a)* does not constitute a bona fide defence for summary judgment purposes.

The notice section 129 requires was again under the spotlight in *Standard Bank of South Africa Ltd v Maharaj t/a Sanrow Transport* 2010 (5) SA 518 (KZP) where an instalment credit agreement was concluded in terms of which the applicant financed the purchase price of a truck bought by the respondent. As a result of the respondent's default, the applicant dispatched a notice in terms of section 129 by prepaid registered post to the contractually chosen domicilium address of the respondent, claiming repossession of the truck. Two defences were raised: *(a)* the notice did not contain a 'proposal' as required by section 129; and *(b)* the respondent did not receive it.

As to the first defence, *BMW Financial Services v Dr MB Mulaudzi* (supra) was cited as authority. In that case, it was held that a cold, mechanical and disinterested approach would be insufficient in drafting a notice in terms of section 129 and that it was not Parliament's intention that section 129(1) merely be reproduced in the contemplated notice (para [13]). What is required is that such notice has to reflect an understandable and practical approach, incorporating workable proposals as stated in section 130(1)*(b)*(ii). However, Swain J disagreed with this contention for the following reasons (paras [10]–[13]). The objectives of section 129(1)*(a)* are to bring the default to the consumer's attention, to propose to the consumer that assistance of one of the entities mentioned therein be sought in order to resolve the dispute under the agreement, or to develop and agree on a plan to bring the payments under the agreement up to date (para [10]). Consequently, the 'proposal' envisaged in section 129(1)*(a)* relates to engaging the services of one of the named entities 'with the intent' to achieve resolution of the dispute (para [11]). The fact that section 130(1)*(b)*(ii) provides for rejection of 'the credit provider's proposals' does not imply that the proposal must be something more than is expressly provided for in section 129(1)*(a)*. It follows that a notice in terms of section 129 does not have to contain more information than that which is expressly mentioned in section 129(1)*(a)* and that the notice in the present case was in line with these requirements.

The respondent's defence that he did not receive the notice in terms of section 129 was also rejected. Swain J relied on *Munien v BMW Financial Services* (supra; see also 2009 *Annual Survey* 1001) where Wallis J came to the conclusion that the prescribed manner of delivering documents (notices) in terms of the NCA must be in accordance with the definition of 'delivered' in the National Credit Regulations and not section 65(2) of the Act (para [12]). Wallis J further held that a document is 'delivered' in terms of the National Credit Regulations if it has been sent by hand, registered post, fax, or e-mail to an address chosen in the agreement by the recipient or, if no such address is available, to the recipient's registered address. In respect of all these methods of delivery, it is the sending of the document, not receipt thereof that amounts to delivery. Wallis J motivated his view by emphasizing the reality that a credit provider has little control over this matter and no means of ensuring that the notice actually comes to the attention of the consumer (para [14]). It is the consumer who is in a position to advise the credit provider accordingly. Thus, if a credit provider delivered the notice in the manner chosen by the consumer in the agreement and such manner was one specified in section 65(2)*(a)*, it is irrelevant whether the notice actually came to the consumer's attention.

In the case under discussion, the chosen method of delivery was by way of registered post. Although section 65(2)*(a)*(i) provides only for delivery by way of 'ordinary mail', Swain J agreed with Wallis J in *Munien* that sending a notice in terms of section 129 by registered post is not a material departure from section 65(2)*(a)*(i) as the notice is not less likely to reach its destination (para [16]). As a result, the applicant's claim succeeded.

JM Otto ('Kennisgewings kragtens National Credit Act: moet die verbruiker dit ontvang? *Absa Bank Ltd v Prochaska t/a Bianca Interiors* 2009 (2) SA 512 (D)' 2010 (73) *THRHR* 137) disagrees with the conclusion reached in *Prochaska*. He bases his view on case law (*Fitzgerald v Western Agencies* 1968 (1) SA 288 (T); *Marques v Unibank Ltd* 2001 (1) SA 145 (W); *Mercedes Benz Finance (Pty) Ltd v Coster* (unreported NPD AR 521/99) and *Van Niekerk and Another v Favel and Another* 2006 (4) SA 548 (W)) relating to previous legislation with similar provisions (the Hire-Purchase Act 36 of 1942, the Instalment Sale of Land Act 72 of 1971, the Credit Agreements Act 75 of 1980 and the Alienation of Land Act). In those cases it was held that it is not a requirement that the notice must come to the actual attention of the addressee (see 2009 *Annual Survey* 1001). Quite the opposite view has been taken by Sarah-Lynn Tennant ('A default notice under the National Credit Act must come to the attention of the consumer unless the consumer is at fault' 2010 *TSAR* 852). She endorses the conclusion reached in *Prochaska*.

The delivery requirements in respect of a notice in terms of section 129 were, at last, brought before the Supreme Court of Appeal for deliberation in *Rossouw and Another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA). This appeal was based on a loan agreement and mortgage bond in respect of which the appellants had fallen into arrears. After receipt of a notice in terms of section 129, the appellants attended debt counselling and, subsequently, made a debt-restructuring proposal to the respondent to which a counter-offer was made and accepted. However, this revised payment plan was later breached by the appellants, whereupon the respondent delivered a fresh notice in terms of section 129, followed by a summons claiming payment of an amount of R1 117 180,65 from the appellants and ancillary relief, including an order declaring the mortgaged property executable. The basis of the claim was that the appellants had failed to maintain regular instalments and that the full outstanding amount had thus become due and payable in terms of the agreement. In opposing this claim the appellants raised several defences, including that that they had not received the notice as envisaged in sections 129(1) and 130(1), and that the summons was excipiable since a mortgage loan agreement is not among the types of agreements mentioned in section 130(2). Thus, a credit provider is precluded from claiming any shortfall if the full amount of the debt under the agreement is not realized after execution of such property. Consequently, the only order the trial court could have granted was to declare the property executable. (This line of reasoning was based on the expressio unius est exclusio alterius principle in interpreting section 130(2). The latter issue is addressed below.)

The Supreme Court of Appeal confirmed that section 129(1)*(a)* does not prescribe the method of delivery of the notice it contemplates. For this reason, recourse must be had to section 65 (paras [22]–[23]). This section deals with the consumer's right to receive 'documents', which, according to Maya JA, includes 'notices'.

The court held that although the NCA defines the term 'prescribed' as meaning 'prescribed by regulation' (s 1) and the regulations contain a definition of the term 'delivered', it is generally impermissible to use regulations, created by a Minister, as an aid to interpret the intention of the legislature in an Act (para [23]). However, 'delivered' is defined in the regulations as, 'unless otherwise provided for, . . . sending a document by hand, by fax, by e-mail or registered mail to an address chosen in the agreement by the proposed recipient, or, if no such address is available, the recipient's registered address'. All the definitions in the regulations are also qualified in so far as 'in these Regulations, any word or expression defined in the Act bears the same meaning as in the Act'. Thus, the question remains whether the above definition of 'delivered' is the 'prescribed manner' envisaged by section 65(2).

Maya JA argued that the use of the phrase 'in these Regulations', convincingly indicates that the definitions in regulation 1 are operative only for purposes of the regulations, especially in the context of section 65(1), since the regulations do not refer to section 65(1) or the word 'prescribed' used in section 65(1) (para [26]). As opposed to the views of the court below, the Supreme Court of Appeal consequently held that the definition of the word 'delivered' in the regulations has no application in interpreting sections 129(1)*(a)* and 130(1) (para [27]). It follows, so Maya JA held, that the definition of 'delivered' in the regulations does not imply a 'prescribed manner' for delivery. The answer lies predominantly in the provisions of section 65(2), which prescribes six methods of delivery: 'in person', at the credit provider's premises or at any other location he or she chooses, by ordinary mail, fax, e-mail, or printable web-page (paras [27]–[28]).

Arriving at the above conclusion, the court also pointed out that section 65(2) must be read with section 96 (para [29]). Section 96, which deals with the address for delivery of legal notices (including a notice in terms of section 129), provides as follows:

> '(1) Whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at —
> *(a)* the address of that party as set out in the agreement, unless paragraph *(b)* applies; or
> *(b)* the address most recently provided by the recipient in accordance with subs (2).
>
> (2) A party to a credit agreement may change their address by delivering to the other party a written notice of the new address by hand, registered mail, or electronic mail, if that other party has provided an e-mail address.'

In this case, the parties had agreed to a domicile and a mode of delivery of notices as envisaged by sections 65(2) and 96. The chosen method was registered mail, which is not one of the options listed in section 65(2). Because registered mail is more reliable and cannot harm either party's interests, the court held that the choice of registered and not ordinary mail does not upset the provisions of section 96 (para [30]). The court further motivated this view by referring to section 168, which provides that if a document is sent by registered mail to a person's last known address, proper service will be deemed to have taken place, unless otherwise provided for in the Act (para [31]).

Cloete JA supported this viewpoint and, referring to *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 (4) SA 994 (A), held that a notice in terms of section 129 must comply with both the contract and the NCA (para [57]). Thus, the notice has to be sent by registered post, as stipulated in the contract, to comply with the contract, and this requirement does not frustrate the aim of section 65(2)*(a)*(i), because the greater (registered post) includes the lesser (ordinary post). However, if a consumer chooses another method of delivery in terms of section 65(2), the credit provider must comply with that choice and send the notice by registered post too if the latter is a provision of the agreement. To make the application of section 65(2) effective, Cloete JA emphasized that credit providers have to inform consumers of their options and if they fail to do so, credit providers should not complain if courts require compliance to the letter with both the Act and the terms of the agreement (para [58]).

Maya JA concluded that the legislature's intention was to grant the consumer a right to choose the manner of delivery, because it is within the consumer's sole knowledge as to which means of communication will reasonably ensure delivery to him or her, thus placing the risk of non-receipt on the consumer (paras [32]–[33]). This understanding, according to Maya JA, is also not inconsistent with the purposes of the NCA.

Claiming of a shortfall after execution of immovable property

Another concern broached in *Rossouw v Firstrand Bank* (supra) was whether a credit provider is precluded from claiming any shortfall if the full amount of the debt under the agreement secured by a mortgage bond is not realized after execution of such immovable property.

Section 130(2) provides that:

> '[i]n addition to the circumstances contemplated in subs (1), in the case of *an instalment agreement, secured loan, or lease*, a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if —
> *(a)* all relevant property has been sold pursuant to —
> (i) an attachment order; or
> (ii) surrender of property in terms of s 127; and
> *(b)* the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement' (emphasis added).

An instalment sale agreement, secured loan and lease are defined in section 1. They all involve a sale, pledge or cession of movable property. A mortgage agreement, in contrast, is defined (s 1) as a 'credit agreement that is secured by a pledge of *immovable property*' (emphasis added).

With reference to section 3*(d)* which, significantly, acknowledges the balancing of the respective rights and responsibilities of credit providers and consumers, the court held that a number of inequities may result if effect is given to the appellants' interpretation of section 130(2), which interpretation would alter credit providers' common-law rights (para [17]). The Supreme Court of Appeal, however, reaffirmed the principle that a statute may explicitly state an intention to alter the common law (para [18]). For example, section 83, which stipulates that an agreement may be suspended if it is found to be 'reckless', is a case in point where the legislature's intention to alter the common law is made abundantly clear. To emphasize this principle the court also referred to the provisions of section 90(2)*(c)* which acknowledge the parties' common-law rights and declare any provisions in a credit agreement which purport to waive such rights unlawful (para [19]). Thus, Maya JA observed that it was inconceivable that the legislature would, in the same Act, indirectly do away with the mortgagee's vested common-law right to claim the balance of the debt after execution against the mortgaged property (ibid).

Cloete JA arrived at the same conclusion and interpreted section 130(2) as follows:

> 'What the section means is that, in the three types of credit agreement mentioned (ie an instalment agreement, a secured loan and a lease), if the further requirements of the section are satisfied (ie all relevant property has been sold, pursuant to an attachment order or the surrender of property in terms of s 127; and the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement), then the credit provider is excused from complying with ss (1) (ie the credit provider does not have to send a notice and wait for the days to elapse). The circumstances under which a credit provider in the three types of contract mentioned in ss (2) may approach a court for the enforcement of a credit agreement, are in addition to the circumstances set out in ss (1) — that is why ss (2) commences with the very words 'in addition to the circumstances contemplated in subs (1)' (para [42]).

He further held that the rationale for the omission of a mortgagee in section 130(2) is clear because a consumer's home is usually at stake and accordingly a credit provider must proceed under section 130(1) (para [43]). The omission of a credit provider who is a mortgagee in section 130(2) cannot mean that, to the extent that the debt is not satisfied by execution against the mortgaged property, that part of the debt is unenforceable. That would compromise the mortgagee's rights and could not have been the intention of Parliament.

Debt enforcement after debt rearrangement

In *Firstrand Bank Ltd v Fillis and Another* 2010 (6) SA 565 (ECP), the plaintiff sought summary judgment against the defendants on a credit agreement secured by a mortgage bond. For reasons of financial difficulties, the defendants, through a debt counsellor, applied for debt review in terms of section 86. The application succeeded and a debt rearrangement order restructuring the defendants' debts in terms of section 86(7)*(c)* was made by the Magistrate's Court. The plaintiff claimed that the defendants were in default of both the credit agreement and the debt rearrangement order and that it was accordingly, by virtue of section 88(3), entitled to enforce its rights by summary judgment. The defendants raised several defences. They argued, inter alia, argued that once a debt rearrangement order has been made, no legal action can be taken by a credit provider to enforce a credit agreement unless the debt rearrangement order has been rescinded in terms of section 36 of the Magistrates' Courts Act, irrespective of whether the defendants are in breach of the debt rearrangement order. This defence was based on the argument that an application for a debt rearrangement order in terms of section 86(7)*(c)* is an application directed by the rules of the magistrates' courts. Consequently, credit providers are disqualified from proceeding to enforce their rights, unless they have first rescinded the rearrangement order in accordance with the provisions of section 36 of the Magistrates' Courts Act. It follows, so it was argued, that since orders of court do not automatically fall away, unless specifically authorized by an Act, the provisions of section 88(3) merely give a credit provider the right to apply for rescission of the rearrangement order. Another defence was that, notwithstanding the defendants' failure to meet the required payments stipulated in the debt rearrangement order, they were nevertheless not in default. This defence was founded on the notion that once a debt-review process has commenced in terms of section 86, a consumer was not required to make any payment concerning his or her liability under a credit agreement until such time as a rearrangement order is granted or the application for credit review is rejected. Hence, any payments preceding the rearrangement order should be set off against the successive obligations following the rearrangement order. Therefore, so it was reasoned, since the defendants had made certain (undue) payments prior to the rearrangement order, they were not in default if these (undue) payments were added to those paid in accordance with the rearrangement order.

As to the first defence, the court held that the NCA offers comprehensive protection to a consumer who has become over-indebted. If, however, he or she rebuffs this opportunity or fails to comply with the debt restructuring order, the NCA sanctions the common law to run its course (paras [14]–[15]). However, once the credit-review process has commenced, section 88(3) prevents a credit provider from exercising or enforcing, by litigation or other judicial process, any right or security under any credit agreement until the consumer is in default under the credit agreement (s 88(3)*(a)*) and the debt counsellor has rejected the application; the court has determined that the consumer is not over-indebted; all the consumer's obligations under a credit agreement as re-arranged by a court or an agreement between the consumer and credit provider(s) have been fulfilled (unless the consumer has fulfilled the obligations by way of a consolidation agreement); or the consumer has defaulted on any obligation in terms of a re-arrangement agreement or order by a court or tribunal (s 88(1)*(a)*–*(c)* read with section 88(3)*(b)*(i) and (ii)).

Thus, Eksteen J, as a matter of interpretation, held that once the jurisdictional requirement outlined in section 88(3)*(a)* co-exists with any one of the jurisdictional requirements set out in section 88(3)*(b)*(i) and (ii), a credit provider is allowed to litigate against a consumer without further notice (para [16]). The court also ruled that, in such event, the restraint imposed on a credit provider as a result of a credit-review process and a rearrangement order, falls away on the express authority of section 88(3). According to Eksteen J, this view is supported by the provisions of section 129(2) (para [18]).

As to the second defence, the court, without expressing a view, held that whatever a consumer's obligations may be during the debt-review process, the magistrate hearing the application is mandated to investigate the position of the consumer as it is at that time, and to make an appropriate rearrangement order which has to operate from the time it is made, unless otherwise directed (para [21]). Consequently, the defendants in this case were in default as a result of the rearrangement order.

Debt enforcement under the NCA as opposed to sequestration

Both respondents in *Investec Bank Ltd and Another v Mutemeri and Another* 2010 (1) SA 265 (GSJ) successfully applied, in terms of section 86 of the NCA, for debt counselling. An application for debt review was launched by the debt counsellor on 15 May 2009, and enrolled for hearing (s 87) by the magistrate's court on 11 August 2010. However, in the meantime Investec Bank Ltd and another financial institution brought an application for the sequestration of the respondents' joint estates in the High Court. It was common cause that the respondents were hopelessly insolvent.

The respondents' main defence was that a sequestration application under the present circumstances was barred by sections 88(3), 129(1)*(b)*, 130(1), and 130(3) of the NCA. All these sections, in some way, limit a credit provider's right to either institute legal proceedings, or to enforce a credit agreement against a consumer. Hence, the question was whether an application for the sequestration of a consumer's estate, based on a claim in terms of a credit agreement, qualifies 'as legal proceedings' or the 'enforcement of a credit agreement' and is consequently disallowed in terms of these sections.

Referring to *Estate Logie v Priest* 1926 AD 312, Trengove AJ conceded that a creditor's motive in applying for the sequestration of a debtor's estate might be to obtain payment of his or her debt (para [27]). However, whether an application for sequestration constitutes an application 'for an order to enforce a credit agreement' within the meaning of section 130(1) of the NCA depends on the nature of the relief a creditor seeks and not on his or her underlying motive. An application is barred by section 130(1) only if it is an application for an order 'to enforce a credit agreement' (para [28]).

In *Collett v Priest* 1931 AD 290, it was held that a civil suit is a 'legal proceeding in which one party sues for or claims something from another' and does not include an application for sequestration. Sequestration proceedings are instituted not for the purpose of claiming something from a debtor, but for the purpose of setting the machinery of law in motion to have the debtor declared insolvent. In *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others* 1976 (2) SA 856 (W) McEwan J also came to the conclusion that the winding-up of a debtor's estate does not constitute proceedings 'for the recovery of a debt'. Trengove AJ agreed with the rationale of these judgments, especially in the light of section 9(2) of the Insolvency Act 24 of 1936 which does not even require a creditor's claim to be enforceable before a sequestration application may be filed (para [31]). The ratio for section 9(2) is that a sequestration order is not an order for the enforcement of a claim. He held that the purpose of sequestration is merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that all creditors are treated equally (ibid). Thus, an application for sequestration is not an application for enforcement of the sequestrating creditor's claim and is accordingly not subject to the requirements of section 130(1) of the NCA.

Because an application for sequestration does not qualify as legal proceedings as envisaged in a civil suit (*Collett v Priest* supra; *Prudential Shippers v Tempest Clothing* supra), the same argument holds true regarding 'legal proceedings to enforce' a credit agreement as mentioned in sections 129(1)*(b)* and 130(3) of the NCA (para [33]). Hence, the court held that an application for sequestration does not contravene the latter two sections (ibid).

Trengove AJ furthermore, on the same grounds, held that an application for sequestration does not amount to litigation or another judicial process by which a credit provider exercises or enforces any right under a credit agreement as contemplated in section 88(3) of the NCA, and is accordingly not precluded by it (para [34]).

However, it was held by Binns-Ward AJ in *Ex parte Ford and Two Similar Cases* 2009 (3) SA 376 (WCC) that court proceedings in terms section 85 of the NCA include proceedings for voluntary surrender under the Insolvency Act and that proceedings under section 85 are not limited to credit agreements (para [12]). Therefore, before opting to surrender their estates under the Insolvency Act 24 of 1936, insolvents, according to Binns-Ward AJ, will be well advised to rely on the special remedies under the NCA if credit agreements are the principal source of their financial misfortune (para [14]). In conclusion, Binns-Ward AJ held that there is a consonance between the objects of the relevant provisions of the NCA and the Insolvency Act, namely not to deprive creditors of their claims but merely to regulate the manner and extent of their payment (para [21]) (see 2009 *Annual Survey* 1021).

C van Heerden and A Boraine ('The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of insolvency law' (2009) 12 *PER* 22 and C van Heerden & A Boraine 'To sequestrate or not to sequestrate — a tale of two judgments' (2010) 12 *PER* 84) have investigated debt relief under the NCA in relation to the Insolvency Act. They rightfully emphasize the following aspects. In the first instance, unlike insolvency law, the NCA is not based on a concursus creditorum that entails a collective debt settlement procedure, but rather operates on the principle of extension or restructuring of payments to settle debts. Secondly, section 2(7) of the NCA stipulates that no provision of the NCA is to be construed as limiting, amending, repealing or otherwise altering any provision of any other Act, except where it is specifically set out in, or necessarily implied by, the NCA. None of the sections of the NCA specifically mentions the Insolvency Act in this regard. Thirdly, schedule 1 of the NCA, which sets out the rules on conflicting legislation, is silent on any directly or indirectly conflicting provision relating to debt review and debt restructuring vis-à-vis the Insolvency Act. Fourthly, if there were any overriding conflicting provisions in this regard, the NCA would have expressly stated so in Schedule 1. Fifthly, from the amendment of section 84 of the Insolvency Act by Schedule 2 of the NCA, it is clear that the legislature was aware of the Insolvency Act and did not consider it. They conclude that it was not the intention of Parliament to oust the application of insolvency law directly or by necessary implication in such a manner that a pending debt review, debt restructuring order, or agreement is a bar to sequestration.

Also under consideration in *Investec Bank v Mutemeri* was whether a debt counsellor has a direct and substantial interest in the sequestration application of a consumer and for this reason has to be joined as a party to the proceedings. The court held that a debt counsellor's role is confined to the functions set out in sections 71 and 86 of the NCA (para [37]). In terms of these sections, debt counsellors are facilitators and mediators between over-indebted consumers and credit providers, and nothing more. It is not a debt counsellor's role to determine the relief afforded to over-indebted consumers. This is determined by agreement between consumers and credit providers or by court order. It is also not a debt counsellor's role to police the implementation of the NCA or to act as guardian of the pursuit of its purpose. A debt counsellor does not have a direct and substantial interest in the sequestration application of consumers merely because he or she is acting as their debt counsellor. A debt counsellor's role is not to advance or protect any legal interest of his or her own, or to assume control or responsibility over a consumer's estate, but to mediate and facilitate (para [39]).

The question whether a sequestration application qualifies 'as legal proceedings' or the 'enforcement of a credit agreement' as envisaged by the NCA was again raised in *Naidoo v Absa Bank Ltd* 2010 (4) SA 597 (SCA). In this case, the appellant was sequestrated at the respondent's instance following the appellant's failure to meet his obligations under certain instalment sale agreements to which the NCA applies. The appellant argued that the respondent was not allowed to institute sequestration proceedings before complying with the provisions of section 129(1)*(a)*. Agreeing with the judgment of Trengove AJ in *Investec Bank v Mutemeri* (supra), the Supreme Court of Appeal held that sequestration proceedings are not in and of themselves legal proceedings to enforce the agreement within the meaning of section 129(1)*(b)* (para [4]).

The appellant's argument that the effect of section 130(3)*(a)*, read with section 129(1), indicates that the legislature intended to encompass all proceedings to which the NCA applies, and not merely proceedings to enforce a credit agreement, was rejected by the Supreme Court of Appeal (para [7]). Cachalia JA held that the proceedings referred to in section 130(3)*(a)* do not extend the remit of section 129. This simply means that where a credit provider intends to institute enforcement proceedings, commencement of such proceedings may only take place after he or she has complied with the procedure in section 129(1)*(a)*. This principle is similarly applicable to the procedures referred to in sections 127 and 131. It follows that a credit provider need not comply with the procedure provided for in section 129(1)*(a)* before instituting sequestration proceedings against a consumer (para [11]).

Although Cachalia JA briefly referred to *Absa Bank Ltd v De Villiers and Another* 2009 (5) SA 40 (C), in which it was held that the term 'enforce' as used in section 129(1)*(b)* must bear the wider meaning of embracing all contractual remedies, including cancellation, the Supreme Court of Appeal found that it was unnecessary in this case to elaborate on this question (para [8]).

It is worth mentioning that, according to A Boraine and J Calitz ('Some consequences of the National Credit Act 34 of 2005 on the proof of claims in insolvency law' 2010 *TSAR* 797), a presiding officer adjudicating claims submitted by creditors at a creditors' meeting ought to take cognisance of the provisions of the NCA that may affect the validity of such claims. For example, if credit was granted recklessly, the provisions of the NCA will apply and the presiding officer will be constrained by the relevant provisions of the NCA.

Interaction between judgment by consent and the NCA

The questions under consideration in *African Bank v Myambo NO and Others* 2010 (6) SA 298 (GNP) were *(a)* whether a consumer who is indebted under a credit agreement governed by the NCA can legally consent to judgment in terms of section 58 of the Magistrates' Courts Act; *(b)* what effect the NCA has on the procedure prescribed by section 58; and *(c)* what influence the NCA has on the adjudication of a request for judgment by consent. In brief, section 58 provides for a procedure in terms of which a creditor, on obtaining the written consent of a debtor, can obtain judgment by consent.

The applicant in this case sent a notice in terms of section 129 to the consumer's chosen domicile, to which he did not respond. A second letter of demand, complying with the provisions of section 58, was sent to the consumer. On receipt of the second letter of demand the consumer signed a consent to judgment and also undertook to pay the outstanding amount, interest and costs in monthly instalments. In terms of section 58, and on the strength of the consumer's written consent, the applicant applied to the clerk of the magistrate's court for judgment by consent. However, the magistrate refused to grant judgment as she was convinced that a consent judgment in terms of section 58 would be contrary to the purposes of the NCA. The applicant then sought an order reviewing and setting aside the magistrate's decision.

On review, Du Plessis J, delivering the majority judgment, held that, in terms of section 172(1) (read with s 172(2) and (4)), the NCA does not repeal section 58. Instead, it provides for a mechanism to resolve any conflict between section 58 and the provisions of the NCA in so far as the provisions of the NCA shall 'prevail to the extent of the conflict' (at 304G–I). Du Plessis J confirmed that one of the purposes of the NCA, as set out in section 3, is to promote cost-effective, fair and speedy court procedures, and that this is exactly what the section 58 procedure may achieve (at 305A–D). Thus, the section 58 procedure, as such, does not defeat the purposes of the NCA.

On behalf of the respondent it was argued that when a consumer consents to a judgment in terms of section 58, a new cause of action, distinct from the underlying legal relationship in terms of the (credit) agreement, is created. Consequently, when a plaintiff requests judgment by consent, the clerk of the court or the magistrate, as the case may be, is concerned only with the consent as a cause of action and not with the underlying cause of action via the (credit) agreement. Du Plessis J differed from this argument and held that the fundamental basis for consent to judgment in terms of section 58 remains the summons or letter of demand per se, which has to contain the particulars of the plaintiff's claim and set out a cause of action (at 306F–H). Consequently, the cause of action is based on the underlying legal relationship (credit agreement) which gave rise to the debt, and no other cause of action exists when the summons or a letter of demand is issued. Thus, a debtor who consents to judgment under section 58 does so in respect of a cause of action specified in the summons or letter of demand. Du Plessis J further explained that the function of the consent to judgment in terms of section 58 is to avoid a claim based on the underlying legal relationship and that, once judgment by consent has been granted, the judgment has the effect of a judgment by default which renders that cause of action res judicata (at 307B–D).

Du Plessis J concluded

> '. . . that when a plaintiff applies for judgment by consent in terms of s 58, it is an application for judgment based on the cause of action stated in the summons or the letter of demand. It is that cause of action that is before the clerk of the court and not a new cause of action based only on the written consent to judgment' (at 306E).

After analysing section 58, which stipulates that 'the clerk of the court *shall* . . . enter judgment in favour of the plaintiff' (emphasis added) if the defendant has consented to judgment in the prescribed manner, Du Plessis J held that the word 'shall' in section 58, which is usually a strong indication that a legislative provision is peremptory, is however, in this instance, not mandatory (at 308D–H). The word 'shall' in section 58 indicates that clerks of the court have the discretion to do one of three things: refuse judgment, grant judgment if the papers are formally in order, or refer the matter to the court in terms of rule 12(7) if the papers are formally in order but the clerk of the court has reason to question the plaintiff's entitlement to judgment.

However, rule 12(5) provides that the clerk of the court shall refer any request for judgment founded on any cause of action governed by the Credit Agreements Act 75 of 1980 to the court. As section 172(4) of the NCA repealed the Credit Agreements Act and did not re-enact it, Du Plessis J held that the reference to the Credit Agreements Act in rule 12(5) cannot be read as a reference to the NCA and that the failure to amend rule 12(5) to refer to the NCA might have been an oversight (at 309C–H). Du Plessis J concluded that where an action is based on a credit agreement governed by the NCA, clerks of the court are not in every case obliged to refer the request for judgment by consent to the court, provided the purpose of the NCA to protect consumers is constantly taken into account if and when clerks of the court exercise their discretion (at 309E–I). Put differently, if a clerk of the court is uncertain whether granting judgment against a consumer might be in conflict with the NCA, he or she must refer the matter to the court.

Du Plessis J held that if the cause of action in a consent to judgment procedure is based on a credit agreement governed by the NCA, the following allegations have to be made in the summons or letter of demand: *(a)* section 129 or 86(10) has been complied with; *(b)* the defaulting consumer has been in default for at least twenty business days; *(c)* a ten-day period has expired since delivery of a notice in terms of section 129 or 86(1); and *(d)* the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127 if an instalment agreement, secured loan or a lease operates (at 311B–H and 312A–B).

However, to ensure that a consumer's consent is informed, Du Plessis J also held that a true copy of the notice in terms of section 129 must be attached to the request for judgment (at 313C–D). In accordance with the view of Mogoeng JP (as he then was) in *BMW Financial Services v Dr MB Mulaudzi Inc* (supra), Du Plessis J held that a notice in terms of section 129 must not be a 'dry and mechanical reproduction of the subsection', but must, in a meaningful way in plain language, bring the variety of important facts and options to the attention of the consumer (at 313D–H). This qualification, according to Du Plessis J, is of immense importance in the context of the procedure in terms of section 58 to ensure that a consumer's consent is informed in so far as he or she must have understood the available alternatives to legal proceedings and must have been given an opportunity to pursue them (at 314A). In a minority judgment, Poswa J went a step further and held that if a person's official language is not English or Afrikaans, such person be offered a notice in terms of section 129 in the official language of his or her choice (at 327D).

Du Plessis J confirmed that the section 58 procedure constitutes 'proceedings commenced in a court' and that for this reason the requirements of section 130(3) must be met (at 312G–H). Consequently, an allegation to this effect has to be contained in the summons or letter of demand. Du Plessis J further held that a blanket allegation in this regard will be insufficient; a prerequisite is that each requirement stipulated in section 130(3) must be dealt with separately in the particulars of claim (at 313A–B).

Du Plessis J also stated that if a plaintiff requests judgment by consent in terms of section 58 and the cause of action is based on a credit agreement which is regulated by the NCA, magistrates are entitled to interrogate the application for judgment and, in doing so, they are sanctioned to require proof of any fact or document to determine whether the credit agreement was an issue; what the extent of the admitted debt is; whether the credit was recklessly granted; whether the plaintiff was registered as a credit provider; whether the debtor failed to respond to the plaintiff's notice in terms of section 129; whether the debtor rejected the proposals referred to in the notice in terms of section 129; or whether it was to act in terms of section 85 where allegations of over-indebtedness were made (at 315B, 316E–F, 318F–I, 319C–D, 320A–B and 317G).

In his minority judgment, Poswa J, however, observed that it is a matter of great concern that a magistrate's intervention depends entirely on the decision of the clerk of the court in the sense that it is only after the clerk has deemed it fit to refer the application for consent judgment to the magistrate's court that a magistrate can intervene (paras [6]–[8] and [12]–[15]). It follows that clerks of the court may not refer matters to the magistrate simply because they are overwhelmed by the process, too busy to give it the attention it requires, or are not mindful of how important their role is to ensure that the provisions of the NCA are complied with. For this reason, Poswa J held that it would be inappropriate to merely order that clerks of the court 'may' refer the request for judgments to a magistrate. There are instances where the clerks of the court 'must' refer the request to a magistrate. For example, if the provisions of sections 127, 129, and 131 do not apply and the plaintiff has neglected to state why these provision(s) are inapplicable, the clerk of the court must refer the application to the magistrate.

What constitutes a debt-review process in terms of section 86?

In *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 (5) SA 618 (KZD), BMW sent a notice in terms of section 129 to Mudaly by registered post on 19 May 2009. On 8 June 2009, after more than ten business days had elapsed, Mudaly made a debt-review application in terms of section 86(1). The debt counsellor's proposal in terms of this application was rejected by BMW, whereupon the debt counsellor, on 7 October 2009, lodged an application in terms of section 87(1)*(b)*(ii) with the clerk of the magistrate's court for an order for the rearrangement of Mudaly's obligations. Although service of this application on BMW was only effected on 4 December 2009, a letter was written to BMW on 20 October 2009 informing them that the application had been made. In the meantime, on 30 October 2009, BMW gave notice in terms of section 86(10) of termination of the debt review and a letter cancelling the credit agreement was sent on 2 November 2009. The present repossession proceedings relating to the motor vehicle commenced on 11 December 2009.

BMW's case for repossession was based on Mudaly's breach. Mudaly's opposition to this claim was founded on the argument that because he had commenced a process of debt review, he did not have to restore possession of the motor vehicle until the magistrate had dealt with his application in terms of section 86(8)*(b)*. In the alternative, he contended that he was over-indebted and that the court should make an order to rearrange his obligations in terms of section 85, the effect of which would be that he might retain the motor vehicle.

Wallis J held that the main issue to be scrutinized was whether the agreement was ever subject to a debt-review process (para [5]). The answer to this, so it was held, depended on section 86(2), which stipulates that a debt-review application may not be made after a credit provider has begun to take the steps contemplated in section 129 to enforce a credit agreement. As a result of BMW's taking the steps contemplated in section 129, the question thus was whether this particular agreement fell outside the process of debt review.

The court referred to academic views regarding the interpretation of section 86(2) (paras [6]–[8]). Firstly, CM van Heerden and JM Otto ('Debt Enforcement in terms of the National Credit Act 34 of 2005' 2007 *TSAR* 667) argue that the steps mentioned in section 129 are not steps to enforce the agreement, but merely required procedures before debt enforcement. Secondly, Van Loggerenberg, Dicker and Malan (January/February 2008 *De Rebus* 40) are of the opinion that since a notice in terms of section 129 contains a proposal to refer the credit agreement to a debt counsellor, the steps referred to in section 86(2) entail, at least, service of a summons on the consumer to enforce the debt. Thirdly, C van Heerden ('Over-indebtedness and reckless credit' in Scholtz et al *Guide to the National Credit Act* 10–11) submits that Parliament intended the debt-review process to be available to a consumer for as long as the credit provider does not serve a summons on him or her. If a consumer wishes to rely on over-indebtedness after summons has been served, the matter must be dealt with in terms of section 85 which empowers the court either to refer the matter to a debt counsellor for evaluation or recommendation or to make such a declaration itself. However, Otto holds the view that service of a notice in terms of section 129 is sufficient to exclude a credit agreement from the debt-review process. (See also Van Heerden & Lötz (2010) 73 *THRHR* 502.) Fourthly, Boraine and Renke ((2008) 41 *De Jure* 1) are also of the opinion that delivery of a notice in terms of section 129 does not constitute a legal step to enforce a credit agreement, with the result that an application for debt review may still be made after service of the notice. However, they regard the issue of summons, rather than its service, as crucial.

From a case-law perspective, Wallis J referred to *National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP) at 318–19 where Du Plessis J had held that section 86(2) serves to ensure that consumers do not apply to be declared over-indebted only to frustrate a credit provider who has already initiated enforcement of such credit agreement (paras [9]–[10]). Section 129(1)*(a)*, in contrast, does not envisage general debt-restructuring under sections 86 and 87, but alternate dispute resolution and 'a plan to bring the payments under the agreement up to date' (see 2009 *Annual Survey* 1024; DW de Villiers '*National Credit Regulator versus Nedbank Ltd* and the practice of debt counselling in South Africa' (2010) 13 *PER* 128). Wallis J also referred to *Nedbank Ltd v Ditsheho Isaac Motaung* (TPD (case 2245/07) unreported) in which Du Plessis J had held that when a credit provider has already proceeded to take the steps contemplated in section 129 to enforce the agreement, a consumer's debt-review application no longer applies to the credit agreement under consideration.

Wallis J recognized that the debt-review process under section 86 is fundamentally different from a debt-review proposal in terms of a notice under section 129 in so far as the process under section 86 is one directed generally at the consumer's financial affairs with a view to declaring that the consumer is over indebted (para [11]). He emphasized that a consumer is, in terms of section 79(1), over indebted if the preponderance of available information at the time when the determination is made indicates that he or she is, or will be, unable to satisfy, in a timely manner, all the obligations under all the credit agreements to which he or she is a party (ibid). Contrary to section 79(1), a notice in terms of section 129 affords the consumer the opportunity of referring the particular agreement in respect of which such notice is given to a debt counsellor 'with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date'.

Agreeing with Du Plessis J in the *National Credit Regulator* case (supra) and the conclusion reached in *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 (6) SA 63 (KZD) at 319A that section 129(1)*(a)* does not envisage a general debt-restructuring under sections 86 and 87 (para [12]), Wallis J concluded that a proposal for debt review in terms of section 129:

> 'is directed at achieving a situation where the consumer and the credit provider, through the agency of the debt counsellor, negotiate a resolution to the consumer's particular difficulties under a particular credit agreement. It is a consensual process, the success or failure of which will depend upon whether the parties can arrive at a workable basis upon which to resolve the issues caused by the consumer's default. By contrast, s 86 may lead to a court-imposed rearrangement of the consumer's obligations in terms of s 87(1)*(b)*(ii) of the NCA. The invitation extended to the consumer by a credit provider under a notice in terms of s 129(1)*(a)* is not an invitation to engage in a general process of debt review. It is a limited process directed at resolving the consumer's difficulties under a particular credit agreement' (para [11]).

Wallis J further held that the reference in section 86(2) to the steps (plural) contemplated in terms of section 129 must refer to section 129(1)*(b)* and not to section 129(1)*(a)* because the latter section only refers to a single step (to give notice) and such notice (step) it is not directed at enforcing the agreement (paras [13]–[20]). On the contrary, section 129(1)*(b)* is used to enforce the agreement and involves both giving notice and meeting the requirements of section 130, which logically entails more than one step. It follows that a consumer is debarred from applying for debt review in terms of section 86(2) only once a credit provider has completed the steps envisaged in section 129(1)*(b),* and such credit provider is entitled to commence legal proceedings against the consumer to enforce the agreement. Put differently, if a credit provider has complied with the provisions of section 129(1)*(b)* and is thus entitled to commence legal proceedings against a consumer, section 86(2) will debar such consumer from applying for debt review in terms of section 86(1).

Wallis J pointed out that consumers who run into financial difficulties may apply for debt review at various stages, such as when their creditors start to complain of defaults; when a notice in terms of section 129 alerts them to those problems and debt counselling to resolve the problem is proposed; or if they realize that their problem is a broader one and they have the time provided for in section 130(1)*(a)* to bring an application for debt review in order to obtain a declaration that they are over-indebted (para [17]).

However, the court held that an application for debt review under section 86(1) should be directed at resolving the consumer's financial difficulties prior to the need to resort to litigation and may not be used to frustrate legitimate recovery proceedings (para [18]).

Wallis J held that the correct interpretation of section 86(2):

> 'lies somewhere between the views of those who hold that it is triggered by the giving of notice under s 129(1)*(a)*, and those who contend that it only operates once legal proceedings have commenced. In my view the proper construction is that the bar in s 86(2), to the inclusion of a particular credit agreement in a debt-review process, comes into existence when the credit provider under that agreement has taken all steps necessary to enable it lawfully to commence legal proceedings. If all the requirements laid down in ss 129 and 130 for the commencement of legal proceedings to enforce the agreement have been satisfied a debt-review application under s 86(1) will not extend to that credit agreement' (para [20]).

Thus, it was held that Mudaly's reliance on the debt-review process was misplaced and that the plaintiff's cancellation of the agreement was lawful (para [21]).

JM Otto ('Die oorbelaste skuldverbruiker: die Nationale Kredietwet verleen geensins onbeperkte vrydom van skulde nie' 2010 *TSAR* 399) points out that the main purpose of debt restructuring is rehabilitation. However, this purpose has to be balanced against the rightful interest of individual creditors in asserting their financial claims and should not spoil the payment morale of the general public. (For a discussion of the debt counsellor's role regarding debt restructuring, see DW de Villiers '*National Credit Regulator versus Nedbank Ltd* and the practice of debt counselling in South Africa' 2010 (13) *PER* 128.)

Termination of debt-review proceedings

In *Standard Bank of South Africa Ltd v Kruger & Standard Bank of South Africa Ltd v Pretorius* 2010 (4) SA 635 (GSJ), the court was called on to determine whether section 86(10) empowers a credit provider to terminate a debt-review process if a debt counsellor has already referred the review, with recommendations, to a magistrate's court for consideration. Both respondents argued that the termination of their debt review was prematurely executed, since their debt-review applications were brought within the 60 business days contemplated in section 86(10). Thus, the matters were sub judice because the debt-review proceedings before the magistrate's court had not been finalized.

It followed that the summary judgment applications against them should be dismissed.

To interpret section 86(10), the court held that the point of departure is to establish the purpose and objectives of section 86 against the Act as a whole and section 2(1) which provides that '[t]his Act must be interpreted in a manner that gives effect to the purpose set out in section 3' (paras [10]–[11]). The court came to the conclusion that the purpose of the Act is clearly to promote and protect consumers and that the Act must accordingly be interpreted to give effect to this core purpose.

Kathree-Setiloane AJ held that, by virtue of the qualifying words 'being reviewed in terms of *this section*', the termination provisions of section 86(10) are strictly limited to a debt-review process in terms of section 86. Thus, a credit provider's right to terminate a debt-review application in terms of section 86(10) applies only to a debt review to which section 86 applies (para [13]). Once a debt review has been referred to the magistrate's court in terms of section 86(8)*(b)*, the debt-review process conducted in terms of section 86 ends and the process becomes a debt review which falls within the ambit of section 87. Consequently, any termination of a debt review in terms of section 86(10) under the circumstances of this case would be unlawful (para [14]).

The court confirmed that section 86(10) contemplates that the debt-review process before a debt counsellor has to be completed within at least 60 business days after the date on which the consumer applied for the debt review (para [17]). If it is not completed during that period, the credit provider may terminate the debt review in terms of section 86(10).

The court also held that, notwithstanding lengthy delays that may occur due to logistical hiccups, exceeding 60 business days before a debt review may be finalized by a magistrate's court, an unqualified entitlement to terminate debt-review proceedings which are already under the wings of a court, without reference to that court, will be inconsistent with the objective of the Act to promote and protect consumers (ibid). Accordingly, it was held that once the debt-review process has been initiated, which thereafter results in the referral of the debt review to the magistrate's court, a credit provider is not entitled to institute court proceedings to enforce its claim until the magistrate's court has made a finding in terms of section 87 (para [20]). To avoid doubt, the court confirmed that the time limit of 60 business days set in section 86(10) is confined to debt reviews conducted by debt counsellors in terms of section 86(6) to 86(8)*(a)*. It also confirmed that section 86(10) contemplates that the 60 days will run from the date on which the consumer first applied to a debt counsellor for a debt review, and not that it will run at least 60 days from the date of referral by a debt counsellor to a magistrate's court (paras [22]–[23]). It is accordingly not the magistrate, but the debt counsellor, who is required to make a determination within at least 60 days from the date on which the consumer applies for the debt review in terms of section 86(1).

The section 86(10) termination issue (whether a credit provider is entitled to terminate a debt review after a debt counsellor's proposal has been referred to a magistrate's court for an order as contemplated in section 86(7)*(c)*) was again considered in *Firstrand Bank Ltd v Collett* 2010 (6) SA 351 (ECG). In this case, the respondent applied for a debt review in terms of section 86. The debt counsellor later referred this debt review, with recommendations, to the magistrate's court for a hearing. However, in the interim the plaintiff served a notice in terms of section 86(10) terminating the debt-review process and applied for summary judgment.

In opposing summary judgment, the respondent relied on the judgment of Kathree-Setiloane AJ in *Standard Bank v Kruger* (supra) in which it was held that that once a debt counsellor has, in terms of section 86(8)*(b)*, referred a debt review to the magistrate's court for consideration, it falls within the scope of section 87 and not section 86 and any termination of the debt review in terms of section 86 will be unlawful. Consequently, a credit provider is not entitled to institute court proceedings to enforce his or her claim until the magistrate's court has made a ruling in terms of section 87. Kathree-Setiloane AJ came to the same conclusion in *Taxi Securitization (Pty) Ltd v Matlala* (GSJ 29 July 2010 (case 6359/2010), unreported). However, this view was rejected in *SA Taxi Securitization (Pty) Ltd v Nako and Others* (ECB 8 June 2010 (case 19/10, 21/10, 22/10, 77/10, 104/10 and 842/10), unreported) where Kemp AJ, relying on the provisions of section 86(11) which Kathree-Setiloane AJ had ignored, concluded that a credit provider remains entitled to give notice in terms of section 86(10), even after the debt counsellor has referred the debt review, together with his or her proposal, to the magistrate's court.

Referring to *National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP), Eksteen J held that when a debt counsellor determines that a consumer is over-indebted, he or she is required 'to refer the matter to the magistrate's court' in terms of section 86(7)*(c)* and (8)*(b)* (paras [16]–[17]). The 'matter' which is referred to the magistrate's court is the information gathered in the debt review, and the debt counsellor's role is not completed by merely referring the matter to the magistrate's court. The magistrate's court is then required to conduct a hearing and to deliver an appropriate order in terms of the NCA. Thus, the credit-review process in terms of section 86 continues until the magistrate's court has made an order in terms of section 87.

The court held that the words 'that is being reviewed in terms of this section' contained in section 86(10) must not be interpreted in isolation but in the context of the NCA (para [18]). With this in mind, the court held that the more conceivable explanation to be attached to these words is that they are used to distinguish the process in section 86 from that in sections 83 and 85. Unable to find anything in the structure of section 86 or the NCA which may point to the intention of Parliament to limit the credit provider's right in terms of section 86(10) to terminate the debt-review process, the court held that the credit provider's right to give notice in terms of section 86(10) and to legitimately terminate the debt-review process, continues until the magistrate's court has made an order as contemplated in section 87 (ibid). This line of reasoning, so Eksteen J held, is strengthened by section 86(11) which refers to the magistrate's court 'hearing the matter', indicating that the aforementioned 'matter' can only point to 'the matter' referred to in section 86(8)*(b)* (para [23]).

Eksteen J also found that, as opposed to, for example, sections 83, 85, 129(2) and 130 where reference is made to 'the court' or 'a court', the jurisdiction provided for in section 86(11) is explicitly restricted to the magistrate's court (para [24]). This jurisdictional restriction reinforces the notion that section 86(11) forms part of the debt-review proceedings provided for in section 86. Thus, it follows that this debt-review process is restricted to the exclusive judicial supervision of the magistrate's court (see also *National Credit Regulator v Nedbank* supra).

The court confirmed that the purpose of the entire process in terms of section 86(5) and (7) is for the magistrate's court to provide judicial oversight of the debt-review process. If a termination notice is given in terms of section 86(10), the consumer is entitled to the remedy in section 86(11), affording a magistrate's court the discretion to order resumption of the debt-review process (paras [25]–[27]). Hence, section 86(11) is intended to protect the interests of the consumer in such circumstances.

The court further held that it is only the magistrate's court that exercises judicial oversight over the debt-review process that may order resumption of the process as envisaged in section 86(11). This restriction underscores the rationale that a credit provider is entitled to terminate the debt-review process after the matter has been referred to the magistrate's court (paras [27]–[28]). Although a credit provider does not have carte blanche to terminate the process without sound reason, he or she may do so where a debt counsellor and consumer intentionally delay the hearing in terms of section 87 in order to undermine the credit provider's rights. Conversely, if a credit provider dares to enforce the credit agreement pursuant to such notice, a consumer may, without delay, approach the magistrate hearing the matter to exercise his or her judicial oversight and, where justice directs, resumption of the debt-review process will be ordered.

It follows that Eksteen J differed from Kathree-Setiloane AJ's inference in *Taxi Securitization v Matlala* (supra) that the phrase 'the magistrate's court hearing the matter' in section 86(11) refers to the magistrate's court hearing the matter involving the enforcement of the agreement in terms of part C of chapter 6 of the NCA (para [29]). Eksteen J held that such interpretation is bizarre and that the jurisdiction conferred in section 86(11) has purposely been limited to the magistrate's court.

For the sake of comprehensiveness, the court also analysed section 129(2) (procedural matters concerning debt restructuring) and section 88(3) (the moratorium placed on enforcement of a credit agreement by litigation or other judicial means) and concluded that these provisions do not thwart delivery of a notice in terms of section 86(10) (paras [31]–[42]).

Surety's liability under the NCA

The causes of action in *Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others* 2010 (5) SA 523 (GSJ) were based on suretyships granted by the defendants to the plaintiff in respect of the principal debtor's overdraft facilities. The defendants' defence against the claim was that the plaintiff had not notified them in terms of section 129(1) prior to commencement of the legal proceedings.

To evaluate the merit of this defence, the court held that the NCA only applies to a suretyship if the Act applies to the principal debt (para [4]). Van der Merwe AJ confirmed that the NCA does not apply if the consumer is a juristic person whose asset value or annual turnover, at the time of conclusion of the agreement, equals or exceeds the current threshold value of R1 million (s 4(1)*(a)* read with GN 713 *GG* 28893 of 1 June 2006) (paras [5] and [8]). Nor does it apply if the principal debt arose from a large agreement, even if the asset value or annual turnover of the principal debtor is below the abovementioned threshold value (s 4(1)*(b)*; *FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* 2009 (3) SA 384 (T)). Since the principal debtor in this case was a juristic person as contemplated in section 4(1)*(a)*, the court held that the NCA did not apply to the principal debt (para [8]).

The defendants' contention that the NCA applies to sureties who are natural persons was rejected as section 4(2)*(c)* expressly provides that the NCA 'applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted' (para [9]). It follows that the NCA does not apply to a suretyship if the principal debt did not arise from a credit agreement which falls within the scope of the Act.

It was further held that the provisions of section 8(5) confirm the above conclusion in so far as they stipulate that a credit guarantee only constitutes a credit agreement for purposes of the Act if it undertakes or promises to satisfy an obligation of another consumer in terms of a credit facility or a credit transaction to which the Act applies (para [10]). Thus, since the NCA did not apply to the principal debt in this case, the suretyships did not constitute credit agreements for purposes of the Act.

In conclusion it was held that section 129(1) was inapplicable with the result that the plaintiff was not required to notify the defendants (ibid).

Cancellation, attachment, and repossession

The plaintiff in *Absa Bank Ltd v Havenga and Similar Cases* 2010 (5) SA 533 (GNP) applied in each matter for an order confirming the cancellation of the relevant agreements, repossession of the res vendita to have it valued, and postponement of default judgment pending the valuation and calculation of the amounts the defendants owed as damages.

The court held that, to succeed with these prayers, it was imperative to allege in the particulars of claim that on breach of the agreement the credit provider may cancel it, repossess the res vendita, dispose of it, retain the proceeds and recover any outstanding amount from the consumer as damages (at 535A–F). It follows that, in order to value the res vendita to establish any damage suffered, a preliminary application for repossession for this purpose will be necessary. The point of departure for all of this is the credit provider's right to cancel the agreement either by way of a lex commissoria (which is not limited to material breaches only) or, in the absence of a lex commissoria, by acquiring a right to cancel the agreement by notifying the consumer to rectify the breach of a material term.

Horwitz AJ endorsed the finding in *Absa Bank Ltd v De Villiers and Another* (2009 (5) SA 40 (C) at paragraphs [19], [28], [32] and [42]–[43]), where it was held that before a credit provider is entitled to claim a final order authorizing attachment of a res vendita, he or she must first cancel the agreement, provided that the credit provider has a vested right of cancellation (at 535G–H) (see 2009 *Annual Survey* 1035; JM Otto 'Attachment of goods sold in terms of instalment agreement without cancellation of contract — sanctioned by National Credit Act? *Absa Bank Ltd v De Villiers* unreported case no 15692/07' 2009 (72) *THRHR* 473.)

In the present case, the court held that the right to cancel an agreement arises out of an application of the rules of the law of contract and that if pleadings allege that an agreement contains a cancellation provision, whilst it does not, such omissio will be fatal to an attachment application (at 536C–J and 537C–E). As regards the latter point, the court further held that if an agreement does not contain a lex commissoria, the common law may avail a credit provider of such a cancellation right as explained above, provided the appropriate allegations were made in the pleadings (at 537A–B).

However, the court rejected the submission that compliance with the provisions of sections 123 and 129 is sufficient to found an action for cancellation, because these provisions create and afford a credit provider a right of cancellation (at 537C–D). Horwitz AJ confirmed that sections 123 and 129 are procedural in nature. They prescribe the procedure a credit provider must follow when he or she enjoys a right of cancellation, no matter how that right of cancellation arises from the rules of the law of contract.

Interim attachment orders

An interlocutory application for the interim attachment of two motor vehicles for safekeeping, pending finalization of the trial, was instituted in *SA Taxi Securitization (Pty) Ltd v Chesane* 2010

(6) SA 557 (GSJ). In the main action the applicant claimed cancellation of the lease agreements and return of the vehicles. At the time of the action, ownership of the vehicles still vested in the applicant.

Boruchowitz J framed the fundamental question as being whether, and to what extent, the applicant's right to obtain the relief sought was affected by the provisions of the NCA (para [5]). Referring to *Morrison v African Guarantee & Indemnity Co Ltd* 1936 (1) PH M35 (T), *Loader v De Beer* 1947 (1) SA 87 (W) and *Van Rhyn v Reef Developments A (Pty) Ltd* 1973 (1) SA 488 (W), the court recognized that the common law relating to interim attachment of goods pending the outcome of vindicatory or quasi-vindicatory proceedings is well established. However, the NCA is silent as to whether a credit provider may obtain an order for interim attachment of goods (para [6]). Boruchowitz J held that sections 129(3)*(b)*, 129(4)*(a)* and 130(2)*(a)*(ii) clearly provide for attachment orders, but that it is unclear whether these orders include orders for interim attachment of goods pending the outcome of vindicatory or quasi-vindicatory proceedings (paras [7]–[8]). Hence, the answer to this ambiguity lies with general interpretative principles.

The court, in accordance with *Stadsraad van Pretoria v Van Wyk* 1973 (2) SA 779 (A), reiterated the basic interpretative principle that where the provisions of a statute are doubtful, a presumption against alteration of the common law prevails and such statute must be read as being consistent with the common law, rather than differing from it, unless the statute obviously intended to modify the common law (para [8]). In accordance with this common-law guideline, Boruchowitz J observed that there is no express indication in the NCA that the common-law remedy for interim attachment of goods pending the outcome of vindicatory or quasi-vindicatory proceedings has been abolished (para [9]).

Relying on JM Otto (*The National Credit Act Explained* 2nd ed (2009) ¶ 44.4), *SA Taxi Securitization (Pty) Ltd v HW Young* (CPD (case 10249/08), unreported) and *Absa Bank Ltd v De Villiers and Another* 2009 (5) SA 40 (C), Boruchowitz J held that the basis of an interim attachment order is safeguarding the goods against deterioration and damage until the case between the parties has been finalized (para [10]). Consequently, its purpose is not to enforce remedies or obligations under the credit agreement, and this interim relief does not form part of the debt enforcement process envisaged by the NCA.

Boruchowitz J confirmed the following entrenched requirements for an application for an interim attachment order: *(a)* the right the applicant requires to enforce is clear, or, if not, a prima facie foundation of such right is present; *(b)* if the right is only prima facie established, a well-grounded concern of irredeemable harm, if the interim relief is not granted, has to be verified by the applicant; *(c)* the balance of convenience favours the granting of the interim relief; *(d)* the applicant has no other appropriate remedy; and *(e)* any agreement under which a respondent has the right to possess the goods must first be cancelled (para [11]).

However, the respondent disputed the validity of the applicant's cancellation of the lease agreements. The basis of this dispute was that when the applicant purported to cancel the lease agreements, a debt-review process, as envisaged in section 86, was already in process, which barred the applicant from cancelling the agreements. This submission was rejected by the court. Boruchowitz J held that when the applicant terminated the debt-review process, the debt counsellor had not yet presented a proposal to the respondent or to the magistrate's court as contemplated in section 86(7)*(c)* (para [20]). A written proposal was only put to the respondent and the magistrate's court after the applicant had already terminated the debt-review process in terms of section 86(10). As a result, it was found that since all the jurisdictional requirements of section 86(10) had been satisfied, the debt-review termination by the applicant was legitimate and the only remedy available to the respondent was the one indicated in section 86(11) which allows for a resumption or revival of the debt-review process by the magistrate's court hearing the matter (paras [20]–[21]).

For the above reasons, the court concluded that the applicant had complied with the provisions of sections 129(1)*(b)*(i) and 130(1) and was accordingly entitled to enforce its debt, which debt enforcement included the right of cancelling the lease agreements (paras [22]–[23]). It was further held that the NCA authorizes a court to reinstate an agreement that has been validly terminated. The applicant was sanctioned to obtain an order for the interim attachment of the vehicles (para [23]).