

**The impact of the National Credit Act on civil  
procedural aspects relating to debt enforcement**

by

**Hermie Coetzee**

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## **Abstract**

This dissertation considers the possible impact of certain requirements of the National Credit Act 34 of 2005 (hereafter “NCA”) on ordinary civil procedural rules relating specifically to debt enforcement procedures. It further identifies problem areas created by some of the provisions of the NCA in this regard, and ultimately proposes potential solutions thereto.

However, as indicated in various sections of the dissertation, it is not always clear what the legislature had in mind with certain provisions. This uncertainty calls for interpretation, which gives rise to further confusion in certain instances.

In view of the aims of the NCA as stated in section 3 thereof, as well as various procedural provisions discussed in this dissertation, it is clear that the NCA mainly has the protection of the consumer at heart when devising procedures relating to, or ancillary to debt enforcement procedures utilised by credit providers to collect outstanding debt sounding in money. Since the NCA must operate within an existing legal system and procedural regime where certain terms have become entrenched, a broad background on some legal concepts and relevant civil procedures are provided where after the impact of the NCA thereon is considered and analysed. As the NCA will only affect general civil procedure where a credit provider attempts to enforce obligations to which the NCA applies, the exact application of the NCA and the general enforcement procedures contained therein are determined. Against this background the impact of specific procedures prescribed by the NCA on existing rules of civil procedure are critically analysed.

This dissertation illustrates that although the NCA improves the position of the consumer in many ways, also with regard to debt enforcement procedures, the legislature should have drafted some provisions more carefully which would have resulted in some vital issues being clearer. Although practice and precedent will eventually even out many of the practical difficulties currently

experienced it will take time and money to do so. It is therefore submitted that some areas should be reconsidered for amendment by the legislature in order to allow this significant piece of legislation to operate smoothly.

Ultimately, two sets of conclusions are drawn together in this dissertation. Firstly, the general conclusions relating to the impact of the NCA on general civil debt enforcement procedures are stipulated and, secondly, specific areas that should be reconsidered by the legislature in order to allow the NCA to function optimally are identified.

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## PART I: INTRODUCTION

### CHAPTER 1: GENERAL INTRODUCTION

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#### 1.1 Background information

During the last decade, reckless behaviour almost became the norm in the global credit industry and the subsequent worldwide economic meltdown is the expensive price that credit providers and consumers are now paying for their irresponsible behaviour. The global economic crisis led to increased debt enforcement litigation as credit providers hustle to courts to collect outstanding debt from over-extended consumers. South Africa has not been entirely insulated against the consequences of the meltdown as can *inter alia* be seen from data released by Statistics South Africa that recorded a 15.6% increase in civil summonses for the period February to April 2009 compared to the same period in 2008.<sup>1</sup> However, many believe that the National Credit Act,<sup>2</sup> that became fully effective on 1 June 2007,<sup>3</sup> created a buffer for South Africa against the worst of the worldwide economic meltdown.

The NCA can be classified as consumer credit legislation since the main aim is to level the playing field between credit providers and consumer debtors.<sup>4</sup> It introduces greater consumer protection through strict regulation of the credit industry coupled with harsh consequences for non-compliant role players. The measures believed to have shielded South Africa to some extent are those introduced to prevent over-indebtedness and reckless credit extension. These

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<sup>1</sup> Statistics South Africa on Statistics of Civil Cases for Debt (April 2009) *Report*; see also reports in the popular media on the debt crisis facing South Africa such as “Drowning in default judgments” *Sunday Times* 17 May 2009; “Skuldmonster sluk al hoe meer in” *Rapport* 24 May 2009.

<sup>2</sup> 34 of 2005 (hereafter “NCA”).

<sup>3</sup> The President assented to the NCA on 10 March 2006 and the NCA came into effect incrementally on 1 June 2006, 1 September 2006 and 1 June 2007: See proc 22 of 2006 in GG 28864 of May 2006.

<sup>4</sup> Preamble to the NCA and s 3. See also Borraine and Renke 2007 *De Jure* 222 and 223.

measures include mandatory disclosures to consumers combined with plain language requirements, the regulation of costs and marketing practices, compulsory credit assessment prior to extending credit, improved consumer education, the establishment of regulatory bodies, compulsory registration and regulation of role players and prohibition on the waiver of consumer rights guaranteed by the NCA. Even though these measures are admirable, empirical studies must still be conducted to measure possible unintended consequences of this stringent regulation. However, as the NCA has virtually left no stone unturned it was expected that it will inevitably impact on existing civil procedures and more specifically on civil procedures utilised by credit providers to collect outstanding debt sounding in money.<sup>5</sup>

## **1.2 Problem statement and research objective**

The NCA contains elaborate provisions relating to debt enforcement. These provisions must inevitably be read with, and fit into, existing civil enforcement procedures. The NCA does not provide detailed information as to how the new provisions link with and affect existing procedures and, in some instances, inelegant and perhaps careless drafting poses interpretational problems. A critical analysis of general debt enforcement procedures in light of the NCA is especially relevant in the current economic climate. The research objective of this dissertation is thus to investigate the impact of the NCA on existing debt enforcement procedures with specific focus on procedures resulting in judgment and execution.

## **1.3 Delineation and limitations**

Debt review in itself falls outside the ambit of the research objective of this dissertation, as debt review is not a debt enforcement mechanism *per se*, but rather an alternative debt relief measure. However, where and as far as debt

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<sup>5</sup> Scholtz, Otto, Van Zyl, Van Heerden and Campbell (hereafter Scholtz *et al*) (2008) 12-1.

review may affect debt enforcement procedures, such interrelation is considered.

Alternative dispute resolution, though ancillary to debt enforcement, also falls outside the ambit of this dissertation, as the focus is on the effect of the NCA on the existing formal civil debt enforcement mechanisms. The notion of legal costs and fees as they relate to debt enforcement procedures will however not be discussed as such.

It is to be noted that this dissertation reflects relevant developments in this area of the law as at 30 June 2009, except for a reference to the judgement in *Firststrand Bank Ltd v Maleke and Others*,<sup>6</sup> which judgment gave some direction as to an earlier decision - although it was delivered shortly after the relevant date.

#### **1.4 Significance of the study**

This study provides a comprehensive analysis of the general debt enforcement procedures in light of the NCA in an attempt to serve as a guide regarding these procedures.

#### **1.5 Structure of dissertation**

This dissertation is structured in three parts to meet its objective of analysing the impact of the NCA on existing debt enforcement procedures. Part I, consisting of chapters 1 to 4, contains the general introduction and orientation to establish a firm basis for determining the exact application of the NCA, and further provides an overview of both general civil enforcement procedures and enforcement procedures in terms of the NCA. Part II deals with specific enforcement procedures in terms of the NCA and critically analyses its impact

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<sup>6</sup> *Firststrand Bank Ltd v Maleke and Others* (Unreported case number 637/2009) (GSJ) – see chapter 5 par 5.4.

on existing rules of civil procedure. These specific procedures are discussed in chapters 5 to 8. Part III contains the general conclusion and recommendations in chapter 9.

## 1.6 Key references, terms and definitions

For the purposes of this dissertation it is important to note that the Renaming of the High Courts Act<sup>7</sup> provides for the renaming of the High Courts of the Republic. Although this Act became operative on 1 March 2009,<sup>8</sup> in this dissertation all references to High Court divisions will, however, follow the specific case reference as it appears in the relevant law report or as referred to in a specific piece of legislation.

It is also necessary for the sake of clarity to define the following terminology that will be used throughout this dissertation:<sup>9</sup>

**“agreement”** includes an agreement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties.

**“consumer”**, in respect of a credit agreement to which the NCA applies, means

- (a) the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement;
- (b) the party to whom money is paid, or credit granted, under a pawn transaction;
- (c) the party to whom credit is granted under a credit facility;
- (d) the mortgagor under a mortgage agreement;
- (e) the borrower under a secured loan;
- (f) the lessee under a lease;

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<sup>7</sup> 30 of 2008.

<sup>8</sup> See GG 31948 of February 2009.

<sup>9</sup> Derived from s 1 of the NCA.

- (g) the guarantor under a credit guarantee; or
- (h) the party to whom or at whose direction money is advanced or credit granted under any credit agreement.

“**credit**”, when used as a noun, means

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

“**credit agreement**” means an agreement that meets all the criteria set out in section 8 of the NCA.

“**credit provider**”, in respect of a credit agreement to which the NCA applies, means

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

## CHAPTER 2: LAW OF OBLIGATIONS AND APPLICATION OF THE NATIONAL CREDIT ACT

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### 2.1 Introduction

In order to appreciate the nature and extent of the legal obligations to which the National Credit Act<sup>1</sup> applies, it is important to investigate the origins of legal obligations generally and to make specific reference to the most significant sources thereof. Obligations where the object of performance is payment sounding in money are mainly relevant to this dissertation and will thus be considered. Once this foundation is established, the general scope of the NCA's application will be determined, followed by a detailed analysis of the specific obligations to which it applies. It is of paramount importance to establish the precise application of the NCA as existing enforcement procedures will only be affected where a credit provider attempts to enforce an obligation to which the NCA applies.

### 2.2 Law of obligations

#### 2.2.1 Introduction

Legal consequences flow from legal facts and a legally recognised obligation is an example of such a legal fact.<sup>2</sup> The law of obligations concerns itself with personal rights and duties,<sup>3</sup> which means that a legally recognised debtor-creditor relationship, where the parties acquire rights and duties, should exist

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<sup>1</sup> 34 of 2005 (hereafter "NCA"); For a general overview of the NCA, see Renke, Roestoff and Haupt (hereafter Renke *et al*) 2007 *Obiter* 229.

<sup>2</sup> Van der Merwe, Van Huyssteen, Reinecke and Lubbe (hereafter Van der Merwe *et al*) (2007) 5; Van Zyl and Van der Vyver (1982) 3 and 501.

<sup>3</sup> Nagel, Boraine, De Villiers, Lombard, Löt, Prozesky-Kuschke, Renke, Roestoff, Van Eck and Van Jaarsveld (hereafter Nagel *et al*) (2007) 14; Van Zyl and Van der Vyver (1982) 360.

before one can speak of an enforceable personal obligation.<sup>4</sup> An obligation therefore consists of a right and a duty, as the creditor's right is the converse of the debtor's duty.<sup>5</sup> The debtor's duty can also be called a debt. In this discussion only obligations that give rise to debt in the form of payment of an amount of money are considered.

Thomas defines an obligation as:

a legal bond whereby, on the one side, a debtor has a duty to perform towards a creditor and on the other side, the creditor has a personal right against this debtor to enforce performance.<sup>6</sup>

Now that the meaning of an obligation is established, it should be noted that it is customary to distinguish between natural and civil obligations. A natural obligation is recognised in law, but not enforceable through a court of law,<sup>7</sup> for example a wager.<sup>8</sup> This study is, however, only concerned with civil obligations, that is, obligations that are legally recognised and enforceable.<sup>9</sup>

### **2.2.2 General sources of obligations**

A few examples of legal facts giving rise to obligations are contract<sup>10</sup> and delict,<sup>11</sup> as well as various other causes like *negotiorum gestio*,<sup>12</sup> unjustified enrichment and family relationships.<sup>13</sup> The basis of the most significant obligations, namely, those created by contract and delict, are considered briefly.

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<sup>4</sup> Van Zyl and Van der Vyver (1982) 3 and 360.

<sup>5</sup> Van Zyl and Van der Vyver (1982) 436 to 437.

<sup>6</sup> Thomas, Van der Merwe and Stoop (hereafter Thomas *et al*) (2000) 215.

<sup>7</sup> *Id*; Van Zyl and Van der Vyver (1982) 105 to 106.

<sup>8</sup> Van der Merwe *et al* (2007) 4.

<sup>9</sup> Nagel *et al* (2007) 14.

<sup>10</sup> Van Zyl and Van der Vyver (1982) 506.

<sup>11</sup> Van Zyl and Van der Vyver (1982) 508 to 510.

<sup>12</sup> Directly translated as "care taking".

<sup>13</sup> Van der Merwe *et al* (2007) 6; Thomas *et al* (2000) 215; Nagel *et al* (2007) 15.

A contract comes into being through a legal fact known as a juristic act.<sup>14</sup> This means that the legal subject had some of the consequences in mind when the subject acted in such a manner as to create the obligation. A contract is thus a legally relevant act based on agreement.<sup>15</sup>

The basis of a contract is the consensus reached between contracting parties as to their respective legally binding rights and duties (responsibilities).<sup>16</sup> In the event that A buys a motor vehicle from B, A has the right to receive the vehicle and B has the duty to deliver the vehicle. In turn, B has the right to payment for the vehicle and A the duty to deliver same. These legal obligations between the two parties flow from the contract that they have concluded, being a contract of purchase and sale.

As mentioned above, delict is another example of a legal fact giving rise to an obligation.<sup>17</sup> The law of delict concerns itself with the circumstances in which a legal subject becomes liable for damages caused by such a subject.<sup>18</sup> An obligation is created as the wrongdoer has the duty to compensate the legal subject who suffered the damages and such a subject has a right against the wrongdoer to claim for the damages suffered.<sup>19</sup> A delict may be defined as:

The act of a person that in a wrongful and culpable way causes harm to another.<sup>20</sup>

Where there is breach of an obligation, created by a legally enforceable contract, an infringement of a legally recognised right or interest takes place. It is therefore logical that in the case of a breach of contract, the primary remedy

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<sup>14</sup> Nagel *et al* (2007) 14.

<sup>15</sup> Van der Merwe *et al* (2007) 6.

<sup>16</sup> Nagel *et al* (2007) 18.

<sup>17</sup> Van Zyl and Van der Vyver (1982) 438.

<sup>18</sup> Neethling, Potgieter and Visser (hereafter Neethling *et al*) (2006) 3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

will be fulfilment thereof and damages will only play a secondary role. In the case of a delict however, the remedy focuses on damages.<sup>21</sup>

The NCA regulates civil obligations created through certain specified legally defined agreements. The distinctive types of agreements to which the NCA applies will be considered in paragraph 2.3.3. It is therefore important to note that the NCA and its procedures do not apply to obligations based on other causes like delict for instance.

## **2.3 Application of the NCA**

### **2.3.1 Introduction**

The NCA only regulates certain specified types of civil obligations, collectively termed credit agreements, as specifically defined in the NCA. However, even if an obligation strictly falls within the definition of a specific type of credit agreement, the NCA will in certain circumstances not apply to such an agreement as the application thereof may be specifically excluded.

The discussion now focuses on an investigation of the general provisions regulating the application of the NCA incorporating the specific types of obligations to which it applies.<sup>22</sup>

### **2.3.2 General application**

Unlike its predecessors, namely, the Usury Act<sup>23</sup> and the Credit Agreements Act,<sup>24</sup> the NCA's protective measures prescribe no artificial monetary ceiling as

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<sup>21</sup> Neethling *et al* (2006) 6.

<sup>22</sup> See in general Stoop 2008 *De Jure* 352 for a detailed discussion of the application of the NCA.

<sup>23</sup> 73 of 1968.

<sup>24</sup> 75 of 1980.

far as natural persons are concerned,<sup>25</sup> and includes credit agreements relating to all goods and services.

Section 4 regulates the general application of the NCA and section 4(1) provides that the NCA applies to every credit agreement between parties dealing at arm's length made within or having an effect within the Republic. From this subsection it is clear that three general requirements should be present before the NCA will apply. The agreement should (i) be classified as a credit agreement; (ii) the parties should be dealing at arm's length; and (iii) the agreement must have been concluded or at least have an effect within the Republic.<sup>26</sup>

Each of these requirements is considered in detail below.

### **2.3.3 Credit agreements**

An agreement constitutes a credit agreement if it qualifies as a credit facility, credit transaction, credit guarantee or a combination thereof.<sup>27</sup>

An agreement will be termed a credit facility<sup>28</sup> if a credit provider supplies goods, services or money to a consumer from time to time<sup>29</sup> and either defers the consumer's obligation to pay any part of the cost of goods, services or money or bills the consumer periodically.<sup>30</sup> A further prerequisite to qualify as a credit facility is that a charge, fee or interest is added to the amount deferred or

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<sup>25</sup> Monetary caps applicable to juristic persons are dealt with in par 2.3.6. The meaning of juristic person has been extended for purposes of the NCA and according to s 1 a juristic person: includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if –  
(a) there are three or more individual trustees; or  
(b) the trustee is itself a juristic person,  
but does not include a stokvel.

<sup>26</sup> See in general Otto (2006) 15 to 27; Scholtz, Otto, Van Zyl, Van Heerden and Campbell (hereafter Scholtz *et al*) (2008) 4–1 to 4–8.

<sup>27</sup> S 8. See in general Flemming (2007) 20 to 22.

<sup>28</sup> S 8(3).

<sup>29</sup> S 8(3)(a)(i).

<sup>30</sup> S 8(3)(a)(ii).

periodically billed to the consumer.<sup>31</sup> This type of credit agreement can generally be described as revolving credit for example credit cards, overdrafts or store cards.

An agreement constitutes a credit guarantee<sup>32</sup> if a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the NCA applies. This is commonly known as a suretyship.<sup>33</sup>

In turn, an agreement will be classified as a credit transaction,<sup>34</sup> if the agreement constitutes a:

a Pawn transaction:<sup>35</sup>

A pawn transaction is an agreement where a creditor advances money or extends credit and at the same time takes possession of goods as security for the money advanced or credit granted. Either the estimated resale value of the goods must exceed the value of the money provided or credit extended or a charge, fee or interest must be imposed in respect of the agreement, the loaned amount or the credit extended. The credit provider is entitled, after a specified period, to sell the goods and retain the proceeds of the sale in settlement of the consumer's obligations under the agreement if the consumer fails to satisfy the obligation.<sup>36</sup>

b Discount transaction:<sup>37</sup>

In a discount transaction, goods or services are provided to a consumer over a period of time and more than one price is quoted. A lower price

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<sup>31</sup> S 8(3)(b).

<sup>32</sup> S 8(5).

<sup>33</sup> Otto (2006) 21.

<sup>34</sup> S 8(4).

<sup>35</sup> S 1.

<sup>36</sup> Certain provisions of the NCA are not applicable to pawn transactions, e.g. unlawful agreements in terms of s 89(1) and reckless credit in terms of s 78(2).

<sup>37</sup> S 1.

applies if the account is paid on or before a determined date and a higher price if paid after the determined date or periodically.

c Incidental credit agreement:<sup>38</sup>

Incidental credit is extended where an account is tendered for goods or services that have been provided to a consumer, or are to be provided to a consumer over a period of time and a fee, charge or interest is payable when payment is not made on or before a specified date. Where two prices are quoted for settlement of an account (the lower if the account is paid on or before a specified date, and the higher if the account is not paid by that date), the agreement will also constitute an incidental credit agreement.<sup>39</sup>

d Instalment agreement:<sup>40</sup>

An instalment agreement is an agreement where movable property is sold to a consumer and all or part of the price of such property is deferred and is to be paid through instalments. Possession and use of the property are immediately transferred to the consumer, but ownership passes:

- i when the agreement has been fully complied with; or
- ii immediately subject to a right of re-possession should the consumer fail to meet his financial obligations under the agreement.

Interest, fees or other charges are payable in respect of the agreement, or the amount so deferred.

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<sup>38</sup> *Id.*

<sup>39</sup> There is an obvious overlap between the definition of incidental credit and a discount transaction. It is submitted that the legislature should intervene so as to clarify this issue.

<sup>40</sup> S 1. The spelling of the word "instalment" in the NCA is not correct according to U.K. English on which this dissertation is based. Although the incorrect spelling is recognised, preference is given to the spelling used in the NCA.

e Mortgage agreement:<sup>41</sup>

A mortgage agreement is defined as “a credit agreement that is secured by a pledge of immovable property”.<sup>42</sup>

f Secured loan:<sup>43</sup>

A secured loan is an agreement in terms of which a credit provider advances money or extends credit to a consumer and retains, or receives a pledge or cession of the title to any movable property or other thing of value as security for amounts outstanding under the agreement.<sup>44</sup> Instalment agreements are specifically excluded from the definition of secured loans.

g Lease of movable property:<sup>45</sup>

An agreement can be typified as a lease of movable property if movable goods are let to a consumer.<sup>46</sup> Payment is made on a periodic basis or deferred for a period and interest and fees or other charges are payable. Ownership of the property passes to the consumer absolutely or upon fulfilment of specific conditions at the end of the term.<sup>47</sup>

When an agreement is not included in the above categories and where it cannot be classified as revolving credit (credit facility) or suretyship (credit guarantee), it will still constitute a credit transaction if the agreement is characterised by a deferral of payment and the levying of a charge, fee or interest.<sup>48</sup>

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<sup>41</sup> S 1.

<sup>42</sup> In South African law only movable items can be pledged. Using the word “pledge” is extremely inappropriate in the context of immovable property. See Scholtz *et al* (2008) 8–8.

<sup>43</sup> S 1.

<sup>44</sup> Otto submits that the word “title” in the definition can only mean ownership and that it is impossible to pledge or cede ownership. He proposes that the intention of the legislature is probably the pledge of the property itself and not the ownership thereof. See Scholtz *et al* (2008) 8–8.

<sup>45</sup> S 1.

<sup>46</sup> Scholtz *et al* (2008) 8–9.

<sup>47</sup> There is a clear overlap between the definitions of “instalment agreement” and “lease of movable property”. It is submitted that the legislature should intervene to clarify this issue.

<sup>48</sup> S 8(4)(f).

The NCA also applies to a combination of a credit transaction, a credit facility and a credit guarantee.<sup>49</sup> An example is where a consumer enters into an instalment agreement and payments are effected through the budget option on a credit card.<sup>50</sup>

From the description of the various forms of credit agreements it can be seen that, generally, credit agreements have two characteristics – a deferral of payment (or prepayment of debt in case of a discount transaction or incidental credit agreement)<sup>51</sup> and costs, fees or charges that are added to the agreement.<sup>52</sup>

For completeness sake, it needs to be pointed out that the NCA in certain instances defines agreements as developmental<sup>53</sup> or public interest<sup>54</sup> credit agreements. These agreements can be characterised as altruistic agreements and enjoy special privileges in terms of the NCA.<sup>55</sup>

#### **2.3.4 At arm's length**

The NCA does not apply to agreements entered into between parties dealing within arm's length. Even though this concept is not defined, the NCA provides a few examples of agreements where parties will not be dealing at arm's length.<sup>56</sup> These are:

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<sup>49</sup> S 8(1)(d).

<sup>50</sup> Otto (2006) 21.

<sup>51</sup> S 1.

<sup>52</sup> Otto (2006) 15; Renke *et al* 2007 *Obiter* 229 at 235; Scholtz *et al* (2008) 4–2.

<sup>53</sup> S 10; Examples of such agreements are educational loans or loans entered into for the development of small businesses. In terms of s 10(1)(a), a credit provider must apply for a supplementary registration certificate before extending such credit.

<sup>54</sup> S 11. These types of credit agreements are created by the Minister through notice in the *Gazette* in order to promote the availability of credit in circumstances of natural disaster or similar emergent and grave public interest.

<sup>55</sup> E.g. interest charged in terms of developmental credit agreements are relatively high and reckless credit provisions are not applicable to public interest credit agreements.

<sup>56</sup> S 4(2)(b).

- a a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider, or *vice versa*;<sup>57</sup>
- b a credit agreement between natural persons who are in a familial relationship and are co-dependent upon one another or where one is dependent on the other;<sup>58</sup>
- c any other agreement where the parties are not independent and do not strive to obtain the utmost advantage out of the transaction;<sup>59</sup> or
- d it is of a type that has been held in law to be between parties who are not dealing at arm's length.<sup>60</sup>

The statements by the Supreme Court of Appeal below exemplify the interpretation that our courts will probably favour when interpreting the principle of an arm's length transaction in a credit agreement.

An arm's length transaction was defined by Trollip JA in *Hicklin v Secretary for Inland Revenue*<sup>61</sup> who held that:

It connotes that each party is independent of the other and, in so dealing, will strive to get the utmost possible advantage out of the transaction for himself.

He further stated that in Afrikaans the corresponding phrase will be “die uiterste voorwaardes beding”.

### **2.3.5 Made within or having an effect within the Republic**

The NCA will apply if the agreement was concluded in South Africa or even if it only has an effect within the Republic.<sup>62</sup> In this instance, the legislature

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<sup>57</sup> S 4(2)(b)(i) and s 4(2)(b)(ii).

<sup>58</sup> S 4(2)(b)(iii).

<sup>59</sup> S 4(2)(b)(iv)(aa).

<sup>60</sup> S 4(2)(b)(iv)(bb).

<sup>61</sup> *Hicklin v Secretary for Inland Revenue* 1980 (1) 481 (A) at 495.

<sup>62</sup> S 4(1).

specifically ousted the common-law presumption that legislation does not have extraterritorial application.<sup>63</sup> Whether a credit agreement has effect in the Republic will depend on the circumstances of the particular agreement and must be determined on the specific facts present.<sup>64</sup>

### **2.3.6 Exclusions**

Certain agreements may well be classified as credit agreements according to the definitions of credit facility, credit transaction and credit guarantee, but will not be regulated by the NCA as they are specifically excluded from the ambit thereof. These agreements are:

- a an insurance policy (or credit extended for maintaining the premiums on an insurance policy),<sup>65</sup>
- b a lease of immovable property;<sup>66</sup> and
- c a transaction between a stokvel and its members.<sup>67</sup>

Furthermore, certain consumers do not enjoy the protection of the NCA as the legislature does not consider them to be in need of protection. Even though the agreements that these consumers enter into may strictly fall within the definition of a credit agreement, they are specifically excluded from the application of the NCA. These agreements include instances:

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<sup>63</sup> Scholtz *et al* (2008) 4–3.

<sup>64</sup> *Id.*

<sup>65</sup> S 8(2)(a).

<sup>66</sup> S 8(2)(b).

<sup>67</sup> S 8(2)(c); A stokvel is defined in s 1 as

a formal or informal rotating financial scheme with entertainment, social or economic functions, which-

- (a) consists of two or more persons in a voluntary association, each of whom has pledged mutual support to the others towards the attainment of specific objectives;
- (b) establishes a continuous pool of capital by raising funds by means of the subscriptions of the members;
- (c) grants credit to and on behalf of members;
- (d) provides for members to share in profits from, and to nominate management of, the scheme; and
- (e) relies on self-imposed regulation to protect the interest of its members.

- a Where the consumer is -
  - i a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons,<sup>68</sup> equals or exceeds one million rand at date of entering into the agreement;<sup>69</sup>
  - ii the state or an organ of state.<sup>70</sup>
- b Where the consumer is a juristic person with an asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, of less than one million rand at date of entering into a large agreement (a mortgage agreement or any other credit transaction or guarantee in excess of R250 000, but excluding a pawn transaction).<sup>71</sup>
- c Where the credit provider is the Reserve Bank of South Africa.<sup>72</sup>
- d Where the credit provider is situated outside the Republic and the consumer has successfully applied to the Minister to be exempted.<sup>73</sup>

The NCA will therefore always protect natural persons, but will only protect juristic persons as consumers to a limited extent. “Large” juristic persons will never be protected as consumers and “small” juristic persons will only be protected as far as they do not enter into large agreements.<sup>74</sup> In the event that

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<sup>68</sup> In terms of s 4(2)(d), a juristic person is related to another juristic person if one has direct or indirect control over whole or part of the business of the other or if a person has direct or indirect control over both of them.

<sup>69</sup> S 4(1)(a)(i). In terms of s 7(1)(a) the Minister must determine a monetary threshold by notice in the *Gazette*. In GN 713 of 2006 in GG 28893 of June 2006 (hereafter “Threshold Regulations”) the threshold was set at one million rand by the Minister.

<sup>70</sup> S 4(1)(a)(ii) and s 4(1)(a)(iii).

<sup>71</sup> S 4(1)(b) read with s 9. In terms of s 7(1)(b) the Minister must determine monetary thresholds by way of notice in the *Gazette*. In the Threshold Regulations, the lower threshold was set at R15 000 and the higher at R250 000; Also see *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 (3) 384 (T).

<sup>72</sup> S 4(1)(c).

<sup>73</sup> S 4(1)(d); In GN R489 of 2006 GG 28864 of May 2006 (hereafter “Regulations to the NCA”), reg 2 determines that an application in terms of s 4(1)(d) must be submitted to the Minister by completing Form 1 that forms part of schedule 1 of the regulations.

<sup>74</sup> S 4(1)(b).

the NCA applies to a “small” juristic person as consumer, it will only have limited application.<sup>75</sup>

Furthermore, the debt resulting from a dishonoured cheque or similar instrument does not constitute a credit agreement for purposes of the NCA.<sup>76</sup> Similarly, when payment takes place through a charge against a credit facility (for example a credit card where a third party is the credit provider) and such a charge is refused by the credit provider for any reason, the resulting debt does not constitute a credit agreement in terms of the NCA.<sup>77</sup>

A debt arising from a continuous service,<sup>78</sup> is the last exemption in terms of the NCA. In the event that a supplier of a utility<sup>79</sup> or other continuous service defers payment until an account has been rendered and the supplier does not impose any charge in respect of the amount so deferred if the consumer pays before a certain period, the agreement will not qualify as a credit facility.<sup>80</sup> The consumer must be given at least 30 business days after the account has been rendered to settle same.<sup>81</sup> Any overdue amount on which interest is charged will be deemed to be incidental credit.<sup>82</sup>

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<sup>75</sup> S 6.

<sup>76</sup> S 4(5).

<sup>77</sup> S 4(5)(b).

<sup>78</sup> Continuous service is defined in s 1 as

the supply for consideration of a utility or service, other than credit or access to credit, or the supply of such a utility or service combined with the supply of any goods that are essential for the utilisation of that utility or service by the consumer, with the intent that, so long as the agreement to supply that utility or service remains in force, the supplier will make the service continuously available to be used, accessed or drawn upon –

- (a) from time to time as determined by the consumer; and
- (b) with any frequency or in any amount as determined, accessed, required, demanded or drawn upon by the consumer, subject only to any total use or cost limits set out in the agreement.

<sup>79</sup> Utility is defined in s 1 as

the supply to the public of an essential –

- (a) commodity, such as electricity, water, or gas; or
- (b) service, such as waste removal, or access to sewage lines, telecommunication networks or any transportation infrastructure.

<sup>80</sup> S 4(6)(b).

<sup>81</sup> S 4(6)(b)(ii).

<sup>82</sup> S 4(6)(b)(ii).

It seems that continuous services have been exempted to exclude the application of the NCA to agreements between municipalities and consumers, although other service providers may also construct their agreements to fall within this exemption.<sup>83</sup>

### **2.3.7 Limited application of the NCA**

The NCA has limited application to incidental credit agreements, agreements where juristic persons act in their capacity as consumers, credit guarantees as well as pre-existing credit agreements.

In terms of section 5(2) incidental credit agreements are deemed to have been made:

twenty business days after –

- (a) the supplier of the goods or services that are the subject of that account, first charges a late payment fee or interest in respect of that account; or
- (b) a pre-determined higher price for full settlement of the account first becomes applicable, unless the consumer has fully paid the settlement value before that date.

As the parties to an incidental credit agreement never intended to grant and take up credit, the more onerous provisions of the NCA, for instance those relating to credit assessment and reckless credit, do not apply to such agreements. The following parts of the NCA do not apply to incidental credit agreements:<sup>84</sup>

- a Chapter 3 : Consumer credit industry regulation
    - i Part A: Registration requirements, criteria and procedures
    - ii Part B: Compliance procedures and cancellation of registration
- Section 55 – Compliance notices

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<sup>83</sup> Scholtz *et al* (2008) 4–6.

<sup>84</sup> S 5(1).

Section 56 – Objection to notices

Section 57 – Cancellation of registration

Section 58 – Voluntary cancellation of registration

- b Chapter 4: Consumer credit policy
  - i Part C: Credit marketing practices
  
- c Chapter 5: Consumer credit agreements
  - i Part A: Unlawful agreements and provisions
  - ii Part B: Disclosure, form and effect of credit agreements
  - iii Part F: Rescission and termination of credit agreements
  
- d Chapter 6: Collection, repayment, surrender and debt enforcement
  - i Part B: Surrender of goods

As stated elsewhere, the NCA is fully applicable to consumers who are natural persons. The NCA has limited application to juristic persons who enjoy protection under the NCA.<sup>85</sup> Only the following parts of the NCA do not apply to credit agreements where the consumer is a protected (“small”) juristic person:

- a Chapter 4: Consumer credit policy
  - i Part C: Credit marketing practices
  - ii Part D: Over-indebtedness and reckless credit
  
- b Chapter 5: Consumer credit agreements
  - i Part A: Unlawful agreements and provisions
    - Section 89(2)(b)<sup>86</sup>
    - Section 90(2)(o)<sup>87</sup>

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<sup>85</sup> S 6.

<sup>86</sup> Subject to subsections (3) and (4), a credit agreement is unlawful if – (b) the agreement results from an offer prohibited in terms of section 74(1). S 74(1) deals with negative option marketing.

iii Part C: Consumer's liability, interest, charges and fees

The NCA further has limited application to credit guarantees, as it will only apply to such guarantees to the extent that it is applicable to the credit transaction or credit facility in respect of which the guarantee is granted.<sup>88</sup>

Many credit agreements that were entered into prior to the commencement of the NCA will still be in force long after its effective date, such as mortgage agreements. Schedule 3<sup>89</sup> item 4 sets out the extent to which the NCA applies to pre-existing credit agreements. Item 4(1) provides that as a point of departure all agreements that would have been subject to the NCA, had the NCA been in force when the agreements were entered into, will be subject to the NCA. Certain provisions are fully applicable, others have limited application and some are not applicable at all. A detailed discussion of the provisions that apply to pre-existing agreements falls beyond the scope of this dissertation.<sup>90</sup>

Even though the NCA has limited application to incidental credit agreements, agreements where juristic persons act in their capacity as consumers and pre-existing credit agreements, the provisions dealing with debt enforcement are fully applicable to these agreements. As mentioned above, credit guarantees will follow the principal debt.

## 2.4 Conclusion

It was determined that a legally recognised civil debtor-creditor relationship should exist before one can speak of an enforceable personal obligation. The NCA regulates certain specified types of civil obligations where the object of

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<sup>87</sup> A provision of a credit agreement is unlawful if – (o) it states or implies that the rate of interest is variable, except to the extent permitted by section 103(4). S 103(4) provides that the interest rate on an agreement may only vary if linked to a reference rate stipulated in the agreement.

<sup>88</sup> S 4(2)(c); Scholtz *et al* (2008) 4–8.

<sup>89</sup> Schedule 3 deals with transitional provisions.

<sup>90</sup> See Scholtz *et al* (2008) 18–7 to 18–12 for an in-depth discussion on the NCA's application to pre-existing credit agreements.

performance is payment of an amount of money, collectively termed credit agreements. These obligations were investigated and defined. It was, however, established that even though a specific obligation may strictly fall within the definition of one of the types of agreements regulated by the NCA, the NCA in certain instances will only have limited applicability, such as where a “small” juristic person enters into a credit agreement as consumer. In other instances the NCA will not apply at all, such as where the consumer is a “large” juristic person or the state.

Existing enforcement procedures will only be impacted on by the NCA where a credit provider attempts to enforce an obligation to which it is applicable. Since the applicability of the NCA has now been determined, chapter 3 will focus on the general enforcement procedures.

## CHAPTER 3: GENERAL ENFORCEMENT PROCEDURES

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### 3.1 Introduction

Law can be divided into substantive and procedural law. Substantive law concerns itself with legal rights, duties and remedies existing between legal subjects and their relationships with legal objects. Procedural law, on the other hand, sets out the “rules of the game”, describing how these rights are protected and enforced in society.<sup>1</sup> However, substantive law cannot be applied properly without procedural law and *vice versa*.<sup>2</sup>

Credit providers (creditors) who want to enforce credit agreements against consumers (debtors) must thus in the first place make use of the general civil procedures. The National Credit Act,<sup>3</sup> however, prescribes certain protective measures in favour of consumers regarding the enforcement of credit agreements by their credit providers (creditors). In order to determine the possible impact of these protective measures on the general principles of debt enforcement as regulated by the law of civil procedure, it is important for the purposes of this study to provide a broad framework of the operation of these general principles in order to understand and explain the deviations necessitated by certain provisions in the NCA. The actual impact of the NCA in this regard is therefore considered in the chapters that follow but against the backdrop of the general principles summarised in this chapter.

The discussion focuses mainly on the Magistrate’s Court procedure as this court will play the dominant role in the enforcement of credit agreements in practice.<sup>4</sup>

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<sup>1</sup> Paterson (2005) 6.

<sup>2</sup> Theophilopoulos, Rowan, Van Heerden and Boraine (hereafter Theophilopoulos *et al*) (2006) 1.

<sup>3</sup> 34 of 2005 (hereafter “NCA”).

<sup>4</sup> See chapter 5 below for a detailed discussion of jurisdiction in terms of the NCA.

## 3.2 Jurisdiction

### 3.2.1 General principles

In litigation it is of the utmost importance to approach the appropriate court that has jurisdiction to hear the matter.<sup>5</sup> A prospective litigant must therefore firstly establish whether the matter falls within the exclusive jurisdiction of the High Court or whether the lower courts may entertain the matter as well.<sup>6</sup> Secondly, it must be determined which specific provincial (or local) division of the High Court or specific Magistrate's Court should be approached.<sup>7</sup>

Before examining the specific grounds of jurisdiction a number of general principles should be considered. There must usually be a specific link between the case and the court to be approached. In this regard the principle of *actor sequitur forum rei* applies, which means that the applicant or plaintiff must follow the forum where the respondent or defendant is resident or domiciled,<sup>8</sup> or the forum where the cause of action arose. In certain circumstances consent to the jurisdiction of a specific court will suffice.<sup>9</sup> Another principle is that a court should only entertain a matter if it can give effect to the order it makes.<sup>10</sup> Convenience<sup>11</sup> is also important since courts may apply it to determine which is the best court for the purposes of a specific case where more than one court has concurrent jurisdiction to hear the matter. At the outset it is important to note that the High Court has inherent jurisdiction and may therefore entertain

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<sup>5</sup> "Jurisdiction means the power or competence of a court to hear and determine an issue between parties" – see *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) 420 (A) at 424; Harms, Van der Walt, Louw, Neukircher and Faris (hereafter Harms *et al*) (1997) 2–3; Harms (1990) A–12.

<sup>6</sup> Theophilopoulos *et al* (2006) 37.

<sup>7</sup> *Id.*

<sup>8</sup> *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) 295 (A) at 305C; Harms (1990) A–21.

<sup>9</sup> *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) 522 (SCA).

<sup>10</sup> Harms (1990) A–17.

<sup>11</sup> *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, third party)* 2008 (3) 355 (SCA) at 370C; Harms (1990) A–33.

any matter provided that no specific prohibition against such jurisdiction exists.<sup>12</sup> The Magistrate's Court on the other hand is a creature of statute and will only have jurisdiction that is specifically conferred on it by law.<sup>13</sup>

General limitations on the jurisdiction of courts are territorial jurisdiction, the monetary value of a claim, the type of claim as well as the parties to the dispute.<sup>14</sup> The general limitations discussed below may be altered by legislation such as the NCA, and the alterations will take preference in a given case.<sup>15</sup>

The onus is on the plaintiff to establish jurisdiction and the defendant may raise the lack thereof in a special plea.<sup>16</sup> In the event that more than one court has jurisdiction, the plaintiff is *dominus litis* and may choose the forum in which to institute action.<sup>17</sup>

### **3.2.2 High Court jurisdiction**

The High Court derives its jurisdiction from the Constitution,<sup>18</sup> and such jurisdiction is further regulated primarily by the Supreme Court Act.<sup>19</sup> As mentioned earlier, the High Court has inherent jurisdiction to hear a matter. It has no monetary ceiling and no lower monetary limit.<sup>20</sup>

The practice of instituting matters in the High Court, where the Magistrate's Court could also have been approached, has always been discouraged because of the risk of being awarded costs on the Magistrate's Court scale

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<sup>12</sup> S 173 Constitution of the Republic of South Africa of 1996.

<sup>13</sup> Erasmus and Van Loggerenberg (1996) 34; Harms *et al* (1997) 2–3; *Mason Motors (Edms) Bpk v Van Niekerk* 1983 (4) 406 (T) at 409E–F.

<sup>14</sup> Harms *et al* (1997) 2–3.

<sup>15</sup> Theophilopoulos *et al* (2006) 45.

<sup>16</sup> Harms *et al* (1997) 2–4.

<sup>17</sup> Harms (1990) A - 14.

<sup>18</sup> S 169; *Phillips and Others v National Director of Public Prosecutions* 2006 (1) 505 (CC) at 520F–H.

<sup>19</sup> S 19 Supreme Court Act 59 of 1959; Harms (1990) A–6.

<sup>20</sup> *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) 812 (W).

only.<sup>21</sup> High Court Rule 69(3) also provides that the maximum civil Magistrate's Court fees for advocates on party-and-party scale will apply where matters were instituted in the High Court while the claim falls within the monetary jurisdiction of the Magistrate's Court.

Because of the High Court's inherent jurisdiction it may entertain any type of matter except if its jurisdiction is restricted or ousted by legislation. Examples of such restrictions are where partial or exclusive jurisdiction is conferred on a special court,<sup>22</sup> for instance the special courts for income-tax appeals,<sup>23</sup> and the Land Claims Court.<sup>24</sup> The High Court's jurisdiction is, however, restricted on territorial grounds and a specific division only has jurisdiction over a person "residing or being in" its area of jurisdiction or if the cause of action arose within its jurisdiction.<sup>25</sup>

Two courts may have concurrent jurisdiction to entertain a specific matter.<sup>26</sup> An example is the concurrent jurisdiction that the Transvaal Provincial Division exercises with the Witwatersrand Local Division.<sup>27</sup>

### **3.2.3 Magistrate's Court jurisdiction**

As stated previously the Magistrate's Court is a creature of statute and in principle only has the jurisdiction conferred on it by law. As it has no inherent jurisdiction it draws its jurisdiction from the Magistrates' Courts Act,<sup>28</sup> as well as several other pieces of legislation, *inter alia*, the NCA.

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<sup>21</sup> *Goldberg v Goldberg* 1938 WLD 83 at 85 to 86; Erasmus and Van Loggerenberg (1996) 36.

<sup>22</sup> Harms (1990) A-13.

<sup>23</sup> S 83 Income Tax Act 58 of 1962.

<sup>24</sup> S 36(2) Restitution of Land Rights Act 22 of 1994.

<sup>25</sup> S 19(1)(a) Supreme Court Act.

<sup>26</sup> S 6(2) Supreme Court Act.

<sup>27</sup> See chapter 1 par 1.6 regarding the renaming of the High Courts and the mode of reference for the purposes of this study.

<sup>28</sup> 32 of 1944.

There are several other grounds on which the Magistrates' Courts' jurisdiction are restricted.<sup>29</sup> Only the restrictions regarding territory, persons, cause of action and the monetary restrictions are discussed briefly.

Section 28 of the Magistrates' Courts Act sets out the jurisdiction in respect of persons. A Magistrate's Court has jurisdiction in respect of the following persons:

- a a person who resides, carries on business or is employed in the district;
- b a partnership which has its business premises situated or a member who resides within the district;
- c a person in respect of proceedings incidental to an action or proceeding instituted in the court by that person;
- d a person if the cause of action arose wholly within the jurisdiction;
- e parties to interpleader proceedings in certain circumstances;
- f a defendant who appears and raises no objection;
- g a person who owns immovable property within the district in actions related to that property or in respect of mortgage bonds thereon.

Section 29 of the Magistrates' Courts Act sets out the causes of action in respect of which a Magistrate's Court shall have jurisdiction. Some of these causes of action are capped at a monetary value of a R100 000.

Only section 29(1)(e) is relevant for this discussion and provides that:

Subject to the provisions of this Act and the National Credit Act, 2005, the court, in respect of causes of action, shall have jurisdiction in –  
actions on or arising out of any credit agreement, as defined in section 1 of the National Credit Act, 2005.

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<sup>29</sup> Harms *et al* (1997) 2–3.

No monetary cap was thus placed on a Magistrate's Court's jurisdiction as far as credit agreements as defined in the NCA are concerned.

Parties may consent in writing to the jurisdiction of a Magistrate's Court in certain instances.<sup>30</sup> Such consent may be to institute claims in a Magistrate's Court where the monetary value of the claim is more than R100 000 provided that the court may exercise jurisdiction over the type of claim. Consent to institute a matter in a particular Magistrate's Court may also be given in cases where proceedings have already been instituted or are about to be instituted.<sup>31</sup>

### **3.3 Letter of demand or statutory notice by creditor / debt collector / attorney**

Usually, the debt collection process commences with the delivery of a letter of demand. Such a demand is forwarded to a prospective defendant in order to claim performance in an effort to prevent costly and time-consuming litigation.<sup>32</sup> In the Magistrate's Court, a creditor will only be entitled to recover the fees of a letter of demand from a debtor if the letter was sent by registered mail.<sup>33</sup>

A letter of demand is, however, generally not a prerequisite for debt enforcement. In certain instances a letter of demand or notice may be required by legislation, contract or in terms of the common law.<sup>34</sup>

Examples where a letter of demand or a similar notice is a statutory requirement are to be found in the Small Claims Court Act,<sup>35</sup> the Institution of Legal Proceedings against Certain Organs of State Act,<sup>36</sup> the Prevention of Illegal

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<sup>30</sup> S 45 Magistrates' Courts Act; Harms *et al* (1997) 2–17; This consent is subject to s 46 which regulates matters beyond the jurisdiction of the Magistrate's Court.

<sup>31</sup> S 45(1).

<sup>32</sup> Theophilopoulos *et al* (2006) 28.

<sup>33</sup> S 56 Magistrates' Courts Act.

<sup>34</sup> Bodenstern, Boniface, De Klerk, Grové, Haupt, Kok, Mahomed, Osman-Hyder, Steenhuisen, Stilwell, Swanepoel and Wimpey (hereafter de Klerk *et al*) (2006) 166.

<sup>35</sup> 61 of 1984.

<sup>36</sup> 40 of 2002.

Eviction from and Unlawful Occupation of Land Act<sup>37</sup> and the Extension of Security of Tenure Act.<sup>38</sup> At common law, a letter of demand may be required in order to place a contracting party *in mora* before instituting legal proceedings.

Where such a letter of demand is required and a prospective litigant does not comply, subsequent legal proceedings may be challenged and nullified. In general, where a letter of demand is prescribed it becomes an essential requirement to complete the plaintiff's cause of action.

### 3.4 Summons and particulars of claim

The action procedure that is in general applied for debt collection and subsequent enforcement, usually commences with the issuing of a summons.<sup>39</sup> The clerk<sup>40</sup> of the Magistrate's Court or the registrar<sup>41</sup> of the High Court issues summonses which the sheriff subsequently serves in terms of the rules of court.<sup>42</sup> The object of a summons is not only to initiate an action but also to give effect to the principle of *audi alteram partem*, informing a defendant of the nature of a claim against him or her.<sup>43</sup>

The Magistrate's Court rules describe a summons as the process of the court for commencing an action, calling on the defendant to enter an appearance to defend the action within ten days after service and to answer the plaintiff's claim.<sup>44</sup> It also alerts the defendant as to the consequences of failure to do so.<sup>45</sup> In the Magistrates' Courts, an ordinary summons that must conform with prescribed Form 2 that forms part of Annexure 1 to the Magistrate's Court rules

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<sup>37</sup> 19 of 1998.

<sup>38</sup> 62 of 1997.

<sup>39</sup> MCR 5(1); Paterson (2005) 77.

<sup>40</sup> MCR 5(2). Clerks of the court act as court administrators in the Magistrates' Courts.

<sup>41</sup> In the High Court, the registrar fulfils the administrative function.

<sup>42</sup> S 36 Supreme Court Act; MCR 8. Sheriffs are officers of court who play an important role in the service of court documents and in the execution process.

<sup>43</sup> *Stafford v Special Investigating Unit* 1999 (2) 130 (E) at 137H; Harms (1990) B-133; Theophilopoulos *et al* (2006) 147.

<sup>44</sup> MCR 5(1).

<sup>45</sup> *Id.*

is used.<sup>46</sup> Where the claims are for rentals in arrear the landlord (lessor) may use the summons that also provides for an automatic rent interdict.<sup>47</sup>

The summons must contain the particulars of the claim,<sup>48</sup> – that is, the plaintiff's cause of action and prayers.<sup>49</sup> The particulars of claim may be set out in the summons itself or attached to the summons if it contains more than a hundred words.<sup>50</sup> It must be signed by the plaintiff or his or her legal representative.<sup>51</sup>

The High Court rules prescribe the form of a summons in the High Court.<sup>52</sup> Two general types of summonses are used in the High Court. A simple summons may be used where the debt is based on a debt or liquid claim and no evidence as to the quantum is necessary.<sup>53</sup> A debt or liquidated demand is a claim for a fixed, certain or ascertained amount or thing.<sup>54</sup> An extensive description of the claim is not necessary, but the cause of action and relief sought must be set out in concise terms. The simple summons must be in the format of Form 9 in the First Schedule to the High Court Rules Schedules. If the defendant enters an appearance to defend, the plaintiff must deliver a declaration,<sup>55</sup> setting out the complete cause of action as well as the relief sought.<sup>56</sup>

If the debt is not based on a debt or liquid claim, a combined summons, consisting of a summons and particulars of claim must be used.<sup>57</sup> The combined summons must be in the format as set out in Form 10 of the High Court Rules Schedules.

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<sup>46</sup> MCR 1(2)(a). An exception is the automatic rent interdict summons in terms of s 31 Magistrates' Courts Act.

<sup>47</sup> S 31 Magistrates' Courts Act.

<sup>48</sup> MCR 6(1)(a).

<sup>49</sup> Particulars of claim set out the basis for the claim as well as the relief sought.

<sup>50</sup> MCR 6(3)(d).

<sup>51</sup> MCR 6(1)(a); MCR 6(2)(a) read with MCR 2(1)(b).

<sup>52</sup> HCR 17.

<sup>53</sup> HCR 17(2)(a); Harms (1990) B-133.

<sup>54</sup> Harms (1990) B-135; Theophilopoulos *et al* (2006) 149; *Supreme Diamonds (Pty) Ltd v Du Bois Regent Neckwear Manufacturing Co (Pty) Ltd v Ehrke* 1979 (3) 444 (W); *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) 736 (T).

<sup>55</sup> A declaration is identical to the particulars of claim.

<sup>56</sup> HCR 20; Theophilopoulos *et al* (2006) 151.

<sup>57</sup> HCR 17(2).

The defendant's attorney must sign a simple summons or if an attorney does not represent the defendant, the defendant must sign the summons.<sup>58</sup> The combined summons is a pleading and must be signed by an advocate and an attorney or an attorney enjoying right of appearance in the High Court.<sup>59</sup>

It is clear that a litigant must satisfy him- or herself of the substantive law applicable to his or her claim before drafting the particulars of claim. The substantive law will prescribe the facts that must be averred in order to complete the plaintiff's cause of action. All the necessary material facts or *facta probanda* must be pleaded in order to claim relief in terms of the plaintiff's specific cause of action.<sup>60</sup> Evidence or *facta probantia* may generally not be pleaded.

In both the High Court and the Magistrate's Court a provisional sentence summons may be used to institute a claim by way of provisional sentence procedure where the claim is based on a liquid document.<sup>61</sup> Provisional sentence is a unique procedure that contains elements of both the action procedure and the application procedure.

### **3.5 Satisfaction of a claim and judgment by consent**

After a summons has been served on a defendant in Magistrate's Court proceedings, the defendant has a number of options to consider. The defendant may oppose the matter on technical grounds or on the merits; settle the matter; or decide not to oppose the matter at all. In the latter instance, the defendant has further options available: If the defendant chooses not to defend the matter, the defendant may simply pay the amount claimed or offer to pay the claim in instalments or otherwise; the defendant may consent to judgment against the

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<sup>58</sup> HCR 17(3); Theophilopoulos *et al* (2006) 151.

<sup>59</sup> HCR 18(1); s 4 Rights of Appearance in Courts Act 62 of 1995.

<sup>60</sup> Paterson (2005) 87 to 88.

<sup>61</sup> According to HCR 8(1) the summons must be as near as possible to Form 3 of the First Schedule; MCR 14A(1) prescribes Form 2A of Annexure 1.

defendant; or simply remain passive, thereby allowing the plaintiff to obtain default judgment.<sup>62</sup>

If the defendant meets the claim after receipt of the summons, all further legal action is terminated. In the event that the defendant is not in a financial position to meet the claim immediately, section 57 of the Magistrates' Courts Act provides for a process in terms of which the defendant may tender payment of the debt (or other amount), costs and collection fees in instalments or otherwise and agree that judgment may be entered against the defendant according to the defendant's offer, should the defendant fail to carry out the terms thereof.<sup>63</sup> If the plaintiff or the plaintiff's attorney accepts the offer, the defendant must be informed of such acceptance by registered mail.<sup>64</sup> The plaintiff will then be entitled to obtain judgment without further notice to the defaulting debtor and such judgment shall have the effect of a default judgment.<sup>65</sup>

In terms of section 58 of the Magistrates' Courts Act, a defendant also has the option of unconditionally consenting in writing to judgment for the amount claimed, or some other amount as well as costs.<sup>66</sup> The defendant may further agree to pay the debt in specified instalments or otherwise. The clerk<sup>67</sup> of the court is then required to grant judgment upon the plaintiff's written request and a judgment so granted shall, (like the judgment in terms of section 57) have the effect of a default judgment.

Both the processes of admission of liability in terms of section 57 and consent to judgment in terms of section 58 may be utilised by a defendant following the receipt of a letter of demand. A summons is therefore not a prerequisite before

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<sup>62</sup> Paterson (2005) 107.

<sup>63</sup> This procedure is also available to a debtor upon receipt of a letter of demand. A summons is therefore not a *sine qua non* for the utilisation of this procedure. See Harms *et al* (1997) 17–2 to 17–3.

<sup>64</sup> S 57(1).

<sup>65</sup> S 57(4); see the discussion on default judgment in 3.6 below.

<sup>66</sup> See Harms *et al* (1997) 17–4 to 17–5.

<sup>67</sup> The Magistrates' Courts are mainly used for debt enforcement and the clerks of the court process the majority of default judgments.

a debtor may use these procedures. Stated differently, either a letter of demand will be delivered to, or a summons will be served on a debtor before the debtor will be entitled to make use of the procedures contained in these two sections.

There are no similar procedures available to a debtor in the High Court in that the settlement procedure by consent to judgment in the High Court Rules are only available after summons has been served on a debtor.<sup>68</sup>

After summons has been served in the Magistrate's Court, a defendant may also consent to judgment in terms of rule 11(1) before delivery of a notice of intention to defend and in terms of rule 11(4) after delivery of a notice of intention to defend.<sup>69</sup>

### **3.6 Default judgment**

A default judgment is a judgment entered against a party in his or her absence.<sup>70</sup> If a litigating party does not deliver a pleading on time the proceedings may be brought to an end at an early stage in that the opposing party may apply for default judgment.<sup>71</sup> In certain instances such application may be brought immediately and in other instances after following certain prescribed procedures. Default judgment is therefore granted where a party is in default of delivery and service of a pleading within the prescribed time limits.<sup>72</sup>

The majority of default judgments are granted in instances where the defendant has failed to deliver a notice of intention to defend timeously, but it may also be granted where a party is in default in other instances of the process.<sup>73</sup>

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<sup>68</sup> HCR 31(1)(a) and 31(1)(b).

<sup>69</sup> Theophilopoulos *et al* (2006) 179.

<sup>70</sup> MCR 12(1) and HCR 31(2)(a).

<sup>71</sup> Theophilopoulos *et al* (2006) 174.

<sup>72</sup> *Id.*

<sup>73</sup> Paterson (2005) 115; Erasmus and Van Loggerenberg (1996) 12–1 to 12–17.

In the Magistrates' Courts, a litigating party may apply for and default judgment is usually granted on four occasions:<sup>74</sup>

- a where the defendant fails to enter an appearance to defend timeously;<sup>75</sup>
- b where the defendant enters an appearance to defend but fails to deliver a plea after being served with a notice of bar (within the time period provided in the notice);<sup>76</sup>
- c where the defendant delivers a defective notice of intention to defend and the plaintiff has duly notified the defendant to rectify same;<sup>77</sup>
- d where a party fails to appear in person or by way of a legal representative in court on the date that the matter has been set down.<sup>78</sup>

Generally, the clerk of the court grants default judgments based on liquidated claims.<sup>79</sup> The plaintiff will apply to the clerk in writing, and without prior notice to the defendant, for default judgment where no appearance to defend has been entered.<sup>80</sup> In other instances, specific prescribed steps must be taken before the plaintiff may apply for default judgment.

Where the claim is, however, unliquidated, the request must be referred to the court and the plaintiff must deliver evidence as to the *quantum* of the claim either orally or by way of affidavit.<sup>81</sup>

Where the cause of action arises from an agreement in terms of the former Hire-Purchase Act,<sup>82</sup> or the Credit Agreements Act,<sup>83</sup> the request for default

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<sup>74</sup> Paterson (2005) 116; Theophilopoulos *et al* (2006) 174.

<sup>75</sup> MCR 12(1)(a).

<sup>76</sup> MCR 12(1)(a) and 12(1)(b)(i).

<sup>77</sup> MCR 12(2)(a).

<sup>78</sup> MCR 32(1) and 32(2).

<sup>79</sup> Harms *et al* (1997) 19–3.

<sup>80</sup> MCR 12(1)(a).

<sup>81</sup> MCR 12(4).

<sup>82</sup> 36 of 1942.

<sup>83</sup> 75 of 1980.

judgment had to be referred to the court.<sup>84</sup> This principle now applies to credit agreements in terms of the NCA.<sup>85</sup>

In the High Court a litigating party may apply for and default judgment is usually granted on four occasions:<sup>86</sup>

- a where the defendant fails to deliver a notice of intention to defend timeously;<sup>87</sup>
- b where the defendant enters an appearance to defend, but fails to deliver a plea after being served with a notice of bar (within the time period provided in the notice);<sup>88</sup>
- c where the plaintiff fails to deliver a declaration after being served with a notice of bar within the time period provided in the notice;<sup>89</sup>
- d where a party fails to appear in person or by way of a legal representative in court on the date that the matter has been set down.<sup>90</sup>

As in the Magistrate's Court, the registrar may grant default judgments based on debt or liquidated demands.<sup>91</sup> A written request must be submitted to the registrar and no notice is required. Unliquidated claims must be referred to the court as evidence must be lead.<sup>92</sup>

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<sup>84</sup> MCR 12(5).

<sup>85</sup> The Credit Agreements Act 75 of 1980 was repealed and replaced by the NCA.

<sup>86</sup> Theophilopoulos *et al* (2006) 175.

<sup>87</sup> HCR 31(2)(a), 31(4) and 31(5)(a).

<sup>88</sup> HCR 26. In terms of HCR 24(1) the same principle applies where the plaintiff fails to deliver a plea to the defendant's counterclaim.

<sup>89</sup> HCR 31(3) and 26.

<sup>90</sup> HCR 39(1) and 39(3).

<sup>91</sup> S 27A of the Supreme Court Act and HCR 31(5)(a); Harms (1990) B-199 and B-207.

<sup>92</sup> HCR 31(2)(a).

### **3.7 Notice of intention to defend, the plea and summary judgment**

#### **3.7.1 Notice of intention to defend and the plea**

A defendant who intends to defend an action must do so within a specified period after service of a summons on him or her, by delivering a notice of such intention to the plaintiff.<sup>93</sup> The general period of delivery of such notice is ten days in both the Magistrate's Court and the High Court calculated as from the date on which the summons was served on the defendant.<sup>94</sup>

After delivery of the notice of intention to defend there are various ways to answer and defend a claim, for example, by raising an exception to the particulars of claim, raising a special plea, etcetera. The most common defence is, however, a defence on the merits of the matter which is set out in a plea.<sup>95</sup> A plea is therefore an answer to the plaintiff's claim,<sup>96</sup> and must clearly and concisely state the nature of the defence as well as all material facts on which it is based.<sup>97</sup>

In the Magistrate's Court a plea must be delivered within ten days:<sup>98</sup>

- a after entry of appearance to defend;
- b after delivery of documents or particulars in terms of rule 15 or rule 16;<sup>99</sup>
- c after the dismissal of an application for summary judgment, if such application is made;
- d after the making of an order giving leave to defend;

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<sup>93</sup> MCR 13(1); HCR 19(1).

<sup>94</sup> MCR 5(1) read with MCR 13; HCR 19 read with s 27 Supreme Court Act; HCR 19(1) provides that the days between 16 December and 15 January (High Court recess) should not be taken into account when calculating the ten-day period in which a notice of intention to defend should be served.

<sup>95</sup> Paterson (2005) 178.

<sup>96</sup> Theophilopoulos *et al* (2006) 239.

<sup>97</sup> MCR 19(4); HCR 22(2); Harms (1990) B-158.

<sup>98</sup> MCR 19(1).

<sup>99</sup> MCR 15 and 16 set out the process of requesting documentation and the process of requesting further particulars necessary to plead.

- e after dismissal of an exception or application to strike out, if such exception or application was set down for hearing in terms of rule 17(7);  
or
- f after any amendment of the summons allowed by the court at the hearing of such exception or application.

In the High Court a plea must be delivered within twenty days:<sup>100</sup>

- a after service of a declaration where a simple summons was used to institute the action;
- b after delivery of a notice of intention to defend where the combined summons was used.

In the event that a defendant delivers a notice of intention to defend but subsequently fails to deliver a plea, the plaintiff may serve a notice of bar on the defendant calling on the latter to deliver a plea within five days of receipt of the notice, failing which the defendant shall be *ipso facto* barred to deliver same.<sup>101</sup>

A defendant may also attack the plaintiff's claim on a basis not apparent from the particulars of claim.<sup>102</sup> The attack is lodged by way of a special plea in which the dismissal or postponement of the claim is requested.<sup>103</sup> In the Magistrate's Court, a special plea must be delivered together with the plea on the merits as the complete defence should be set out and the rules do not provide for a separate special plea.<sup>104</sup> In the High Court the matter has not been decided finally and it is submitted that it will be good practice to include the plea on the merits and the special plea in one document.<sup>105</sup> Some of the issues on which a

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<sup>100</sup> HCR 22(1).

<sup>101</sup> MCR 12(1)(a) and (1)(b)(i); HCR 26.

<sup>102</sup> Harms (1990) B-160.

<sup>103</sup> Paterson (2005) 179; Theophilopoulos *et al* (2006) 241.

<sup>104</sup> MCR 19(4); Harms *et al* (1997) 14-3.

<sup>105</sup> Theophilopoulos *et al* (2006) 247.

special plea may be raised are jurisdiction,<sup>106</sup> *lis alibi pendens*,<sup>107</sup> *locus standi in iudicio*,<sup>108</sup> prescription,<sup>109</sup> and *res judicata*.<sup>110</sup>

### 3.7.2 Summary judgment

An application for summary judgment is an extraordinary and drastic remedy whereby a matter can be finalised rapidly under certain circumstances.<sup>111</sup> This procedure may only be used in the instances below and where the defendant has no *bona fide* defence and is only defending the action to delay finalisation of the matter.<sup>112</sup>

In both the Magistrate's Court and the High Court, the plaintiff may apply for summary judgment where the plaintiff's claim is based on:<sup>113</sup>

- a a liquid document;
- b a liquidated sum of money;
- c the delivery of specified movable property; or
- d ejectment.

It is thus apparent that this procedure may only be used where the merits are easily ascertainable without the need for evidence to be lead in a court,<sup>114</sup> and only after the defendant delivered a notice of intention to defend.<sup>115</sup>

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<sup>106</sup> Van Loggerenberg and Farlam (1994) B1–143.

<sup>107</sup> *Lis pendens* means that there is pending litigation between the same parties flowing from the same cause of action.

<sup>108</sup> *Locus standi* refers to an interest in a matter and/or the capacity to sue or be sued – therefore a special plea on *locus standi* will be based on the lack thereof.

<sup>109</sup> Once a claim has prescribed, the defendant may raise prescription as a defence and the claim will subsequently not be enforceable; Prescription Act 68 of 1969.

<sup>110</sup> A matter is *res judicata* if already finalised in a court of law.

<sup>111</sup> *Maharaj v Barclays National Bank Ltd* 1976 (1) 418 (A) at 423F; Harms (1990) B–209.

<sup>112</sup> Harms *et al* (1997) 21–3; Harms (1990) B–209; *Mosehla v Sancor CC* 2001 (3) 1207 (SCA).

<sup>113</sup> MCR 14(1); HCR 32(1).

<sup>114</sup> Paterson (2005) 135.

<sup>115</sup> MCR 14(1); HCR 32(1).

In the Magistrate's Court, the application for summary judgment must be made with at least ten days notice and within ten days after the defendant delivered the notice of intention to defend.<sup>116</sup> In the High Court a ten day notice period is also required, but the application must be made within at least fifteen days after service of the notice of intention to defend.<sup>117</sup> The application for summary judgment therefore places a "moratorium" on the delivery of the plea.<sup>118</sup>

If the claim is based on a liquid document, a copy of such document must be attached to the notice.<sup>119</sup> An affidavit must also accompany the notice of motion in the High Court,<sup>120</sup> but in the Magistrate's Court it will only be necessary where the claim is not based on a liquid document.<sup>121</sup> The affidavit should include a verification of the cause of action and the amount claimed (if any) as well as an averment that there is no *bona fide* defence and that the notice of intention to defend was delivered solely to delay the proceedings.<sup>122</sup>

If the defendant wishes to oppose the application for summary judgment, he or she may either provide security,<sup>123</sup> or convince the court by way of an opposing affidavit that he or she has a *bona fide* defence.<sup>124</sup> In the Magistrate's Court, evidence contained in the affidavit may be supplemented by oral evidence with leave of the court.<sup>125</sup> The same principle applies in the High Court.<sup>126</sup>

If security is provided, or a *bona fide* defence is raised, the court must grant leave to the defendant to defend the matter.<sup>127</sup> If no security was provided or no

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<sup>116</sup> MCR 14(2).

<sup>117</sup> HCR 32(2).

<sup>118</sup> Harms *et al* (1997) 21–3.

<sup>119</sup> MCR 14(2); HCR 32(2).

<sup>120</sup> HCR 32(2); Harms (1990) B–212.

<sup>121</sup> MCR 14(2).

<sup>122</sup> MCR 14(2); HCR 32(2); Paterson (2005) 137; Theophilopoulos *et al* (2006) 190.

<sup>123</sup> MCR 14(3)(b); HCR 32(3).

<sup>124</sup> MCR 14(3)(c); HCR 32(3)(b).

<sup>125</sup> MCR 14(3)(c).

<sup>126</sup> HCR 32(3)(b).

<sup>127</sup> MCR 14(7); HCR 32(7); Theophilopoulos *et al* (2006) 191 and 195.

*bona fide* defence was established, the court has a discretion and may grant the summary judgment or grant leave to defend the action.<sup>128</sup>

### **3.8 Interim procedures**

#### **3.8.1 Exception**

An exception is “a legal objection to the opponent’s pleading”.<sup>129</sup> It is an objection against a formal and substantive defect in the pleading itself or in the manner that a summons was served.<sup>130</sup> As an exception indicates that a pleading is out of order, argument may only be presented on the excipiable pleading. No facts outside the pleading against which the objection is raised may be pleaded.<sup>131</sup>

Where the summons discloses no cause of action or the plea no defence, the exception procedure provides an inexpensive and quick way of ending the matter without prolonged and expensive trial procedures.<sup>132</sup>

Usually, a court that allows the exception grants the party against whose pleading the exception was raised leave to amend the pleading within a certain period.<sup>133</sup> If such defect cannot be rectified, the matter will be finalised.<sup>134</sup>

In the Magistrate’s Court, a defendant has ten days after delivery of the defendant’s notice of intention to defend to deliver an exception to the summons

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<sup>128</sup> MCR 14(6); MCR 14(7); HCR 32(5).

<sup>129</sup> Van Loggerenberg and Farlam (1994) B1–151.

<sup>130</sup> Paterson (2005) 151 to 152.

<sup>131</sup> *Salzmann Appellant v Holmes Respondent* 1914 AD 152 at 156; *Minister of Safety and Security and Another v Hamilton* 2001 (3) 50 (SCA) at 52G–H; Van Loggerenberg and Farlam (1994) B1–151; Theophilopoulos *et al* (2006) 197; Paterson (2005) 152 and 159.

<sup>132</sup> *Kahn v Stuart and Others* 1942 CPD 386; Paterson (2005) 152; Harms *et al* (1997) 13–4; Harms (1990) B–164; Van Loggerenberg and Farlam (1994) B1–151.

<sup>133</sup> *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) 593 (A) at 602C.

<sup>134</sup> Theophilopoulos *et al* (2006) 197.

or particulars of claim.<sup>135</sup> In the event that delivery of documents or particulars has been requested, an exception may be raised within ten days of delivery of such documents or particulars.<sup>136</sup> After the expiry of this period, an exception may only be raised with leave of the court upon application on notice.<sup>137</sup>

The grounds on which a defendant may raise an exception in the Magistrate's Court are that the summons:<sup>138</sup>

- a does not disclose a cause of action;
- b is vague and embarrassing;
- c does not comply with rule 5 or rule 6; (formal defect due to non-compliance with the rules);
- d was not properly served; or
- e served on the defendant differs materially from the original summons.

Any other defences must be raised by way of a plea.<sup>139</sup>

An exception based on the ground that a summons is vague and embarrassing may only be raised after a notice has been delivered to the plaintiff wherein the plaintiff is informed of the defect and allowed the opportunity to rectify such defect within ten days.<sup>140</sup>

In the Magistrate's Court a plaintiff may within ten days of delivery of the plea or further particulars raise an exception to such plea.<sup>141</sup> The grounds on which the plaintiff may base the exception are that the plea:<sup>142</sup>

- a does not disclose a defence;

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<sup>135</sup> MCR 17(1)(a).

<sup>136</sup> MCR 17(1)(a).

<sup>137</sup> MCR 17(1)(b).

<sup>138</sup> MCR 17(2).

<sup>139</sup> MCR 17(3).

<sup>140</sup> MCR 17(5)(c) and MCR 17(1)(a).

<sup>141</sup> MCR 19(13).

<sup>142</sup> MCR 19(14).

- b is vague and embarrassing;
- c does not comply with the requirements of rule 19 (formal defects in the plea).

The requirement of notice before an exception can be raised on the basis that the summons is vague and embarrassing, as discussed above, applies *mutatis mutandis* to an objection to a plea.<sup>143</sup>

The excipient raises an objection by delivering a notice of exception which clearly and concisely sets out the grounds on which the exception is based.<sup>144</sup> A notice of exception should contain a prayer in which the court is requested to dismiss the plaintiff's claim or the defendant's defence.<sup>145</sup>

Any party may place the matter on the roll with ten days' notice.<sup>146</sup> An exception will only be upheld if the court is satisfied that the excipient would otherwise be prejudiced.<sup>147</sup> The exception may be heard at the same time as an application for summary judgment.<sup>148</sup>

In the High Court, an exception may be raised against a pleading if the pleading:<sup>149</sup>

- a is vague and embarrassing; or
- b lacks averments that are necessary to uphold an action or defence.

As in the Magistrate's Court, where a pleading is vague and embarrassing, an excipient must notify and award the opposing party an opportunity to rectify such defect.<sup>150</sup> The notification should be delivered within the period provided

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<sup>143</sup> MCR 19(15)(c).

<sup>144</sup> MCR 17(5)(b) and 19(15)(b).

<sup>145</sup> *Bothma v Laubscher* 1973 (3) 590 (O); Paterson (2005) 158.

<sup>146</sup> MCR 17(7) and MCR 19(18).

<sup>147</sup> *Theophilopoulos et al* (2006) 206; MCR 15(5)(a) and 19(15)(a).

<sup>148</sup> MCR 17(7).

<sup>149</sup> HCR 23(1).

<sup>150</sup> *Id.*

for the filing of subsequent pleadings and the opposing party must rectify the pleading within fifteen days from day of notice.<sup>151</sup> In the event that the opposing party does not remove the cause of complaint, a notice of exception may be filed. The notice of exception should be filed within ten days from date of receipt of reply or within ten days from the date the reply was due.<sup>152</sup>

Where a pleading lacks the necessary averments, notification and therefore the opportunity to rectify need not be awarded to the opposing party.<sup>153</sup> An excipient may proceed with a notice of exception, which must clearly and concisely set out the grounds of exception and end with a relevant prayer.<sup>154</sup>

### **3.8.2 Request for further particulars**

In the Magistrate's Court, parties may during the pleading phase request further particulars to place them in a proper position to plead.<sup>155</sup> This procedure is in general not available in the High Court during the pleading phase.

The function of such particulars is to limit the generality of allegations in pleadings, define issues with greater certainty and to prevent surprises at the trial.<sup>156</sup> This procedure is thus invented to place a party in a position to take the next procedural step without being disadvantaged.<sup>157</sup>

The critical question is whether the party requesting the further particulars is embarrassed without them.<sup>158</sup> There is no hard and fast rule as to the degree of particularity required and the circumstances and nature of the facts in each case will determine the reasonable amount of certainty and particularity

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Theophilopoulos *et al* (2006) 204.

<sup>154</sup> HCR 23(3).

<sup>155</sup> MCR 16(1); *South African Railways and Harbours v Deal Enterprises (Pty) Ltd* 1975 (3) 944 (W) at 946H.

<sup>156</sup> *Tahan v Griffiths* 1950 (3) 899 (W) at 902G–H; *South African Railways and Harbours* above n155 at 946H; see also Theophilopoulos *et al* (2006) 216.

<sup>157</sup> Paterson (2005) 167; Theophilopoulos *et al* (2006) 215.

<sup>158</sup> Paterson (2005) 167.

required.<sup>159</sup> A party is, however, not entitled to information that bears no connection to the cause of action.<sup>160</sup>

In the event that a summons does not contain a cause of action, a defendant may except to the summons and does not need to request further particulars to rectify the summons.<sup>161</sup>

The procedure for requesting further particulars entails that a party must deliver a notice requesting further particulars within ten days after:<sup>162</sup>

- a entry of appearance to defend in case of a summons;
- b delivery of any other pleading (other than a summons); or
- c judgment on an exception to such pleading.

The party to whom such notice was delivered must within ten days after receipt thereof provide such further particulars.<sup>163</sup> If further particulars are not provided within ten days, the applicant may employ the general sanction rule by applying for an order to compel such provision.<sup>164</sup> Should the opposing party still fail to provide the requested information, an application may be brought to dismiss the claim.<sup>165</sup>

A request for further particulars is not a pleading but an answer to such a request supplements the pleadings.<sup>166</sup> Particulars provided by a defendant in terms of rule 16 shall be deemed to be included in the plea.<sup>167</sup> Even though

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<sup>159</sup> *Van Biljoen v Botha* 1952 (3) 494 (O) at 496H.

<sup>160</sup> *Theophilopoulos et al* (2006) 216.

<sup>161</sup> *Id.*

<sup>162</sup> MCR 16(1).

<sup>163</sup> MCR 16(2).

<sup>164</sup> MCR 60(2).

<sup>165</sup> MCR 60(3).

<sup>166</sup> *White v Moffett Building and Contracting (Pty) Ltd* 1952 (3) 307 (O) at 312A–D; *Theophilopoulos et al* (2006) 216; *Paterson* (2005) 168.

<sup>167</sup> MCR 19(16).

there is no similar rule relating to other pleadings, the consequences are the same.<sup>168</sup>

### 3.9 Execution

#### 3.9.1 Introduction

Usually a judgment debtor will comply with the judgment granted against him or her, but if the debtor is unwilling or reluctant to do so, the judgment creditor needs a formal process to achieve satisfaction of the judgment.<sup>169</sup> Execution is the process which enables a judgment creditor to enforce (or execute) a judgment.<sup>170</sup> Depending on the type of judgment (*ad factum praestandum*<sup>171</sup> or *ad pecuniam solvendam*<sup>172</sup>), execution may be effected against either the property or the person of the judgment debtor.<sup>173</sup> In chapter 2 it was emphasised that this discussion will only consider debt in the form of payment of an amount of money and therefore only the general execution of judgments sounding in money are considered further.<sup>174</sup>

Execution of a judgment sounding in money is effected through the attachment and sale in execution of property,<sup>175</sup> and gives rise to a so-called judicial mortgage.<sup>176</sup> Movable, immovable and incorporeal property may be attached in execution, but usually a judgment creditor must first execute against movable property and only turn to immovable property once insufficient attachable movable property to satisfy the judgment and costs was found.<sup>177</sup> It should be

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<sup>168</sup> Theophilopoulos *et al* (2006) 216 n103.

<sup>169</sup> Theophilopoulos *et al* (2006) 347.

<sup>170</sup> Cilliers, Loots and Nel (hereafter Cilliers *et al*) (2009) 1020; Harms (1990) B-315; Paterson (2005) 251.

<sup>171</sup> Where the defendant is ordered to perform an act.

<sup>172</sup> Where the defendant is ordered to pay an amount of money.

<sup>173</sup> Cilliers *et al* (2009) 1020; Harms (1990) B-315.

<sup>174</sup> See chapter 2 par 2.2.1.

<sup>175</sup> Harms (1990) B-315.

<sup>176</sup> *Reynders v Rand Bank Bpk* 1978 (2) 630 (T) at 633E-F.

<sup>177</sup> HCR 45(1); s 66(1)(a) of the Magistrates' Courts Act; Theophilopoulos *et al* (2006) 349; Harms (1990) B-326(2).

noted that both the Supreme Court Act<sup>178</sup> and the Magistrates' Courts Act<sup>179</sup> provide for certain items to be exempted from attachment and execution.<sup>180</sup>

As far as procedure is concerned, a number of requirements must be met for a valid execution to take place, namely:<sup>181</sup>

- a the issuing of a valid writ (or warrant) of execution;
- b the attachment of a debtor's property by the sheriff if the debtor did not satisfy the amount of the writ (or warrant) and the costs; and
- c the sale through public auction by the sheriff of property so attached.

The discussion now turns to a brief overview of the execution processes in both the High Court and the Magistrate's Court.

### **3.9.2 Writ/warrant of execution**

Although a judgment debt does not warrant payment thereof, the principle of effectiveness dictates that procedural law must provide enforcement procedures that will in principle enable a court to seek enforcement of its orders or judgments. The first step in the execution procedure following judgment is thus the issuing of a valid writ of execution in High Court proceedings or warrant of execution in Magistrate's Court proceedings.<sup>182</sup>

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<sup>178</sup> S 39 Supreme Court Act.

<sup>179</sup> S 67 Magistrates' Courts Act.

<sup>180</sup> These excluded items are *inter alia*, beds, clothing, etc.

<sup>181</sup> *Mattoida Constructions (SA) (Pty) Ltd v E Carbonari Construction (Pty) Ltd* 1973 (3) 327 (D) at 332C; see also Cilliers *et al* (2009) 1021.

<sup>182</sup> According to HCR 45(1) the writ must be as near as possible to Form 18 of the First Schedule where it pertains to movable property, and Form 20 to the First Schedule as far as immovable property is concerned. S 66(1)(a) of the Magistrates' Courts Act provides that a warrant based on payment of money must conform to Annexure 1 Form 32 irrespective of whether movable or immovable assets are to be attached; Theophilopoulos *et al* (2006) 351.

Cilliers *et al* defines a writ of execution as follows:<sup>183</sup>

This is a document under the hand of the registrar of a High Court, directed to the sheriff, ordering him to take possession of so much of the debtor's property as will realise by public sale the amount of the judgment and the costs incurred in satisfying it.

The purpose of the writ and warrant in the different forums is comparable. In the High Court, the registrar issues the writ, whilst in the Magistrate's Court a warrant is issued by the clerk.<sup>184</sup> After being issued, the writ or warrant is delivered to the sheriff for execution purposes.<sup>185</sup>

### **3.9.3 Attachment and public auction of movable property**

The general execution process as provided for in Magistrate's Court Rule 41 and High Court Rule 45 are set out below.<sup>186</sup>

The sheriff shall, after receiving a writ or warrant, go to the residence, place of business or employment of the execution debtor and demand satisfaction of the debt and costs, or require the execution debtor to point out movable property in order to satisfy the writ or warrant as the case may be.<sup>187</sup> The sheriff may also conduct a search for such property.<sup>188</sup> The sheriff shall formulate an inventory and valuation of such property,<sup>189</sup> and goods so inventoried are deemed to be judicially attached.<sup>190</sup>

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<sup>183</sup> Cilliers *et al* (2009) 1024.

<sup>184</sup> S 36(1) Magistrates' Courts Act.

<sup>185</sup> Theophilopoulos *et al* (2006) 351.

<sup>186</sup> See in general Paterson (2005) 257 and 267; Van Loggerenberg and Farlam (1994) B1-319; Harms (1990) B-315; Harms *et al* (1997) 38-1; Theophilopoulos *et al* (2006) 352 and 355; Erasmus and Van Loggerenberg (1996) 41-1 to 41-8; Cilliers *et al* (2009) 1033 to 1038.

<sup>187</sup> HCR 45(3)(a) and (b); MCR 41(1)(a).

<sup>188</sup> HCR 45(3)(c); MCR 41(b).

<sup>189</sup> HCR 45(3)(c); MCR 41(1)(b).

<sup>190</sup> MCR 41(4).

Thereafter, the sheriff shall publicly sell the property to the highest bidder at the public auction after due advertisement and notice.<sup>191</sup> After satisfaction of the claim and costs, the balance (if any) shall be paid out to the execution debtor.<sup>192</sup>

### **3.9.4 Attachment and public auction of immovable property**

Magistrate's Court Rule 43 read with section 66 of the Magistrates' Courts Act, and High Court Rule 46 regulate the procedure whereby immovable property is attached.<sup>193</sup> As pointed out earlier, this procedure will follow only after insufficient movable property was found to satisfy the judgment and costs.<sup>194</sup>

The process commences with the issuing of a writ or warrant of execution against immovable property, which shall contain a full and complete description of the nature and situation of such property.<sup>195</sup> The sheriff attaches the property by serving a notice on the execution debtor and other interested parties.<sup>196</sup>

The sheriff shall appoint a day and place for the sale and due notice must be given.<sup>197</sup> The sale shall be by public auction without reserve and shall be sold to the highest bidder.<sup>198</sup> Transfer of the property shall take place upon payment of the purchase price and performance of the conditions of sale.<sup>199</sup> After the sale, the sheriff shall prepare a distribution plan in order of preference according to the rules, which will lie for inspection.<sup>200</sup> The sheriff will then pay out the proceeds in accordance with the distribution plan.<sup>201</sup>

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<sup>191</sup> HCR 45(7); MCR 41(8).

<sup>192</sup> HCR 45(11); MCR 41(11).

<sup>193</sup> See in general Paterson (2005) 264 and 268; Van Loggerenberg and Farlam (1994) B1-331; Harms (1990) B-326(2); Harms *et al* (1997) 38-18; Theophilopoulos *et al* (2006) 353 and 358.

<sup>194</sup> See par 3.9.1.

<sup>195</sup> HCR 46(1); MCR 43(1).

<sup>196</sup> HCR 46(3); MCR 43(2).

<sup>197</sup> HCR 46(7) and HCR 46(5); MCR 43(6) and 43(7).

<sup>198</sup> HCR 46(10) and HCR 46(12); MCR 43(10).

<sup>199</sup> HCR 46(13); MCR 43(13).

<sup>200</sup> HCR 46(14)(b); MCR 43(14).

<sup>201</sup> HCR 46(14)(f); MCR 43(14)(g)(iv).

### **3.9.5 Creditors with real rights to property**

If a creditor seeks protection of his or her claim, he or she may do so by requiring security to strengthen the creditor's position, reduce the creditor's risks and provide the creditor with a preferential right.<sup>202</sup> Pledge, notarial bond and mortgage agreements are examples of contractually negotiated securities.

In the event of a mortgage or a pledge, the secured credit provider is entitled to foreclose if the debtor fails to pay amounts due or breaches other terms of the contract.<sup>203</sup> Foreclosure is the process in terms whereof the secured creditor is entitled to have the property that forms the basis of the security sold in order to obtain the amount outstanding in terms of the agreement.<sup>204</sup>

The registrar may specifically declare immovable property executable when granting judgment in terms of rule 31(5).<sup>205</sup> A summons can also include a prayer for specially mortgaged property to be specifically declared executable in order to immediately satisfy a mortgage debt.<sup>206</sup> The plaintiff is thereby excused from first executing against the debtor's movable property.<sup>207</sup>

### **3.9.6 Some Constitutional developments**

#### **3.9.6.1 Immovable property**

Constitutional developments have taken place in the realm of execution against immovable property in both the High Court and the Magistrate's Court.<sup>208</sup>

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<sup>202</sup> Van Schalkwyk and Van der Spuy (2008) 18.

<sup>203</sup> Scott and Scott (1987) 203; *Benson v Hirschhorn* 1936 NPD 277.

<sup>204</sup> Scott and Scott (1987) 203; *Vasco Dry Cleaners v Twycross* 1979 (1) 603 (A) at 611G.

<sup>205</sup> Van Loggerenberg and Farlam (1994) B1-324.

<sup>206</sup> *Colonial Mutual Life Assurance Society Ltd v Tilsim Investments (Pty) Ltd* 1952 (4) 134 (C) at 135; *Goldfields Building, Finance and Trust Corporation, Ltd v Pienaar* 1928 WLD 211; *Wimble v Waldek* (1882) 2 EDC 204; *Colonial Government v Silo* (1895) 12 SC 170.

<sup>207</sup> *Colonial Mutual Life Assurance Society Ltd* above n206 at 135.

<sup>208</sup> For a detailed discussion of the developments in case law and the effect thereof on civil procedure refer to Boraine and Van Heerden 2006 *De Jure* 319.

In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*<sup>209</sup> the Constitutional Court has, for example, declared section 66(1)(a) of the Magistrates' Courts Act unconstitutional as the section fails to provide for judicial oversight prior to a warrant of execution being issued against immovable property where a *nulla bona* return indicated that insufficient movable property was available to extinguish the debt.<sup>210</sup> The court found the section to be in contravention of section 26(1) of the Constitution, which guarantees the right to access to adequate housing. The court acknowledged the fact that this right may be limited, if justifiable under section 36(1) of the Constitution,<sup>211</sup> and therefore read into section 66(1)(a) the requirement that a *court* may order execution against immovable property only after considering all relevant circumstances.<sup>212</sup> The court failed to single out residential property with the result that the amended section 66(1)(a) will now also apply to other immovable property.<sup>213</sup>

A few diverging decisions on specially hypothecated immovable property have been reported in the High Court subsequent to the *Jaftha* decision,<sup>214</sup> although no section or rule pertaining to the enforcement or execution procedures in the High Court have been declared unconstitutional. In *Standard Bank of SA Ltd v Snyders and Eight Similar Cases*, the Cape Provincial Division held that the registrar does not hold the power to declare hypothecated immovable property executable and that those applications must be heard by the court itself.<sup>215</sup>

In *Nedbank Ltd v Mortinson*<sup>216</sup> the Witwatersrand Local Division, however, decided that the registrar may declare specially hypothecated property executable in terms of High Court Rule 31(5) as long as there is no abuse of the

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<sup>209</sup> *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) 140 (CC).

<sup>210</sup> *Jaftha* above n209 at 159H/I–160A.

<sup>211</sup> *Jaftha* above n209 at 156G–I.

<sup>212</sup> *Jaftha* above n209 at 161H.

<sup>213</sup> Boraine and Van Heerden 2006 *De Jure* 319 at 330 to 331.

<sup>214</sup> *Nedbank Ltd v Mortinson* 2005 (6) 462 (W); *Standard Bank of SA Ltd v Snyders and Eight Similar Cases* 2005 (5) 610 (C).

<sup>215</sup> *Snyders* above n214.

<sup>216</sup> *Mortinson* above n214.

procedure. The court stated that High Court Rule 31(5) contains sufficient safeguards to protect debtors. Rules of practice were laid down by the court to assist the registrar in detecting abuses and referring matters to court. The court, however, urged the necessity of reading the *Jaftha* principles into High Court Rule 45(1) as far as the issuing of a writ against immovable property is concerned where insufficient movable property was found to extinguish the debt.

The Supreme Court of Appeal, in *Standard Bank of South Africa Ltd v Saunderson and Others*,<sup>217</sup> held that section 26(1) of the Constitution does not hinder the registrar of the High Court to grant default judgments on and declaring hypothecated immovable property executable in terms of High Court Rule 31(5). The court held that where debtors have freely bonded their property, the situation must be distinguished from that of *Jaftha* where the sale in execution deprived a person of the title to a house because of her inability to settle a “relatively trifling extraneous debt”.<sup>218</sup> The court stated that, *in casu*, the “debt is not extraneous, but is fused into the title to the property”<sup>219</sup> and that the sole fact that property is of a residential nature is not enough to draw the inference that section 26(1) has been infringed.<sup>220</sup> The court finally held that the debtor should be informed of section 26(1) of the Constitution that may affect the bondholder’s claim to execution and that it should be done in the summons initiating such action.<sup>221</sup>

Our courts seem to be progressing towards judicial oversight in order to monitor the process and weigh up the circumstances where a possible infringement of the constitutional right to adequate housing comes into play.<sup>222</sup> It is, however, important to emphasise that no part of the High Court procedure has been

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<sup>217</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) 264 (SCA).

<sup>218</sup> *Id* at 274.

<sup>219</sup> *Id*.

<sup>220</sup> *Saunderson* above n217 at 275.

<sup>221</sup> *Saunderson* above n217 at 276.

<sup>222</sup> See also *Campus Law Clinic, University of Kwazulu-Natal v Standard Bank of South Africa Ltd and Another* 2006 (6) 103 (CC); *ABSA Bank Ltd v Ntsane and Another* 2007 (3) 554 (T); *Menqa and Another v Markom and Others* 2008 (2) 120 (SCA).

declared unconstitutional, as is the case with Magistrate's Court procedure, thus far.

### **3.9.6.2 Self-help clauses in case of real security**

In stead of making use of the usual debt enforcement procedures as set out above, a pledgor may agree by way of a so-called *parate executie*-clause that the pledgee may sell the object of the security without recourse to the court and thus satisfy the debt from such proceeds. The pledgor may, however, object to *parate executie* if the pledgor reasonably fears that it may be to the pledgor's prejudice.<sup>223</sup> Based on section 34 of the Constitution that promotes due legal process and militates against self-help, an earlier judgment ruled against the constitutionality of this principle.<sup>224</sup> However, in *Bock v Dubororo Investments (Pty) Ltd*<sup>225</sup> the Supreme Court of Appeal ruled that *parate executie* in a pledge agreement was valid.<sup>226</sup>

A *parate executie*-clause in case of a mortgage bond over immovable property will, however, be invalid.<sup>227</sup> Summary execution against mortgaged immovable property without recourse to the court will only be valid if the mortgagor has, *after defaulting*, given specific consent to such execution. In the case of movables that are subject to a general notarial bond, the creditor (mortgagee) must first obtain possession of the security objects by way of specific consent by the debtor (mortgagor) or the court's sanction, in order to apply a *parate executie*-clause.

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<sup>223</sup> *Osry v Hirsch Loubser and Co Ltd* 1922 CPD.

<sup>224</sup> *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* 2001 (1) 251 (E).

<sup>225</sup> *Bock and Others v Dubororo Investments (Pty) Ltd* 2004 (2) 242 (SCA).

<sup>226</sup> This judgment was followed in *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) 248 (SCA) and *SA Bank of Athens Ltd v Van Zyl* 2005 (5) 93 (SCA); see also Badenhorst, Pienaar and Mostert (hereafter *Badenhorst et al*) (2006) 393 to 394.

<sup>227</sup> See *Iscor Housing Utility Co and Another v Chief Registrar of Deeds and Another* 1971 (1) 613 (T); *Bock* above n225; see also *Badenhorst et al* (2006) 367 to 368.

### **3.10 Conclusion**

The purpose of this chapter is to provide a roadmap regarding the basic procedures that could be utilised by a creditor when attempting to enforce unpaid debt against a debtor. The causes of action that give rise to a debt relationship may arise from any of the obligations discussed in chapter 2. The NCA does not provide its own specialised procedures that replace the procedures as discussed in this chapter and therefore these general procedures are of extreme importance to credit providers when they enforce credit agreements in terms of the NCA against consumers. There are, however, certain provisions of the NCA that will amend or impact on some of the general debt enforcement procedures and it is therefore of the utmost importance to have a clear understanding of when a provision of the NCA may be relevant or impact on the general procedures. In order to save cost and time, credit providers must thus apply the general debt enforcement procedures in conjunction with the amendments brought about by the NCA when attempting to enforce credit agreements regulated by the NCA. As indicated in chapter 1, it is the main aim of this study to analyse the impact of the NCA on these basic debt collection and enforcement procedures. In the chapters that follow, the relevant provisions of the NCA that may impact on the general rules of civil procedure as broadly discussed in this chapter, will be discussed with reference to the latter.

## CHAPTER 4: OVERVIEW OF ENFORCEMENT IN TERMS OF THE NATIONAL CREDIT ACT

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### 4.1 Introduction

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

Section 3 of the NCA, which states the purpose of the NCA and the manner in which it endeavours to protect consumers, is *inter alia* aimed at:

- (h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
- (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

The far-reaching debt enforcement procedures contained in the NCA were therefore to be expected. These procedures attempt to provide enforcement mechanisms in line with the purposes of the NCA.<sup>5</sup> The new procedures are said to be far more complicated than those of the NCA's predecessors and they are much more stringent where a credit provider seeks to enforce obligations under a credit agreement.<sup>6</sup>

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<sup>1</sup> 34 of 2005 (hereafter "the NCA").

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

<sup>3</sup> Ss 3(c) and 3(g); Scholtz, Otto, Van Zyl, Van Heerden and Campbell (hereafter Scholtz *et al*) (2008) 12–1; Van Heerden and Otto 2007 *TSAR* 655; Renke, Roestoff and Haupt (hereafter Renke *et al*) 2007 *Obiter* 229 at 230; Van Loggerenberg, Dicker and Malan (hereafter Van Loggerenberg *et al*) 2008 January/February *De Rebus* 40.

<sup>4</sup> Scholtz *et al* (2008) 12–1; Van Heerden and Otto 2007 *TSAR* 655.

<sup>5</sup> Scholtz *et al* (2008) 12–1.

<sup>6</sup> Otto (2006) 85; Scholtz *et al* (2008) 2–1; Van Heerden and Otto 2007 *TSAR* 655.

This chapter provides a general overview of those sections dealing with enforcement of debt governed by the NCA, or having an effect thereon. The chapters that follow analyse and attempt to harmonise these procedures with the existing rules of enforcement as they must be integrated with existing rules of civil procedure.<sup>7</sup> Such attempts will inevitably lead to conflicting opinions<sup>8</sup> and the continued application of these procedures in practice will hopefully establish workable solutions in time.

## 4.2 Overview: Chapter 6 Part C of the NCA

Chapter 6 Part C of the NCA specifically deals with debt enforcement. Chapter 6 is titled “Collection, repayment, surrender and debt enforcement” and Part C “Debt enforcement by repossession or judgment”.<sup>9</sup>

Section 129 prescribes the required preliminary steps that a prospective litigant must take prior to instituting an action to enforce a debt regulated by the NCA. These steps entail *inter alia* that a notice must be provided to a defaulting consumer to inform the consumer of certain rights that the consumer has under the NCA.<sup>10</sup> The section also incorporates section 130, which prescribes further requirements that need to be complied with before the commencement of legal proceedings.<sup>11</sup> It is clear from the section that the foregoing procedure does not apply to a credit agreement subject to a debt restructuring order or proceedings that could result therein.<sup>12</sup> In addition the section regulates the consumer’s right to re-instate a credit agreement under certain circumstances.<sup>13</sup>

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<sup>7</sup> See chapter 3 in general.

<sup>8</sup> Van Loggerenberg *et al* 2008 January/February *De Rebus* 40.

<sup>9</sup> Part C consists of ss 129 to 133.

<sup>10</sup> Ss 129(1)(a) and 129(1)(b)(i).

<sup>11</sup> S 129(1)(b)(ii).

<sup>12</sup> S 129(2); see in general *re* debt restructuring Scholtz *et al* (2008) chapter 11 and Roestoff, Haupt, Coetzee and Erasmus 2009 *PELJ* 247.

<sup>13</sup> Ss 129(3) and 129(4).

Section 130 sets out the circumstances under which a court may be approached by a credit provider to enforce a credit agreement,<sup>14</sup> the facts of which the court must be satisfied before determining the matter,<sup>15</sup> as well as the authority of the court to make orders under certain specified circumstances.<sup>16</sup>

Repossession of goods forming the subject of a credit agreement is dealt with in section 131. This section refers back to Chapter 6 Part B, namely, “Surrender of goods” and states that some of the procedures contained in that part must also be followed pursuant to an attachment order. Chapter 6 Part B contains two sections, being section 127 that deals with the surrendering of goods and procedures to be followed subsequent thereto as well as section 128 that deals with compensation for the consumer who is dissatisfied with the sale of goods under section 127. Section 131 provides that section 127 and 128 should be “read with the changes required by the context”.

Section 132 regulates the situation where a credit provider fails to resolve a dispute with a consumer regarding the costs of the attachment of property.<sup>17</sup> The section sets out the circumstances under which a court may grant an order for compensation in favour of the credit provider.<sup>18</sup>

The last section forming part of Chapter 6 Part C is section 133 that deals with prohibited collection and enforcement practices. The section refers back to section 90(2)(f) which is one of the subsections dealing with unlawful provisions in a credit agreement.<sup>19</sup> Section 90(2)(f) mainly prohibits the consent by the consumer to certain specified instruments, such as identity documents and credit or debit cards, being used in the collection of debt. Section 90 prohibits the granting of consent to use such collection mechanisms, whilst section 133

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<sup>14</sup> Ss 130(1) and 130(2).

<sup>15</sup> S 130(3).

<sup>16</sup> S 130(4).

<sup>17</sup> S 132(1).

<sup>18</sup> S 132(2).

<sup>19</sup> Ss 133(1) and 133(2).

prohibits the use of any of these instruments or devices in any debt collection procedure.<sup>20</sup> A person who contravenes section 133 is guilty of an offence.<sup>21</sup>

As previously stated, the enforcement procedures contained in Chapter 6 Part C of the NCA cannot be viewed in isolation and cannot function on their own. These procedures must fit into existing systems and inevitably need to be read in conjunction with the rules of general civil procedure as far as debt enforcement is concerned.<sup>22</sup>

### 4.3 Contextual meaning of “enforcement”

It should be mentioned that section 123 that deals with the termination of credit agreements by a credit provider does not fall within Chapter 6 Part C. However, this section states that the credit provider may take steps as set out in Part C of Chapter 6 to enforce and terminate the agreement.<sup>23</sup> At first glance, the section creates some uncertainty as it is not clear how an agreement can simultaneously be enforced and terminated.<sup>24</sup>

The undefined term “enforce” is a new concept introduced by the NCA<sup>25</sup> which seems to refer, in the context of the NCA, to the creditor making use of *any* of his or her remedies to address default by the consumer debtor.<sup>26</sup>

Support for the statement that the word “enforce” is used in a very wide sense can be found in section 129(3).<sup>27</sup> This section still forms part of the enforcement procedures of the NCA and provides that a consumer may “at any time before the credit provider has cancelled the agreement re-instate a credit agreement”.

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<sup>20</sup> *Id.*

<sup>21</sup> S 133(3).

<sup>22</sup> Boraime and Renke 2008 *De Jure* 1 at 2.

<sup>23</sup> S 123(2).

<sup>24</sup> Otto (2006) 87; Scholtz *et al* (2008) 12–1.

<sup>25</sup> Otto (2006) 87 to 88; Scholtz *et al* (2008) 12–2; Van Heerden and Otto 2007 *TSAR* 655.

<sup>26</sup> Otto (2006) 87 to 88; Scholtz *et al* (2008) 12–2; Van Loggerenberg *et al* 2008 January/February *De Rebus* 40; Boraime and Renke 2008 *De Jure* 1 at 2.

<sup>27</sup> Otto (2006) 87 to 88.

It will further be nonsensical that a credit provider must provide a notice in terms of section 129(1)(a) when enforcing payment, but not when the more serious remedies of cancellation and restitution are utilised.<sup>28</sup>

Therefore, it is submitted that the word “enforce” is used in a very wide sense so as to include a credit provider making use of *any* of his remedies in legal proceedings.<sup>29</sup> Chapter 6 Part C will thus apply regardless of the remedy that the credit provider attempts to utilise.

#### **4.4 Conflicting legislation**

At the outset, it should be clear that the NCA must be read with Chapter VIII of the Magistrates’ Courts Act,<sup>30</sup> which deals with the recovery of debts. The Magistrates’ Courts will play a dominant role in the enforcement of credit agreements in future.

It is also necessary to consider section 172(2) and schedule 1 of the NCA which provides that Chapter 7, Part D of Chapter 4 and sections 127, 129, 131, 132 and 164 will prevail in case of a conflict with sections 57 and 58,<sup>31</sup> as well as Chapter IX of the Magistrates’ Courts Act that deal with execution.

Thus, in certain instances of conflict, the NCA will clearly enjoy preference over prior existing Magistrate’s Court procedures.

#### **4.5 Conclusion**

The NCA generally prescribes a two-stage approach to enforcement in that certain procedures have to be complied with before enforcement commences,

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<sup>28</sup> Otto (2006) 88; Boraine and Renke 2008 *De Jure* 1 at 2.

<sup>29</sup> Van Heerden and Otto 2007 *TSAR* 655; Boraine and Renke 2008 *De Jure* 1 at 2 n5.

<sup>30</sup> 32 of 1944. See chapter 3 in general.

<sup>31</sup> Ss 57 and 58 forms part of chapter VIII.

and certain other procedures have to be followed in court after commencement of enforcement.

Some writers perceive the NCA as overtly prescriptive and consumer orientated, whereas others speculate as to whether it was not high time that the legislature intervened in an attempt to prohibit the exploitation of consumers.

Irrespective of the policy considerations behind the NCA, the main question that must be investigated is how the debt enforcement procedures under the NCA will affect existing civil enforcement procedures whenever a credit provider attempts to enforce a credit agreement regulated by the NCA. The chapters that follow will therefore attempt to address some of these issues.

## PART II: SPECIFIC ENFORCEMENT PROVISIONS IN TERMS OF THE NCA

### CHAPTER 5: JURISDICTION OF THE RELEVANT COURTS

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#### 5.1 Introduction

Unlike the Credit Agreements Act,<sup>1</sup> the National Credit Act<sup>2</sup> does not deal with the jurisdiction of the civil courts in particular.<sup>3</sup> Section 29 of the Magistrates' Courts Act,<sup>4</sup> however, prescribes the types of actions over which the Magistrates' Courts have jurisdiction and section 29(1)(e) now provides that:<sup>5</sup>

Subject to the provisions of this Act and the National Credit Act, 2005 (Act 34 of 2005), the court, in respect of causes of action, shall have jurisdiction in –

- (e) actions on or arising out of any credit agreement, as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005);

Section 1 of the NCA defines a credit agreement as “an agreement that meets all criteria set out in section 8”.<sup>6</sup>

The Magistrates' Courts Act puts no monetary maximum on the value of the claims based on credit agreements in terms of the NCA,<sup>7</sup> unlike the monetary limitation that applied to claims based on the Credit Agreements Act.<sup>8</sup>

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<sup>1</sup> S 21 of the Credit Agreements Act 75 of 1980; see further par 5.4.

<sup>2</sup> 34 of 2005 (hereafter “NCA”).

<sup>3</sup> See in general the discussion of jurisdiction in Scholtz, Otto, Van Zyl, Van Heerden and Campbell (hereafter Scholtz *et al*) (2008) 12–39 and 11–28 to 11–30.

<sup>4</sup> 32 of 1944; see chapter 3 par 3.2.1 for a discussion of general principles of jurisdiction and par 3.2.3 for a general discussion of the jurisdiction of the Magistrates' Courts in particular.

<sup>5</sup> S 29(1)(e) Magistrates' Courts Act was amended by schedule 2 of the NCA; Erasmus and Van Loggerenberg (1996) 72.

<sup>6</sup> Chapter 2 of this dissertation discussed the different types of credit agreements provided for in s 8 of the NCA. See the discussion in 2.3.3 above.

The NCA frequently uses the word “court” and it is submitted by Van Heerden that the word should bear its ordinary meaning, but in the context of debt enforcement it can be accepted that the High Court and Magistrate’s Court are the relevant forums referred to.<sup>9</sup> In various instances, such as in sections 86, 87 and 127 the NCA, however, specifically mentions “Magistrate’s Court” and “Magistrates’ Courts Act”. This raises the question whether it was the intention that Magistrates’ Courts will mainly entertain disputes originating from credit agreements especially since these forums are traditional debt-collection courts.<sup>10</sup>

In a recent matter decided in the Transvaal Provincial Division, *Nedbank Ltd v Mateman; Nedbank Ltd v Stringer*,<sup>11</sup> it was confirmed that the Magistrates’ Courts now have unlimited monetary jurisdiction over matters falling under the NCA by virtue of section 172(2) of the NCA.<sup>12</sup> The full bench confirmed that a High Court has concurrent jurisdiction with the Magistrates’ Courts and that the High Court’s jurisdiction is not ousted or partly ousted when deciding a matter to which the NCA applies.<sup>13</sup>

The matter of *ABSA Bank Ltd v Myburgh*<sup>14</sup> followed an interesting approach where Bertelsman J, one month prior to the full bench decision, decided that the plaintiff was not entitled to approach the High Court for enforcement if the claim

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<sup>7</sup> The Minister of Justice is sanctioned by s 29 of the Magistrates’ Courts Act to determine monetary limits for certain claims by way of notice in the *Government Gazette*. Erasmus and Van Loggerenberg (1996) 72; Scholtz *et al* (2008) 12–39; Harms, Van der Walt, Louw, Neukircher and Faris (hereafter Harms *et al*) (1997) 2–12.

<sup>8</sup> See chapter 3 par 3.2.3 in relation to the monetary jurisdiction of the Magistrates’ Courts.

<sup>9</sup> Scholtz *et al* (2008) 12–40.

<sup>10</sup> Scholtz *et al* (2008) 12–41.

<sup>11</sup> *Nedbank Ltd v Mateman and Others; Nedbank Ltd v Stringer and Another* 2008 (4) 276 (T). See 5.3 below for a detailed discussion.

<sup>12</sup> *Mateman* above n11 at 284B.

<sup>13</sup> *Mateman* above n11 at 284C and F–G.

<sup>14</sup> *ABSA Bank Ltd v Myburgh* 2009 (3) 340 (T). See 5.2 below for a detailed discussion.

fell within the (now unlimited monetary) jurisdiction of the Magistrates' Courts.<sup>15</sup> This judgement was promptly overruled by the full-bench decision.

In both the *Myburgh* and *Mateman* matters the court had to interpret subsections 90(2)(k)(vi)(aa) and (bb) of the NCA which prohibit the inclusion of a provision in a credit agreement which:

- ...expresses, on behalf of the consumer –
- (vi) a consent to the jurisdiction of -
    - (aa) the High Court, if the magistrates' court has concurrent jurisdiction; or
    - (bb) any court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept;

Against the backdrop of this introduction, and the general jurisdictional principles discussed in chapter 3,<sup>16</sup> this chapter investigates the jurisdictional issues relating to debt enforcement specifically and briefly refers to some related jurisdictional issues in terms of the NCA.

## 5.2 ABSA Bank Ltd v Myburgh

In this matter, Bertelsmann J had to decide whether the High Court retains its jurisdiction in relation to credit agreements.<sup>17</sup>

The facts were that in January 2007 the defendant entered into a credit agreement with a business whose right, title and interest were ceded to ABSA Bank (the plaintiff) on the same day. At the time of conclusion of the agreement it was regulated by the Credit Agreements Act. At all relevant times, the defendant was resident, and the property situated, in Barberton. The agreement

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<sup>15</sup> See chapter 3 par 3.2.3 regarding the now unlimited monetary jurisdiction of the Magistrates' Courts as far as credit agreements are concerned.

<sup>16</sup> See chapter 3 par 3.2.

<sup>17</sup> See also the discussion of the matter in Van Loggerenberg, Dicker and Malan (hereafter Van Loggerenberg *et al*) 2008 January/February *De Rebus* 40 at 42 to 44.

included a clause in which the parties consented to the jurisdiction of the Magistrate's Court in case of a dispute. The defendant defaulted with his contractual payments and a section 11 notice, demanding R5 277.87, was forwarded to the defendant in terms of the Credit Agreements Act, to which he did not react. Summons was consequently issued from the Transvaal Provincial Division and served on the defendant during August 2007, which happened after the NCA became effective. The plaintiff approached the registrar of the Transvaal Provincial Division for default judgment who refused same by relying on sections 90(2)(k)(vi) and 127(8) of the NCA.<sup>18</sup>

The matter was referred to court for argument and Bertelsman J considered the purpose, aim and general scheme of the NCA. He referred to the preamble as well as section 2(1), which provides that the NCA must be interpreted to give effect to the purposes set out in section 3.<sup>19</sup> The court also considered sections 3(d) and 3(e)(iii).<sup>20</sup> Section 3(d) provides that the NCA strives to protect consumers *inter alia* by balancing the rights and responsibilities of credit providers and consumers. Section 3(e)(iii) provides that consumers must be protected by addressing and correcting imbalances in negotiating power and should also be guarded from deception and unfair or fraudulent conduct by credit providers and credit bureaus. Specific reference was made to the measures set out in the NCA aiming to prevent and address reckless credit and over-indebtedness so as to further protect consumers.<sup>21</sup>

Section 90 was finally considered and the court pointed out that the section *inter alia* rendered unlawful provisions aimed at defeating the purposes of the NCA

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<sup>18</sup> Section 127(8)(a) provides that:

If a consumer –

- (a) fails to pay an amount demanded in terms of subsection (7) within 10 business days after receiving a demand notice, the credit provider may commence proceedings in terms of the Magistrates' Courts Act for judgment enforcing the credit agreement;

<sup>19</sup> *Myburgh* above n14 at 342 to 343.

<sup>20</sup> At 343E–H.

<sup>21</sup> Chapter 4 Part D; *Myburgh* above n14 at 343 to 344.

or that restricted the consumer's rights or constructing unauthorised procedural advantages for credit providers.<sup>22</sup>

Also relevant to the court was section 127(8) which provides that enforcement proceedings aimed at collecting remaining obligations after a voluntary surrender of goods may be instituted in the Magistrate's Court. This will be the case regardless of the monetary value involved.<sup>23</sup>

The court indicated that the NCA protects consumers by limiting legal costs and that High Court litigation and execution is more expensive than in the Magistrate's Court. *In casu*, the defendant also had to appoint a correspondent attorney that would increase the cost of defending the matter.<sup>24</sup>

Bertelsmann J found that the registrar correctly refused to grant the judgement and held that:

If the section [s 90(2)(k)(vi)] is read in the context of the Act as a whole, however, and in particular with reference to sections 2 and 3 thereof, it is clear that the Legislature intended to prevent the institution of an action in the High Court in circumstances such as the present.<sup>25</sup>

He further decided that section 90(2)(k)(vi) should rather read as:

declaring unlawful 'the practice of instituting action in the High Court to enforce the credit provider's rights in terms of a credit agreement while a magistrates' court has concurrent jurisdiction'.<sup>26</sup>

The court held that the wording of section 127 supported this interpretation and referred the matter back to the magistrate's court in Barberton.<sup>27</sup>

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<sup>22</sup> At 344E.

<sup>23</sup> At 345A.

<sup>24</sup> At 345E–I.

<sup>25</sup> At 346C–D.

<sup>26</sup> At 346J to 347 A.

<sup>27</sup> At 347A and 347D–E.

### 5.3 Nedbank Ltd v Mateman; Nedbank Ltd v Stringer

In this case, a full bench of the Transvaal Provincial Division considered the matter which, like in the *Myburgh* matter, raised the question of the High Court's jurisdiction pertaining to credit agreements to which the NCA applies.

The judgment resulted from an application for default judgement referred to court by the registrar, who refused to grant judgment for claims that could have been brought either in the Witwatersrand Local Division<sup>28</sup> or in the Magistrate's Court. The registrar again, as was the case in *Myburgh*, relied on section 90(2)(k)(vi)(aa) and (bb) read with section 127(8) of the NCA.

In *Mateman* the amount claimed was R19 353.70 inclusive of interest and costs, as well as an order declaring property situated in Brakpan executable. In *Stringer* the same orders were prayed for but the claim was for an amount of R922 410.41 and the property was situated in Boksburg.<sup>29</sup>

The question that the registrar posed was:

whether he has jurisdiction to deal with applications for default judgment governed by the National Credit Act . . . in cases where the defendants are resident or employed or the subject property is situated in the jurisdiction of another court, whether a High Court with concurrent jurisdiction or the magistrate's court.<sup>30</sup>

In both matters the court had to consider and interpret a standard clause in all the plaintiff's mortgage agreements, namely clause 13, that read:

#### 13 Jurisdiction

The Mortgagor consents in terms of Section 45 of Act 32 of 1944 to the Bank taking any legal proceedings for enforcing any of its rights under this bond for recovery of moneys secured under this bond in the Magistrate's Court for any district having jurisdiction

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<sup>28</sup> *Id.*

<sup>29</sup> *Mateman* above n11 at 278B–C.

<sup>30</sup> At 279A–B.

in respect of the Mortgagor by virtue of section 28(1) of the aforesaid Act. The Bank is nevertheless, at its option, entitled to institute proceedings in any division of the High Court of South Africa which has jurisdiction.<sup>31</sup>

According to the court, the questions that it needed to answer were:

[D]oes the NCA oust the jurisdiction of the High Court, and therefore also the jurisdiction of the registrar, to deal with applications for default judgment falling under the NCA or is the High Court's jurisdiction partly ousted, and if so, to what extent?<sup>32</sup>

The court first dealt with a High Court's jurisdiction in general,<sup>33</sup> and the concurrent jurisdiction of the Transvaal Provincial Division with the Witwatersrand Local Division.<sup>34</sup> The court confirmed that the High Court retains jurisdiction over matters that fall within the Magistrate's Court jurisdiction by referring to *Standard Credit Corporation Ltd v Bester*.<sup>35</sup> The court pointed out that there is a safeguard in the risk that a cost order will only be awarded on the Magistrate's Court scale if the matter could have been instituted in the Magistrate's Court.<sup>36</sup>

The court discussed the presumption against ouster or curtailment of the High Court's jurisdiction and indicated that no express ouster of jurisdiction is to be found in the NCA<sup>37</sup> and that the only question left to consider was whether the court's jurisdiction is ousted by necessary implication. In order to answer this question, the court considered the provisions of section 2(7) of the NCA that provides as follows:<sup>38</sup>

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<sup>31</sup> At 283G–H.

<sup>32</sup> At 279C.

<sup>33</sup> S 19(1)(a) and s 19(3) Supreme Court Act 59 of 1959; HCR 31(5).

<sup>34</sup> S 6 Supreme Court Act.

<sup>35</sup> *Standard Credit Corporation Ltd v Bester* 1987 (1) 812 (W).

<sup>36</sup> *Mateman* above n11 at 280B–C.

<sup>37</sup> From 282H.

<sup>38</sup> At 283F–G.

Except as specifically set out in, or necessarily implied by, this Act, the provisions of this Act are not to be construed as

- (a) limiting, amending, repealing or otherwise altering any provision of any other Act;
- (b) exempting any person from any duty or obligation imposed by any other Act; or
- (c) prohibiting any person from complying with any provision of another Act.

The court interpreted section 90(2)(k)(vi)(aa) and decided that clause 13 in the *Mateman* matter did not contain a consent to the jurisdiction of the High Court where the Magistrate's Court had concurrent jurisdiction.<sup>39</sup> Similarly, the court decided that in *Stringer* clause 13 did not contain a consent to the jurisdiction of a court seated outside the jurisdiction of a court having concurrent jurisdiction and where the consumer resides, works or goods are ordinarily kept as prohibited by section 90(2)(k)(vi)(bb). In both instances the court held that even if clause 13 contained an unlawful provision it could easily be severed from the rest of the agreement.<sup>40</sup>

The court further held that section 90 does not oust the High Court's jurisdiction by necessary implication and that section 90 was intended to "outlaw forum shopping".<sup>41</sup> As far as section 127(8) is concerned, it held that the subsection did not intend to deal with jurisdiction at all, but merely afforded an additional right to a consumer, namely, the voluntary surrender of goods.<sup>42</sup>

The court briefly considered the *Myburgh* decision, the preamble to the NCA, and sections 2(1) and 3 and concluded that not one purpose of the NCA indicates that the High Court's jurisdiction is ousted in any way.<sup>43</sup> It further stated that the mere fact that Bertelsmann J transferred the matter to the Magistrate's Court in Barberton shows that the judge accepted that the High Court retained its jurisdiction.

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<sup>39</sup> At 283l.

<sup>40</sup> At 283J to 284 A.

<sup>41</sup> At 284F–G.

<sup>42</sup> At 285A–B.

<sup>43</sup> At 285F–I.

The court granted the default judgments and further ordered that costs should be paid on the Magistrate's Court scale.<sup>44</sup>

#### 5.4 Evaluation of the decisions and legal principles involved

Section 90(2)(k)(vi)(aa) is considered first whereafter the discussion focuses on section 90(2)(k)(vi)(bb).

It is important to note from the outset that section 90(2)(k)(vi)(aa) renders unlawful a *provision* in a credit agreement in which consent is given to the jurisdiction of the High Court where a Magistrate's Court has concurrent jurisdiction.<sup>45</sup> As Bertelsmann J pointed out, the section may even seem superfluous at first glance, as no consent is needed to institute action in the High Court.<sup>46</sup> This section (and no other section in the NCA for that matter)<sup>47</sup> does not expressly oust or partly oust the jurisdiction of the High Court.<sup>48</sup> The question is thus what the meaning of this section is and whether jurisdiction is by necessary implication ousted or partly ousted.<sup>49</sup> *Myburgh* answered this question positively and even declared the practice of instituting action in the High Court where it could have been instituted in the Magistrate's Court unlawful, but the full bench reached the opposite conclusion in *Mateman* by attributing a literal interpretation to the relevant section.

Presuming that the final conclusion in *Mateman* is correct and the High Court's jurisdiction is not affected by section 90(2)(k)(vi)(aa), what does the section then mean in light of the common-law presumption that the legislature does not

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<sup>44</sup> At 286E–G.

<sup>45</sup> Roestoff and Coetzee 2008 *THRHR* 678 at 684; see chapter 3 par 3.2.2 regarding concurrent jurisdiction.

<sup>46</sup> *Myburgh* above n14 at 346A–B; see chapter 3 par 3.2.2 regarding the High Court's inherent jurisdiction; Roestoff and Coetzee 2008 *THRHR* 678 at 684; Van Heerden 2008 *TSAR* 840 at 845.

<sup>47</sup> Van Heerden 2008 *TSAR* 840 at 844; see chapter 3 par 3.2.2.

<sup>48</sup> *Mateman* above n11 at 2811; see chapter 3 par 3.2.2.

<sup>49</sup> Roestoff and Coetzee 2008 *THRHR* 678 at 684.

intend to enact invalid or purposeless provisions?<sup>50</sup> It is submitted that the full bench did not apply their minds as to what the actual meaning of subsection (aa) is and merely stated that the section was intended to outlaw forum shopping.<sup>51</sup> It is ironic that forum shopping is exactly what the court allowed by granting the default judgement.<sup>52</sup> Even though the court considered the preamble to and sections 2(1) and 3 of the NCA,<sup>53</sup> it never actually considered how these purposes affect the issue of jurisdiction. The full bench also referred to ousting by necessary implication, but again, it is respectfully submitted, did not apply their minds to such a possibility.<sup>54</sup>

When a party consents to the jurisdiction of a specific court, such party also consents to the particular scale of costs.<sup>55</sup> It is submitted that the purpose of subsection (aa) is to prevent the practice of consenting to the High Court's jurisdiction and thereby also to the High Court costs scale. Even though a court will always retain its discretion in awarding costs, the agreement between the parties pertaining to costs will still play a role when such an order is made.<sup>56</sup> It is therefore submitted that Bertelsmann J in *Myburgh* correctly found that section 90 was enacted to protect consumers by limiting legal costs.<sup>57</sup> It is, however, further submitted that the legislature did not intend to and did not need to oust the High Court's jurisdiction to reach this goal.<sup>58</sup> This argument is strengthened in light of the common-law presumption against the ouster of a court's jurisdiction as well as sections 34 and 165 of the Constitution<sup>59</sup> dealing with

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<sup>50</sup> Roestoff and Coetzee 2008 *THRHR* 678 at 684 to 685; *Esselman v Administrateur SWA* 1974 (2) 597 (SWA) at 599F; Botha (2005) 73 to 74; De Ville (2000) 167; Du Plessis (2002) 187 to 191; Van Tonder (1981) 119 to 124.

<sup>51</sup> *Mateman* above n11 at 284G; Van Heerden 2008 *TSAR* 840 at 853 and 854.

<sup>52</sup> Roestoff and Coetzee 2008 *THRHR* 678 at 685.

<sup>53</sup> *Mateman* above n11 at 285F–J.

<sup>54</sup> Van Heerden 2008 *TSAR* 840 at 852.

<sup>55</sup> Roestoff and Coetzee 2008 *THRHR* 678 at 685; *Standard Bank of SA v Pretorius* 1977 (4) 395 (T) at 398A–B; *Mofokeng v General Accident Versekerings Bpk* 1990 (2) 712 (W) at 717B; Cilliers (1997) 2–23.

<sup>56</sup> Roestoff and Coetzee 2008 *THRHR* 678 at 685; *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 (4) 1 (A) at 14A–B; *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) 1045 (SCA) at 1055 H; Van Heerden 2008 *TSAR* 840 at 845; see chapter 3 par 3.2.2.

<sup>57</sup> *Myburgh* above n14 at 345–346.

<sup>58</sup> Roestoff and Coetzee 2008 *THRHR* 678 at 685; see also Harms *et al* (1997) 2–12; Harms (1990) A–14.

<sup>59</sup> The Constitution of the Republic of South Africa 1996.

access of individuals to courts and the independence of the judiciary respectively.<sup>60</sup>

The following *dictum* in *Goldberg v Goldberg*<sup>61</sup> is relevant in this regard:

The discretion which the court has in regard to costs provides a powerful deterrent against the bringing of proceedings in the Supreme Court which might more conveniently have been brought in the magistrate's court. Not only may a successful applicant be awarded only magistrate's court costs but he may even be deprived of his costs and be ordered to pay additional costs incurred by the respondent by reason of the case having been brought in the Supreme Court. In all normal cases these powers should suffice to protect the respondent against the hardship of being subjected to unnecessarily expensive proceedings.

Uniform Rule 69(3) is also worth mentioning and determines that maximum advocate's fees on party-and-party scale will apply to civil matters instituted in the High Court where the amount or value of the claim falls within the jurisdiction of the Magistrate's Court, unless the court exercises its discretion to the contrary.<sup>62</sup> Further support for the argument that the High Court's jurisdiction is not ousted is that Magistrates' Courts were never intended to decide on issues that are of a complex factual or legal nature.<sup>63</sup>

It is proposed that the full bench correctly decided that section 127 merely provides a new right to a consumer, namely, that of voluntary surrender of goods, and that it has no effect whatsoever on jurisdiction.<sup>64</sup>

It is therefore finally submitted that a consumer is adequately protected by the discretion a court has in the awarding of costs. This protection is now

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<sup>60</sup> Roestoff and Coetzee 2008 *THRHR* 678 at 686; De Ville (2000) 177; Du Plessis (2002) 169 to 173.

<sup>61</sup> *Goldberg v Goldberg* 1938 WLD 83 at 85 to 86.

<sup>62</sup> Roestoff and Coetzee 2008 *THRHR* 678 at 686; see also chapter 3 par 3.2.2.

<sup>63</sup> *Koch v Realty Corporation of South Africa* 1918 TPD 356 at 359.

<sup>64</sup> Roestoff and Coetzee 2008 *THRHR* 678 at 686.

strengthened by subsection (aa) in that consumers may no longer consent to the High Court cost scale in credit agreements.<sup>65</sup>

Some authors are not in agreement with the above deliberation regarding the purpose of subsection (aa).<sup>66</sup> The point of view exists that the full bench recognised that the Magistrates' Courts have unlimited monetary jurisdiction by virtue of section 172(2) of the NCA and section 29(1)(e) of the Magistrates' Courts Act and therefore no monetary limit exists that would "activate that risk" of a cost order on a lower scale.<sup>67</sup> In answer to this point of view, it is submitted that the High Court should now always consider whether to award costs on the Magistrate's Court scale and that only matters of a complex factual or legal nature should be entertained by the High Court.

Claassen J in the recently decided matter of *Firstrand Bank Ltd v Maleke and Others*,<sup>68</sup> held that *Mateman* does not oblige a High Court to hear a matter once it has been instituted in the High Court.<sup>69</sup> The judge further commented that *Mateman* did not curtail the discretion of the High Court to decline a hearing of the matter and thereafter referring it to a Magistrate's Court with jurisdiction.<sup>70</sup> This interpretation of *Mateman* is supported.

When interpreting section 90(2)(k)(vi)(bb) it is also clear that the section does not expressly oust the jurisdiction of the High Court. The section states that a *provision* in a credit agreement consenting to the jurisdiction of *any* court seated outside the jurisdiction of a court having concurrent jurisdiction and in which the consumer resides, works or where the goods in question are ordinarily kept will be unlawful.

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<sup>65</sup> *Id.*

<sup>66</sup> Van Loggerenberg and Farlam (1994) B1-204B n4; see also Erasmus and Van Loggerenberg (1996) 73 n3.

<sup>67</sup> *Id.*

<sup>68</sup> *Firstrand Bank Ltd v Maleke and Others* (Unreported case number 637/2009) (GSJ); all references are to the typed manuscript.

<sup>69</sup> *Maleke* above n68 par 22.

<sup>70</sup> Par 23.

It is submitted that Otto correctly states that the legislature in all probability intended to restrict the credit provider to only approach a court where the consumer lives, works or where the goods are kept.<sup>71</sup> Therefore, *Myburgh* correctly held that section (bb) renders unlawful consent to the jurisdiction of a court:

not closest in distance to the consumer's residence or the locality where the goods supplied in terms of the credit agreement are kept.<sup>72</sup>

Unlike the NCA and as previously stated,<sup>73</sup> section 21 of the Credit Agreements Act specifically dealt with jurisdiction and specifically provided that:

For the purposes of this Act in relation to civil proceedings, section 28(1)(d) of the Magistrates' Courts Act, 1944, shall not apply unless the credit receiver concerned at the relevant time does no longer reside in the Republic.<sup>74</sup>

In terms of section 28(1)(d) of the Magistrates' Courts Act, a Magistrate's Court will have jurisdiction over a person, irrespective of whether such person resides, carries on business or works within the district, if the cause of action arose wholly within the district.<sup>75</sup> Thus, as far as credit agreements under the Credit Agreements Act were concerned, a Magistrate's Court only had jurisdiction if the credit receiver resided, carried on business or worked within the district.<sup>76</sup> The same exclusion did not apply to the High Court and a specific division of a High Court retained its jurisdiction if the cause of action or part thereof arose within its jurisdiction.<sup>77</sup>

The position under the Credit Agreements Act can therefore be compared with the position under subsection (bb) which provides that a consumer may not

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<sup>71</sup> Otto (2006) 45 n47.

<sup>72</sup> *Myburgh* above n14 at 344F.

<sup>73</sup> See par 5.1 above.

<sup>74</sup> See also Van Heerden 2008 *TSAR* 840 at 843.

<sup>75</sup> See chapter 3 par 3.2.3 for a discussion of section 28 of the Magistrates' Courts Act.

<sup>76</sup> S 28(1)(a).

<sup>77</sup> S 19(1)(a) Supreme Court Act; Roestoff and Coetzee 2008 *THRHR* 678 at 687.

consent to *any* court seated outside the area of jurisdiction of a court having concurrent jurisdiction and where the consumer resides or works or the goods are kept. It is submitted that the phrase “any court” includes a High Court.<sup>78</sup>

In the assumption that the legislature does not enact ineffective and purposeless provisions, the only reasonable conclusion is that subsection (*bb*) indeed ousts the jurisdiction of a High Court if such a court is seated outside the area of jurisdiction of a court where the consumer resides or works or where the goods are ordinarily kept.<sup>79</sup> It is submitted that the rationale behind such ouster is, like the motivation proposed for subsection (*aa*), to limit the legal costs as such costs are increased if the summons is issued from another jurisdiction as pointed out by Bertelsmann J in *Myburgh*.<sup>80</sup>

Therefore, as far as subsection (*aa*) is concerned, it is submitted that the jurisdiction of the High Court is not ousted or even partly ousted. However, in terms of subsection (*bb*), the jurisdiction of a Magistrate’s Court as well as a division of the High Court not closest situated to where the consumer resides or works or where the goods are kept, is ousted.<sup>81</sup> The presumption against interference with a court’s jurisdiction is not strictly adhered to where jurisdiction of one court is ousted in favour of another on the same level in the hierarchy.<sup>82</sup> Therefore, it is submitted that only the Magistrate’s Court or the division of the High Court closest to where the consumer resides or works or where the goods are ordinarily kept will have jurisdiction to entertain the matter.<sup>83</sup>

It is submitted that the court in *Stringer* incorrectly concluded that clause 13 does not contravene subsection (*bb*) as the clause grants consent to the

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<sup>78</sup> Roestoff and Coetzee 2008 *THRHR* 678 at 687.

<sup>79</sup> *Id.*

<sup>80</sup> *Myburgh* above n14 at 345I; Roestoff and Coetzee 2008 *THRHR* 678 at 687.

<sup>81</sup> Roestoff and Coetzee 2008 *THRHR* 678 at 687.

<sup>82</sup> See the discussion in De Ville (2000) 177; Roestoff and Coetzee 2008 *THRHR* 678 at 688.

<sup>83</sup> Roestoff and Coetzee 2008 *THRHR* 678 at 688.

jurisdiction of the Magistrate's Court for *any* district having jurisdiction by virtue of section 28(1) of the Magistrates' Courts Act.<sup>84</sup>

The criticism of Van Heerden on *Mateman*, namely, that the decision leads to the absurd situation that a consent to jurisdiction clause may be invalid and severable by a court in terms of section 90(2)(k)(vi), but that the same High Court to whom the defendant "unlawfully" consented may still be approached on the basis of its concurrent jurisdiction, is supported.<sup>85</sup>

## 5.5 Jurisdiction under section 85

A jurisdictional issue indirectly related to debt enforcement arises under section 85 of the NCA. In terms of this section, if it is alleged in *any* court proceedings<sup>86</sup> that a consumer is over-indebted, the court has a discretion whether to take cognisance of the consumer's alleged over-indebtedness or not.<sup>87</sup> The court may refer the matter to a debt counsellor in order to evaluate the consumer's circumstances and report back to the court in terms of section 86(7),<sup>88</sup> or declare the consumer over-indebted and make an order in terms of section 87 to relieve such over-indebtedness.<sup>89</sup>

Van Heerden is of the opinion that the word "court", as used in section 85, suggests that any court (including the High Court) can relieve the consumer's over-indebtedness.<sup>90</sup> However, she submits that when the section is read with sections 86(7) and 87, it is clear that the legislature intended that the

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<sup>84</sup> Roestoff and Coetsee 2008 *THRHR* 678 at 688; Van Heerden 2008 *TSAR* 840 at 853.

<sup>85</sup> Van Heerden 2008 *TSAR* 840 at 853.

<sup>86</sup> In *Ex parte Ford and Two Similar Cases* 2009 (3) 376 (WCC) at 381F–H it was decided that the application of s 85 is not restricted to proceedings where enforcement of credit agreements are considered, but that the section was "cast in very wide terms". *In casu* the court decided that it would also apply to an application for voluntary surrender under the Insolvency Act 24 of 1936.

<sup>87</sup> See *Standard Bank of South Africa Ltd v Hales and Another* 2009 (3) 315 (D) for a discussion of the discretion of the court under s 85; see in general Kelly-Louw 2008 *SA Merc LJ* 200 for a discussion of the prevention and alleviation of consumer over-indebtedness in terms of the NCA.

<sup>88</sup> S 85(a).

<sup>89</sup> S 85(b).

<sup>90</sup> Scholtz *et al* (2008) 11–17.

Magistrate's Court should entertain the actual debt restructuring as both the latter sections specifically refer to Magistrate's Court.<sup>91</sup>

However, in the matter of *Standard Bank of South Africa Ltd v Panayiotts*,<sup>92</sup> it was decided that the effect of section 85(a) is that if it is the High Court who refers the matter to a debt counsellor, the recommendation should be made to the High Court.<sup>93</sup> The court held that any other construction could result in absurdity as the High Court will then have to let the matter pend whilst it is adjudicated in the Magistrate's Court.<sup>94</sup> The court further stated that policing would be problematic since the High Court will not necessarily know whether the request has been paid attention to and followed through in the Magistrate's Court.<sup>95</sup> Similarly, if the High Court decides to assist the consumer under section 85(b), it will have the power to entertain the matter in terms of section 87.<sup>96</sup>

The interpretation in *Standard Bank of South Africa Ltd v Panayiotts* is preferred. Support for this interpretation can be found in section 130(4)(c)(ii) and (iii). This section provides that if a court determines that a credit agreement is subject to a pending debt review, the court may:

- (ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85(b); or
- (iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85(b);

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<sup>91</sup> *Id.*; see also Van Heerden 2008 *TSAR* 840 at 845.

<sup>92</sup> *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) 363 (WLD); see also van Rooyen 2009 March *Society News* 8 and 9.

<sup>93</sup> *Panayiotts* above n92 at 368A. See Scholtz *et al* (2008) 11–18 for a contrary view.

<sup>94</sup> At 367H.

<sup>95</sup> *Id.*

<sup>96</sup> At 368E; see Scholtz *et al* (2008) 11–29 to 11–30 for a contrary view.

## 5.6 Conclusion

To conclude, it is submitted that the uncertainty, conflicting decisions and opinions surrounding jurisdiction are a direct consequence of the legislature's failure to specifically deal with jurisdictional issues as far as debt enforcement is concerned. A further consequence of this oversight is that sections that were not intended to regulate jurisdiction primarily now have to be scrutinised in an attempt to clarify the issue and provide practitioners with some kind of workable solution. It is further submitted that the legislature should specifically regulate jurisdiction so as to provide that the High Court exercises concurrent jurisdiction with the Magistrate's Court, but that the jurisdiction of *any* court not closest in distance to the consumer's residence, place of employment or place where goods are kept, be ousted.<sup>97</sup> It is finally submitted that special consideration regarding the relevant court to approach should be taken when drafting pleadings and instituting action to enforce a credit agreement.

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<sup>97</sup> Roestoff and Coetzee 2008 *THRHR* 678 at 688.

## CHAPTER 6: PRE-ENFORCEMENT PROCEDURES

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### 6.1 Introduction

In terms of section 11 of the now repealed Credit Agreements Act,<sup>1</sup> a creditor had to notify a defaulting debtor in writing of the debtor's breach and demand performance in terms of the agreement before the creditor could claim the return of goods forming the subject of such agreement.<sup>2</sup> The notice had to be handed or forwarded to the debtor by registered mail at the address as set out in the agreement,<sup>3</sup> or the duly changed address,<sup>4</sup> and the debtor then had thirty days to remedy the breach.<sup>5</sup> The NCA also prescribes certain processes that must be complied with before a creditor may commence enforcement proceedings.<sup>6</sup> One such prerequisite, similar to its predecessor the Credit Agreements Act, is the delivery of a notice in terms of section 129 of the NCA.<sup>7</sup>

This chapter focuses on the purpose, effect, manner and periods of delivery of such notice. It also examines the question as to which consumers and under what circumstances the notice must be provided and whether the provision of the notice is required to complete the credit provider's cause of action. Other prescribed statutory requirements provided for in the NCA and applicable only in specific circumstances are also considered and a comparison with the requirements in terms of the Credit Agreements Act will be done as far as it is relevant to this study.

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<sup>1</sup> 75 of 1980 repealed by s 172(4) of the National Credit Act 34 of 2005 (hereafter "NCA"); See Scholtz, Otto, Van Zyl, Van Heerden and Campbell (hereafter Scholtz *et al*) (2008) 12–2.

<sup>2</sup> See in general Otto (1991) par 29.

<sup>3</sup> S 5(1).

<sup>4</sup> S 5(4).

<sup>5</sup> Days referred to in s 11 were calendar days.

<sup>6</sup> S 129(1)(a).

<sup>7</sup> The relevant section refers to two different notices. Emphasis is placed on the one that is the most prevalent in practice, namely, the s 129(1)(a) notice, but the notice in terms of s 86(10) is also briefly considered. See chapter 3 par 3.3 for a discussion of prescribed statutory notices.

## 6.2 Section 129(1)(a) notice in general

In terms of section 129(1)(a) a credit provider may draw a consumer's default to the consumer's attention in writing and propose that the consumer consult with a debt counsellor,<sup>8</sup> alternative dispute resolution agent,<sup>9</sup> consumer court<sup>10</sup> or ombud<sup>11</sup> with jurisdiction. The purpose of sending this notice is to attempt to resolve any dispute relating to the agreement or to develop a plan to bring payments up to date.<sup>12</sup> The section provides as follows:

- (1) If the consumer is in default under a credit agreement, the credit provider -
  - (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, 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;

At first glance, the use of the word "may" is misleading, but when read in context it is clear that the provision of such notice is a *sine qua non* for enforcement of a credit agreement.<sup>13</sup> Section 129(1)(b) provides unequivocally that a credit provider may not commence legal proceedings to enforce the

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<sup>8</sup> The NCA contains no definition of a debt counsellor. However, in *GN R489 of 2006 GG 28864 of May 2006* (hereafter regulations to the NCA), reg 1 defines a debt counsellor as "a neutral person who is registered in terms of section 44 of the Act offering a service of debt counselling".

<sup>9</sup> Defined in s 1 as "a person providing services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration".

<sup>10</sup> Defined in s 1 as "a body of that name, or a consumer tribunal established by provincial legislation".

<sup>11</sup> Defined in s 1 as:

in respect of any particular dispute arising out of a credit agreement in terms of which the credit provider is a 'financial institution' as defined in the Financial Services Ombud Schemes Act, 2004 (Act No. 37 of 2004), means an 'ombud', or 'statutory ombud', as those terms are respectively defined in that Act, who has jurisdiction in terms of that Act to deal with a complaint against that financial institution.

<sup>12</sup> S 129(1)(a).

<sup>13</sup> *Otto* (2006) 87; see also *Boraine and Renke* 2008 *De Jure* 1 at 3; *Van Loggerenberg, Dicker and Malan* (hereafter *Van Loggerenberg et al*) 2008 January/February *De Rebus* 40; *Scholtz et al* (2008) 12–7; *Taylor* 2009 *De Jure* 103 at 114; see further *Munien v BMW Financial Services (SA) (Pty) Limited* (as yet unreported case no 16103/08 (KZD)) par 2 – all references to the decision are to the typed manuscript.

agreement before first providing such notice<sup>14</sup> to the consumer and further complying with any requirements set out in section 130.<sup>15</sup> Section 130(1)(a) also provides that a credit provider may only approach the court for an order to enforce a credit agreement if the consumer is in default for at least twenty business days<sup>16</sup> and at least ten business days have elapsed since the credit provider provided such notice.<sup>17</sup> Furthermore, according to section 130(1)(b), enforcement may only be commenced if the consumer has not responded to the notice<sup>18</sup> or responded by rejecting the proposals contained therein.<sup>19</sup>

It is submitted that the ten business-day delivery period and twenty business-day default requirements may run concurrently.<sup>20</sup> A consumer will thus have a minimum of twenty business days to utilise the rights, as brought to the consumer's attention, before the credit provider may commence enforcement proceedings. Twenty business days amount to more or less 28 calendar days, which is close to the 30 business-day provision provided for in terms of section 11 of the Credit Agreements Act.<sup>21</sup>

It is submitted that compliance with the provisions of section 129(1)(a) completes the plaintiff's cause of action and is therefore not merely a statutory

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<sup>14</sup> Or a notice as contemplated in s 86(10) which will apply when the credit provider wishes to terminate a debt review under s 86.

<sup>15</sup> The Credit Agreements Act only required a notice when the credit provider wanted to cancel the agreement. In terms of the NCA, the s 129(1)(a) notice must also be provided if a credit provider wants to claim payment in terms of the agreement.

<sup>16</sup> S 2(5) defines business days and provides that:

When a particular number of business days is provided for between the happening of one event and another, the number of days must be calculated by –

- (a) excluding the day on which the first such event occurs;
- (b) including the day on or by which the second event is to occur; and
- (c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b) respectively.

<sup>17</sup> Or a notice as contemplated in s 86(9). It is submitted that the reference to s 86(9) is incorrect and should be substituted with a reference to s 86(10).

<sup>18</sup> S 130(1)(b)(i).

<sup>19</sup> S 130(1)(b)(ii).

<sup>20</sup> Otto (2006) 91; Van Heerden and Otto 2007 *TSAR* 655 at 662; Taylor 2009 *De Jure* 103 at 114.

<sup>21</sup> Van Heerden and Otto 2007 *TSAR* 655 at 662 n46.

requirement.<sup>22</sup> The provision of the notice forms part of the *facta probanda*<sup>23</sup> and compliance is a jurisdictional factor that must be present and proved by the plaintiff<sup>24</sup> before a court will determine the matter.<sup>25</sup> In defended matters, the defendant (consumer) will bear the *onus* of rebutting provision of the notice.<sup>26</sup>

The Natal Provincial Division issued a rule of practice,<sup>27</sup> requiring the plaintiff to allege in the summons that there has been compliance with section 129 of the NCA. A certificate representing compliance with the said section must be attached to the summons.

The Cape Provincial Division also issued a practice note<sup>28</sup> requiring the insertion of an allegation that the plaintiff complied with sections 129 and 130 in the summons or particulars of claim. This division further calls for an affidavit satisfying the court that these requirements have been met when applying for judgment.

It is submitted that the Cape Provincial Division practice note is to be followed. The suggested filing of an affidavit seems to be the only sensible approach to prove compliance and it is suggested that it should be followed in divisions where no directive is issued, as well as in the Magistrates' Courts.<sup>29</sup>

It is apparent from the discussion above that the notice need not be sent to every consumer in default, but must be sent if the credit provider intends to commence proceedings to enforce the agreement.<sup>30</sup>

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<sup>22</sup> See chapter 3 par 3.3 regarding prescribed statutory notices intended to complete the plaintiff's cause of action.

<sup>23</sup> Boraine and Renke 2008 *De Jure* 1 at 3 n143.

<sup>24</sup> Otto (2006) 87; Erasmus and Van Loggerenberg (1996) 240A; Van Loggerenberg *et al* 2008 January/February *De Rebus* 40.

<sup>25</sup> Erasmus and Van Loggerenberg (1996) 240A.

<sup>26</sup> Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 41; Erasmus and Van Loggerenberg (1996) 240A.

<sup>27</sup> Natal Provincial Division Rule of Practice 28.

<sup>28</sup> Cape Provincial Division Practice Note 25.

<sup>29</sup> Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 41.

<sup>30</sup> *Id.*

The only exceptions to the provision of the section 129(1)(a) notice are that it does not apply to credit agreements being reviewed in terms of section 86 of the NCA,<sup>31</sup> where the agreement is subject to a debt restructuring order or proceedings that could result in such an order,<sup>32</sup> where reckless credit is alleged or where over-indebtedness is raised in a court. Substantiation for the above can be found in section 88(3) that provides that a credit provider who receives notice of court proceedings in terms of section 83,<sup>33</sup> section 85<sup>34</sup> or section 86(4)(b)(i) may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until certain events have occurred.<sup>35</sup> The latter section, section 86(4)(b)(i), refers to the prescribed notification to credit providers and credit bureaus of an application for debt review.<sup>36</sup> When these exceptions are apparent, different procedures will apply that need to be adhered to before the commencement of enforcement of such a credit agreement.

As submitted by Van Heerden and Otto, providing a section 129(1)(a) notice would not be necessary if a credit agreement has already been cancelled under the Credit Agreements Act as the notice is also a requirement for cancellation.<sup>37</sup> The specific wording contained in section 129(1)(a) suggests that cancellation of the agreement has not taken place as yet. Where the agreement has therefore already been cancelled under the Credit Agreements Act, but no enforcement proceedings has commenced, the provision of a section 129(1)(a) notice will not be necessary prior to such enforcement proceedings.<sup>38</sup>

Boraine and Renke submit that the section 129(1)(a) notice may also serve the purpose of a “final” letter of demand, in that a letter of demand can be

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<sup>31</sup> See par 6.6 below.

<sup>32</sup> S 129(2).

<sup>33</sup> Proceedings in a court relating to reckless credit.

<sup>34</sup> Proceedings in a court where over-indebtedness is alleged.

<sup>35</sup> Van Heerden and Otto 2007 *TSAR* 655 at 659 n38.

<sup>36</sup> Reg 24(2) and Form 17.1 of the prescribed forms contained in Schedule 1 of the regulations.

<sup>37</sup> Van Heerden and Otto 2007 *TSAR* 655 at 660.

<sup>38</sup> *Id.*

supplemented with the wording of section 129(1)(a).<sup>39</sup> In such an instance the terms and conditions of the specific credit agreement coupled with the relief that the credit provider attempts to claim will determine whether particulars will be included to provide the credit provider with cancellation or a right to cancel the agreement.<sup>40</sup> If the agreement contains a *lex commissoria*, the agreement may strictly speaking be cancelled immediately and without the necessity of obtaining a court order. But section 129(1)(a), however, still needs to be complied with as this notice remains a prerequisite to cancel an agreement. If there is no *lex commissoria* in the agreement, the section 129(1)(a) notice may also be utilised to acquire a right of cancellation.<sup>41</sup>

### 6.3 Comparable notices

Item 7(3) of Schedule 3 provides that a notice provided in terms of a previous Act must be considered as a notice provided in terms of a comparable provision in the NCA.

The question that thus arises is whether a section 11 notice delivered to a defaulting consumer in terms of the Credit Agreements Act, will suffice as a notice in terms of section 129(1)(a) of the NCA. In *ABSA Bank Ltd v Myburgh*<sup>42</sup> the judge apparently inferred that this is indeed the case and assumed that the respective notices are comparable.<sup>43</sup>

It is, however, submitted by Van Heerden and Otto that the provision of a section 11 notice will not be adequate and that a section 129(1)(a) notice still needs to be provided prior to enforcement proceedings in such circumstances.<sup>44</sup> Their reasons are that section 129(1)(a) is a prerequisite in all enforcement

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<sup>39</sup> Borraine and Renke 2008 *De Jure* 1 at 4; see also Scholtz *et al* (2008) 12–14.

<sup>40</sup> *Id.*

<sup>41</sup> Borraine and Renke 2008 *De Jure* 1 at 4 to 5 n24.

<sup>42</sup> *ABSA Bank Ltd v Myburgh* 2009 (3) 340 (T). See chapter 5 for a detailed discussion of the case.

<sup>43</sup> *Myburgh* above n42 at 342A.

<sup>44</sup> Van Heerden and Otto 2007 *TSAR* 655 at 659 to 660; Scholtz *et al* (2008) 12–6 to 12–7.

procedures, whereas the section 11 notice only applied in instances where the return of goods were claimed. Different time periods apply to the respective notices as discussed above and there is a striking difference between the aims of these notices. The section 11 notice was intended as a letter of demand, informing a debtor of the debtor's default and affording such debtor a specific period to rectify the breach, failing which the credit provider will be entitled to reclaim the goods. Section 129(1)(a) primarily informs a consumer of certain rights as contained in the NCA and is intended to resolve a possible dispute or to reach an agreement to bring payments up to date.

It is submitted that the point of view of Van Heerden and Otto is correct. In particular their third argument, relating to the aims of the respective notices, is supported since the analysis is in line with one of the main purposes of the NCA, namely, consumer protection,<sup>45</sup> in that the consumer's rights in terms of the NCA are brought to the latter's attention.

#### **6.4 Interaction between section 86(2) and section 88(3)**

There is an interplay between debt enforcement provisions on the one hand, and debt review procedures on the other hand in that the one process effectively suspends the other.<sup>46</sup>

Section 86(2) provides that:

An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement.

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<sup>45</sup> S 3.

<sup>46</sup> Boraine and Renke 2008 *De Jure* 1 at 4 n22; Otto (2006) 85 to 87; Renke, Roestoff and Haupt (hereafter Renke *et al*) 2007 *Obiter* 229 at 261.

From the above citation it is clear that a consumer may not apply for debt review if a credit provider already commenced enforcement proceedings, as “contemplated in section 129”.

Section 88(3), as previously mentioned,<sup>47</sup> further provides that a credit provider may not enforce by litigation or other judicial process any right or security under a credit agreement once such credit provider has received a notice from a debt counsellor of an application for debt review,<sup>48</sup> until the consumer is in default and certain specified circumstances are present.<sup>49</sup> This subsection is subject to sections 86(9) and 86(10).<sup>50</sup> The circumstances referred to by section 88(3)(b) are:

- a The debt counsellor rejects the application and the prescribed time in which the consumer may directly approach the court for relieve in terms of section 86(9)<sup>51</sup> has lapsed.<sup>52</sup>
- b The court has determined that the consumer is not over-indebted or rejected a proposal made by a debt counsellor or the consumer’s application.<sup>53</sup>
- c There is a court order in place rearranging the consumer’s obligations or the consumer agreed on a re-arrangement plan with the consumer’s credit providers and all obligations in terms of either the order or

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<sup>47</sup> Above par 6.2.

<sup>48</sup> Or notice in terms of s 83 dealing with reckless credit or s 85 dealing with a court’s intervention when over-indebtedness is alleged.

<sup>49</sup> S 88(3).

<sup>50</sup> Thus, the provisions of s 86(10) will still apply. In the case of *First Rand Bank v Smith* (Unreported case no 24205/08) (WLD) - all references are to the typed manuscript - the court however interpreted and applied section 88(3) to the facts of the case, without taking cognisance of the possible application of section 86(10).

<sup>51</sup> S 86(9) provides that a consumer may with leave of the Magistrate’s Court apply directly in the prescribed manner and form for an order to declare agreements reckless and for an order to rearrange the consumer’s obligations. The manner prescribed for this application is to be found in reg 26 which awards the consumer twenty business days or a longer period on good cause shown. Form 18 to the regulations prescribes the form of the application.

<sup>52</sup> S 88(3)(b)(i) read with s 88(1)(a).

<sup>53</sup> S 88(3)(b)(i) read with s 88(1)(b).

agreement are fulfilled, unless the obligations are fulfilled by way of a consolidation agreement.<sup>54</sup>

- d The consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the National Consumer Tribunal.<sup>55</sup>

It is clear that debt review procedures,<sup>56</sup> and debt enforcement procedures<sup>57</sup> cannot run concurrently and that the commencement of one procedure effectively places a moratorium on the commencement of the other.<sup>58</sup> The question that now arises is at what point exactly it can be said that either procedure has commenced and therefore suspends the possible commencement of the other. What exactly did the legislature had in mind when the legislature referred to “steps contemplated in section 129 to enforce”?

In *Nedbank Ltd v Ditsheko Isaac Motaung*,<sup>59</sup> and *Potgieter Ronald Frederick v Greenhouse Funding (Pty) Ltd and another*,<sup>60</sup> the Transvaal Provincial Division and Witwatersrand Local Division respectively decided that the mere provision of a section 129(1)(a) notice will suffice to suspend an application for debt review in terms of section 86. Otto is in agreement that section 86(2) must be interpreted to mean that a consumer may not apply for debt review once a section 129(1)(a) notice has been provided.<sup>61</sup>

It is respectfully submitted that it could never have been the intention of the legislature that the mere provision of the section 129(1)(a) notice suspends an

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<sup>54</sup> S 88(3)(b)(i) read with s 88(1)(c). S 88(2) determines that the effect of s 88(1) will also apply to a consolidation agreement.

<sup>55</sup> S 88(3)(b)(ii).

<sup>56</sup> S 86.

<sup>57</sup> Chapter 6, Part C.

<sup>58</sup> See Otto (2006) 85 to 87 for a general discussion of the interplay between debt review and debt enforcement; see also Boraine and Renke 2008 *De Jure* 1 at 3 n141; Renke *et al* 2007 *Obiter* 261; Taylor 2009 *De Jure* 103 at 113.

<sup>59</sup> *Nedbank Ltd v Ditsheko Isaac Motaung* (Unreported case no 22445/2007 (T)) – all references to the decision are to the typed manuscript 6 to 8.

<sup>60</sup> *Potgieter Ronald Frederick v Greenhouse Funding (Pty) Ltd and another* (Unreported case no 31825/2008 (W)) 4 to 5 – all references to the decision are to the typed manuscript.

<sup>61</sup> Otto (2006) 85 n 25; see also Flemming (2007) 30.

application for debt review. One of the prescribed proposals contained in the notice is the option of consulting with a debt counsellor. If the intention was to exclude such agreements from the debt review process it will lead to an absurd result in that a credit provider refers a consumer to a debt counsellor due to non fulfilment of obligations under a specific credit agreement, but that specific agreement may not be included in the debt review process.<sup>62</sup> Furthermore, one of the common-law principles underlying the law of civil procedure is that of *audi et alteram partem*.<sup>63</sup> Hoexter explains the principle of procedural fairness in the form of the *audi* principle and provides that it

is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions.<sup>64</sup>

If enforcement indeed commences upon the delivery of the notice, it would mean that the consumer is informed of the consumer's right to consult a debt counsellor but will not have "a chance of influencing the outcome" as the consumer will not be able to approach a debt counsellor once the notice has been provided.

In conclusion, it is submitted that section 129 should be read as a whole, especially since section 86(2) refers to section 129 and not merely section 129(1)(a) in isolation.<sup>65</sup> Section 129(1)(b)(ii) refers to further requirements in terms of section 130 dealing in turn with debt procedures *in a court*. Van Heerden and Otto propose that the reference in section 86(2) to section 129 should be substituted with a reference to section 130.<sup>66</sup> This proposed amendment is supported.

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<sup>62</sup> See also Van Loggerenberg *et al* 2008 January/February *De Rebus* 40.

<sup>63</sup> "Hear also the other side"; De Vos 1997 *TSAR* 444; Paterson (2005) 48; Theophilopoulos, Rowan, Van Heerden and Boraine (hereafter Theophilopoulos *et al*) (2006) 3 to 4 and 159. See the application of the principle in light of the notion of a duty to act fairly *Administrator, Transvaal and Others v Traub and Others* 1989 (4) 731 (A).

<sup>64</sup> Hoexter (2007) 326.

<sup>65</sup> Boraine and Renke 2008 *De Jure* 1 at 9 n186.

<sup>66</sup> Van Heerden and Otto 2007 *TSAR* 655 at 668.

If we accept that legal action or enforcement does not commence upon the provision of a section 129(1)(a) notice, the question arises at what time such action or enforcement then does commence. Is it upon the service of a summons or will the mere issuing thereof suffice?

In *Labuschagne v Labuschagne; Labuschagne v Minister van Justisie*,<sup>67</sup> the wording of section 32 of the Police Act,<sup>68</sup> (now repealed) was considered. The section provided that:

Enige siviele geding teen die Staat of enige persoon, ten opsigte van enigets uit hoofde van hierdie Wet gedoen, moet ingestel word binne ses maande nadat die eisorsaak ontstaan het, en die skriftelike kennisgewing van enige siviele geding en van die oorsaak daarvan moet aan die verweerder gegee word minstens een maand voordat dit ingestel word.

The court decided that the notice, as provided for by section 32, should be provided to the defendant at least one month prior to the *issuing* of the summons and that “instel” of civil proceedings therefore refers to the issuing and not the service of a summons.<sup>69</sup>

It is submitted that *Labuschagne* is not authoritative anymore and that service of a summons and not the mere issuing thereof commences action or enforcement proceedings for the reasons as set out below.<sup>70</sup>

The first argument in favour of this statement relates to section 15(1) of the Prescription Act,<sup>71</sup> which provides that:

The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

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<sup>67</sup> *Labuschagne v Labuschagne; Labuschagne v Minister van Justisie* 1967 (2) 575 (A).

<sup>68</sup> 7 of 1958 (repealed by proclamation R5 of 27 January 1995).

<sup>69</sup> *Labuschagne* above n67 at 585E.

<sup>70</sup> Scholtz *et al* (2008) 11–9; Van Loggerenberg *et al* 2008 January/February *De Jure* 40.

<sup>71</sup> 68 of 1969; commencement date 1 December 1970.

*Labuschagne* was decided<sup>72</sup> before the commencement of the Prescription Act. In terms of the Institution of Legal Proceedings against Certain Organs of State Act,<sup>73</sup> national state departments are now subject to the Prescription Act.<sup>74</sup>

Prescription is only interrupted once the summons has been served upon the defendant. In the event that the summons was issued before the claim has prescribed, but served only after the specific period of prescription has lapsed,<sup>75</sup> the defendant will have a defence, namely, prescription of the claim. Therefore it can be argued that the summons only becomes effective upon service thereof.

The second argument is that the jurisdiction of a court is determined upon service of a summons and not the issuing thereof. The court in *Mills v Starwell Finance (Pty) Ltd*<sup>76</sup> concluded that:

It is the service which gives efficacy to the summons. Against a “qualyk en t'onrechte geciteerde zynde” defendant the service is ineffectual. Merula 4.24.11.6. The service of the summons locks the parties in the process of litigation and calls on the defendant to answer in a particular court the plaintiff's claim against him. In my judgment the time of service is the time at which to determine whether the court before which the defendant is summoned is a court of competent jurisdiction.

In light of the above arguments, it is submitted that the service of a summons and not the mere issuing thereof commences enforcement proceedings,<sup>77</sup> and that the steps referred to in section 86(2) therefore refer to service.<sup>78</sup> This interpretation is in line with the NCA's purpose of consumer protection as it

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<sup>72</sup> Judgment delivered on 23 March 1967.

<sup>73</sup> 40 of 2002.

<sup>74</sup> S 2 Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.

<sup>75</sup> See s 11 of the Prescription Act for the periods of prescription of debts.

<sup>76</sup> *Mills v Starwell Finance (Pty) Ltd* 1981 (3) 84 (N) 90G-H.

<sup>77</sup> See also Van Loggerenberg *et al* 2008 January/February *De Rebus* 40. See Boraine and Renke 2008 *De Jure* 1 at 9 n186 for a contrary view as well as Renke *et al* 2007 *Obiter* 229 at 262 n325.

<sup>78</sup> *Id.*

awards a consumer more time to approach a debt counsellor.<sup>79</sup> It is, however, submitted that the legislature should intervene and specifically define the commencement of enforcement in terms of the NCA.

Section 85 should, however, always be kept in mind, in that even if enforcement proceedings have commenced, a court may still refer the matter to a debt counsellor.

## 6.5 Allegation of over-indebtedness in terms of section 85

As stated above, section 85 may be used to circumvent the prohibition of an application for debt review where enforcement proceedings have commenced.

This section provides that:

Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may –

- (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or
- (b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

This provision therefore creates an exception to section 86(2) prohibiting debt review applications once enforcement proceedings have commenced.<sup>80</sup> It is submitted by Otto that an allegation of over-indebtedness is a prerequisite and that a court cannot exercise this power *mero motu*.<sup>81</sup> In *Standard Bank of SA*

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<sup>79</sup> S 3.

<sup>80</sup> See *Ex parte Ford and Two Similar Cases* 2009 (3) 376 (WCC) at 381F–G where the court held that the application of this section is not restricted to enforcement proceedings and that it would also find application in proceedings for voluntary surrender under the Insolvency Act 24 of 1936. See Boraime and Van Heerden 2009 *PELJ* 22.

<sup>81</sup> Otto (2006) 87 n34.

*Ltd v Panayiotts*,<sup>82</sup> the court remarked that the consumer who raises over-indebtedness should also plead and prove same.<sup>83</sup> The court pointed out that the consumer must explain his failure to approach a debt counsellor prior to litigation as it is undesirable that the more costly procedure of the High Court should be implemented and that the High Court should deal with frequent applications for debt restructuring along the lines of the section 65 procedure contained in the Magistrates' Courts Act.<sup>84</sup> Furthermore, the court held that the High Court should not deal with a matter where there is an alternative, simple and effective procedure available.<sup>85</sup>

Otto comments<sup>86</sup> that the section allows a consumer to play “ducks and drakes” with a credit provider. This view is supported in that the section offers life after death; however, it grants the court a discretion and it is submitted that a consumer who is unable to justify its reliance on the section must not be allowed this second chance.

## 6.6 Section 86(10) notice

Section 86 of the NCA specifically deals with the application for debt review and resorts under Chapter 4 Part D, namely, the over-indebtedness and reckless credit provisions. As stated above, a consumer cannot apply for debt review once enforcement proceedings have commenced<sup>87</sup> and a credit provider may not enforce any right or security under a credit agreement after the consumer applied for debt review, until certain circumstances as contemplated in section

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<sup>82</sup> *Standard Bank of SA Ltd v Panayiotts* 2009 (3) 363 (W).

<sup>83</sup> *Panayiotts* above n82 at 366D; see also Harms (1990) B–218 and Van Rooyen 2009 March *Society News* 8 and 9.

<sup>84</sup> 32 of 1944; *Panayiotts* above n82 at 369B–D. See also *Firststrand Bank Ltd v Olivier* 2009 (3) 353 (SE) at 360F–H where the court also held that a consumer, relying on s 85, must explain his or her failure to approach a debt counsellor prior to litigation. The *Panayiotts* and *Olivier* matters, however, conflict in relation to whether over-indebtedness could constitute a *bona fide* defence as contemplated in HCR 32(3)(b). In *Panayiotts* the court decided that it is indeed the case whereas the court in *Olivier* reached the opposite conclusion. See chapter 3 par 3.7.2 for a discussion of summary judgment and the applicable rules.

<sup>85</sup> *In casu* the debt review procedure in terms of s 86 of the NCA; *Panayiotts* above n82 at 369E.

<sup>86</sup> Otto (2006) 86.

<sup>87</sup> Subject to s 85.

88(3) read with 88(1) have materialised. Section 88(3) furthermore provides that a credit provider's right to enforce any right or security is subject to sections 86(9) and 86(10) once a consumer applied for debt review.

Section 86(10) of the NCA provides for the termination of the debt review and determines that:

If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner<sup>88</sup> to –

- (a) the consumer;
  - (b) the debt counsellor; and
  - (c) the National Credit Regulator,
- at any time at least 60 business days after the date on which the consumer applied for the debt review.<sup>89</sup>

Even though section 86(10) does not specifically state that the notice is a prerequisite to enforcement of a credit agreement under debt review, section 88(3) provides that the enforcement of a credit agreement under *inter alia* debt review is subject to section 86(10). Section 129 read with section 130 further supports this conclusion.

Section 129(1)(b) provides that:

If the consumer is in default under a credit agreement, the credit provider -

- (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before –
  - (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
  - (ii) meeting any further requirements set out in section 130.

Section 130(1)(a) provides that:

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<sup>88</sup> No such “prescribed manner” is to be found in the NCA or the regulations.

<sup>89</sup> The application for debt review means the signing of Form 16, contained in Schedule 1 to the regulations, by the consumer. See also Scholtz *et al* (2008) 11–6.

Subject to subsection (2),<sup>90</sup> a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and –

- (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be;

It is proposed that the reference to section 86(9) is an error and that the reference should be to section 86(10).<sup>91</sup>

A strict interpretation of these sections will invariably result in a conclusion that, should a credit provider attempt to enforce a credit agreement under debt review, the provision of a section 86(10) notice would be a prerequisite to such enforcement in addition to the other prerequisites provided for in section 88(3) read with section 88(1).

Regulation 24(6) to the NCA requires a debt counsellor to make a determination of over-indebtedness within 30 business days after receiving an application for debt review. In light of this regulation, Van Heerden poses the question whether a credit provider may still only terminate a debt review at least 60 business days after application for debt review as required by section 86(10), in the event that a debt counsellor does not make the determination of over-indebtedness within the required 30 business day period.<sup>92</sup> She asks, without providing an answer, whether a credit provider who has not delivered a section 129(1)(a) notice as yet must wait for the remaining 30 business days to expire and only then terminate the agreement, or if the credit provider can deliver a section 129(1)(a) notice and proceed with litigation.

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<sup>90</sup> S 130(2) lays down further pre-enforcement requirements relating to instalment agreements, secured loans or leases pursuant to an attachment order or a voluntary surrender of property. See chapter 7 par 7.3 for a detailed discussion of s 130(2).

<sup>91</sup> S 86(9) deals with the rejection of an application for debt review by a debt counsellor and the consumer's rights to apply directly to the Magistrate's Court. The section does not mention any notice. See also Otto (2006) 91 n77; Scholtz *et al* (2008) 12–21; Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 41.

<sup>92</sup> Scholtz *et al* (2008) 12–18 n102.

Section 129(1)(b)(i) read with section 130(1)(a) clearly prescribes that a credit provider must provide *either* a section 129(1)(a) notice or a section 86(10) notice as the case may be before commencing enforcement procedures.<sup>93</sup> It is therefore submitted that a section 86(10) notice must be delivered before commencement of enforcement procedures of an agreement considered under debt review and a section 129(1)(a) notice in all other instances.<sup>94</sup> These two notices have different consequences and apply to different circumstances, as discussed above, and therefore the one may not be utilised in circumstances for which the other was intended.

The only exception to the above can be found in section 129(2), which provides that section 129(1), prescribing either of the two notices, does not apply to a credit agreement subject to a debt restructuring order, or to proceedings in a court that could result in such an order.<sup>95</sup> It seems, however, that section 129(2) and section 88(3)(b)(ii) contradicts one another as the latter section makes a re-arrangement by consensus or by order of court, or the Tribunal provided for in the NCA, subject to section 86(10).

Lastly, it should be noted that section 86(11) provides that if such notice was given and a credit provider proceeds to enforce the credit agreement, a Magistrate's Court may order the debt review to resume on any conditions determined by the court.<sup>96</sup>

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<sup>93</sup> Boraine and Renke 2008 *De Jure* 1 at 3 n143.

<sup>94</sup> Boraine and Renke 2008 *De Jure* 1 at 4; Renke *et al* 2007 *Obiter* 229 at 262.

<sup>95</sup> See the discussion in Scholtz *et al* (2008) 12–18 to 12–20.

<sup>96</sup> Refer also to s 85, namely, the exception to the rule that a credit agreement may not be included under debt review once debt enforcement procedures have commenced as discussed in par 6.5 above. Note, however, that where s 85 requires an allegation of over-indebtedness, s 86(11) does not require a request by the consumer and it seems that a court may refer such matter *mero motu*.

## 6.7 Provided to natural and juristic persons

Given that the section 129(1)(a) notice is a prerequisite for enforcement, the question arises as to which consumers must be provided with the notice. This question is especially relevant since some of the prescribed proposals contained in the notice, for instance the referral to a debt counsellor, do not apply to juristic persons.<sup>97</sup> Section 129(1) itself does not mention any exclusion in this regard and the only direct exclusion to be found in the NCA, as previously stated, is contained in section 129(2) that provides that the notice need not be sent where the credit agreement is subject to a debt restructuring order, or to proceedings in a court that could result in such an order. When a consumer is subject to debt review procedures, a different procedure applies.<sup>98</sup>

Section 6, dealing with limitations to the application of the NCA where the consumer is a juristic person, also does not exclude section 129 procedures.

It is submitted that the proposals contained in the notice are proposals to consult with third parties so as to bring payments up to date or resolve disputes,<sup>99</sup> and therefore they are not merely proposals to apply for debt review. Hence, it may be said that the notice should be sent prior to enforcement to all consumers who enjoy the protection of the NCA,<sup>100</sup> irrespective of whether they are natural or juristic persons.<sup>101</sup>

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<sup>97</sup> S 78(1) provides that chapter 4 Part D does not apply to credit agreements in respect of which the consumer is a juristic person. Chapter 4 Part D is concerned with over-indebtedness and reckless credit. A juristic person is defined in s 1 of the Act as including:

- a partnership, association or other body of persons, corporate or unincorporated, or a trust if –
  - (a) there are three or more individual trustees; or
  - (b) the trustee is itself a juristic person,but does not include a *stokvel*.

<sup>98</sup> See par 6.6 above.

<sup>99</sup> Scholtz *et al* (2008) 12–15.

<sup>100</sup> See chapter 2 par 2.3.6 for a discussion of the exclusion of the NCA's application in relation to certain consumers.

<sup>101</sup> Van Heerden and Otto 2007 *TSAR* 655 at 667; Scholtz *et al* (2008) 12–16.

## 6.8 Provision of a section 129(1)(a) notice

According to section 65(1), every document that is required to be *delivered* to the consumer in terms of the NCA must be delivered in the prescribed manner. The NCA itself does not define the word “deliver”, but a definition can be found in regulation 1. The relevant part of the definition provides that delivered:

unless otherwise provided for, means sending a document by hand, by fax, by e-mail, or registered mail to an address chosen in the agreement by the proposed recipient, if no such address is available, the recipient’s registered address.

Section 129 does not prescribe the method of providing the notice and is silent as to the address to which the notice must be forwarded.<sup>102</sup> Furthermore section 129 uses the word “providing” and not “delivering”. However section 130, referring to the section 129(1)(a) notice, nevertheless uses the word “delivered”. It seems therefore that it can be assumed that the section 129(1)(a) notice should be “delivered”, but what does delivery in terms of the NCA entail and how should the notice be delivered? Sections 65 and 168 shed some light on these questions.

Section 65(2) of the NCA provides that:

If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must

- (a) make the document available to the consumer through one or more of the following mechanisms –
  - (i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer’s expense, or by ordinary mail;
  - (ii) by fax;
  - (iii) by email; or
  - (iv) by printable web-page; and

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<sup>102</sup> S 11 of the Credit Agreements Act specifically provided that the notice/letter should be handed to the credit receiver or posted by prepaid registered mail to the address stated in the agreement. See Otto (1991) par 29.

- (b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).

Section 168 also deserves some attention. The section provides that:

Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be *served* on a person will have been properly served when it has been either –

- (a) delivered to that person; or
- (b) sent by registered mail to that person’s last known address.<sup>103</sup>

Boraine and Renke comment that section 168 should only apply where serving is required,<sup>104</sup> and that the section 129(1)(a) notice should be delivered in terms of section 65 of the NCA.<sup>105</sup> Although this submission is supported, it is proposed that even if the notice should be “served” as contemplated in section 168, it will make no practical difference as the said section also makes use of the word “delivered”<sup>106</sup> directing the matter once again to section 65.

In civil litigation practice letters of demand are usually sent by registered mail,<sup>107</sup> but this method of delivery is, probably due to an oversight by the legislature, oddly absent from the list of options set out in section 65(2). It is further foreseeable that the prescribed methods of ordinary mail and printable web-page delivery will inevitably constitute evidential problems, especially since the credit provider need to satisfy a court of the delivery of such notice before a court will entertain the matter.<sup>108</sup> It was, however, decided by Wallis J in *Munien v BMW Financial Services (SA) (Pty) Limited* that the fact that ordinary mail, as opposed to registered mail, is included in the list set out in section 65(2)(a) makes no difference as the method remains postal service and registered mail

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<sup>103</sup> Writer’s own emphasis.

<sup>104</sup> Boraine and Renke 2008 *De Jure* 1 at 5 n151.

<sup>105</sup> *Id.* See also Otto (2006) 89; Scholtz *et al* (2008) 12–9; Van Heerden and Otto 2007 *TSAR* 655 at 662.

<sup>106</sup> S 168(a).

<sup>107</sup> Van Heerden and Otto 2007 *TSAR* 655 at 662; Scholtz *et al* (2008) 12–9 n55.

<sup>108</sup> See the discussion in par 6.2; Van Heerden and Otto 2007 *TSAR* 662.

will make it “more, not less, likely to reach its destination”.<sup>109</sup> This view is supported.

A further question that arises relates to the wording contained in section 129(1)(a), namely “draw the default to the notice of the consumer” and section 129(1)(b) “providing notice to the consumer, as contemplated in paragraph (a)”. Do these two phrases mean that a consumer must physically receive the notice before it can be said that there was compliance with the section, or must the credit provider merely satisfy the court that the credit provider forwarded the notice to the consumer? One would expect that the courts should at least consider reported case law on similar provisions in previous credit legislation when interpreting these phrases,<sup>110</sup> and therefore applicable previous case law is now briefly considered.<sup>111</sup>

*Fitzgerald v Western Agencies*<sup>112</sup> was decided under the amended section 12(b) of the Hire-Purchase Act<sup>113</sup> and held that if a notice was sent in accordance with the Act, it will be effective even if it did not physically reach the buyer.<sup>114</sup> The relevant section provided that:

No seller shall, by reason of any failure on the part of the buyer to carry out any obligation under any agreement, be entitled to enforce -

- (b) any provision in the agreement for the payment of any amount as damages, or for any forfeiture or penalty, or for the acceleration of the payment of any instalment, unless he has by letter handed over to the buyer or sent by registered post to him at his last known residential or business address, made demand to the buyer to carry out the obligation in question within a period stated in such

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<sup>109</sup> *Munien* above n13 at par 26.

<sup>110</sup> See *Otto* (2006) 89 to 91; *Van Heerden and Otto* 2007 *TSAR* 655 at 662 to 664; *Scholtz et al* (2008) 12–10 to 12–12; see in general *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) 834 (W) at 847G–H; *Lench and Another v Cohen and Another* 2006 (2) 99 (W) at 106B–C.

<sup>111</sup> See *Otto* (1991) par 29 and *Otto* (2006) 89 to 91 for a discussion of some of the case law that follows.

<sup>112</sup> *Fitzgerald v Western Agencies* 1968 (1) 288 (T).

<sup>113</sup> 36 of 1942.

<sup>114</sup> *Fitzgerald* above n112 at 191F–G.

demand, not being less than ten days, and the buyer has failed to comply with such demand.

However, in *Maron v Mulbarton Gardens (Pty) Ltd*<sup>115</sup> it was held that the word “inform” as used in section 13(1) of the Sale of Land on Instalments Act implied that the notice had to reach the purchaser to be effective.<sup>116</sup> The relevant section provided that:

- 13 (1) No seller shall, by reason of any failure on the part of the purchaser to fulfil an obligation under the contract, be entitled to terminate the contract or to institute an action for damages, unless he has by letter handed over to the purchaser and for which an acknowledgement of receipt has been obtained, or sent by registered post to him at his last known residential or business address, *informed* the purchaser of the failure in question and made demand to the purchaser to carry out the obligation in question within a period stated in such demand, not being less than 30 days, and the purchaser has failed to comply with such demand.<sup>117</sup>

The appellate division in *Maharaj v Tongaat Development Corporation*<sup>118</sup> also preferred the view that the notice in terms of section 13(1) of the Sale of Land on Instalments Act<sup>119</sup> must in fact reach the purchaser.<sup>120</sup> *Maharaj* was followed in *Holme v Bardsley*,<sup>121</sup> which was based on section 19 of the Alienation of Land Act,<sup>122</sup> which also used the word “informed”. The word “informed” was substituted with the word “notify” to render the receipt of the notice unnecessary. This amendment took effect on 27 April 1983,<sup>123</sup> which was after the *Holme* judgement on 20 September 1983. Flemming J in *Holme* referred to

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<sup>115</sup> *Maron v Mulbarton Gardens (Pty) Ltd* 1975 (4) 123 (W).

<sup>116</sup> *Maron* above n115 at 125D.

<sup>117</sup> Writer’s own emphasis.

<sup>118</sup> *Maharaj v Tongaat Development Corporation* 1976 (4) 994 (A).

<sup>119</sup> 72 of 1971.

<sup>120</sup> *Maharaj* above n118 at 1000–1001.

<sup>121</sup> *Holme v Bardsley* 1984 (1) 429 (W).

<sup>122</sup> 68 of 1981 – successor of the Sale of Land on Instalments Act.

<sup>123</sup> Alienation of Land Amendment Act 51 of 1983.

the old section 19 and it is strange that council did not bring the amendment to his attention.<sup>124</sup>

Otto holds the opinion that *Holme* was decided incorrectly and that there cannot be an absolute rule that the consumer must receive the notice.<sup>125</sup> In *Marques v Unibank Ltd*,<sup>126</sup> the court approved of Otto's opinion and held that the notice does not have to come to the attention of the credit receiver.<sup>127</sup> In this matter the court considered the wording of section 11 of the Credit Agreements Act and specifically interpreted and contrasted the word "notified"<sup>128</sup> with the word "informed".<sup>129</sup>

As the NCA, in the phrases contained in section 129(1)(a) and 129(1)(b), uses the words "draw the default to the notice" and "providing notice", Otto submits that the courts should follow the *ratio* in *Marques*<sup>130</sup> when interpreting section 129(1) of the NCA.<sup>131</sup> Furthermore, it will only be logical that the consumer bears the risk of the notice not physically reaching the consumer, as it is the consumer who chooses the manner of delivery of the notice from the options listed in section 65(2).<sup>132</sup>

However, in *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors*,<sup>133</sup> it was recently held that the credit provider is required:

to bring the default to the attention of the consumer in a way which provides an assurance to a court, considering whether or not there has been proper compliance with the procedural

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<sup>124</sup> *Marques v Unibank Ltd* 2001 (1) 145 (W) 156.

<sup>125</sup> Otto (1991) par 29.

<sup>126</sup> *Marques* above n124.

<sup>127</sup> *Marques* above n124 at 151.

<sup>128</sup> "has notified the credit receiver that he so failed and required him to comply".

<sup>129</sup> *Marques* above n124 at 156.

<sup>130</sup> *Marques* above n124.

<sup>131</sup> Otto (2006) 91; see also Scholtz *et al* (2008) 12–12; Van Heerden and Otto 2007 *TSAR* 655 at 664.

<sup>132</sup> *Id.*

<sup>133</sup> *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) 512 (D).

requirements of ss 129 and 130, that the default has indeed been drawn ‘to the notice of the consumer’.<sup>134</sup>

The courts’ reasoning was as follows:<sup>135</sup>

In my view the present Act, with regard to the notice contemplated in s 129(1)(a) thereof, represents a radical departure from its predecessor. Whereas the Credit Agreements Act 75 of 1980 merely requires the credit receiver to post by prepaid registered mail and, in this way, ‘has notified the credit receiver’ of the default, the present Act in s 129(1)(a) creates an obligation on the credit provider (when it decides to take such a course) to ‘draw the default to the notice of the consumer in writing’. Section 129(1)(b) creates a bar against a credit provider legitimately commencing any legal proceedings to enforce the agreement before *providing notice* to the consumer as contemplated in s 129(1)(a). In terms of s 130(1)(a) a credit provider may only approach a court for an order to enforce a credit agreement if, inter alia, at least 10 business days have elapsed since a credit provider *delivered a notice*, as contemplated in s 129(1)(a), to the consumer.

The words ‘draw the default to the notice of the consumer’, ‘providing notice’ and ‘delivered a notice’ in the context in which these appear in the previous paragraph to my mind cumulatively reflect an intention on the part of the legislature to impose upon the credit provider an obligation which requires much more than the mere despatching of the notice contemplated by section 129(1)(a) to the consumer in the manner prescribed in the Act and the regulations.

It is not clear from the judgment how a credit provider should “bring the default to the attention of the consumer” so as to assure a court that there has been compliance with section 129(1)(a). The court merely states that the legislature imposed an obligation on a credit provider which requires “much more than the mere despatching of the notice” but fails to elucidate what “much more” entails.

However, in *Munien v BMW Financial Services*, Wallis J with reference to section 129(1)(a) argued that the manner of delivery has been prescribed in the

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<sup>134</sup> *Prochaska* above n133 at 534.

<sup>135</sup> *Id.*

NCA, but the method of delivery has been prescribed in the regulations.<sup>136</sup> He then referred to the definition of “delivered” as contained in the regulations and concluded that “it is the sending of the document that amounts to delivery not the receipt thereof”.<sup>137</sup> The judge further stated that:

it would have been relatively easy to formulate a rule that made it clear that the notice had to be received and come to the attention of the consumer, but the Minister chose to say the “sending” of the document would mean that it was delivered.<sup>138</sup>

Wallis J further held that even if his contention, that the manner in which documents are to be delivered has been prescribed in the regulations, is wrong, approaching the manner in terms of section 65(2) will still not require receipt thereof.<sup>139</sup> He stated that it not merely required from a credit provider to deliver a notice, but that delivery should take place “in the manner chosen by the consumer”.<sup>140</sup> He stated that the language used can only refer to the fact that consumers “who has chosen the method by which the notice is to be made available to them” should bear the risk of the notice not physically reaching them.<sup>141</sup> The following extract summarises the argument:

[P]rovided that 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 in fact came to the attention of the consumer. As the consumer has the right to choose the manner in which notice is to be given it is for the consumer to ensure that the method chosen will be one that is reasonable certain to bring any notice to his or her attention.<sup>142</sup>

The decision in *Munien* is preferred to *Prochaska*. The dispatching of, for instance, a letter by post will be a manner in which the credit provider

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<sup>136</sup> *Munien* above n13 at par 12.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Munien* above n13 at par 16.

<sup>140</sup> *Munien* above n13 at par 20.

<sup>141</sup> *Id.*

<sup>142</sup> *Munien* above n13 at par 23; see also *Vessels and Another v Brink NO and Others* 1950 (4) 352 (T) to which Wallis J *inter alia* referred in his judgment.

endeavours to “draw the default to the attention of the consumer”. Furthermore, the legislature chose the word “notify” instead of “inform” which under previous legislation was interpreted to mean that the notice should actually reach the consumer. This decision is in line with the reasoning of Otto and the decision in *Marques*.<sup>143</sup>

## 6.9 Address for delivery

Apart from establishing the means of delivery, the address to which the section 129 notice must be forwarded must also be determined. Section 96(1) provides that:

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 other party as set out in the agreement, unless paragraph (b) applies; or
- (b) the address most recently provided by the recipient in accordance with subsection (2).<sup>144</sup>

It is submitted that, as the section 129(1)(a) notice is necessary to complete the plaintiff’s cause of action, it should be regarded as a legal notice as contemplated in section 96(1) and should be delivered to the address set out in the agreement, or the address most recently provided by the consumer.<sup>145</sup> It is further submitted that the word “deliver” in section 96(1) should be read with section 65 and the definition of that word in the regulations.<sup>146</sup>

Section 96(2) deals with a change of address and provides as follows:<sup>147</sup>

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<sup>143</sup> See also Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 41; Erasmus and Van Loggerenberg (1996) 240A at n5.

<sup>144</sup> Neither the NCA nor the regulations contain a definition of “legal notice”.

<sup>145</sup> Renke *et al* 2007 *Obiter* 229 at 262 n330; Erasmus and Van Loggerenberg (1996) 240A; Van Heerden and Otto 2007 *TSAR* 655 at 664; Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 41; Scholtz *et al* (2008) 12–10; Van Loggerenberg and Farlam (1994) B1–24.

<sup>146</sup> Scholtz *et al* (2008) 12–10.

<sup>147</sup> Similar to s 5(4) of the Credit Agreements Act which provided that a change of address contrary to this section was ineffective.

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 email address.

It seems that a change of address contrary to section 96(2) will be ineffective and that the notice may still be forwarded to the address provided in the agreement under such circumstances.<sup>148</sup>

Unlike the Credit Agreements Act, which provided that the address chosen in the agreement would serve as *domicilium citandi et executandi*,<sup>149</sup> the NCA does not specifically provide for a *domicilium* address as such. This might be in an attempt to abide by the right of information in clear and understandable language contained in section 64 of the NCA.<sup>150</sup> Nothing in the NCA, however, prohibits parties to include a provision in the contract stating that the address set out in the agreement will serve as the *domicilium* address,<sup>151</sup> and it is therefore recommended that such information should be included for legal certainty.

## 6.10 Conclusion

It is submitted that the purpose of sending the section 129(1)(a) notice is an attempt to resolve a dispute relating to a credit agreement or to develop and agree on a plan to bring payments up to date before resorting to civil litigation. The provision of such notice can be seen as an invitation by the credit provider, allowing the consumer ten business days to decide whether to enter into negotiations through certain specified intermediaries. The notice should be provided to all consumers, natural and juristic persons, enjoying the protection of the NCA in the manner chosen by the consumer from the options available in

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<sup>148</sup> Van Heerden and Otto 2007 *TSAR* 655 at 666; Scholtz *et al* (2008) 12–10.

<sup>149</sup> S 5(1).

<sup>150</sup> Van Heerden and Otto 2007 *TSAR* 655 at 665.

<sup>151</sup> *Id*; Scholtz *et al* (2008) 12–13.

section 65 and should be forwarded to the address as provided by the consumer in terms of section 96. It is submitted that the consumer need not physically receive the notice in order for the credit provider to comply with the section 129(1)(a) requirement.

It is finally submitted that the most important aspect of the section 129(1)(a) notice is that it completes the credit provider's cause of action and therefore forms part of the credit provider's *facta probanda*. A credit provider need not only allege that there has been compliance with the said section but will also carry the burden of proof in this regard. As far as the interaction between debt review and debt enforcement is concerned it is submitted that the mere provision of the section 129(1)(a) notice does not prohibit an application for debt review, but whether the legislature intended the issuing or service of a summons to have this effect remains to be seen. It is, however, suggested that service of a summons and not the mere issuing thereof prohibits an application for debt review.

## CHAPTER 7: ENFORCEMENT PROCEDURES AND ORDERS

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### 7.1 Introduction

Chapter 6 dealt with the pre-enforcement procedures provided for in the National Credit Act.<sup>1</sup> The NCA, in section 130, further prescribes procedures to be followed *in a court* and sets out the powers of the court under specified circumstances.<sup>2</sup> Even though section 130 is titled “Debt procedures in a Court” it is submitted that prospective litigants will have to take cognisance of this section long before actually reaching the stage where a court will entertain the matter as will become clear from the discussion of the said section.

Section 130(3) is especially relevant and provides that a court must satisfy itself of certain prescribed aspects before it may determine a matter concerning a credit agreement to which the NCA applies, despite any provision of law or contract to the contrary. One of the pressing questions flowing from the above is which party bears the burden of satisfying the court of the existence or absence of these aspects.

This chapter investigates the procedures to be followed in court, the powers of the court under certain circumstances, the allegations that must be included in the pleadings and the manner in which a party can prove the existence or absence of the stipulated circumstances.

### 7.2 Pre-enforcement requirements: Section 130(1)

Section 130(1) provides as follows:

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<sup>1</sup> 34 of 2005 (hereafter “NCA”) s 129.

<sup>2</sup> See in general Otto (2006) 91; Scholtz, Otto, Van Zyl, Van Heerden and Campbell (hereafter Scholtz *et al*) (2008) 12–20; Flemming (2007) 32 to 34.

Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and –

- (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9),<sup>3</sup> or section 129(1), as the case may be;
- (b) in the case of a notice contemplated in section 129(1), the consumer has –
  - (i) not responded to that notice; or
  - (ii) responded to the notice by rejecting the credit provider's proposals; and
- (c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.<sup>4</sup>

As discussed in chapter 6,<sup>5</sup> sections 130(1)(a) and (b) are generally peremptory in enforcement procedures and a credit provider attempting to enforce a credit agreement will be obliged to allege compliance with these requirements.<sup>6</sup> In *ABSA Bank Ltd v Prochaska*,<sup>7</sup> it was confirmed that the credit provider bears the onus of establishing that it has complied with the requirements of this subsection. Section 130(1)(c) only applies to specific agreements, namely, instalment agreements, secured loans or leases and prescribes an additional requirement as far as enforcement of these agreements is concerned.<sup>8</sup> The section provides that a credit provider cannot approach<sup>9</sup> the court to enforce the above agreements if the consumer has surrendered the relevant property. Where the property has been surrendered, another specific procedure as

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<sup>3</sup> The section incorrectly refers to s 86(9) in stead of s 86(10) as discussed in chapter 6 par 6.6.

<sup>4</sup> See Otto (2006) 91; Van Heerden and Otto 2007 *TSAR* 655 at 669; Levenstein 2007 October *Without Prejudice* 6.

<sup>5</sup> See chapter 6 par 6.2.

<sup>6</sup> Scholtz *et al* (2008) 12–20; Van Loggerenberg, Dicker and Malan (hereafter Van Loggerenberg *et al*) 2008 January/February *De Rebus* 40 at 41; see chapter 3 par 3.4 for a general discussion of allegations to be included in a summons or particulars of claim to disclose a complete cause of action. Refer also to that paragraph regarding the obligation of a litigant to be acquainted with the applicable substantive law before drafting the particulars of claim.

<sup>7</sup> *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) 512 (D) at 525C.

<sup>8</sup> Boraine and Renke 2008 *De Jure* 1 at 6; see chapter 8 in general for a detailed discussion of enforcement procedures relating to instalment agreements, secured loans and leases.

<sup>9</sup> Boraine and Renke submit that “the court needs to be approached by means of a summons in this regard.” *Id* n155.

contemplated in section 127 is peremptory and the credit provider has to follow it meticulously.<sup>10</sup> It is therefore submitted that a credit provider seeking enforcement of an instalment agreement, secured loan or a lease must plead in particular that the consumer has not surrendered the property and that the credit provider is therefore allowed to institute enforcement procedures.<sup>11</sup>

### **7.3 Enforcing remaining obligations: Section 130(2)**

Section 130(2) provides that in addition to the circumstances set out in section 130(1) that:

- [I]n 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 section 127; and
  - (b) the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement.

The subsection only applies where the credit provider seeks to enforce remaining obligations and only where enforcement of specific types of agreements, that is, instalment agreements, secured loans or leases is sought.<sup>12</sup> It can further be said that a credit provider will only approach the court to enforce remaining obligations under two circumstances. Firstly, a credit provider will attempt to enforce a deficit where the consumer has voluntarily surrendered the relevant property in terms of section 127 and failed to settle the outstanding balance after the property was sold. Secondly, a shortfall may exist subsequent to a sale following an attachment order where the proceeds were not sufficient to extinguish the debt.<sup>13</sup>

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<sup>10</sup> The procedures pursuant to a voluntary surrender of property are discussed in chapter 8 par 8.2.

<sup>11</sup> Scholtz *et al* (2008) 12–20.

<sup>12</sup> Scholtz *et al* (2008) 12–21 to 12–22. It is not clear why mortgage agreements are absent from the list of credit agreements in this subsection.

<sup>13</sup> Scholtz *et al* (2008) 12–25.

Van Heerden considers the meaning of the phrase “[i]n addition to the circumstances contemplated in subsection (1)”. She asks whether it means that in addition to approaching the court for enforcement of a credit agreement, a credit provider may also approach the court for an order enforcing remaining obligations in terms of a credit agreement? She submits that the words mean that a credit provider may only approach the court to enforce remaining obligations where the credit provider in addition to the requirements set out in section 130(1) also complied with the remainder of section 130.<sup>14</sup> Van Heerden therefore holds the opinion that a section 129(1)(a) notice is a prerequisite to the enforcement of remaining obligations as such notice is required in terms of section 130(1).<sup>15</sup> The reason for her submission is that the delivery of such notice is a prerequisite that needs to be complied with prior to enforcement and that the consumer cannot be deprived of the right to be notified of the possibility to, for instance, consult with a debt counsellor merely because the consumer decided to terminate the agreement voluntarily.<sup>16</sup> Boraine and Renke hold a different view as far as the provision of the section 129(1)(a) notice under these circumstances is concerned.<sup>17</sup> They submit that the notice is not necessary when a court is approached for an order enforcing remaining obligations and base their submission *inter alia* on section 129(1)(b) which renders itself subject to section 130(2).<sup>18</sup> They further state that both, where a consumer voluntarily surrendered property, and, where property has been sold pursuant to an attachment order,<sup>19</sup> section 127(7) read with section 127(8)(a) prescribes a notice demanding performance of remaining obligations prior to enforcement of the shortfall. Boraine and Renke therefore submit that it will not be logical to send a notice in terms of section 129(1)(a) and another in terms of section 127(7). It is submitted, in support of Boraine and Renke’s argument that if the legislature intended the information as set out in section 129(1)(a) to also apply

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<sup>14</sup> *Id.*

<sup>15</sup> Scholtz *et al* (2008) 12–26.

<sup>16</sup> Scholtz *et al* (2008) 12–26 n132.

<sup>17</sup> Boraine and Renke 2008 *De Jure* 1 at 6 n160.

<sup>18</sup> *Id.*

<sup>19</sup> The NCA’s prescribed procedures pursuant to a voluntary surrender as well as an attachment order are discussed in chapter 8.

to the section 127(7) notice, it would have stated same in the wording of section 127(7). It therefore seems that section 130(2) creates an exception to the general applicability of and required compliance with sections 130(1)(a) and 130(1)(b). However, it is submitted that until a clear practice has emerged or case law has clarified the position, litigants should rather combine the two notices under these circumstances by including the prescribed content of the section 129(1)(a) notice, and especially the consumer's rights contained therein, in the section 127(7) notice.

As far as voluntary surrender is concerned, section 130(2) should be read in conjunction with section 130(1)(c). This means that the court may only be approached to enforce remaining obligations once the sale of property voluntarily surrendered has been finalised. Where section 130(2) applies, allegations of compliance with the subsection must be included in the particulars of claim.<sup>20</sup>

A final aspect that needs to be addressed under section 130(2) is the absence of a reference to mortgage agreements. Otto states that it would be “unthinkable” that the legislature intended to extinguish mortgagees’ rights to claim deficits after property was sold and where the proceeds were not sufficient to meet the total outstanding debt.<sup>21</sup> However, he argues that the legislature has chosen to deal with mortgages separately in the NCA and concludes that mortgage agreements “were left out on purpose in section 130(2)” and that shortfalls can therefore not be claimed under these agreements.<sup>22</sup> He further argues that this exclusion might not pass constitutional muster in light of section 25 of the Constitution,<sup>23</sup> namely, the property clause, especially since section 130(2) has retrospective effect, affecting pre-existing contractual obligations.<sup>24</sup> Even though Otto's reasoning is

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<sup>20</sup> Scholtz *et al* (2008) 12–20 and 12–24. Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 41.

<sup>21</sup> Otto (2006) 96.

<sup>22</sup> *Id.*

<sup>23</sup> Constitution of the Republic of South Africa of 1996.

<sup>24</sup> Item 7(2) in Schedule 3 to the NCA only preserves pre-existing statutory rights as opposed to contractual rights – see Otto (2006) 97 n126 in this regard.

supported the possibility that the omission was merely an oversight by the legislature cannot be totally ignored.

#### 7.4 Section 130(3) requirements

A court has to be satisfied that a credit provider complied with and/or did not act contrary to the provisions set out in section 130(3) before approaching the court to determine the matter.<sup>25</sup> Section 130(3) provides that despite any provision of law or agreement to the contrary in

any proceedings<sup>26</sup> commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that –

- (a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;
- (b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and
- (c) that the credit provider has not approached the court –
  - (i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or
  - (ii) despite the consumer having –
    - (aa) surrendered property to the credit provider, and before that property has been sold;
    - (bb) agreed to a proposal made in terms of section 129(1)(a) and acted in good faith in fulfilment of that agreement;
    - (cc) complied with an agreed plan as contemplated in section 129(1)(a); or
    - (dd) brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a).

As this subsection unequivocally states that a court may only determine the matter if *satisfied* that the provisions thereof are met, the question arises as to whom must satisfy the court of compliance therewith. It is submitted that the

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<sup>25</sup> Levenstein 2007 October *Without Prejudice* 6.

<sup>26</sup> Proceedings include both action and application proceedings. Van Heerden and Otto 2007 *TSAR* 655 at 668.

plaintiff will have to take cognisance of this subsection when drafting the particulars of claim.<sup>27</sup> Further, the plaintiff will also be confronted with this subsection when applying for default judgment as in such instance only the plaintiff will be before the court.<sup>28</sup> As discussed in chapter 3, particulars of claim should only include facts material to the cause of action (*facta probanda*) and should therefore not contain facts presented as evidence of such facts (*facta probantia*).<sup>29</sup> In light of this distinction, it is clear that compliance with section 130(3) should be alleged in the particulars of claim to complete the cause of action, but compliance therewith should be presented by way of an affidavit when applying for default judgment.<sup>30</sup> Boraine and Renke submit that in defended matters compliance with the subsection will emerge from the exchange of pleadings.<sup>31</sup> In the event that compliance with the section is not alleged, the defendant may raise an exception to the particulars of claim on the basis that the cause of action was not completed.<sup>32</sup> A special plea may be raised on the merits if the court was approached under circumstances prohibited by the subsection.<sup>33</sup>

## 7.5 Pleadings and proof of compliance

Erasmus and Van Loggerenberg submit that compliance with section 130 is, like section 129 compliance, a *sine qua non* for enforcement and therefore a jurisdictional factor that must be present before the matter may be determined.<sup>34</sup> They also state that the credit provider will have to prove compliance by means of “credible testimony” before the court will determine a matter and that the

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<sup>27</sup> Boraine and Renke 2008 *De Jure* 1 at 11; see chapter 3 par 3.4 for a discussion of allegations to be included in the summons or particulars of claim.

<sup>28</sup> *Id*; see chapter 3 par 3.6 for a discussion of default judgment in general.

<sup>29</sup> See chapter 3 par 3.4.

<sup>30</sup> Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 41; refer also to Cape Provincial Division Practice Note 25 as discussed in chapter 6 par 6.2.

<sup>31</sup> Boraine and Renke 2008 *De Jure* 1 at 11; see in general chapter 3 regarding *inter alia* an exception, plea and special plea.

<sup>32</sup> *Id*; see chapter 3 par 3.8.1 for a general discussion of an exception as an interim procedure.

<sup>33</sup> See chapter 3 par 3.7.1 for a general discussion of the special plea.

<sup>34</sup> Erasmus and Van Loggerenberg (1996) 240B to 240C; Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 41; *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) 512 (D) at 519I to 520A.

consumer will carry the onus to rebut the creditor's evidence.<sup>35</sup> This approach is also in line with the practice notice issued by the Cape Provincial Division as discussed earlier.<sup>36</sup>

In light of the above discussion, it is submitted that the following minimum allegations should be included in a particulars of claim where a credit provider seeks specific enforcement of a credit agreement:<sup>37</sup>

- a Citation of the parties and an allegation that the consumer enjoys the protection of the NCA;<sup>38</sup>
- b that the relevant court has jurisdiction to entertain the matter;<sup>39</sup>
- c the date on which and place where the credit agreement was concluded;
- d that the agreement is in writing and a reference to such agreement as an annexure to the pleading;<sup>40</sup>
- e material terms of the credit agreement;
- f that the credit agreement is governed by the NCA;
- g that the credit provider complied with the prescriptions contained in the NCA;
- h details as to the breach of the contract;
- i compliance with section 129(1)(a) and 129(1)(b) or compliance with section 86(10);<sup>41</sup>
- j prescribed time periods as contemplated in section 130(1) has been complied with; and

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<sup>35</sup> Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 41; *Prochaska* above n34 at 525C.

<sup>36</sup> See chapter 6 par 6.2.

<sup>37</sup> Cancellation and return of goods as well as enforcement of remaining obligations are discussed in chapter 8; see also Scholtz *et al* (2008) 12–22 to 12–24; Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 44.

<sup>38</sup> The credit provider will be the plaintiff and the consumer the defendant.

<sup>39</sup> See chapter 3 par 3.2 read in conjunction with chapter 5 regarding the jurisdiction of courts as far as credit agreements are concerned.

<sup>40</sup> S 93 of the NCA requires a written agreement and High Court Rule 18(7) requires a written agreement to be attached to a summons. No similar rule exists in the Magistrate's Court, but should be attached as good practice.

<sup>41</sup> This allegation will not be necessary in circumstances where s 130(2) is applicable.

k compliance with prescriptions contained in section 130(3) and allegations that the court has not been approached under circumstances prohibited in the subsection.

Prayers:

- l Due amount claimed;
- m interest *a tempore morae*;
- n legal costs; and
- o further and/or alternative relief.<sup>42</sup>

## 7.6 Court's powers: Section 130(4)

### 7.6.1 Introduction

Section 130(4) sets out the powers of a court when considering the enforcement of credit agreements.<sup>43</sup> These powers can be exercised in both the action procedure and the application procedure.<sup>44</sup> The subsection in certain circumstances sets out peremptory orders and leaves no discretion to the court,<sup>45</sup> while in other instances the court may choose from a list of alternative possible solutions, depending on the specific circumstances.<sup>46</sup> The powers of the court under specified circumstances are considered below.

### 7.6.2 Reckless credit: Section 130(4)(a)

The NCA aims to protect consumers *inter alia* by promoting responsibility in the credit market through the discouragement of reckless credit extension. This aim is specifically entrenched in section 3(c)(ii) of the NCA.

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<sup>42</sup> This prayer will only be included in proceedings conducted in the High Court.

<sup>43</sup> Van Heerden and Otto 2007 *TSAR* 655 at 674.

<sup>44</sup> Scholtz *et al* (2008) 12–33.

<sup>45</sup> Visagie 2006 June *De Rebus* 20 at 22 states that the provisions of the NCA are limiting the court's discretion to a large extent.

<sup>46</sup> Levenstein 2007 October *Without Prejudice* 6.

Section 80<sup>47</sup> sets out the instances of reckless credit granting and section 83 the consequences thereof.<sup>48</sup> Section 80 firstly mentions the failure to conduct a financial assessment before entering into a credit agreement with a consumer as reckless credit, irrespective of what the outcome of such an assessment would have been.<sup>49</sup> Secondly, if the information available to the credit provider indicates that the consumer did not understand or appreciate all the risks, costs or obligations in terms of the agreement, the agreement would be reckless.<sup>50</sup> Lastly, reckless credit is extended if entering into the agreement with the consumer would render the consumer over-indebted.<sup>51</sup>

The consequences of, or penalties for reckless credit are the setting aside or suspension of the agreement under the first two instances of reckless credit provision.<sup>52</sup> If, however, a court determines that entering into the agreement made the consumer over-indebted the court must further establish whether the consumer is over-indebted at the time of the court proceedings.<sup>53</sup> If the consumer is indeed over-indebted, the court may make an order that suspends the force and effect of the reckless credit agreement<sup>54</sup> and restructure the consumer's obligations under any other credit agreements.<sup>55</sup>

Section 130(4)(a) leaves no discretion to the court and provides that if a court determines that<sup>56</sup> the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83.

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<sup>47</sup> See Scholtz *et al* (2008) 11–21 to 11–23 for an in-depth discussion of the types of reckless credit.

<sup>48</sup> See Scholtz *et al* (2008) 11–24 to 11–27 for an in depth discussion of the consequences of reckless credit extension.

<sup>49</sup> S 80(1)(a); see Scholtz *et al* (2008) 11–20 for a discussion of assessment mechanisms and procedures.

<sup>50</sup> S 80(1)(b)(i).

<sup>51</sup> S 80(1)(b)(ii).

<sup>52</sup> S 83(2); See Scholtz *et al* (2008) 11–24 to 11–26 in this regard.

<sup>53</sup> S 83(3)(a).

<sup>54</sup> S 83(3)(b)(i); s 84 deals with the effect of suspension of a credit agreement and is dealt with in par 7.6.6.

<sup>55</sup> S 83(3)(b)(ii); such restructuring will be done in accordance with s 87.

<sup>56</sup> Scholtz *et al* (2008) 12–34. See the discussion in van Heerden and Otto 2007 *TSAR* 655 at 675.

### 7.6.3 *Contravention of section 130(3)(a) or (c)*

If a credit provider has not complied with the necessary procedural requirements or approached a court when prohibited from doing so under certain circumstances, the provisions of the NCA are also peremptory and leave no discretion to the court.<sup>57</sup>

Section 130(4)(b) states that if:

the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a), or has approached the court in circumstances contemplated in subsection (3)(c) the court must –

- (i) adjourn the matter before it; and
- (ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;

It is interesting to note that the court must *adjourn* the matter, as this subsection is peremptory. A matter may therefore not simply be struck from the roll.

Section 130(3)(a) refers to the procedures prescribed in sections 127,<sup>58</sup> 129<sup>59</sup> and 131<sup>60</sup> respectively. Sections 127 and 131 largely refer to the same procedure and it is understandable that a court will be able to point out in which respect the credit provider did not comply with the said procedure and direct the credit provider to carry out specific steps before approaching the court again. If, for instance, the credit provider approached a court for the enforcement of remaining obligations after a voluntary surrender but failed to inform the consumer of the deficit after the goods were sold, the court may instruct the credit provider to deliver the required notice and adhere to the ten business-day period before approaching the court again.<sup>61</sup>

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<sup>57</sup> Van Heerden and Otto 2007 *TSAR* 655 at 676.

<sup>58</sup> See chapter 8 par 8.2 for a detailed discussion of s 127.

<sup>59</sup> See chapter 6 in general regarding s 129.

<sup>60</sup> See chapter 8 par 8.3 for a detailed discussion of s 131.

<sup>61</sup> S 127(7)

The reference to section 129, however, creates a predicament as it is submitted that certain peremptory requirements in section 129 complete the plaintiff's cause of action.<sup>62</sup> The institution of any action before the section 129(1)(a) notice has been delivered would be premature. This provision may be to the serious detriment of the consumer as section 86(2) provides that an application for debt review may not be made in respect of a particular agreement if the credit provider has commenced with enforcement procedures.<sup>63</sup> If the credit provider did not adhere to the section 129(1)(a) notice requirement and issued and served a summons, the instruction of the court to comply with the notice requirement before approaching the court again will serve no purpose. In these instances, the rights contained in the notice cannot be exercised by the consumer. The instruction to deliver such notice will be futile, except if the order is coupled with a section 85(a) order leaving the possibility of debt review open even though enforcement has already commenced.<sup>64</sup>

Section 130(3)(c) sets out certain circumstances during which, or occurrences after which, the credit provider may not approach the court. If the matter was, for instance, before an ombud with jurisdiction, the court must adjourn and set out steps to be completed before the matter may resume. It can be expected that the court will order the ombud's investigation to be finalised before approaching the court again. The court may also not be approached, for instance, if the consumer positively has taken specified steps to resolve the matter as set out in section 130(3)(c)(ii). One such example is where the consumer has surrendered the property, under which circumstances the court may only be approached after the procedure set out in section 127(2) to (6) has been followed and a deficit remains. In such an instance it is foreseeable that the court will direct the credit provider to comply with the relevant procedure before pursuing the matter further.

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<sup>62</sup> See chapter 6 par 6.2 regarding the statement that the s 129(1)(a)-notice completes the plaintiff's cause of action.

<sup>63</sup> See chapter 6 par 6.4 for a discussion of the interplay between debt review and debt enforcement procedures.

<sup>64</sup> See chapter 6 par 6.5 for a discussion on s 85.

#### 7.6.4 Pending debt review: Section 130(4)(c)

Section 130(4)(c) deals with the situation where a credit provider instituted proceedings in a court to enforce a credit agreement while the agreement is subject to a pending debt review.<sup>65</sup>

The provisions of this subsection are not peremptory and the court may choose from various options depending on the circumstances of the matter. In terms of section 130(4)(c) the court may:

- (i) adjourn the matter, pending a final determination of the debt review proceedings;
- (ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85(b);<sup>66</sup>  
or
- (iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85(b).

The position envisaged in section 130(3)(c)(i) must be distinguished from the position set out in section 130(4)(c).<sup>67</sup> In the latter instance the consumer has already applied for, and is subject to debt review. Section 130(3)(c) applies where the consumer has taken steps pursuant to a section 129(1)(a) notice.<sup>68</sup>

It is submitted that section 130(3)(c) will apply where the debt counsellor acts as a mediator in resolving a dispute without employing the formal debt review process as contemplated in section 86 of the NCA. This section will also apply

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<sup>65</sup> See chapter 6 par 6.4 for a discussion of the interplay between debt review and debt enforcement procedures.

<sup>66</sup> S 85(b) provides that:

Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may –

- (b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

<sup>67</sup> Van Heerden and Otto 2007 *TSAR* 655 at 676.

<sup>68</sup> *Id*; Scholtz *et al* (2008) 12–35; see also the reasoning by van Heerden and Otto 2007 *TSAR* 655 at 676 to 677 on the distinction between these two subsections.

where the consumer considers the option of applying for formal debt review and is in consultation with the debt counsellor, but did not formally apply for debt review as envisaged in section 86(1). Section 130(4)(c), in turn, will come into play after the consumer formally applied for debt review in terms of section 86(1).<sup>69</sup> Here the court has a choice to adjourn the matter pending the debt counsellor's recommendation, to order the debt counsellor to report directly to the court or order the debt counsellor to discontinue the debt review and utilise the provisions of section 85(b).<sup>70</sup> It is submitted that the distinction discussed above is strengthened by the nature of the powers given to the court under the different circumstances.

#### **7.6.5 Pending matters before the National Consumer Tribunal: Section 130(4)(d)**

Section 130(4)(d) provides that where a matter is pending before the National Consumer Tribunal<sup>71</sup> as contemplated in subsection (3)(b) the court may:

- (i) adjourn the matter before it, pending a determination of the proceedings before the Tribunal; or
- (ii) order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination;

The subsection refers to section 130(3)(b) and will therefore only apply in instances where the matter pending before the Tribunal could result in an order *affecting* the issues to be determined by the court.<sup>72</sup> Two or more distinct issues may arise from the same credit agreement. If a determination of the matter before one forum will not affect the issues before the other forum there can be

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<sup>69</sup> See also reg 24(1) and form 16 contained in Schedule 1 of the regulations.

<sup>70</sup> See chapter 6 par 6.5 for a discussion of s 85.

<sup>71</sup> Chapter 2, Part B contains the provisions relating to the National Consumer Tribunal.

<sup>72</sup> Van Heerden and Otto 2007 *TSAR* 655 at 677; See chapter 3 par 3.7.1 regarding *lis alibi pendens*, which means that there is pending litigation between the same parties flowing from the same cause of action, that may be raised by way of a special plea in general civil procedure.

no objection to cumulative proceedings in different forums. The parties involved may also differ depending on the issue at hand.<sup>73</sup>

#### **7.6.6 *Suspended agreements or agreements subject to debt re-arrangement orders or agreements: Section 130(4)(e)***

If a credit provider approaches a court while the credit agreement is either suspended or subject to a debt re-arrangement order or agreement, and the consumer has complied with that order or agreement, the court must dismiss the matter.

Subsections 84(1) and 88(3) are relevant in this regard. Section 84(1)(c) details the effect of suspension of a credit agreement on a credit provider's rights and determines that during such period the credit provider's rights under the agreement, or under any law in respect of that agreement, are unenforceable despite any law to the contrary.<sup>74</sup>

Section 88(3)(b)(ii) also provides that while an agreement is subject to re-arrangement as agreed upon by credit providers or ordered by court or the Tribunal, such obligations may not be enforced until the consumer defaults in terms of the agreement or order.<sup>75</sup>

In light of the above, it is submitted that whilst either an agreement is suspended or a re-arrangement is agreed upon or ordered and the consumer complies with such re-arrangement, the credit provider may not attempt to enforce such credit agreement.<sup>76</sup>

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<sup>73</sup> Scholtz *et al* (2008) 12–36; Van Heerden and Otto 2007 *TSAR* 655 at 677.

<sup>74</sup> Visagie 2006 June *De Rebus* 20 at 22 who emphasises the “grave consequences” of the suspension of a credit agreement.

<sup>75</sup> See chapter 6 par 6.4 for a discussion of s 88(3).

<sup>76</sup> See also Van Heerden and Otto 2007 *TSAR* 655 at 677 to 678.

## 7.7 Conclusion

Even though section 130 is titled “Debt procedures in a Court”, it is submitted that litigants should take cognisance of its provisions long before they actually reach the stage where a court must determine the matter. A credit provider who seeks enforcement of a credit agreement to which the NCA applies should take note of these provisions prior to the commencement of litigation as well as during the pleading phase as this section prohibits the commencement of enforcement procedures in certain instances and prescribes pre-enforcement procedures in others.

It is submitted that in any enforcement proceedings, save for proceedings where a credit provider attempts to enforce remaining obligations to which section 130(2) applies, compliance with the provisions set out in sections 130(1)(a) and 130(1)(b) are peremptory. Compliance with section 130(3) is peremptory in all enforcement proceedings and must always be alleged in pleadings, whereas compliance with sections 130(1)(a) and 130(1)(b) must be alleged when applicable. Where a credit provider seeks enforcement of an instalment agreement, secured loan or lease, compliance with section 130(1)(c) must be specifically alleged by stating that the consumer did not surrender the relevant property. Section 130(2) will only be applicable in specific circumstances, namely, where an order enforcing remaining obligations under instalment agreements, secured loans or leases are requested. In these instances, compliance with section 130(2) must be alleged in addition to an allegation that section 130(3) has been complied with. It is submitted that these requirements complete the plaintiff’s cause of action and are jurisdictional factors that need to be complied with before a court will entertain a matter.

It is finally submitted that the burden of proof will rest on the credit provider-plaintiff as far as compliance with section 130 is concerned. In defended matters, the consumer defendant will bear the *onus* to rebut such evidence.

## CHAPTER 8: VOLUNTARY SURRENDER, REPOSSESSION OF GOODS AND RE-INSTATEMENT

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### 8.1 Introduction

Section 127 of the National Credit Act<sup>1</sup> affords consumers a statutory right of termination and surrender of goods under certain circumstances.<sup>2</sup> A consumer may voluntarily surrender goods forming the subject of instalment agreements, secured loans or leases irrespective of whether a consumer is in default under such agreements or not.<sup>3</sup> Section 127 further prescribes a detailed procedure to be followed by credit providers subsequent to a voluntary surrender of goods. In turn, section 131 refers back to the same procedure where a credit provider has repossessed property pursuant to an attachment order.

This chapter thus investigates the prescribed statutory procedures relating to a voluntary surrender by consumers on the one hand, and the repossession of goods by credit providers on the other. The impact of the latter procedure on ordinary civil execution procedures is analysed<sup>4</sup> and the possibility of attachment of property for the safekeeping or protection of goods under the NCA is considered.

The fact that the NCA also allows the consumer under certain conditions to re-instate a credit agreement and to resume possession of property voluntarily surrendered or repossessed by the credit provider will also be considered in this chapter.

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<sup>1</sup> 34 of 2005 (hereafter “NCA”).

<sup>2</sup> See Otto (2006) 59; Scholtz, Otto, Van Zyl, Van Heerden and Campbell (hereafter Scholtz *et al*) (2008) 6–12; Flemming (2007) 15 to 16.

<sup>3</sup> S 127(1) read with s 127(3); see par 8.2.2 regarding the definitions of these agreements as contained in s 1 of the NCA.

<sup>4</sup> See chapter 3 par 3.9 for a discussion of general execution procedures.

## 8.2 Termination by way of voluntary surrender

### 8.2.1 Process in terms of section 127

A consumer may voluntarily surrender goods forming the subject of an instalment agreement, secured loan or a lease and the NCA prescribes a specific procedure that a credit provider must follow subsequent to such surrender.<sup>5</sup> This procedure is provided for in section 127 of the NCA.<sup>6</sup>

The consumer sets the process in motion by delivering a written notice to the credit provider to terminate the agreement.<sup>7</sup> If the goods that are subject to the instalment agreement, secured loan or lease are in the credit provider's possession, the consumer merely requests the credit provider to sell the goods.<sup>8</sup> In the event that the goods are not in the possession of the credit provider, the consumer must return them to the credit provider within five business days after the date of notice, unless otherwise agreed between the parties.<sup>9</sup>

Within ten business days after the later of receipt of the notice<sup>10</sup> or receiving the goods from the consumer,<sup>11</sup> the credit provider must furnish the consumer with a written notice indicating the estimated value of the goods.<sup>12</sup> A non-defaulting consumer then has ten business days<sup>13</sup> to withdraw the notice of termination unconditionally and resume possession of the goods.<sup>14</sup> A

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<sup>5</sup> Only instalment agreements, secured loans and leases are referred to in s 127 even though the NCA applies to a wider scope of agreements as discussed in chapter 2 par 2.3.3.

<sup>6</sup> See Otto (2006) 59 to 60; Scholtz *et al* (2008) 6–12 and 9–25 to 9–27; Boraine and Renke 2008 *De Jure* 1 at 6 n160; Van Heerden and Otto 2007 *TSAR* 655 at 656–658; Van Loggerenberg, Dicker and Malan (hereafter Van Loggerenberg *et al*) 2008 January/February *De Rebus* 40 at 41.

<sup>7</sup> S 127(1)(a).

<sup>8</sup> S 127(1)(b)(i).

<sup>9</sup> S 127(1)(b)(ii). Goods must be returned to the credit provider's place of business during ordinary business hours.

<sup>10</sup> S 127(1)(b)(i).

<sup>11</sup> S 127(1)(b)(ii).

<sup>12</sup> S 127(2).

<sup>13</sup> After receiving the notice as contemplated in s 127(2).

<sup>14</sup> S 127(3).

consumer in default of the credit agreement is not entitled to withdraw the termination notice.<sup>15</sup>

The credit provider must return the goods to a non-defaulting consumer who has elected to exercise the right of withdrawal of the earlier termination notice.<sup>16</sup> In the case of a consumer in default or where a non-defaulting consumer has not responded to the valuation notice, the credit provider must sell the goods as soon as possible for the best price reasonably obtainable.<sup>17</sup>

After the sale of the goods, the credit provider must credit the consumer's account with the proceeds of the sale less reasonable expenses in connection with the sale, or debit the consumer's account with a charge.<sup>18</sup> The credit provider must further furnish a notice to the consumer setting out the settlement value prior to the sale,<sup>19</sup> the gross amount realised,<sup>20</sup> net proceeds of the sale,<sup>21</sup> as well as the amount credited or debited to the consumer's account.<sup>22</sup> If the amount credited to the consumer's account is less than the settlement value or an amount is debited to the account, the credit provider may further demand payment of the outstanding balance in the notice.<sup>23</sup>

In the event that a surplus remains after crediting the consumer's account and another credit provider has a registered agreement in respect of the same goods, the excess amount must be remitted to the National Consumer Tribunal which may order the distribution of this amount in a just and reasonable manner.<sup>24</sup> If no other credit provider has a registered agreement relating to the same goods, the balance must be remitted to the consumer

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<sup>15</sup> S 127(3).

<sup>16</sup> S 127(4)(a).

<sup>17</sup> S 127(4)(b).

<sup>18</sup> S 127(5)(a). The consumer's account will be debited where the proceeds of the sale could not entirely extinguish the costs of the sale; see *Otto* (2006) 60 n87; *Scholtz et al* (2008) 9–27.

<sup>19</sup> S 127(5)(b)(i).

<sup>20</sup> S 127(5)(b)(ii).

<sup>21</sup> S 127(5)(b)(iii).

<sup>22</sup> S 127(5)(b)(iv).

<sup>23</sup> S 127(5) read with s 127(7).

<sup>24</sup> S 127(6)(a).

when delivering the notice in terms of section 127(5)(b) and the agreement is terminated upon such remittance.<sup>25</sup>

If a shortfall remains after an amount was credited to the consumer's account or when an amount was debited to the consumer's account, the credit provider may demand payment of the outstanding amount when issuing the section 127(5)(b) notice.<sup>26</sup> This demand is in fact the section 127(7) notice that will further be referred to as such. In the event that the consumer fails to settle the demanded outstanding amount within ten business days from receiving the notice, the credit provider may commence with enforcement proceedings in terms of the Magistrates' Courts Act.<sup>27</sup> If the demanded amount is paid at any time before judgment is obtained, the agreement is terminated upon payment.<sup>28</sup>

Interest is payable on the outstanding amount at the rate applicable to the credit agreement, as from the time of the demand until the outstanding balance has been fully settled.<sup>29</sup> A credit provider who fails to follow the procedure as set out in section 127 is guilty of an offence.<sup>30</sup>

### **8.2.2 Perspectives on the section 127 procedure**

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

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<sup>25</sup> S 127(6)(b).

<sup>26</sup> S 127(7).

<sup>27</sup> 32 of 1944; s 127(8)(a); see chapter 5 in general for a discussion of jurisdiction of courts relating to credit agreements regulated by the NCA.

<sup>28</sup> S 127(8)(b).

<sup>29</sup> S 127(9). It seems that by implication a credit provider's right to interest is suspended prior to such demand.

<sup>30</sup> S 127(10); see Otto (2006) 100; Scholtz *et al* (2008) 16–3.

A critical issue that must be addressed is what exactly the legislature had in mind with the phrase “goods that are the subject of that agreement” in section 127(1)(b)(ii). The meaning of the word “goods” as well as the meaning thereof within the quoted phrase must be considered. As “goods” are neither defined in the NCA nor the regulations it is submitted that it should bear its ordinary meaning, being a referral to movable property.<sup>31</sup> This inference is strengthened by the usage of the word within its context as the section only applies to instalment agreements, secured loans and leases all of which concern only movable property. Section 1 defines the respective agreements as follows:

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

- (a) all or part of the price is deferred and is to be paid by periodic payments;
- (b) possession and use of the property is transferred to the consumer;
- (c) ownership of the property either –
  - (i) passes to the consumer only when the agreement is fully complied with; or
  - (ii) passes to the consumer immediately subject to a right of the credit provider to re-possess the property if the consumer fails to satisfy all of the consumer’s financial obligations under the agreement; and
- (d) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred;

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

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- (a) advances money or grants credit to another, and
  - (b) retains, or receives a pledge or cession of the title to any movable property or other thing of value as security for all amounts due under that agreement;<sup>32</sup>

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<sup>31</sup>The most appropriate general definition of goods in a legal dictionary is to be found in Milne, Cooper and Burne (1951) 332, viz that “Goods shall mean goods, luggage or other movable property of any description”.

<sup>32</sup> This definition creates uncertainties with regard to the object of the security in the sense that it initially refers to movable property but then immediately states that it also applies to a pledge or session of another thing of value. In its ordinary context “thing” may include all types of property, also immovable property. Otto also refers to this apparent inaccurate construction by indicating that mortgage agreements are dealt with separately in the NCA –

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

It is submitted that the phrase “goods that are the subject of that agreement” encompasses two instances, namely (a) where movable goods are financed under a credit agreement<sup>33</sup> irrespective of whether ownership passed or had been retained,<sup>34</sup> and (b) where movable goods are used as security for payment of amounts due under a credit agreement.<sup>35</sup>

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

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

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see Scholtz *et al* (2008) 8–9. It is submitted that it was not the intention of the legislature to include mortgage agreements in respect of immovable property in this context.

<sup>33</sup> In the case of an instalment agreement or a lease.

<sup>34</sup> Ownership can either pass or be retained under an instalment agreement.

<sup>35</sup> In the case of a secured loan; see chapter 3 par 3.9.5 for a discussion of creditors with real rights to property.

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

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

When compared to the position under the Credit Agreements Act,<sup>36</sup> the point of view exists that section 127 of the NCA differs drastically from the previous position in this regard. In terms of section 12 of the Credit Agreements Act, the consumer could have been re-instated in the contract after goods had been returned to the credit provider if the consumer brought payments up to date within 30 days and the consumer did not terminate the agreement.<sup>37</sup> The situation under the Credit Agreements Act therefore provided for re-instatement even if the consumer was in default at some stage.<sup>38</sup> Otto submits that the position under the Credit Agreements Act differs from the position under section 127(3) of the NCA in that a consumer may consider the

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<sup>36</sup> 75 of 1980; Otto (2006) 60; Scholtz *et al* (2008) 9–26; see also Sawyer 2008 July *Without Prejudice* 44.

<sup>37</sup> See in general Otto 1981 *SALJ* 516.

<sup>38</sup> Otto (2006) 60.

withdrawal of the consumer's notice of termination with the proviso that the consumer is not in default.<sup>39</sup>

However, it is arguable that section 127(3) can be construed to resemble section 12 of the Credit Agreements Act to some extent. The words "unless the consumer *is* in default"<sup>40</sup> in section 127(3) do not mean that such consumer was *never* in default. Section 127(3) could well be interpreted that if such consumer was in default, the default was remedied in that the consumer brought payments up to date and has thereby cancelled the default. It is, however, clear that a consumer may not withdraw the consumer's notice of termination whilst the consumer *is* in default. It is further submitted that the agreement is not terminated upon the provision of the consumer's written notice of termination as sections 127(6)(b) and 127(8)(b) clearly provide that the agreement is only terminated upon remittance of a surplus amount to the consumer in the case where section 127(6)(b) is applicable, or when the consumer remits the shortfall to the credit provider in circumstances to which section 127(8)(b) applies.

In terms of the former Credit Agreements Act, it frequently happened that a consumer surrendered property to a credit provider, who then sold the goods for much lower than their market value. The consumer had to settle the difference between the price realised and the outstanding balance on the account. The NCA has improved this situation by providing that if a consumer did not withdraw the notice of termination or when a consumer is still in default after the ten-day period has lapsed, a credit provider must sell surrendered property as soon as practicable for the best price reasonably obtainable. Whether a credit provider has complied with the direction that goods must be sold "as soon as practicable for the best price reasonably obtainable", will depend on *inter alia* the type of goods, market conditions, the condition of the goods as well as customs and practice in the specific industry.<sup>41</sup> Even though

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<sup>39</sup> Scholtz *et al* (2008) 9–26; Van Heerden and Otto 2007 *TSAR* 655 at 657.

<sup>40</sup> Writer's own emphasis.

<sup>41</sup> Van Heerden and Otto 2007 *TSAR* 655 at 657 n28; see also par 8.2.3 for a discussion of s 128 which provides a remedy to a consumer who is not satisfied that goods were sold as soon as practicable for the best reasonably obtainable price.

consumers must still settle a shortfall, credit providers may clearly not sell the goods for just any price.<sup>42</sup>

If after the property was sold an amount is credited to the consumer's account and a shortfall remains, or where the consumer's account is debited, the credit provider may demand payment of the outstanding amount in terms of section 127(7). It is clear that the section 127(7) notice is a prerequisite for enforcement of the remaining obligations under the agreement. In light of *inter alia* the aforesaid, Boraine and Renke submit that a section 129(1)(a) notice need not be sent where the credit provider approaches a court for an order enforcing remaining obligations following a voluntary surrender in terms of section 127.<sup>43</sup> They rely *inter alia* on section 129(1)(b), that provides that the provision of the section 129(1)(a) notice is subject to section 130(2). Section 130(2) deals with the enforcement of remaining obligations pursuant to either an attachment order or surrender of property in terms of section 127. Boraine and Renke are further of the opinion that a section 129(1)(a) notice would be superfluous as section 127(7) read together with section 127(8)(a) prescribes a notice demanding fulfilment of remaining obligations prior to enforcement. In support of Boraine and Renke's point of view, it is submitted in chapter 7 that if the legislature intended section 129(1)(a) information to be included in the section 127(7) notice, it would have implicated same.<sup>44</sup>

The last issue under a voluntary surrender of goods in terms of section 127 that deserves attention is the fact that section 127(8) specifically provides that a credit provider may only commence enforcement proceedings in terms of the Magistrates' Courts Act<sup>45</sup> if the consumer fails to pay a shortfall within ten business days from *receiving* the section 127(7) notice. The evidential

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<sup>42</sup> Campbell and Logan (2008) 112.

<sup>43</sup> Boraine and Renke 2008 *De Jure* 1 at 6 n160; compare Scholtz *et al* (2008) 12–25 to 12–26 for an opposite view as discussed in chapter 7 par 7.3.

<sup>44</sup> See chapter 7 par 7.3.

<sup>45</sup> See chapter 3 par 3.2 in conjunction with chapter 5 regarding the jurisdiction of courts under the NCA.

problems that will inevitably arise are of concern to credit providers attempting to enforce remaining obligations under credit agreements.<sup>46</sup>

### **8.2.3 Disputed sale of goods**

In terms of section 128,<sup>47</sup> the National Consumer Tribunal may review a disputed sale of goods in terms of section 127 if a consumer could not resolve the dispute directly or through alternative dispute resolution with the credit provider.<sup>48</sup> The Tribunal may order the credit provider to pay the consumer an amount exceeding the net proceeds of the sale if the Tribunal is not satisfied that the goods have been sold as soon as practical for the best reasonably obtainable price.<sup>49</sup> Such a decision by the Tribunal is subject to appeal or review by the High Court to the extent permitted by section 148.<sup>50</sup>

## **8.3 Repossession pursuant to an attachment order**

### **8.3.1 Process in terms of section 131**

Section 131 of the NCA forms part of Chapter 6 Part C dealing with debt enforcement by repossession or judgement and is titled “Repossession of goods”.<sup>51</sup> This section provides that:

If a court makes an attachment order with respect to property that is the subject of a credit agreement, section 127(2) to (9) and section 128, read with the changes required by the context, apply with respect to any goods attached in terms of that order.<sup>52</sup>

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<sup>46</sup> See the discussion in chapter 6 par 6.8; also see Van Heerden and Otto 2007 *TSAR* 655 at n34.

<sup>47</sup> See Otto (2006) 60 to 61; Scholtz *et al* (2008) 9–27; Boraime and Renke 2008 *De Jure* 1 at 6 n160; Van Heerden and Otto 2007 *TSAR* 655 at 672; Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 42; Flemming (2007) 16.

<sup>48</sup> S 128(1); alternative dispute resolution in terms of the NCA is contained in Chapter 7 part A.

<sup>49</sup> S 128(2); see Otto (2006) 33.

<sup>50</sup> S 128(3); s 148 falls under Chapter 7 part D and deals with appeals and reviews.

<sup>51</sup> Erasmus and Van Loggerenberg (1996) 240C; Scholtz *et al* (2008) 12–28; Boraime and Renke 2008 *De Jure* 1 at 8; Van Heerden and Otto 2007 *TSAR* 655 at 671 to 673; Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 42.

<sup>52</sup> The NCA’s detailed prescriptions in this regard inevitably have an impact on general execution procedures as discussed in chapter 3 par 3.9.

### **8.3.2 Perspectives on the section 131 procedure**

In the event that a credit provider seeks cancellation of a credit agreement, as opposed to specific performance, the particulars of claim will typically include prayers for cancellation of the agreement and restitution of property forming the subject of such agreement.<sup>53</sup> Section 131 provides prescriptions regarding aspects of the execution and realisation process after property had been attached pursuant to an attachment order by incorporating the provisions of sections 127(2) to (9) and 128 of the NCA.<sup>54</sup>

As in the case of the discussion on voluntary surrender, the wording in section 131 should be analysed to ascertain exactly what types of property the legislature had in mind when drafting section 131. It is of paramount importance to determine the intention of the legislature as the credit provider should follow the section 127 procedure after attachment of property as referred to by section 131. The relevant part of the phrase quoted and analysed under section 127, namely “*goods* that are the subject of that agreement”<sup>55</sup> should be compared and contrasted with the phrase, “*property* that is the subject of a credit agreement,”<sup>56</sup> in section 131. Even though the heading of section 131 refers to “*goods*” and the word is again used in the particular section, the legislature chose to deviate from the wording used in section 127 by referring specifically to “*property*” under the quoted phrase. This despite the fact that the rest of the quoted phrases under sections 127 and 131 are almost exactly the same and can be attributed the same meaning. Therefore, the question is if an inference can be drawn that the two words should not merely be awarded the same meaning and that it can also therefore not be assumed that the legislature only had movable property in mind under section 131? Unfortunately, as was the case with “*goods*”,

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<sup>53</sup> Borraine and Renke 2008 *De Jure* 1 at 8.

<sup>54</sup> *Id*; see also *ABSA Bank Ltd v De Villiers and Another* 2009 (5) 40 (C) at 49 and 52 where the court held that the legislature has not done away with the common law requirement of cancellation of a agreement before an attachment order in terms of s 131 may be granted (although this case was reported after 30 June 2009, the judgment was delivered and available to the writer prior to this date).

<sup>55</sup> Writer’s own emphasis.

<sup>56</sup> Writer’s own emphasis.

“property” is not defined in the NCA or the regulations. It was established that the word “goods” refers to movable property specifically, by *inter alia* referring to the definitions of the agreements listed in section 127(1). Section 131 refers back to the procedure contained in section 127(2) to (9), thereby specifically excluding section 127(1) and therefore also the limitation placed on agreements to which that procedure applies. Section 131 does not refer to specific types of credit agreements, which could have shed some light on the meaning of “property”. It is a further question if the legislature really intended to exclude immovable property that is the object of a credit agreement in terms of the NCA and that could therefore also be subject to an attachment? If this was the case, the legislature would have denied such a consumer the protective measures provided for in section 131 of the NCA and it is not clear what the reason would have been for such a denial. In light of the above, it is thus submitted that there is good reason that “property” should be read within this particular context, to include both movable and immovable property for the purposes of section 131.<sup>57</sup> The reference in section 131 to “a credit agreement” strengthens this submission as section 8, dealing with the classification of credit agreements, also uses the phrase “a credit agreement” whereafter the classes of agreements regulated by the NCA are dealt with. Mortgage agreements are specifically listed in section 8 and are defined in section 1 as meaning “a credit agreement that is secured by a pledge of immovable property”. It would also be incomprehensible that the NCA should regulate mortgage agreements in all instances except that the protective measures in favour of the consumer as prescribed by sections 127(2) to 127(9) do not apply to such agreements. It is finally submitted that if the legislature intended immovable property to be excluded from the ambit of section 131 it should have made it clear by specifically excluding such property. The later use of the word “goods” in the section may raise the question if the term “property” is not limited by the use of the former and that the section therefore only applies to movable property. It is submitted that this

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<sup>57</sup> The current notion in the law of property is to attribute a wider meaning to the word “property” thereby referring to “everything which can form part of a person’s estate, including corporeal things and incorporeal interests and rights” – Van der Walt and Pienaar (2006) 8. See also Badenhorst, Pienaar and Mostert (2006) 2 where property is defined as “referring to a wide variety of assets that make up a person’s estate or belongings and which serve as objects of the rights that such a person exercises in respect thereof”.

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

A further issue that should be investigated is what is meant with the word “repossession” in particular. This term is also not defined in the NCA or the regulations. Usually, the expression is used to refer to an act by a credit provider to cancel an agreement and claim back possession of property where such credit provider has retained ownership of the property. There may also be instances of statutory rights of repossession like in the case of an instalment agreement where ownership has passed to the consumer, but where the credit provider enjoys such a statutory right.<sup>58</sup> Repossession is therefore not readily used when referring to the attachment of property forming the basis of real security.<sup>59</sup> However, as already indicated it seems that “repossession” may be attributed a wider meaning, to include instances where ownership has passed to the buyer. This could be interpreted as either a specific statutory revival of ownership under instalment agreements or the inference can be drawn that the legislature referred to repossession in a wider context throughout the NCA, thereby including both repossession of property by the true owner and attachment of property forming the basis of contractually negotiated securities. It is submitted that the latter, however inelegantly stated, is what was intended with repossession as used by the legislature, in that it would be unthinkable that the NCA provides an elaborate procedure for instances where a true owner wishes to cancel an agreement and reclaim property, but not where a credit provider seeks attachment of property forming the basis of a security. In light of the above discussion it is submitted that section 131 refers to the attachment of both movable and immovable property irrespective of whether the credit provider retained ownership thereof or whether the goods formed part of contractually agreed securities.<sup>60</sup>

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<sup>58</sup> See the definition of instalment agreement as defined in s 1 and discussed in par 8.2.2.

<sup>59</sup> See chapter 3 par 3.9.5 for a discussion of contractually negotiated securities.

<sup>60</sup> See also Brown (1993) 2552 who refers to “repossess” in the wider sense of the word as meaning

1 Regain or recover possession of (a place, property, a right, etc.); reoccupy. Also (*spec.*), regain or retake possession of (property or goods being paid for by instalments) when a purchaser defaults on the payments. L15. 2 Restore

A proper attachment order for the purposes of execution under section 131 presupposes that the agreement was cancelled by the credit provider.<sup>61</sup> However, it should be noted that section 129(3)(a) provides that a consumer who is in default may re-instate a credit agreement before a credit provider has cancelled the agreement by making certain payments as provided for in this section. “Re-instate” in this context can be construed to mean that the consumer thus has the right to re-instate an already cancelled agreement. Such an interpretation would, however, not make sense since the first part of the section clearly states that the consumer may only exercise this right before the credit provider has cancelled the agreement. It is thus submitted that the section had the situation in mind where the consumer brings his or her payments up to date in general, or under circumstances where the credit provider already acquired the right to cancel the agreement, but has not yet exercised such right. Clearly the consumer, by making the prescribed payments, will prevent the credit provider from exercising the right to cancel the agreement and thereafter to continue with such an agreement. But the latter proposed construction is clouded when section 129(3)(a) is read with section 129(3)(b) that allows the consumer to resume possession of any property that had been repossessed by the credit provider pursuant to an “attachment order” and after complying with section 129(3)(a). In the latter instance it seems impossible that repossessed property pursuant to an attachment order could have been attached for the purposes of execution if the contract has not been cancelled.<sup>62</sup>

It was argued above that mortgage agreements are included under section 131 as property should bear its ordinary meaning, thereby including both movable and immovable property. Based on this argument, the procedure set out in terms of section 127(2) to (9) should therefore also apply pursuant to the attachment of immovable property. Otto argues rather convincingly that a

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(a person) *to* or re-instate *in* possession of something. Sc. L16. 3 Put (a person) in possession of something again. L16.

<sup>61</sup> See also the discussion in par 8.3.4.

<sup>62</sup> See also par 8.3.5 regarding interim attachment orders and interdicts where section 129(3) is also considered.

credit provider cannot claim the shortfall under a mortgage agreement with reference to section 130(2),<sup>63</sup> since this deals with the enforcement of remaining obligations and lists the same agreements as those mentioned in section 127(1), namely, instalment agreements, secured loans and leases. It was, however, submitted in chapter 7 that the exclusion of mortgage bond in section 130(2) could have been a mere oversight by the legislature.<sup>64</sup> Some support for this argument may be found in the fact that section 131 did not exclude subsections 127(7),<sup>65</sup> 127(8)<sup>66</sup> and 127(9)<sup>67</sup> when referring to the procedures contained in section 127. It is nevertheless submitted that the legislature should clarify its intention as far as section 130(2) is concerned by expressly including or excluding mortgage agreements.

Much has been said above about the exclusion of section 127(1) from the section 131 procedure. Section 127(10) is, however, also excluded thereby not rendering non-compliance with the process an offence as opposed to non-compliance in the case of a voluntary surrender.<sup>68</sup>

The last issue that should be addressed in the realm of section 131 read together with the section 127 procedure, is whether this procedure substitutes the general civil execution procedures discussed in chapter 3.<sup>69</sup> Section 131 commences with the words: “If a court makes an attachment order”, and ends with “goods attached in terms of that order”. In light of the quoted phrases it is submitted that the general execution rules will fully apply up to the actual attachment of property forming the subject of a credit agreement. Thereafter, it is submitted, the section 127 procedure does not substitute the general civil execution procedure, but supplements it. Section 127 does not contain

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<sup>63</sup> See chapter 7 par 7.3 for a discussion of the enforcement of remaining obligations under mortgage agreements; Otto (2006) 96.

<sup>64</sup> See chapter 7 par 7.3.

<sup>65</sup> This subsection deals with the notice that a credit provider may send to a consumer when a deficit remains after the sale of the property.

<sup>66</sup> This subsection refers to enforcement proceedings that may commence within ten business days subsequent to the demand in terms of s 127(7). It further provides that the agreement will be terminated upon payment of the demanded shortfall.

<sup>67</sup> This subsection provides that the interest payable on the demanded shortfall is at the rate applicable to the credit agreement.

<sup>68</sup> Van Heerden and Otto 2007 *TSAR* 655 at 672 n107.

<sup>69</sup> See chapter 3 par 3.9.

elaborate execution procedures but rather points to consumer protection, by providing for additional consumer rights. These rights include keeping consumers informed during each step of the process and further that property should be sold as soon as practicable for the best price reasonably obtainable. There are, however, slight deviations from the general execution process. The first deviation is the direction that a surplus should be remitted to the Tribunal if another credit provider has a registered credit agreement in respect of the same property, and the second that the credit provider will only be able to claim damages after the section 127 process was completed *in toto*.<sup>70</sup> The last deviation is derived from section 127(6) that specifically provides that the surplus amount should be remitted to the consumer or the Tribunal depending on the specific circumstances at hand. Up to that stage the credit provider is only allowed the amount due in terms of the agreement together with default charges and reasonable costs incurred in relation to the sale of the property.<sup>71</sup>

### **8.3.3 Dispute over costs of attachment**

Section 132 provides for compensation for a credit provider in relation to disputed costs of attachment.<sup>72</sup> Section 132(1) provides that if a dispute arises relating to the costs of attachment of property in terms of sections 129 to 131, a credit provider must firstly attempt to resolve same directly with the consumer or through alternative dispute resolution.<sup>73</sup> If the dispute could not be resolved, a credit provider may turn to the court to claim compensation from the consumer in excess of the costs of repossession that is permitted under section 131.<sup>74</sup>

Section 132(2) provides that the court may<sup>75</sup> grant an order as contemplated in section 132(1) if the court is satisfied that

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<sup>70</sup> Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 42.

<sup>71</sup> *Id.*

<sup>72</sup> Erasmus and Van Loggerenberg (1996) 240C; Otto (2006) 63–64; Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 42; Boraine and Renke 2008 *De Jure* 1 at 13.

<sup>73</sup> S 132(1); alternative dispute resolution is provided for in chapter 7 part A.

<sup>74</sup> S 132(1).

<sup>75</sup> The court has a discretion to award compensation to a credit provider.

- (a) the consumer knowingly –
  - (i) provided false or misleading information to the credit provider in terms of section 97;<sup>76</sup> or
  - (ii) engaged in a pattern of behaviour that was reasonably likely to frustrate or impede the exercise of the credit provider’s right to repossess property under section 129 to 131; and
- (b) as a result, the credit provider experienced unreasonable delay or incurred exceptional costs in the exercise of those rights.

Otto submits that a credit provider who experiences delays in the attachment of goods may or may not incur extra costs.<sup>77</sup> He argues that a credit provider will find it difficult to recover a loss, such as deterioration or a decrease in value, due to a delay and that the court may “apparently” make a cost order purely on delay caused by the consumer.<sup>78</sup> On the other hand, he argues, section 132(1) specifically refers to the cost of attachment and submits that the legislature should have drafted the section more carefully. Lastly, he mentions the possibility that section 132(2)(b) can be construed to provide for compensation in two instances, namely, when “exceptional costs” have been incurred or on grounds of “unreasonable delay”.<sup>79</sup> In support of Otto, it is submitted that the legislature should intervene so as to clarify its intention in terms of section 132.

Erasmus and Van Loggerenberg submit that a credit provider claiming such compensation must prove the aspects contained in section 132 by means of credible testimony before an order for compensation will be made.<sup>80</sup> Van Heerden states that a credit provider will have to satisfy the court as regards both sections 132(2)(a) and (b).<sup>81</sup>

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<sup>76</sup> S 97 forms part of chapter 5 part B, namely, disclosure, form and effect of credit agreements and specifically deal with the consumer’s obligation to disclose the location of goods.

<sup>77</sup> Otto (2006) 64.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; see also Scholtz *et al* (2008) 12–38.

<sup>80</sup> Erasmus and Van Loggerenberg (1996) 240C; Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 42.

<sup>81</sup> Scholtz *et al* (2008) 12–38.

### **8.3.4 Further perspectives on re-instatement in terms of section 129(3) and section 129(4)**

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

It is clear from these provisions that the legislature intended to place the consumer in the optimum position, in that the latter will only be barred from bringing payments up to date and thereby remedying the default once the goods have been sold in all the instances as indicated in section 129(4) that follow *inter alia* an attachment order or the surrender of property as referred to in section 129(4).<sup>82</sup> On this basis it can therefore be said that the sale of the property marks the final point of no return for the consumer. Thereafter the consumer may not re-instate the credit agreement and resume possession of surrendered goods.

As discussed in paragraph 8.2.2 and as will be seen from the discussion in paragraph 8.3.5, section 129(3) read together with section 129(4) is not without its interpretational difficulties.

### **8.3.5 Interim attachment of goods and interdicts**

The NCA does not expressly provide for interim attachment orders intended for the safekeeping or protection from deterioration of goods as opposed to an

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<sup>82</sup> Although not altogether clear, it is argued below at par 8.3.4 that “attachment order” in this context may refer to an interim attachment order.

order for permanent attachment by way of legal recourse.<sup>83</sup> Such orders are, however, not prohibited either. A clear need exists for such orders especially where a credit provider intends to ask for cancellation and permanent return of goods forming the subject of a credit agreement and where the goods are at risk.<sup>84</sup> In order to determine whether such a possibility exists under the NCA, previous legislation and decisions in terms thereof should at least be considered.<sup>85</sup>

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

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<sup>83</sup> Otto (2006) 95; Boraine and Renke 2008 *De Jure* 1 at 12; Erasmus and Van Loggerenberg (1996) 87.

<sup>84</sup> Boraine and Renke 2008 *De Jure* 1 at 12.

<sup>85</sup> See Scholtz *et al* (2008) 12–28.

<sup>86</sup> The credit provider must have already issued summons before an application under s 17(2) could be brought.

<sup>87</sup> See Grové and Otto (2002) 52 to 53; Otto (1991) par 38.

<sup>88</sup> S 30 of the Magistrates' Courts Act was used to obtain interim attachment of goods pertaining to lease agreements.

<sup>89</sup> See Grové and Otto (2002) 52; Otto (1991) par 38.

<sup>90</sup> S 18(2).

<sup>91</sup> Otto (2006) 94; For a further discussion of the decisions see Steyn 2000 *SALJ* 661; Steyn 2004 *SA Merc LJ* 77; Otto 2000 *De Jure* 181.

Purchase Act.<sup>92</sup> It is thus necessary to refer briefly to the development of interim attachment orders under both the Hire-Purchase Act and the Credit Agreements Act.

In *Fil Investments v Levinson*<sup>93</sup> the Witwatersrand Local Division held that an interim attachment order was not possible when considering the wording of section 12(b) of the Hire-Purchase Act. Section 12(b) provided that:

no seller shall, by reason of any failure on the part of the buyer to carry out any obligation under any agreement, be entitled to enforce any provisions in the agreement for the payment of any amount as damages or for any *forfeiture* or penalty or for the acceleration of the payment of any instalment, unless he has made written demand to the buyer to carry out the obligation in question within a period stated in such demand, not being less than ten days, and the buyer has failed to comply with such demand.<sup>94</sup>

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

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

The meaning of “forfeiture” was considered and it was decided that the word is wide enough to include loss of possession.<sup>95</sup> In a Free State decision, *Santam Bpk v Dempers*,<sup>96</sup> the court arrived at a contrary conclusion when considering the wording of the Credit Agreements Act. The court decided that section 11 of the Credit Agreements Act differed in a material aspect from section 12(b) of the Hire-Purchase Act.<sup>97</sup> Section 11 provided that a credit provider may not “claim the return of the goods” before first notifying the

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<sup>92</sup> 36 of 1942; see *Otto* (1991) par 29(g); *Otto* (2006) 94; *Scholtz et al* (2008) 12–29 n144; *Van Heerden and Otto* 2007 *TSAR* 655 at 678 n137 and n138; *Boraine and Renke* 2008 *De Jure* 1 at 12.

<sup>93</sup> *Fil Investments (Pty) Ltd v Levinson* 1949 (4) 482 (W).

<sup>94</sup> Writer’s own emphasis; see also *Scholtz et al* (2008) 12–30 n145.

<sup>95</sup> *Fil Investments* above n93 at 486.

<sup>96</sup> *Santambank Bpk v Dempers* 1987 (4) 639 (O).

<sup>97</sup> *Dempers* above n96 at 644.

consumer of his or her breach of contract and demanding performance. The court held that the application for an interim attachment order cannot be equated to the return of goods. It was, however, decided that the goods must remain in the possession of the sheriff in the meantime and an action for the permanent return of the goods should follow shortly.<sup>98</sup> *Dempers* was not followed in the Witwatersrand Local Division in *First Consolidated Leasing and Finance Corp Ltd v NM Plant Hire*<sup>99</sup> as the court preferred its previous decision in *Fil Investments*.<sup>100</sup> Hereafter, the Witwatersrand Local Division in *BMW Financial Services (Pty) Ltd v Mogotsi*,<sup>101</sup> however, followed *Dempers*.

*Dempers* is preferred as the objective in applying for an interim order is that of safekeeping pending a final attachment order. The intention is not the permanent return of such goods and cannot be seen as enforcement as such.<sup>102</sup> It is submitted that the approach in *Dempers* should be followed when considering interim attachment orders for safekeeping and prohibition of depreciation in terms of the NCA, but the courts may favour the approach that crystallised within their respective divisions prior to the NCA.<sup>103</sup> Boraine and Renke argue that the common law will prescribe the substance of a right to an interim attachment order whilst the procedures of the relevant courts will prescribe the procedures to be followed.<sup>104</sup> In the Magistrates' Courts, section 30(1) of the Magistrates' Courts Act read together with rule 56 of the Magistrates' Courts Rules need to be followed.<sup>105</sup>

Finally, section 129(3) deserves some attention in this regard.<sup>106</sup> The section provides as follows:

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<sup>98</sup> *Id* at 645–646 and 648.

<sup>99</sup> *First Consolidated Leasing and Finance Corporation Ltd v NM Plant Hire (Pty) Ltd* 1988 (4) 924 (W).

<sup>100</sup> *First Consolidated Leasing and Finance Corporation Ltd* above n99 at 925.

<sup>101</sup> *BMW Financial Services (Pty) Ltd v Mogotsi* 1999 (3) 384 (W) at 387 and 388.

<sup>102</sup> Otto (2006) 95; Scholtz *et al* (2008) 12–29 to 12–30; Boraine and Renke 2008 *De Jure* 1 at 12 to 13; Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 42; Van Heerden and Otto 2007 *TSAR* 655 at 679.

<sup>103</sup> Otto (2006) 95; Boraine and Renke 2008 *De Jure* 1 at 12; Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 42.

<sup>104</sup> Boraine and Renke 2008 *De Jure* 1 at 12.

<sup>105</sup> Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 42; Boraine and Renke 2008 *De Jure* 1 at 13.

<sup>106</sup> Van Heerden and Otto 2007 *TSAR* 655 at 683 to 684.

- Subject to subsection (4), a consumer may –
- (a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and –
  - (b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.

As was submitted previously, section 129(3) is unclear and may even be contradictory.<sup>107</sup> Van Heerden submits that section 129(3) may be construed to refer to interim attachment orders.<sup>108</sup> She further states that section 129(4)(a) in contrast seems to refer to a final attachment order.<sup>109</sup> Otto states that section 129(3) may even lead one to believe that a genuine attachment order is possible prior to cancellation, but that the matter is not altogether clear.<sup>110</sup> It is submitted that section 129(3) should be redrafted in order to provide clearly for interim attachment orders with the object of safekeeping pending a final attachment order.<sup>111</sup>

## **8.4 Pleadings and proof of compliance**

### **8.4.1 Cancellation and return**

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

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<sup>107</sup> See the discussion in par 8.3.2.

<sup>108</sup> Scholtz *et al* (2008) 12–30; see also Otto (2006) 95.

<sup>109</sup> Scholtz *et al* (2008) 12–30.

<sup>110</sup> Otto (2006) 95.

<sup>111</sup> See also Boraine and Renke 2008 *De Jure* 1 at 14.

of claim where a credit provider has cancelled the agreement and seeks mere affirmation of cancellation as well as an attachment order.<sup>112</sup>

- a Citation of the parties and an allegation that the consumer enjoys protection under the NCA.<sup>113</sup>
- b That the relevant court has jurisdiction to entertain the matter.<sup>114</sup>
- c Date on which and place where the credit agreement was concluded.
- d That the agreement is in writing and a reference to such agreement as an annexure to the pleading.<sup>115</sup>
- e Material terms of the credit agreement and particulars of the property forming the subject of such agreement.
- f That the credit agreement is governed by the NCA.
- g That the credit provider complied with the prescriptions contained in the NCA.
- h Details as to the breach of the contract.
- i Compliance with section 129(1)(a) and (b) or compliance with section 86(10).
- j Prescribed time periods as contemplated in section 130(1) has been complied with.
- k Compliance with prescriptions contained in section 130(3) and allegations that the court has not been approached during circumstances prohibited in the subsection.
- l Cancellation of the credit agreement on account of the consumer's default.

Prayers:

- m Affirmation of cancellation of the agreement.<sup>116</sup>

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<sup>112</sup> See chapter 3 par 3.4 for a discussion of particulars of claim in general; see also Scholtz *et al* (2008) 12–24; Boraine and Renke 2008 *De Jure* 1 at 10; Van Loggerenberg *et al* 2008 January/February *De Rebus* 40 at 44.

<sup>113</sup> The credit provider will be the plaintiff and the consumer the defendant.

<sup>114</sup> See chapter 5 in general regarding the jurisdiction of courts as far as credit agreements are concerned.

<sup>115</sup> The NCA requires a written agreement in terms of s 93 and High Court Rule 18(7) requires a written agreement to be attached to a summons. No similar rule exists in the Magistrate's Court, but a copy of the agreement should be attached as good practice.

- n Return of the property.
- o Interest a *tempore morae*.
- p Legal costs.
- q Further and/or alternative relief.<sup>117</sup>

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

In terms of section 130(2) a credit provider will only be entitled to claim fulfilment of remaining obligations under a credit agreement if such credit provider followed the procedure as set out in section 127 and a shortfall remains.<sup>118</sup> Van Heerden submits that the very nature of a voluntary surrender presupposes that a credit provider approaches the court for the first time when seeking enforcement of the shortfall and therefore pre-enforcement procedures as well as enforcement procedures in a court should be adhered to in addition to the section 127 procedure.<sup>119</sup> However, it has already been argued that the section 129(1)(a) notice is not a prerequisite under these circumstances.<sup>120</sup> It is submitted that the following allegations should be made in the particulars of claim where a credit provider seeks enforcement of a shortfall pursuant to a voluntary surrender:<sup>121</sup>

- a Citation of the parties and an allegation that the consumer enjoys protection under the NCA.<sup>122</sup>
- b That the relevant court has jurisdiction to entertain the matter.<sup>123</sup>

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<sup>116</sup> A distinction must be drawn between the case where a credit agreement has already been cancelled prior to the institution of the claim and where the court is requested to grant a cancellation order. It is submitted that in the former instance, cancellation need not be requested as such or at most the prayer may include a request for affirmation of the prior cancellation. In other instances the prayers must include a prayer for cancellation. If the credit provider is uncertain with regard to the prior cancellation of the credit agreement, cancellation should be asked for in the alternative and the particulars of claim should be adjusted accordingly.

<sup>117</sup> This prayer will only be included in proceedings in the High Court.

<sup>118</sup> See chapter 7 par 7.3 for a detailed discussion of s 130(2).

<sup>119</sup> Scholtz *et al* (2008) 12–26.

<sup>120</sup> See par 8.2.2 and chapter 7 par 7.3

<sup>121</sup> See chapter 3 par 3.4 for a discussion of particulars of claim in general.

<sup>122</sup> The credit provider will be the plaintiff and the consumer the defendant.

<sup>123</sup> See chapter 5 in general regarding the jurisdiction of courts as far as credit agreements are concerned.

- c Date on which and place where the credit agreement was concluded.
- d That the agreement is in writing and a reference to such agreement as an annexure to the pleading.<sup>124</sup>
- e That the credit agreement is an instalment agreement, secured loan or lease governed by the NCA.
- f Material terms of the credit agreement and particulars of the property forming the subject of such agreement.
- g That the credit provider complied with the prescriptions contained in the NCA.
- h Details as to the voluntary surrender of the goods by the consumer.
- i Compliance with section 127(2), 127(4), 127(5), 127(7)<sup>125</sup> and 127(8).
- j Compliance with section 130(2).
- k Compliance with prescriptions contained in section 130(3) and allegations that the court has not been approached during circumstances prohibited in the subsection.

Prayers:

- l Payment of the outstanding amount.
- m Interest at the rate applicable to the credit agreement.<sup>126</sup>
- n Legal costs.
- o Further and/or alternative relief.<sup>127</sup>

In the event that a credit provider seeks enforcement of remaining obligations where property has been attached in terms of section 131, it will not be the first time that the court is approached so as to enforce the particular agreement. As section 127(2) to (8) should have been followed prior to approaching the court once again, in this instance for the enforcement of

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<sup>124</sup> The NCA requires a written agreement in terms of s 93 and High Court Rule 18(7) requires a written agreement to be attached to a summons. No similar rule exists in the Magistrate's Court, but a copy of the agreement should be attached as good practice.

<sup>125</sup> It was previously submitted that the s 129(1)(a) notice should be combined with the s 127(7) notice – see chapter 7 par 7.3; Scholtz *et al* (2008) 12–26 n132.

<sup>126</sup> S 127(9).

<sup>127</sup> This prayer will only be included in proceedings conducted in the High Court.

remaining obligations, compliance with section 127(2), 127(4), 127(5), 127(7) and 127(8) needs to be specifically alleged in the particulars of claim.<sup>128</sup>

Section 130(3)(a) provides that a court may only determine the matter if *satisfied* that the prescriptions contained in sections 127, 129 and 131 have been complied with. As discussed in chapter 3 and chapter 7, particulars of claim should only include facts material to the cause of action (*facta probanda*) and should therefore not contain facts presented as evidence of such facts (*facta probantia*).<sup>129</sup> In light of this distinction, it is clear that compliance with section 130(3)(a) should be alleged in the particulars of claim to complete the cause of action, but compliance therewith should be presented by way of an affidavit when applying for default judgment relating to the enforcement of remaining obligations pursuant to either a voluntary surrender or an attachment order. An exception may be raised against the pleading if it does not contain allegations of compliance with the prescribed procedure.<sup>130</sup> If the credit provider did in actual fact not follow the prescribed procedures, a special plea may be raised on the merits.<sup>131</sup>

## 8.5 Conclusion

It has been established that the NCA provides a statutory right to consumers in that they may unilaterally terminate an instalment agreement, a secured loan or a lease at any time, irrespective of whether they are in default or not. The NCA, in section 127, prescribes a specific procedure that needs to be followed pursuant to a voluntary surrender and further provides, in section 131, that this procedure should also be followed after a court has ordered attachment of property, subject to contextual changes. Section 127(2) to (9) should be followed subsequent to any attachment order in respect of property, encompassing both movable and immovable property, whereas the section 127 procedure pursuant to a voluntary surrender only applies to instalment agreements, secured loans and leases all of which concern only movable

<sup>128</sup> Also see Scholtz *et al* (2008) 12–27.

<sup>129</sup> See chapter 3 par 3.4 and chapter 7 par 7.4 regarding *facta probanda* and *facta probantia*.

<sup>130</sup> See chapter 3 par 3.8.1 for a general discussion of an exception as an interim procedure.

<sup>131</sup> See chapter 3 part 3.7.1 for a general discussion of the special plea.

property. It is submitted that a voluntary surrender will be possible in two instances, namely, where movable goods are financed under a credit agreement, irrespective of whether ownership passed or has been retained, and where movable goods are the object of security for amounts due under a credit agreement.

It was further argued that the legislature attributes a wide meaning to the word “repossession” under section 131, thereby referring to both instances where a credit provider attaches property of which ownership was retained or where goods forming part of contractually agreed securities are attached. It has been argued that the term “property” in terms of section 131 encompasses both movable and immovable property and that the section 127(2) to section 127(9) procedures should be followed subsequent to an attachment order irrespective of whether the credit provider retained ownership thereof or whether the goods formed part of contractually agreed securities. Non-compliance with the prescribed procedure after a voluntary surrender of property constitutes an offence, but the same does not apply in relation to the process pursuant to an attachment order.

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

Re-instatement of a credit agreement, specifically provided for in section 129(3), creates interpretational problems as section 129(3)(a) and section

129(3)(b) contradict one another in that it is impossible to repossess property pursuant to an attachment order for the purposes of execution if the credit agreement has not been cancelled. It is submitted that the legislature should rectify this untenable situation.

Section 129(3)(a) read in conjunction with section 129(4) was also considered in this chapter as it allows the consumer who is in default to be re-instated by paying to the credit provider all amounts due, subject to section 129(4). When a consumer exercises the right to re-instate a credit agreement in terms of section 129(3)(a) read with section 129(4), the consumer basically prevents the credit provider from continuing a debt enforcement procedure as envisaged in section 129.

The section 127 procedure significantly improves consumers' rights under both a voluntary surrender and a true attachment order in that a credit provider is obliged to sell the goods as soon as practicable for the best price reasonably obtainable. Section 128 further provides a statutory remedy to a consumer who is dissatisfied with the sale of goods. Similarly a credit provider may, in terms of section 132, approach a court to claim compensation after failing, directly or through alternative dispute resolution, to resolve a dispute relating to costs of attachment with the consumer. It is submitted that the possibility of an interim attachment order with the aim of safekeeping or protection of goods should be permitted, but that the legislature should clarify the issue by specifically providing for such orders.

It was established that a section 129(1)(a) notice need not be sent where a credit provider desires to enforce remaining obligations pursuant to either a voluntary surrender or attachment of property. Whether a shortfall may be claimed under a mortgage agreement is unclear and it is submitted that the legislature should intervene so as to clarify its intention in this regard.

It is submitted in conclusion that the procedure in terms of section 131 read together with section 127 has some impact on general civil execution procedures by supplementing such procedures with additional consumer

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

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

## PART III: GENERAL CONCLUSION AND RECOMMENDATIONS

### CHAPTER 9: CONCLUSION

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#### 9.1 Introduction

This dissertation investigated the possible impact of certain provisions of the National Credit Act<sup>1</sup> on ordinary civil procedural rules relating specifically to debt enforcement procedures. It also identified problem areas created by some of the provisions of the NCA and ultimately offered some solutions as to how they can be solved.

As indicated in various sections of the dissertation it is, however, not always clear what the legislature intended with certain provisions. This state of affairs calls for interpretation and gives rise to confusion in many instances. A few precedents provided some interpretational guidance and some viewpoints of authors on the topic are also of some assistance in making such provisions clearer.

In view of the aims of the NCA as stated in section 3, as well as various procedural provisions discussed in this dissertation, it is clear that the NCA mainly has the protection of the consumer at heart when devising procedures relating to, or ancillary to debt enforcement procedures utilised by credit providers to collect outstanding debt sounding in money.<sup>2</sup> Since the NCA must operate within an existing procedural regime and within a legal system where certain terms have become entrenched, it was important for the purposes of this

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<sup>1</sup> National Credit Act 34 of 2005 (hereafter “NCA”).

<sup>2</sup> See chapter 1 par 1.1 and chapter 4 par 4.1.

study to provide a broad background on some relevant civil procedures and legal concepts in order to ascertain and analyse the impact of the NCA in that regard.<sup>3</sup>

As the NCA will only affect general civil procedure where a credit provider attempts to enforce obligations to which the NCA applies, it was important at the outset to determine the exact application of the NCA<sup>4</sup> and the general enforcement procedures contained therein.<sup>5</sup> Against this background the impact of specific procedures prescribed by the NCA on existing rules of civil procedure was analysed critically.<sup>6</sup>

This chapter draws together two sets of conclusions. Firstly, there are general conclusions relating to the impact of the NCA on general civil debt enforcement procedures. Secondly, there are those that relate specifically to the areas that should be reconsidered by the legislature in order to allow the NCA to function optimally.

## 9.2 Summary of findings

From the outset, the contextual meaning of enforcement in terms of the NCA is of particular importance. It is submitted that a wide meaning should be attributed to the term in order to include a referral to *any* of the remedies available to a credit provider.<sup>7</sup>

Chapter 5 dealt with the uncertainty surrounding the jurisdiction of the courts in terms of the NCA. This uncertainty became apparent from conflicting decisions and opinions and can be directly attributed to the NCA's failure to deal specifically with jurisdictional issues as far as debt enforcement is concerned.<sup>8</sup>

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<sup>3</sup> See chapter 3 regarding general enforcement procedures.

<sup>4</sup> See chapter 2.

<sup>5</sup> See chapter 4.

<sup>6</sup> See chapters 5 to 8.

<sup>7</sup> Chapter 4 par 4.3.

<sup>8</sup> Chapter 5 par 5.6.

Sections that were not primarily intended to regulate jurisdiction, now have to be scrutinised in an attempt to elucidate the issue and provide some kind of workable solution in practice.<sup>9</sup> Sections 85, 86, 87 and 127 of the NCA and section 29(1)(e) of the Magistrates' Courts Act<sup>10</sup> were evaluated and sections 90(2)(k)(vi)(aa) and 90(2)(k)(vi)(bb) analysed to determine the jurisdiction of the relevant courts as far as credit agreements are concerned.

It has been established that the Magistrates' Courts now have unlimited monetary jurisdiction over credit agreements to which the NCA applies<sup>11</sup> and that the High Court exercises concurrent jurisdiction with the Magistrates' Courts in this regard.<sup>12</sup> It was submitted that section 90(2)(k)(vi)(aa) neither expressly nor by necessary implication ousts or partly ousts the High Court's jurisdiction and that the purpose of section 90(2)(k)(vi)(aa) is to prevent the practice of consenting to the High Court's jurisdiction and thereby also the High Court scales of costs.<sup>13</sup> This section was therefore enacted to protect consumers by limiting legal fees.<sup>14</sup> It was further submitted that section 90(2)(k)(vi)(bb) also does not expressly oust or partly oust the High Court's jurisdiction,<sup>15</sup> but that the section does oust the jurisdiction of a Magistrate's Court as well as a division of the High Court not situated closest to where the consumer resides, works or where the goods are ordinarily kept by necessary implication.<sup>16</sup> It is proposed that the reason for this provision is to restrict the credit provider to only approach a court where the consumer lives, works or where goods are kept,<sup>17</sup> in an attempt to limit legal costs.<sup>18</sup> It was, however, established that a High Court retains the right to decline the hearing of a particular matter and to refer it to a Magistrate's Court with jurisdiction.<sup>19</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> 32 of 1944.

<sup>11</sup> Chapter 5 par 5.1.

<sup>12</sup> Chapter 5 par 5.4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

As far as section 85 is concerned, it is submitted that any court including a High Court, can relieve the consumer's over-indebtedness by restructuring the consumer's credit agreements in terms of section 85<sup>20</sup> and that the court that refers a matter to a debt counsellor in terms of section 85(a) is the court to which the debt counsellor should make a recommendation.<sup>21</sup> At present it is generally accepted that section 127 of the NCA merely provides for a specific aspect of consumer protection and that it has no effect on jurisdiction as such.<sup>22</sup>

The NCA prescribes specific pre-enforcement procedures that a credit provider must comply with prior to commencing enforcement litigation. These procedures differ depending on the circumstances at hand. Chapter 6 examined these provisions and the conclusions drawn from the above discussions are mentioned below.

The most significant compulsory pre-enforcement procedure is the section 129(1)(a) notice informing the consumer of certain rights under the NCA.<sup>23</sup> It has been established that this prerequisite is required by the legislature in an attempt to resolve a dispute relating to a credit agreement or to develop and agree on a plan to bring payments up to date before resorting to expensive and time consuming civil litigation.<sup>24</sup> The notice should be provided to all types of consumers, natural and juristic persons, who enjoy the protection of the NCA<sup>25</sup> and should be forwarded to the address as provided by the relevant consumer in terms of section 96 or the duly changed address,<sup>26</sup> but need not be delivered where the credit agreement was already cancelled as the notice is also a prerequisite for cancellation of the agreement.<sup>27</sup> Even though the NCA does not provide that the address in terms of section 96 will serve as the *domicilium citandi et executandi*, it is recommended to state it as such in credit agreements

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<sup>20</sup> Chapter 5 par 5.5.

<sup>21</sup> *Id.*

<sup>22</sup> Chapter 5 par 5.4.

<sup>23</sup> Chapter 6 par 6.2.

<sup>24</sup> *Id.*

<sup>25</sup> Chapter 6 par 6.7.

<sup>26</sup> Chapter 6 par 6.9.

<sup>27</sup> Chapter 6 par 6.2.

for legal certainty.<sup>28</sup> The study has also shown that the consumer need not physically receive the notice in order for the credit provider to comply with this requirement.<sup>29</sup>

Regarding the section 129(1)(a) notice and a letter of demand it is submitted that the wording of section 129(1)(a) may be included in the latter<sup>30</sup> and that the ten business-day period after provision of such notice and the twenty business-day default period may run concurrently.<sup>31</sup>

It was submitted that the section 129(1)(a) notice is a *sine qua non* for enforcement of a credit agreement and that it completes the credit provider's cause of action, therefore forming part of the *facta probanda*.<sup>32</sup> In light hereof a summons should include an allegation that there has been compliance with section 129 and section 130 as far as it relates to the section 129(1)(a) notice.<sup>33</sup> It was established that the credit provider bears the onus of proving compliance with the section 129(1)(a) notice and that the consumer will bear the onus to rebut the provision thereof in defended matters.<sup>34</sup> As a court must be satisfied that the prescriptions relating to the notice have been complied with, the credit provider will have to file an affidavit alleging proper compliance when applying for default judgment.<sup>35</sup>

The study has further indicated that debt review and debt enforcement procedures cannot run concurrently and that the commencement of one procedure suspends possible commencement of the other.<sup>36</sup> It is submitted that it is not the provision of the section 129(1)(a) notice that suspends the initiation

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<sup>28</sup> Chapter 6 par 6.9.

<sup>29</sup> Chapter 6 par 6.8.

<sup>30</sup> Chapter 6 par 6.2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Chapter 6 par 6.4.

of debt review procedures. Various points of view exist, but it is proposed that the service of a summons is the decisive moment.<sup>37</sup>

Where a consumer has applied for debt review and a credit provider wishes to enforce an agreement forming part of the debt review, the provision of a section 86(10) notice is a *sine qua non* for enforcement of the particular agreement.<sup>38</sup> It completes the credit provider's cause of action, therefore forming part of the *facta probanda*,<sup>39</sup> as was the case with the section 129(1)(a) notice in instances where no debt review was in effect.

The discussion in chapter 7 relates to the NCA's provisions on "Debt procedures in a Court" as contained in section 130. However, it was submitted that litigants should take cognisance of these provisions prior to the commencement of litigation as well as during the pleading phase as non-compliance therewith prohibits the commencement of enforcement procedures in certain instances and prescribes pre-enforcement procedures in others.<sup>40</sup> The discussion dealt with procedures to be followed in court, the powers of the court under certain circumstances, the allegations that must be included in pleadings and how a party will prove the existence or absence of stipulated circumstances to the court.

The study has shown that compliance with sections 130(1)(a), 130(1)(b) and 130(3) are generally peremptory and need to be alleged in pleadings as it completes the cause of action and is thus a jurisdictional factor that needs to be complied with before a court will entertain a matter.<sup>41</sup> It was submitted that compliance with sections 130(1)(a) and 130(1)(b) is not necessary where a credit provider attempts to enforce remaining obligations under an instalment agreement, a secured loan or a lease.<sup>42</sup> However, it was submitted that in such

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<sup>37</sup> *Id.*

<sup>38</sup> Chapter 6 par 6.6.

<sup>39</sup> Chapter 6 par 6.6.

<sup>40</sup> *Id.*

<sup>41</sup> Chapter 7 para 7.2 and 7.4.

<sup>42</sup> Chapter 7 par 7.3.

an event, until a clear practice has emerged or case law has clarified the position, litigants should combine the content of the section 129(1)(a) and section 127(7) notices.<sup>43</sup> It was established that where a credit provider seeks enforcement of the last-mentioned agreements, compliance with section 130(1)(c) must be specifically alleged by stating that the consumer did not surrender the relevant property and<sup>44</sup> that section 130(2) will only be applicable where an order enforcing the remaining obligations under the mentioned agreements are prayed for.<sup>45</sup> In such circumstances, compliance with section 130(2) must be specifically alleged.<sup>46</sup> It was submitted that since reason for the absence of mortgage agreements from the list of agreements provided for in section 130(2) is rather unclear it could have been an oversight by the legislature.<sup>47</sup>

When compared, it seems that there is a contradiction between sections 130(3)(c)(i) and 130(4)(c) as both seem to refer to debt review.<sup>48</sup> However, it is important to distinguish these sections as the orders that a court must or may grant differ from one another.<sup>49</sup> It was submitted that in the latter instance the consumer already applied for, and is subject to, debt review and section 130(3)(c)(i) in turn refers to circumstances where the consumer has taken steps pursuant to the section 129(1)(a) notice but did not formally apply for debt review.<sup>50</sup>

It was submitted that the burden of proof regarding compliance with section 130 will rest on the credit provider plaintiff.<sup>51</sup> But, in defended matters, the consumer defendant will bear the *onus* to rebut the evidence.<sup>52</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> Chapter 7 par 7.2.

<sup>45</sup> Chapter 7 par 7.3.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Chapter 7 par 7.6.4.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Chapter 7 par 7.5.

<sup>52</sup> *Id.*

Chapter 8 considered the statutory right of voluntary surrender as well as the repossession of goods and matters ancillary thereto. Re-instatement of a credit agreement was also considered. It was established that a consumer has the right to unilaterally terminate an instalment agreement, a secured loan or a lease at any time, irrespective of whether such consumer is in default or not and that the credit provider will have to follow a specific procedure as contemplated in section 127 subsequent to such surrender.<sup>53</sup> In the event that a credit provider has obtained an attachment order relating to either movable or immovable property, section 131 directs a credit provider to follow the section 127(1) to 127(9) procedure subject to contextual changes.<sup>54</sup> It was submitted that a consumer may only voluntarily surrender movable goods and that such surrender will be possible in two instances.<sup>55</sup> Firstly, movable goods that are financed under a credit agreement, irrespective of whether ownership passed or has been retained, may be surrendered.<sup>56</sup> Secondly, movable goods serving as security for amounts due under a credit agreement may be surrendered.<sup>57</sup> As far as repossession under section 131 is concerned, it was submitted that the legislature intended to attribute a wide meaning to the word, thereby referring to both instances where a credit provider attaches property of which ownership was retained or where goods forming part of contractually negotiated securities are attached.<sup>58</sup> It was also submitted that the phrase “property” in terms of section 131 should include both movable and immovable property.<sup>59</sup>

Section 127(3) provides that a consumer may withdraw the notice of termination under a voluntary surrender and thereafter resume possession of surrendered goods provided that the consumer is not in default.<sup>60</sup> A consumer has a ten business-day period, commencing upon the receipt of the valuation notice, to

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<sup>53</sup> Chapter 8 para 8.1 and 8.2.1.

<sup>54</sup> Chapter 8 par 8.3.1.

<sup>55</sup> Chapter 8 par 8.2.2.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Chapter 8 par 8.2.2.

utilise this right.<sup>61</sup> It was submitted that two aspects should be present before section 127(3) will apply in that the credit provider must have provided the consumer with a valuation notice and that the consumer should not be in default at the time of withdrawal.<sup>62</sup> The right awarded to a consumer under section 127(3) should be contrasted with the right to re-instate a credit agreement under section 129(4)(a)(ii).<sup>63</sup> The latter section provides that the consumer may re-instate an agreement *inter alia* where the consumer voluntarily surrendered property in terms of section 127, provided that the property has not yet been sold.<sup>64</sup> It was submitted that section 129(4)(a)(ii) will find application *inter alia* where the credit provider did not provide the required valuation notice or where the consumer withdrew the notice prior to the ten business-day period in which the credit provider must provide the valuation notice.<sup>65</sup>

It was established that re-instatement of a credit agreement, as provided for in section 129(3), creates interpretational problems as it is incomprehensible that an attachment order for the purposes of execution can be granted in instances where the credit agreement has not been cancelled.<sup>66</sup>

The study has shown that the procedure as contained in section 127 significantly improves consumers' rights under both a voluntary surrender and a true attachment order in terms of section 131. A credit provider is obliged to sell the goods as soon as practicable for the best price reasonably obtainable and section 128 provides a statutory remedy to a consumer who is dissatisfied with the sale of goods in terms of section 127. A dissatisfied credit provider may now also, in terms of section 132, approach a court to claim compensation after failing to directly or through alternative dispute resolution resolve a dispute relating to the costs of attachment with the consumer.<sup>67</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Chapter 8 par 8.3.3.

As was submitted in chapter 7, it was reiterated that a section 129(1)(a) notice need not be sent where a credit provider attempts to enforce the remaining obligations pursuant to either a voluntary surrender in terms of section 127 or the attachment of property under section 131.<sup>68</sup> However, it is unclear whether a deficit may be claimed under a mortgage agreement.<sup>69</sup>

It was established that the provisions contained in section 131 read with section 127 do not substitute general civil execution procedures but rather supplement such procedures by providing for additional consumer rights.<sup>70</sup> These rights entail *inter alia* that the consumer should be kept informed of each step of the process and that property should be sold as soon as possible for the best price reasonably obtainable.<sup>71</sup> There are, however, slight deviations from the general execution process in that, if another credit provider has a registered credit agreement in respect of the same property, a surplus should be paid over to the Tribunal and that damages may only be claimed after the section 127 process was completed.<sup>72</sup>

As stated previously, section 130(3)(a) provides that a court may only entertain a matter if satisfied that, *inter alia*, the procedures contained in sections 127 and 131 have been met.<sup>73</sup> It was submitted that a litigant should take cognisance of these provisions when drafting pleadings by specifically alleging compliance therewith in order to complete the cause of action. An affidavit should be filed to prove compliance therewith when applying for default judgment.<sup>74</sup>

It is clear from this study and some conclusions drawn that the easiest way to deal with some of the problem areas created by the legislature in the NCA is by

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<sup>68</sup> Chapter 8 par 8.2.2.

<sup>69</sup> Chapter 8 par 8.3.2.

<sup>70</sup> Chapter 8 par 8.5.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Chapter 8 par 8.4.2.

<sup>74</sup> *Id.*

amending certain of its provisions. It is submitted that in this regard at least the following matters should receive the attention of the legislature:

1. The overlap between the definitions of “incidental credit” and “discount transaction”.<sup>75</sup>
2. The overlap between “instalment agreement” and “lease” of movable property.<sup>76</sup>
3. The definition of “secured loan” should be revisited to specifically exclude immovable property as mortgage agreements are dealt with separately in the NCA.<sup>77</sup>
4. The fact that the NCA does not specifically regulate jurisdiction. It is submitted that jurisdiction should be specifically regulated so as to provide that the High Court exercises concurrent jurisdiction with the Magistrate’s Court, but that the jurisdiction of *any* court not closest in distance to the consumer’s residence, place of employment or place where goods are kept, be ousted.<sup>78</sup>
5. Section 130(1)(a) incorrectly refers to section 86(9) in stead of section 86(10). This error should be corrected.<sup>79</sup>
6. The legislature should clarify its intention regarding the inclusion or exclusion of mortgage agreements under section 130(2).<sup>80</sup>
7. The reference in section 86(2) to section 129 should be substituted with a reference to section 130.<sup>81</sup>
8. The exact point in time that enforcement of a credit agreement commences must be clearly set out in the NCA. It is submitted that the service of a summons would be the appropriate time.<sup>82</sup>
9. The contradiction created by section 129(2) read with section 88(3)(b)(ii) should be clarified.<sup>83</sup>

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<sup>75</sup> Chapter 2 par 2.3.3 n39.

<sup>76</sup> Chapter 2 par 2.3.3 n47.

<sup>77</sup> Chapter 8 par 8.2.1.

<sup>78</sup> Chapter 5 par 5.6.

<sup>79</sup> Chapter 6 par 6.6.

<sup>80</sup> Chapter 7 par 7.3 and chapter 8 par 8.3.2.

<sup>81</sup> Chapter 6 par 6.4.

<sup>82</sup> *Id.*

10. The ambiguity between section 129(1)(a) and section 127(7) should be clarified.<sup>84</sup>
11. The intention with section 132 should be clarified.<sup>85</sup>
12. Section 129(3) should be redrafted to specifically make provision for interim attachment orders with the object of safekeeping of goods.<sup>86</sup>
13. The legislature should rectify the obvious contradiction between section 129(3)(a) and section 129(3)(b).<sup>87</sup>

### **9.3 A final word**

Finally, it is submitted that although the NCA did improve the position of the consumer in many ways, also with regard to debt enforcement procedures, the legislature could have made some issues as discussed in this dissertation clearer. Practice and precedent will eventually even out many of the practical difficulties currently experienced but it will take time and money to do so. It is therefore submitted that some areas should be reconsidered for amendment by the legislature in order to allow this significant piece of legislation to operate optimally.

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<sup>83</sup> Chapter 6 par 6.6.

<sup>84</sup> Chapter 7 par 7.3.

<sup>85</sup> Chapter 8 par 8.3.3.

<sup>86</sup> Chapter 8 par 8.3.4.

<sup>87</sup> Chapter 8 par 8.5.

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