

**FORMAL PROCEDURAL REQUIREMENTS FOR DEBT ENFORCEMENT
IN TERMS OF THE NATIONAL CREDIT ACT**

by

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Abstract

This dissertation investigates, in general, the debt enforcement procedures contained in the National Credit Act. It provides information on the purpose of consumer credit legislation and the South African credit industry to indicate the necessity for proper regulation. It further identifies some areas that had been problematic in the debt enforcement process, but which were clarified by recent court decisions. Specific aspects related to current problems experienced in the interpretation of the Act with reference to debt enforcement are identified, and the opinions of various authors, as well as the researcher's own opinion, are provided in order to find solutions to such problems.

It is clear from the provisions of section 3 of the Act and the discussions throughout this dissertation that the legislature regarded the protection of the consumers as its first priority. A delicate balance must, however, be maintained to protect the consumers interests, and those of the credit provider, since it would inevitably influence the South African economy if the balance were to favour a particular party's interests.

Recent decisions by the courts indicate that the Act is not all-inclusive and that the common law will be used to provide guidance or to take precedence where the Act does not make provision for certain circumstances or debt enforcement procedures.

This dissertation further illustrates that the legislature needs to refine the provisions of debt enforcement contained in the Act, to clear ambiguities and create legal certainty. For as long as there are ambiguities in the Act, both the consumer and the credit provider will be disadvantaged, since in that case, a balance between the rights and the obligations of the consumer and those of the credit provider does not exist. Despite the fact that these ambiguities will eventually be clarified by interpretations provided by the courts, the Act, currently fails in its purpose to a certain extent, since

clear and precise legislation is required. However, expensive and time-consuming interpretations are now required from the courts to resolve practical problems and to clear ambiguities.

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CHAPTER 1: GENERAL INTRODUCTION

1.1 Background information

1.1.1 Date of inception of the Act

The National Credit Act¹ came into existence on 1 June 2006, but was implemented in three stages during the following 12 months in order to ensure adequate time for compliance. The Act replaced the Credit Agreements Act 75 of 1980 as well as the Usury Act 73 of 1968. A number of regulations were published following the promulgation of the Act and they provide clarity about certain key concepts.²

1.1.2 The South African credit industry

According to the annual report³ for 2009/2010 issued by the National Credit Regulator, it was estimated that, in December 2009, 77.8% of the South African population had a recorded credit transaction at the credit bureaus and that 47% of the population, consisting of 38.37 million consumers, were actively participating in credit transactions. It is further indicated that 4 168 credit providers, ten credit bureaus and 1 462 debt counsellors were registered at the National Credit Regulator. The annual report indicates a steady increase in the number of applications per month for debt review. The statistics released indicate that 66 375 applications for debt review were received for April 2009 and 161 749 such applications were received for March 2010.

According to the consumer credit report⁴ for the third quarter ending on 31 December 2011, published by the National Credit Regulator, the total outstanding gross debtor's book of consumer credit for the quarter ended December 2011 was R1.30 trillion. This consisted of mortgages to the value of R791.11 billion (61.03%), "secured credit agreements" of R250.00 billion (19.29%), credit facilities of R141.26 billion

¹ Act 34 of 2005 (hereinafter "the Act").

² Renke, Roestoff and Haupt "The National Credit Act: new parameters for the granting of credit in South Africa" 2007 *Obiter* 229.

³ *Vide* <http://www.ncr.org.za>. (Accessed on 9 April 2012).

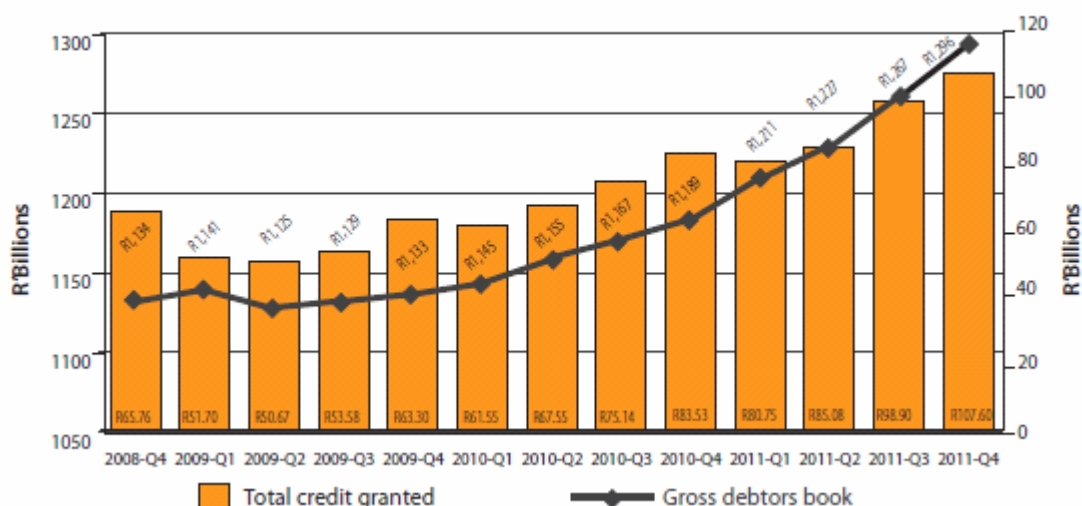
⁴ <http://www.ncr.org.za>. (Accessed on 9 April 2012).

(10.90%), unsecured credit of R112.99 billion (8.72%) and short-term credit of R927.37 million (0.07%).

The National Credit Regulator, in the Consumer Credit Market Report for the third quarter ending on 31 December 2011, defines the gross debtor’s book as “the outstanding balances as at the end of the period, including fees and interest that have been earned and capitalised to the debtor’s book”.⁵

The table below indicates the total credit granted and the gross debtor’s book from June 2008 to December 2011.⁶

Figure 1.1 Total credit granted and gross debtors book at December 2011



1.1.3 Purpose of consumer credit legislation

The purpose of consumer credit law in general, according to the Crowther Report,⁷ is, firstly, to address consumers unequal bargaining power by requiring disclosure of essential information in contracts and advertisements, by including automatic contractual rights and limitations of liability that cannot be excluded, and by restricting contractual provisions that are unilateral and to the detriment of the consumer. Secondly, its purpose is to curb malpractices in the commercial world by

⁵ <http://www.ncr.org.za>.

⁶ <http://www.ncr.org.za>.

⁷ Report of the Committee *Consumer Credit*, chaired by Lord Crowther vol 1 Cmnd 4596 (1971) 234-235.

identifying such malpractices and prohibiting them by imposing civil or criminal sanctions. Finally, the credit provider's remedies are limited by restricting and prohibiting certain extra-judicial remedies, such as the enforcement of the right to repossess goods or by providing a court with the discretion to order payment by instalments.

1.1.4 The purpose of the Act

The purpose of the Act, according to section 3, is “to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers”.

According to Otto and Otto,⁸ section 3 is “not a hollow statement of nice-sounding ideals but rather has an effect on the interpretation of all of the NCA's provisions”. They add that “the NCA can be regarded as consumer credit legislation, as its purpose is to protect the average debtor – the person in the street”.

However, consumer legislation should not only benefit consumers, but should also protect the rights of credit providers.⁹ It was subsequently held by the court that the interpretation of the Act “calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider”.¹⁰

It is clear from the information provided above that the credit industry in South Africa was worth more than a trillion rand at the end of June 2011. For this reason, it is necessary to regulate the industry properly in order to protect consumers against exploitation and reckless credit transactions, but also to protect the rights of credit providers to ensure a sustainable credit industry. It is submitted that if the credit industry is not properly regulated, consumers will be exploited by credit providers.

⁸ Otto and Otto *The National Credit Act Explained* (2010) 6.

⁹ *South African Law Commission Working Paper 46 Project 67 “The Usury Act and Related Matters”* (1993) 57-59.

¹⁰ *Nedbank v National Credit Regulator* 2011 3 SA 581 (SCA) at par 3.

Alternatively, if the provision of credit is no longer an attractive option to credit providers, due to, for example, it being over-regulated, this would *inter alia* lead to employment losses in the credit industry and an insufficient number of credit providers to accommodate the credit demand. A delicate balance must be maintained in order to protect both the consumer's interest and that of the credit provider. If the balance were to favour only one party's interest, it would inevitably have a detrimental effect on the South African economy.

1.1.5 Debt enforcement in general

The Act regulates debt enforcement for credit agreements and stipulates that certain procedures should be followed before a debt may be enforced in a court. These provisions appear primarily in sections 129 to 133 of the Act. Section 129 contains the pre-court procedure and *inter alia* stipulates that an overdue debt can only be enforced once the credit provider has sent a specific notice in terms of section 129, which notice must comply with certain conditions. Failure to send the notice will result in a postponement of the court proceedings until such time as the court is satisfied that the credit provider has complied with the notice. The provisions of section 30 contain the "in-court" procedures, which the credit provider must also comply with before he will be successful with the debt enforcement. In section 131, the Act makes provision for attachment orders, but no notable provision is made for interim attachment orders. The Act endeavours to optimally regulate the debt enforcement of credit agreements, but it still contains a number ambiguities and introduces new legal concepts that lead to legal uncertainty about debt enforcement. In the following chapters of this dissertation, the procedural aspects of debt enforcement will be analysed and discussed.

1.2 Problem statement and research objective

The Act provides for novel debt enforcement procedures that have to fit into existing civil enforcement procedures. However, the Act does not stipulate how this should be achieved, and therefore interpretational problems often occur when ambiguous debt enforcement provisions are founded on the Act. In the current economic climate, a critical analysis of debt enforcement procedures in terms of the Act is especially

relevant. The research objective of this dissertation is thus to investigate debt enforcement procedures in general, with the emphasis on pre-court and in-court procedures.

1.3 Delineation and limitations

The research conducted does not include debt review, as debt review is not a debt enforcement mechanism *per se*, but rather an alternative debt relief measure. However, where debt review could affect debt enforcement procedures, such correlation is considered.

Alternative dispute resolution also falls outside the scope of this dissertation, as the focus is on the effect of the Act on debt enforcement. Legal costs and fees as they relate to debt enforcement will also not be discussed.

It should be noted that this dissertation reflects relevant developments in this area of the law as at 25 April 2012.

1.4 Significance of the study

The research conducted provides an analysis of the general debt enforcement procedures in an attempt to serve as a guide with respect to these procedures.

1.5 Structure of the dissertation

This dissertation is structured in three parts to meet its objective of analysing debt enforcement procedures in terms of the Act. Part I, consisting of chapters 1 and 2, contains the general introduction and orientation to establish the exact application of the Act. Part II deals with the specific debt enforcement procedures. These specific procedures are discussed in chapters 3 and 4. Part III contains the general conclusion and recommendations in chapter 5.

1.6 Key references, terms and definitions

It is necessary for the sake of clarity to define the following terminology that will be used throughout this dissertation:¹¹

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

“**consumer**” with respect to a credit agreement to which the Act is applicable, means

- (a) the party who buys goods or services under a discount transaction, an instalment agreement or an incidental credit agreement;
- (b) the party who receives money or credit under a pawn transaction, or a party who receives credit under a credit facility;
- (c) the mortgagor under a mortgage agreement;
- (d) the lender under a secured loan;
- (e) the lessee of a lease agreement;
- (f) the guarantor of a credit guarantee;
- (g) the party whom credit is provided to 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 Act.

“**credit provider**”, with respect to a credit agreement to which the Act applies, means

- (a) the party responsible for the provision of goods or services under a discount transaction, an instalment agreement or an incidental credit agreement; or
- (b) the party that advances money or credit for a pawn transaction;
- (c) the party that provides credit under a credit facility;

¹¹ Derived from section 1 of the Act.

- (d) the mortgagee in terms of a mortgage agreement;
- (e) the borrower for a secured loan;
- (f) the lessor for a lease agreement;
- (g) the party in whose favour the promise or assurance is made in a credit facility agreement;
- (h) the party that makes available money or credit in terms of any other credit agreement;
- (i) any person who obtains the right of a credit provider after entering into a credit agreement.

CHAPTER 2: FIELD OF APPLICATION OF THE ACT

2.1 General

The purpose of this chapter is to provide an overview of the field of application of the Act to credit agreements. It is essential to determine first of all if the Act is applicable to an agreement, since this would determine whether the procedures in the Act must be followed with respect to debt enforcement. If the Act is not applicable, the normal civil procedure will be followed and the normal remedies will be applicable. The reader will also be introduced to the common law principles of contracts, since the common law stipulates the minimum requirements of a valid and enforceable agreement.

2.2 The applicability of the Act to agreements

Van Zyl,¹² states that it should first be determined if the Act is applicable to an agreement or if the agreement is exempted from the application of the Act. She further indicates that once it is determined that an agreement falls under the ambit of the Act, the provisions limiting the extent to which the Act applies should be considered. Therefore, the Act applies only to an agreement that is regarded as a credit agreement and that complies with the requirements of the Act in order to be a credit agreement, and which is not specifically excluded from the Act.

The Act further qualifies its application to agreements by indicating that it applies to all credit agreements between parties dealing at arm's length and made or having an effect in South Africa.¹³ Therefore it is clear that three requirements must be fulfilled before the Act will be applicable to an agreement:

- a) The agreement must be a credit agreement.
- b) The parties must be dealing at arm's length.
- c) The agreement must have been made in or have an effect in South Africa.
- d) No exclusion must be applicable.

¹² Van Zyl in Scholtz (ed) *Guide to the National Credit Act* (2009-loose leaf) 4-7.

¹³ S 4(1).

2.2.1 Credit agreements

Credit agreements are agreements that comply with section 8.¹⁴ Section 8(1) of the Act stipulates that a credit agreement is a credit facility, a credit transaction, a credit guarantee or any combination of them.

2.2.1.1 Credit facility

A credit facility is an agreement that complies with section 8(3).¹⁵ In essence, a credit facility is an agreement where the credit provider supplies goods or services, or pays an amount to the consumer,¹⁶ on the consumer's behalf or at his instruction¹⁷. The consumer's obligation to pay the price or to repay the money is deferred or he is billed periodically. The consumer pays a charge, fee or interest on the amount deferred,¹⁸ or in respect of an amount billed which is not paid within the time agreed to by the parties.¹⁹

2.2.1.2 Credit transaction

In essence, a credit transaction will be a credit agreement if it is:²⁰

(a) A pawn transaction

A pawn transaction is defined as an agreement where the credit provider provides credit or advances money and retains possession of the goods of the consumer as security. Either the resale value of the goods is more than the amount or credit provided, or a charge, fee or interest is payable. The credit provider may sell the goods after a certain period and may keep the proceeds as settlement of the consumer's debt.²¹

¹⁴ S 1.

¹⁵ S 1.

¹⁶ Eg the consumer withdraws cash with his credit card.

¹⁷ Eg a bank honours the cheque issued by the consumer.

¹⁸ Eg the consumer pays interest on an overdrawn cheque account.

¹⁹ Eg interest is payable on a credit card account when the consumer did not make the payment for such account on the stipulated time.

²⁰ S 8(4).

²¹ S 1.

(b) A discount transaction

A discount transaction is defined as an agreement where goods or services are to be provided to the consumer over a period of time where more than one price is provided. The lower price is payable before a certain date (eg within 30 days), and a higher price is payable thereafter or if the debt is paid periodically.²²

(c) An incidental credit agreement

An incidental credit agreement is defined as an agreement where an account is tendered for goods or services that have been provided to the consumer, or are to be provided to the consumer over a period of time. One or both of the following must be applicable: A fee, charge or interest is payable if the amount charged is not paid before a certain date or two settlement prices are quoted, with the lower price payable before a certain date and the higher price after such date.²³

(d) An instalment agreement

An instalment agreement is defined as the sale of moveable property where the payment is deferred and payable periodically. The consumer enjoys possession and use of the property and ownership of the property transfers as soon as all obligations have been met or ownership will immediately transfer with the provision that the credit provider may reposes the property if the consumer fails with his obligations.²⁴

(e) A mortgage agreement or secured loan

A mortgage agreement is defined as a credit agreement that is secured by a pledge of immovable property.²⁵

(f) A lease

A lease is defined as an agreement where moveable goods are let to a consumer and the consumer has the right to use the goods. Payment of the rent is done *via*

²² S 1.

²³ S 1. A typical example of an incidental credit agreement is where a cell phone company stipulates in the agreement that if the account is not paid before the end of every month, interest will be payable. When interest becomes payable, the agreement will become an incidental credit agreement.

²⁴ S 1. A typical example of an instalment agreement is the selling of a motor vehicle, where the purchase price is paid over a number of years by means of monthly instalments.

²⁵ S 1. A typical example of a mortgage agreement is a house loan that is secured by the registration of a bond over the property.

instalments or is deferred and the consumer must pay a fee, charge or interest. Ownership will transfer to the consumer at the end of the agreement either absolutely or subject to compliance with all the provisions of the agreement.²⁶

(g) Any other agreement

The provisions of section 8(4)(f) cater for the granting of credit that falls outside the definitions provided above. It covers any deferral of payments of an amount when a charge, fee or interest is payable.²⁷

2.2.1.3 Credit guarantee

A credit guarantee is an agreement where a person undertakes or promises to comply on demand with any obligation in terms of a credit facility or a credit transaction under the scope of the Act.²⁸ It should be noted that suretyship falls under the definition of a credit guarantee.²⁹

2.2.2 Dealing at arm's length

The next step in determining whether the Act will be applicable to an agreement is to determine whether the parties were “dealing at arm's length”. If the answer is in the negative, the agreement is not a credit agreement and therefore the Act will not be applicable. The Act does not provide a definition for “dealing at arm's length”, but instead it states the instances where the parties will not be dealing at arm's length.³⁰

- 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 a credit provider, or *vice versa*.³¹
- b) A credit agreement between natural persons who are in a familial relationship and are co-dependent on each other or where one is dependent on the other.³²

²⁶ S 1.

²⁷ An acknowledgement of debt is a typical example of such an agreement.

²⁸ S 8(5). A typical example of such an agreement will be where a person stands as personal surety for another person's debt.

²⁹ *Vide First Rand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 3 SA 384 (T) 390 A-B ; *Standard Bank of SA Ltd v Hunkydory Investments 194 (Pty) Ltd* 2010 1 SA 627.

³⁰ S 4(2)(b).

³¹ S 4(2)(b)(i) and s 4(2)(b)(ii).

- c) Any other arrangement where the parties are not independent of one another and consequently do not necessarily strive to obtain the greatest possible advantage from the transaction.³³
- d) An agreement of a type that has been held in law to be between parties who are not dealing at arm's length.³⁴

A possible definition of “at arm's length” can be found in the decision of the court in *Hicklin v Secretary for Inland Revenue*³⁵. The court indicated that “at arm's length” means that each party is independent of the other and will, therefore, strive to obtain the utmost possible advantage from the transaction for himself. It is interesting to note that this interpretation was codified in section 4(2)(b)(iv)(aa), which indicates that the legislature agreed with the interpretation of the court. However, the legislature went one step further by including “that the type has been held in law to be between parties who are not dealing at arm's length”.³⁶ This means that the instances cited above are not exhaustive, and that any other transaction held in law not to be dealing at arm's length can be added to those mentioned.

2.2.3 Concluded in or having an effect in South Africa

The next step in determining whether the Act is applicable to an agreement is to determine if the agreement was “made within or having an effect in South Africa”.³⁷ According to Van Zyl,³⁸ parties will not be able to circumvent the application of the Act by concluding the transaction outside the borders of South Africa.

The Act further indicates that it will be applicable, irrespective of whether the credit provider resides in or outside South Africa or whether his main place of business is in

³² S 4(2)(b)(iii).

³³ S 4(2)(b)(iv)(aa).

³⁴ S 4(2)(b)(iv)(bb).

³⁵ 1980 1 SA 481 (A) at 495.

³⁶ S 4(2)(b)(iv)(bb).

³⁷ S 4(1).

³⁸ Van Zyl in Scholtz (ed) *Guide to the National Credit Act* (2009-loose leaf) 4-3.

or outside South Africa.³⁹ Moreover, the Act will continue to apply even if both parties no longer reside in South Africa.⁴⁰

2.3 Exclusions

The Act specifically excludes certain agreements from its application. These agreements are:

- a) an insurance policy (or credit extended for maintaining the premiums on an insurance policy);⁴¹
- b) the lease of immovable property;⁴² and
- c) a transaction between a stokvel and its members.⁴³

Other exclusions from the Act's scope of application are:

- a) where the consumer is a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons (large juristic person),⁴⁴ equals or exceeds R1 million at the time when the agreement is made;⁴⁵
- b) the state or an organ of state;⁴⁶
- c) if the consumer is a juristic person whose asset value or annual turnover is lower than R1 million (small juristic person) at the time when the agreement is concluded, and it enters into a large agreement (a mortgage agreement or any other credit transaction or guarantee in excess of R250 000, but not including a pawn transaction);⁴⁷

³⁹ S 4(3)(a).

⁴⁰ S 4(4)(a).

⁴¹ S 8(2)(a).

⁴² S 8(2)(b).

⁴³ S 8(2)(c).

⁴⁴ S 4(1)(a)(i) read with s 9(4).

⁴⁵ According to s 7(1), the minister must determine a monetary threshold by notice in the *Government Gazette*. In GN 713 in *Government Gazette* 28893 of June 2006 the threshold was set by the minister at R1 million.

⁴⁶ S 4(1)(a)(ii) and s 4(1)(a)(iii).

⁴⁷ S 4(1)(b). According to s 7(a)(b), the minister must determine a monetary threshold by notice in the *Government Gazette*. In GN 713 in *Government Gazette* 28893 of June 2006 the minister set the lower threshold as up to R15 000 (small agreements), between R15 000 and R250 000 (intermediate agreements) and R250 000 and above (large agreements).

- d) where the credit provider is the Reserve Bank of South Africa;⁴⁸ or
- e) where the credit provider resides outside the Republic, and received approval by the minister following an application to be exempted.⁴⁹

2.4 Limited application of the Act

The Act has a limited application to incidental credit agreements, credit guarantees, pre-existing agreements and agreements where the consumer is a juristic person.⁵⁰ These limited applications will be dealt with individually.

2.4.1 Incidental credit agreements

An incidental credit agreement is deemed to have been made twenty business days after the supplier of the goods or services first charges a late payment fee or interest on the account, or after a predetermined price for full settlement becomes applicable.⁵¹

The Act will have a limited application to incidental agreements because of the incidental nature of this type of agreement. The credit provider will not have to comply with a number of aspects in the Act with respect to incidental credit agreements.⁵²

2.4.2 Juristic persons

The Act endeavours to protect, apart from natural persons, “small” juristic persons⁵³ who enter into small and intermediate agreements.⁵⁴ The Act will not have an effect on the following transactions where the consumer is a juristic person:

- a) Negative option marketing practices.⁵⁵

⁴⁸ S 4(1)(c).

⁴⁹ S 4(1)(d).

⁵⁰ S 5 and s 6.

⁵¹ S 5(2).

⁵² Van Zyl in Scholtz (ed) *Guide to the National Credit Act* (2009-loose leaf) 4-7.

⁵³ “Small” refers to an asset value or annual turnover of less than R1 million. *Vide* para 2.3 *supra*.

⁵⁴ *Vide* para 2.3 *supra*.

⁵⁵ Part C of chapter 4 of the Act.

- b) Over-indebtedness and reckless credit and debt review.⁵⁶
- c) Interest rate variation.⁵⁷
- d) Recoverable fees, charges and interest claimable from a consumer.⁵⁸

2.4.3 Credit guarantees

The Act applies to a credit guarantee *mutatis mutandis* to the primary debt secured by the guarantee. It will only apply to guarantees when it is applicable to the credit transaction or credit facility for which the guarantee is provided.⁵⁹

2.4.4 Pre-existing agreements

Schedule 3 item 4 stipulates the instances where the Act will be applicable to credit agreements entered into before the commencement of the Act. Agreements that would have been subject to the Act if the Act had been in force at that stage will now fall under the ambit of the Act.⁶⁰ However, certain provisions will have no effect, some applications will have a limited application and some will have no application at all. For the purposes of this dissertation, pre-existing agreements fall outside the scope of the Act.

2.5 Conclusion

The aim of this chapter is to introduce the reader to the field of application of the Act. When determining whether the Act will apply to an agreement, it is essential first to determine whether the agreement complies with the provisions of the Act. The exclusions from and the limited application of the Act were included in order to provide the reader with a broad overview of the applicability of the Act to agreements. Since the applicability of the Act has now been clarified, chapter 3 will focus on the pre-court debt enforcement process.

⁵⁶ Part D of chapter 4 of the Act.

⁵⁷ S 90(2)(o) read with s 103(4).

⁵⁸ Part C of chapter 5 of the Act.

⁵⁹ S 4(2)(c). *Vide* para 2.2.1.3 *supra*.

⁶⁰ Item 4(1).

CHAPTER 3: GENERAL OVERVIEW OF PRE-COURT DEBT ENFORCEMENT IN TERMS OF THE NATIONAL CREDIT ACT

3.1 General

In this chapter the prescribed procedures that have to be followed in order to enforce a credit agreement to which the Act applies will be considered. As will be seen below, these procedures have to be complied with before a court may be approached to enforce a debt.

3.2 The provisions of section 129 of the Act

3.2.1 General

The purpose of section 129 of the Act is to ensure that the consumer, when he is in default, is provided with a notice by the credit provider, whereby he may bring the default to the attention of the consumer and propose that the consumer refer the credit agreement to dispute resolution agents or alternative parties in order to resolve possible disputes or to come to an agreement with respect to remedying the default, before he may enforce the credit agreement.⁶¹

In what follows, section 129(1)(a) will be considered in more detail.

3.2.2 The use of the word “may”

It is not clear why the legislature used the word “may” in the provisions of section 129. It is submitted that the word “may” does not refer to mandatory steps to be taken in a normal context, but rather implies that if the credit provider so desires, he can send a notice to the consumer. The provisions of section 129(1)(b) and section 130(1) clearly indicate that, before the credit provider can enforce the credit agreement, he or she must have complied with the provisions of section 129(1)(a). Van Heerden⁶² is of the view that when a consumer is in default, regardless of the type of credit agreement

⁶¹ S 129(1).

⁶² Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2009-loose leaf) 12.4.2.

or relief sought, a section 129(1)(a) notice must be delivered by the credit provider. Boraine and Van Heerden⁶³ are also of the opinion that in all instances where debt enforcement is required to enforce a credit agreement and where the National Credit Act is applicable, a section 129(1)(a) notice must be provided to the consumer before the enforcement commences.

It is unfortunate that the interpretation of “may” was not considered by the court in *Nedbank v National Credit Regulator*.⁶⁴ The court only indicated that “an analysis of the relevant provisions is required”.⁶⁵

Whether the word “may” was intentionally included in the provisions of section 129 by the legislature or whether it was an oversight remains unclear. However, it is submitted that, in terms of the Act, the word “may”, actually means “must” and “may” should not be interpreted literally. It is further submitted that the legislature should amend section 129 by replacing “may” with “must” in order to create legal certainty.

3.2.3 The use of the word “enforce”

The word “enforce” is not defined in the Act. According to Otto and Otto,⁶⁶ it is not clear what is meant by “enforce” in terms of section 129(1). They state that in normal legal language it would mean the “enforcement of payment or of other obligations”, but in terms of the Act it might mean the credit provider using any of his remedies. Van Heerden and Otto⁶⁷ and Boraine and Renke⁶⁸ are all of the opinion that “enforce” refers to all remedies available to the credit provider when he approaches a court for an appropriate order or relief.

⁶³ Boraine and Van Heerden “The Conundrum of the Non-compulsory/ Compulsory Notice in terms of Section 129(1)(a) of the National Credit Act” (2011) *SAMLJ* 51.

⁶⁴ *Vide* para 1.1.4 *supra* at par 8.

⁶⁵ *Vide ABSA Bank Ltd v de Villiers* 2009 5 SA 40 (C); *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) and *Munien v BMW Financial Services (Pty) Ltd* 2010 1 SA 549 (KZD). The courts were of the view that the sending of the section 129(1)(a) notice is mandatory before legal procedures may be instituted to enforce a credit agreement.

⁶⁶ Otto and Otto (2010) 103.

⁶⁷ Van Heerden and Otto “Debt enforcement in terms of the National Credit Act 34 of 2005” (2007) *TSAR* 655.

⁶⁸ Boraine and Renke “Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005” (Part 2) (2008) *De Jure* 1 at fn 5.

Therefore it would further appear from the opinion of the above authors that, apart from the common law remedies, which constitute the cancellation of the agreement or a claim for specific performance or, in both instances, a claim for damages,⁶⁹ it will also be possible for the credit provider and the consumer to contractually agree on *ex contractu* remedies, for example, a *lex commissoria*.⁷⁰ A *lex commissoria* is an express or implied cancellation clause in an agreement.⁷¹ Van Heerden⁷² is of the opinion that “enforce” is the exercising of the credit provider’s remedies, which include the contractually agreed upon remedies such as the implementation of a *lex commissoria*.⁷³ In *Nedbank v the National Credit Regulator*, the court concluded that enforce includes a reference to all contractual remedies, including cancellation and ancillary relief, and means the enforcement of those remedies by judicial means.⁷⁴

One cannot conclude that the legislature’s intention was to limit a credit provider’s remedies by referring to “enforce”, since the Act must be interpreted to the benefit of both the credit provider and the consumer.⁷⁵ The decision of the court, in *Nedbank v the National Credit Regulator*,⁷⁶ and the opinion of the authors, namely that “enforce” refers to the normal civil procedure in order to approach a court for an order for appropriate relief, is correct. It is further evident from the *Nedbank v the National Credit Regulator* decision,⁷⁷ that, apart from the common law remedies, the *ex contractu* remedies will also be available to the credit provider when the consumer is in breach of the credit agreement.

⁶⁹ Hutchison *et al* (2010) 290.

⁷⁰ Note that the s 129(1)(a) notice remains a pre requisite for the cancellation of an agreement and therefore, despite the *lex commissoria*, in the researcher’s opinion, the credit provider must still provide a s 129(1)(a) notice to the consumer.

⁷¹ Hutchison *et al* (2010) 290.

⁷² Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2009-loose leaf) 12.1.

⁷³ *Vide* para 4.3.1 *infra*.

⁷⁴ *Vide* para 1.1.4 *supra* at par 12. Also *vide Bank Ltd v De Villiers* 2009 5 SA 40 (C) para 3.2.3 *supra* at par 13, where the court decided that a wider meaning should be used when referring to “enforcement”, therefore exercising any of its remedies.

⁷⁵ S 1.

⁷⁶ *Vide* para 4.3.1 *supra* at par 12.

⁷⁷ *Ibid*.

3.2.4 The use of the phrases “when in default”, and “periods of time”

It is clear that the words “when in default” refer to the breach of the credit agreement by the consumer. It is, however, not clear whether such breach must be a material breach of the terms of the agreement, such as not paying the agreed amount on or before a stipulated date, or whether a non-material breach, such as not informing the credit provider of a change of mobile number, constitutes a breach that activates the provisions of section 129. For a breach of material terms of the credit agreement, the answer seems obvious in that the credit provider must send a section 129(1)(a) notice in order to enforce the credit agreement. The answer is not so simple when the breach is not material. If the credit provider and the consumer agreed contractually that the consumer has an obligation to inform the credit provider when his mobile number changes, and the consumer neglects this duty, then the strict interpretation of “when in default” indicates that the credit provider must send a section 129(1)(a) notice to the credit provider informing him of his default. It is submitted that the credit provider would therefore have to comply with all the formalities prescribed by section 129, which effectively makes this a time-consuming and non-essential exercise.

In terms of the Act,⁷⁸ the consumer must be at least twenty business days in default and ten business days must have passed from the date on which the section 129(1)(a) notice was delivered, before the credit provider may approach the court. A “business day” is defined as excluding the first day and including the last day of the event to occur, and as excluding Saturdays, Sundays and public holidays.⁷⁹ The period before the section 129(1)(a) notice can be sent can be extended by means of a provision in the credit agreement. In *Standard Bank v Rockhill*,⁸⁰ the court decided that the parties might contractually agree in the credit agreement that longer periods might be applicable than the minimum periods prescribed in section 130(1)(a).

It is submitted that the period can be contractually agreed upon to be a longer period, but it cannot be contractually agreed upon to be a shorter period than the period prescribed in section 130(1)(a) of the Act. However, the question that arises is for

⁷⁸ S 130(1)(a).

⁷⁹ S 2(5).

⁸⁰ Unreported case no 56251/2009 (GSJ).

how long this period can be extended. It is submitted that if the period is contractually extended, it should be for a reasonable period and not be to the detriment of either party. Of course, the determination of whether the period is reasonable is a factual question where all relevant information should be considered.

3.2.5 The use of the words “attention” and “address”

According to section 129(1)(a), the credit provider must bring the consumer’s default to the attention of the consumer in writing. The section does not indicate how the written notice should be brought to the attention of the consumer. Section 130(1)(a) refers to the “delivery” of the section 129 (1)(a) notice to the consumer. However, the Act does not provide a definition of “delivery”, but section 65(1) indicates that every document that is required to be delivered must be delivered in the prescribed manner. It is evident that the section 129(1)(a) notice should be delivered, but what does “delivery” entail and how should the notice be delivered? Section 65(2), section 168 and regulation 1 provide clarity on these matters. Section 65(2) stipulates that if no method has been provided for the delivery of a document:

- a) the document must be made available to the consumer via one of the following methods:
 - i) in person at the credit provider’s business address, or address chosen by the consumer, or by normal post;⁸¹
 - ii) by fax;
 - iii) by email; or
 - iv) by printable web-page;
- b) and delivered to the consumer in the manner chosen by the consumer in paragraph (a).

Section 168 of the Act stipulates that a notice, order or other document will be properly served if it has been delivered to that person⁸² or sent by registered mail to the last known address.⁸³

⁸¹ In *Munien v BMW Financial Services (Pty) Ltd* para 3.2.3 *supra* at par 12, the court confirmed that despite the reference to normal post in s 65(2), the sending of a s 129(1)(a) notice by registered post also amounts to “delivery”.

Regulation 1 defines “delivery” as sending a document by hand, by fax, by email or by registered mail to an address chosen in the credit agreement by the proposed recipient, and, if no address is available, then delivery to the registered address of the consumer.

Otto and Otto⁸⁴ suggest that if the credit provider meticulously followed the provisions of section 129(1)(a), read together with section 65(2), it would be sufficient for the credit provider to continue with the enforcement of the credit agreement, even if the notice referred to did not reach the consumer. They further recommend that the credit provider should not be penalised if the notice was sent properly, but it did not reach the consumer.⁸⁵

In *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* that court was of the view that when the section 129(1)(a) notice is sent to the consumer, the credit provider should ensure that the address to which the notice is sent is precisely the same as the address chosen by the consumer in the credit agreement.⁸⁶

In *Munien v BMW Financial Services (Pty) Ltd*,⁸⁷ the court considered whether the definition of “delivery” as provided in the regulations, or in the provisions of section 65 of the Act, was applicable. The court indicated that the definition of “delivery” as provided for in the regulations was preferred and applicable. The court held that the consumer bears the risk if the credit provider sends the notice to the address and in the manner selected by the consumer.⁸⁸

⁸² S 168 (a).

⁸³ S 168(b).

⁸⁴ Otto and Otto (2010) 106.

⁸⁵ Otto and Otto (2010) 107.

⁸⁶ 2009 (2) SA 512 (D) 524D-525C.

⁸⁷ *Vide* para 3.2.3 *supra* at par 12.

⁸⁸ *Vide* para 3.2.3 *supra* at par 20. Also *vide Starita v ABSA Bank Ltd* 2010 3 SA 443 (GSJ) at para 3.2.3 *supra* at par 71, where the court used another approach, but came to the same conclusion than in the *Munien* case. *Vide Marques v Unibank (Pty) Ltd* 2001 1 SA 145 (W), where it was decided that the notice did not necessarily have to come to the attention of the consumer. *Vide Van Niekerk v Favel* 2006 4 SA 548 (W), where the court followed the decision in *Marques v Unibank (Pty) Ltd* 2001 1 SA 145 (W).

In *Rossouw v FirstRand Bank Ltd*⁸⁹ the court agreed with the decision in *Munien v BMW Financial Services (Pty) Ltd*,⁹⁰ and confirmed that delivery should occur in the manner chosen by the consumer in the credit agreement and therefore the risk of non-receipt will lie with the consumer.

The interpretation of “it should come to the attention of the consumer” is currently being considered by the constitutional court in the case of *Sebola v Standard Bank*.⁹¹ The Socio-Economic Rights Institute of South Africa (SERI), the National Credit Regulator and the Banking Association of South Africa joined the case as *amicus curiae*. The background of the case is: There was default of payments of the mortgage agreement that existed between Sebola and Standard Bank. Standard Bank cancelled the agreement and obtained default judgement for the total amount outstanding in terms of the credit agreement, together with an order declaring Sebola’s house specially executable. Sebola’s argument, in the court *a quo* and later when the applicant’s appeal was heard by a full bench in the South Gauteng High Court, was that he had not received the section 129 notice, since there had been a mistake at the post office, and therefore he had not been informed of the options available to him in terms of section 129.⁹²

Neither court decided in his favour and Sebola now requires the constitutional court to decide on the following questions:

1. Whether section 129 (1) (a) of the NCA requires that the notice issued under its terms (“the 129 notice” or “the notice”) actually come to the consumer’s attention.
2. If the NCA does require that the 129 notice actually come to the consumer’s attention, how this affects the procedure to be adopted by the credit provider in enforcing the credit agreement before a court.⁹³

⁸⁹ 2010 6 SA 439 (SCA) at par 31.

⁹⁰ *Vide* para 3.2.3 *supra* at par 12.

⁹¹ Case 98/2011 (CC).

⁹² Heads of arguments by the first *amicus curiae* in the Sebola case.

⁹³ *Ibid.*

SERI submits that the constitutional court must take into consideration the effect of sections 25, 26 and 39 of the Constitution in this case. It argues that if non-receipt of the section 129(1)(a) notice be precluded as a valid defence, then –

- a) it would be inconsistent with section 25(1) of the Constitution, since it would permit an arbitrary deprivation of property in this case, since the applicant did not have a realistic opportunity to participate in the dispute resolution procedures the section 129(1)(a) notice is meant to bring to the attention of the consumer. Section 25(1) stipulates that “no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”; and
- b) it would be inconsistent with section 26(1) of the Constitution, since statutorily alternatives to execution have not been explored, and the manner may be disproportionate to the purpose of the debt collection. Section 26(1) stipulates that “everyone has the right to have access to adequate housing”.

SERI further argues that section 39(2) of the Constitution calls for an interpretation of section 129(1)(a) that requires a notice issued under it to actually come to the attention of the consumer. Section 39(2) of the Constitution stipulates that, when interpreting any legislation, every court must promote the spirit, purport and objectives of the Bill of Rights.⁹⁴

The constitutionality of the case does not form part of this dissertation, which will rather focus on the practical issue at hand following the case, which is that the section 129(1)(a) notice must come to the attention of the consumer. It is clear that the section 129(1)(a) notice must actually come to the attention of the consumer, thereby informing him of his default and his options.⁹⁵ The section 129(1)(a) notice is definitely a very important document, since when the notice has reached the attention of the consumer, the consumer may exercise the options provided in such notice. If the section 129(1)(a) notice did not come to the attention of the consumer, the consumer has lost the opportunity to exercise his rights. When the section 129(1)(a) notice was sent via registered mail, there might be very good reasons why the consumer did not

⁹⁴ Heads of arguments by the first *amicus curiae* in the Sebola case.

⁹⁵ S 129.

receive such notice. However, these reasons will not be taken into account, since the non-receipt of the section 129(1)(a) notice will not be regarded a valid defence following the decision in *Rossouw v FirstRand Bank Ltd.*⁹⁶ It appears that the only practical manner to ensure that the section 129(1)(a) notice actually comes to the attention of the consumer is by actual delivery in person, similar to that of a summons. This may, however, be a costly and an onerous process.

”It is submitted that the solution is, in the first place, that the decision in the *Rossouw v FirstRand Bank Ltd.*⁹⁷ is correct and that the sending of the section 129(1)(a) notice, as elected by the consumer in the credit agreement, should be regarded as the correct method of bringing the section 129(1)(a) notice to the attention of the consumer. It is submitted that this would constitute an inexpensive process with a low margin of error of not bringing the section 129(1)(a) notice to the attention of the consumer. Secondly, the court should use its discretion in terms of section 30(3)(a) to satisfy itself that the provisions of section 129 have been complied with. If the consumer provides a *bona fide* allegation that he did not receive such a section 129(1)(a) notice where such notice was sent via registered mail, and the court deems it proper that if the section 129(1)(a) had come to the attention of the consumer, the outcome would have been different from the outcome entailing that the credit provider approach the court, the court may postpone the proceedings, and afford the consumer a reasonable period to refer the matter for dispute resolution. If no such referral takes place, the credit provider may then simply continue with the enforcement procedures.

The outcome of the Sebola case will provide legal certainty in respect of section 129, in that its notice must come to the attention of the consumer. The decision is eagerly awaited by both the consumers and the legal fraternity and will provide legal certainty with regard to the consumer’s rights in terms of section 129.

⁹⁶ *Vide para 3.2.5 supra.*

⁹⁷ *Ibid.*

3.2.6 The use of the word “*domicilium*”

Prior to the National Credit Act, the Credit Agreements Act⁹⁸ stipulated that the Section 11 notice had to be delivered by hand or had to be sent via registered post to the credit receiver’s *domicilium* address. However, in the National Credit Act, no reference is made to the *domicilium* address.

Van Heerden⁹⁹ submits that the option is still open to the credit provider to add a clause to the agreement that will serve as *domicilium citandi et executandi*. This is based on the provisions of section 90, which deals with unlawful provisions. Accordingly, the section does not prevent a credit provider from using the chosen address as the *domicilium* address.

It is submitted that the submission by Van Heerden that the Act does not prevent the credit provider from including a *domicilium* address is correct. However, it is submitted that such a clause would force the consumer to supply a specific address where he is supposed to receive legal documents, normally his home address, and not merely any address he selects. This would therefore neither be in line with the decision in *Rossouw v FirstRand Bank Ltd*,¹⁰⁰ nor with the provisions of section 96(1).¹⁰¹

3.2.7 The use of the word “notice”

No specific form or format is stipulated in the Act or the regulations for the section 129(1)(a) notice. Boraïne and Van Heerden¹⁰² are of the view that the section 129(1)(a) notice can be incorporated into a letter of demand. It is however submitted that the purpose of a section 129(1)(a) notice is the equivalent of the purpose of a letter of demand, with additional provisions, and that it is the first step in starting the

⁹⁸ Act 75 of 1980.

⁹⁹ Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2009-loose leaf) 12.4.8.

¹⁰⁰ *Vide* para 3.2.5 *supra*.

¹⁰¹ S 96(1) provides that when a party is required or wishes to provide a legal notice, the notice must be delivered at the address of the other party as provided for in the credit agreement or the most recent address provided.

¹⁰² Boraïne and Van Heerden 2011 *SAMLJ* 51.

debt enforcement procedures. Van Heerden and Otto¹⁰³ submit that the notice should indicate that debt enforcement would follow, should the consumer fail to respond, or should he reject any proposals made in the notice. However, Van Heerden¹⁰⁴ is of the opinion that the section 129(1)(a) notice must contain an explicit reference to the failure to respond within ten business days and that remaining in default for twenty business days would result in legal steps to enforce the agreement.

It is recommended that the section 129(1)(a) notice should at least draw the consumer's attention to the default and contain a proposal to the consumer to settle the dispute or to come to some sort of agreement via a debt counsellor as contemplated for in section 129(1)(a). It should further contain a provision that debt enforcement procedures will continue within the prescribed period or agreed period if the consumer remains in default or if no agreement can be reached or the dispute cannot be settled.

In *BMW Financial Services (SA) (Pty) Ltd v Dr MB Mulaudzi Inc*,¹⁰⁵ the court indicated that it would not suffice if the credit provider merely duplicated the wording of the subsection. It is required that he add flesh to the wording of section 129(1)(a) in order to make it understandable to the consumer.

It is submitted that the approach of the authors¹⁰⁶ and the decision in *BMW Financial Services (SA) (Pty) Ltd v Dr MB Mulaudzi Inc*¹⁰⁷ should be followed. This would include using language that is reasonably understandable to consumers, informing them of what options are available to rectify the situation, of the period in which the matter should be resolved and of what the consequences would be if the matter cannot be resolved.

¹⁰³ Van Heerden and Otto 2007 *TSAR* 666.

¹⁰⁴ Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2009-loose leaf) 12.4.9.

¹⁰⁵ 2009 3 SA 348 (B) 351 A-B.

¹⁰⁶ *Vide* para 3.2.7 *supra*.

¹⁰⁷ *Ibid*.

3.3 Section 129 and over-indebtedness

Despite the fact that this dissertation does not focus on debt review, it is important to indicate whether a consumer may apply for debt review after receipt of the section 129(1)(a) notice. Inevitably, the answer to such a question has a direct bearing on the debt enforcement process. When a consumer is in breach of the credit agreement, and the credit provider has not enforced such breach as yet, by, among others, sending the section 129(1)(a) notice, the consumer may approach a debt counsellor for a debt review in accordance with section 86(1). After the completion of the relevant documentation, the debt counsellor will inform the respective credit providers of the application received and will request further information from them.¹⁰⁸ The debt counsellor has 30 business days¹⁰⁹ to determine whether the consumer is over-indebted and to refer the matter to a competent court to determine whether or not he is indeed over-indebted.¹¹⁰ Should the debt counsellor fail to comply, it would mean that the credit provider does not have to send a section 129(1)(a) notice¹¹¹ and may proceed directly with debt enforcement, subject to the fulfilment of any other applicable provisions of the Act. However, it appears that, if the credit provider did send a section 129(1)(a) notice when the consumer was in default with the credit agreement, the consumer is prohibited from consulting a debt counsellor for the purpose of undergoing debt review.¹¹²

There are different opinions on this matter, as will be seen below. On the one hand, it is argued that the application of section 86(2) prevents a consumer from applying for debt review. Section 86(2) of the Act stipulates that an application for debt review may not be made if, at the time of the application, the credit provider has already taken the steps stipulated in section 129. On the other hand, it is argued that the section 129 provisions are not steps for enforcing an agreement, but rather steps that must be taken before a debt is enforced.

¹⁰⁸ S 86 (4)(b)(i) and S 86(5).

¹⁰⁹ Reg 24(6).

¹¹⁰ S 86(9).

¹¹¹ S 86.

¹¹² S 86(2).

Boraine and Renke are of the opinion that an application for debt review is only stayed once a summons is issued, and not if merely a default notice, such as the section 129(1)(a) notice, is delivered.¹¹³ They further argue that the decision is not logical, since the purpose of section 129(a) is to refer the consumer to a debt counsellor. Coetzee agrees with Boraine and Renke, but she argues that the application for debt review is only stayed when summons is served and not at the time that it is issued.¹¹⁴ Roestoff *et al* agree with the opinions of Boraine and Renke and that of Coetzee.¹¹⁵ Otto and Otto also agree with Boraine and Renke, and state that section 86(2) is probably aimed at the “legal proceedings to enforce the agreement” contained in section 129(1)(b) and is not applicable to the default notice in section 129(1)(a).¹¹⁶

Van Heerden and Coetzee submit that a consumer may still apply for debt review following receipt of a section 129(1)(a) notice, but prior to summons.¹¹⁷

However, as will be seen below, the courts have decided otherwise in various cases in that the strict interpretation of section 86(2) must be followed and that the consumer may not approach a debt counsellor once he has received a section 129(1)(a) notice. In *BMW Financial Services (Pty) Ltd v Donkin*,¹¹⁸ the court said that once a section 129(1)(a) notice has been delivered, it prohibits the consumer from going for debt review. The court argued that the purpose of the section 129(1)(a) notice is for the consumer to settle disputes or come to some sort of agreement with the credit provider and not to notify the consumer to go for debt review. The court further stated that once a consumer is under debt review, a court may not hear the matter, as each of these two processes takes precedence over the other. The court added that it is not enough for a consumer merely to consult a debt counsellor and to fill in the forms before he receives the section 129(1)(a) notice. His application must be complete as required by the Act and the regulations. If it is incomplete, the credit provider may

¹¹³ Boraine and Renke 2008 *De Jure* 9.

¹¹⁴ Coetzee “The impact of the National Credit Act on Civil Procedural Aspects relating to Debt Enforcement” 2009 SA *MERC LJ* 85-88.

¹¹⁵ Roestof “The debt counselling process- closing the loopholes in the National Credit Act 34 of 2005” 2009 *PELJ* 260.

¹¹⁶ Otto and Otto (2010) 100.

¹¹⁷ Van Heerden and Coetzee “Debt counselling v debt enforcement some procedural questions answered” 2010 *Obiter* 756.

¹¹⁸ 2009 6 SA 63 (KZD) at par 11.

continue with debt enforcement and prevent the consumer from continuing with the debt review.

The court decided in *Nedbank v National Credit Regulator* that once a section 129(1)(a) notice has been delivered in respect of a specific credit agreement, the provisions of section 86(2) bar the consumer from applying for debt review in respect of that specific credit agreement.¹¹⁹ The court argued that “may”, referred to in section 129(1)(a), is mandatory if read with section 129(1)(b) and section 130(1), and is a compulsory step in the debt enforcement process. Therefore, once the section 129(1)(a) notice has been issued, the credit provider has started taking the steps contemplated in section 129 in order to enforce the agreement, and a debt review is thereafter excluded.

It is submitted that there is merit in the arguments posed by the authors and the decisions of the courts.¹²⁰ It is further submitted that consumers are not necessarily educated in the application of the Act, and, once they are in default and receive a section 129(1)(a) notice, they are prohibited from applying for debt review. It is further submitted that, in most instances, if consumers were better informed of their rights in terms of the Act, they would more frequently approach debt counsellors for relief before the section 129(1)(a) notice prohibits them from obtaining relief. However, the opposite is also applicable. It is submitted that the legislature intentionally included the provisions of section 86(2) to prohibit a consumer from applying for debt review. When a consumer is in default with his obligations, such consumer will normally be well aware of his default. Ample provision is made in sections 80 to 83 of the Act to protect the consumer from reckless credit and to enable the consumer to apply for debt review¹²¹. Finally, despite the section 129(1)(a) notice being delivered, the consumer also has the protection of section 85 in that the consumer can still request the court to declare him over-indebted when the matter is heard by the court for the enforcement of the credit agreement. It is finally submitted that the application of section 86(2) balances the rights of the credit provider with those of the consumer. At some stage, the credit provider must be placed in a position

¹¹⁹ *Vide* para 1.1.4 *supra* at par 14.

¹²⁰ *Vide* para 3.3 *supra*.

¹²¹ S 86.

to enforce his rights and the Act cannot be interpreted to the benefit of the consumer only. Once the section 129(1)(a) notice has been issued, the legal process is available for the credit provider to enforce the obligations of the consumer.

3.4 The application of section 129(2)

Section 129(2) stipulates that section 129(1) does not apply to credit agreements that are subject to a debt restructuring order or proceedings in a court that might lead to a debt restructuring order. It is not clear if the legislature was of the opinion that it is not necessary to send the section 129(1)(a) or section 86(10) notice when the consumer is in default because the debt is in the process of being restructured. It is submitted that the legislature's reasoning was that the court has in any event reviewed or will review the total debt of the consumer and act in the best interest of both the consumer and the credit provider(s). Alternatively, section 129(2) might mean that it is not necessary for the credit provider to comply with the provisions of section 129(1) and that the credit provider can proceed directly with the debt enforcement in a court.

Van Heerden¹²² is of the opinion that section 129(2) must be read with section 88(3) of the Act. Section 88(3) stipulates that, subject to sections 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(ii), may not exercise or enforce by litigation or other judicial process any right or security under that agreement until –

- a) the consumer is in default under the agreement; and
- b) one of the following has occurred:
 - (i) an event contemplated in subsection (1)(a) to (c); or
 - (ii) the consumer defaults on any obligation in terms of a rearrangement agreed between the consumer and credit provider(s), or ordered by a court or the tribunal.¹²³

¹²² Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2009-loose leaf) 12.6.

¹²³ Refer to the complete s 88(3).

Van Heerden¹²⁴ submits that when, for example, a consumer is subject to a debt-restructuring order and fails to comply with such order, the credit provider does not have to send a section 129(1)(a) notice to the consumer, but may approach a court directly for the enforcement of the credit agreement.

It is submitted that the interpretation of Van Heerden is correct. The fact that the legislature stipulated in section 129(2) that the provisions of section 129(1) should not be applicable in debt-review proceedings should not be interpreted as if the legislature intended to give the credit provider the right to enforce the credit agreement that was subject to debt review.

3.5 The application of section 129(3) and section 129(4)

Section 129(3) indicates that a consumer in default may reinstate the agreement by paying the credit provider the overdue amounts, plus the default charges and the cost of enforcement of the agreement up to the time of reinstatement.¹²⁵ The consumer may also take possession of the goods after reinstatement of the credit agreement.¹²⁶ The consumer may only reinstate the credit agreement prior to the selling of the goods under an attachment order or the surrendering of the goods.¹²⁷ The credit agreement may also not be reinstated following an execution order by a court¹²⁸ or if the agreement was terminated in terms of section 123.¹²⁹

The provisions of section 129(3) and (4) clearly stipulate that a consumer who is in default may reinstate the credit agreement by paying all overdue amounts, the default charges and the cost of enforcement, subject to the provision that the agreement must not already have been cancelled. He may then resume possession of the property, subject to certain provisions. Certain concepts mentioned in section 129(3) need clarification.

¹²⁴ Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2009-loose leaf) 12.6.

¹²⁵ S 129(3)(a).

¹²⁶ S 129(3)(b).

¹²⁷ S 129(4)(a).

¹²⁸ S 129(4)(b).

¹²⁹ S 129(4)(c).

It is not clear what is meant by “reinstatement”, since it is not defined in the Act. Van Heerden and Coetzee¹³⁰ submit that a possible common interpretation of “reinstatement” is the revival of an already cancelled agreement. However, they acknowledge that section 129(3)(a) clearly states that reinstatement must be prior to cancellation of the credit agreement. They recommend that “reinstatement” should rather be interpreted as referring to the right that the credit provider has obtained to cancel an agreement, but which he has not yet exercised. It is submitted that this would imply that when the consumer has complied with the provisions of section 129(3)(a) and the agreement has not been cancelled, the credit provider will lose his right to cancel the agreement, which would therefore reinstate the agreement. Boraine and Renke¹³¹ submit that it is difficult to understand how an agreement can be reinstated if it was not cancelled. They further argue that the reference to the right that the consumer has to reinstatement is incorrect if the consumer is not allowed to exercise this right in the event of the cancellation of the contract. They indicate that this does not make sense, since the agreement must first be cancelled before an attachment order can be obtained, but the consumer can only reinstate the agreement until its cancellation. They conclude by submitting that the provisions of section 129(3) need to be reviewed.¹³²

It is submitted that the above opinion is correct as a possible interpretation, but that the “reinstatement” of the agreement in fact means the “rectification” of the default by the consumer. It is clear from the provisions of section 129(3)(a) that when the consumer complies with the prescribed provisions (has paid the overdue amounts, paid the default charges and paid the enforcement cost) and the agreement is not yet cancelled, the provisions of section 129(3)(b) come into effect and the consumer may resume possession of the property. Therefore, the consumer has rectified the breach and the parties can continue with their normal contractual obligations. It is submitted that the legislature should replace the word “reinstate” with “rectify”.

¹³⁰ Van Heerden and Coetzee 2010 *Obiter* 773.

¹³¹ Boraine and Renke “Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005” (Part 1) 2007 *De Jure* 14.

¹³² *Vide also Nedbank Ltd v Barnard* 2009 JOL 24159 (ECP) where the applicant argued that the consumer must first “approach” the credit provider, advising him that he wishes to reinstate the credit agreement in terms of s 129(3). The court, however, rejected this argument and therefore the agreement can be unilaterally reinstated by making sufficient payment, as required in s 129(3), and will serve as valid defence against an application order for attachment.

3.6 Conclusion

This chapter reviewed the pre-court debt enforcement procedures in terms of the Act and established that when a consumer is in default with his obligations, certain pre-enforcement procedures are required by the Act, before legal proceedings can commence for debt enforcement. It is submitted that clarity is required on how the section 129(1)(a) notice should be brought to the attention of the consumer.¹³³ It is further not clear if the consumer can be compelled to provide the *domicillium citandi et exetandi* address in the credit agreement.¹³⁴ Confusion still exists with respect to the term “reinstatement of an agreement”, which needs clarification.¹³⁵

¹³³ *Vide* para 3.2.5 *supra*.

¹³⁴ *Vide* para 3.2.6 *supra*.

¹³⁵ *Vide* para 3.5 *supra*.

CHAPTER 4: THE IN-COURT PROCEDURES

4.1 General

In chapter 3, the reader was introduced to the provisions of the Act pertaining to pre-court debt enforcement procedures. In this chapter, the “in-court” debt enforcement procedures will be provided and discussed.

The legislature deemed it necessary to regulate the in-court procedure for the enforcement of a credit agreement in terms of the civil procedure in the National Credit Act. Since the inception of the National Credit Act, debt enforcement has been a complex and ambiguous matter. Due to a lack of clarity, the courts have had to interpret the Act in a number of cases in order to obtain some legal certainty. At the time of writing this dissertation, various aspects of debt enforcement were still abstruse and it is submitted that the courts and legal experts will have to clarify those aspects. Unfortunately the legal process is expensive and therefore the importance of this research is paramount to provide clarity on ambiguous matters and the recommendations made in this research, can most certainly assist to resolve these ambiguities in a cost effective manner.

It is obvious that, before a credit provider may enforce a debt in a court, he must comply with the provisions of section 129.¹³⁶ It is submitted that a credit provider who wishes to enforce a debt in terms of section 130, must overcome two hurdles. First the provisions of section 130(1) and 130(3) must be enacted by the credit provider, and then the provisions relating to the relief sought must be stipulated.

4.2 The provisions of section 130

Section 130(1) indicates that the court may be approached, subject to subsection 2, if the consumer has been in default for at least twenty business days, and if at least ten business days have passed since the section 129(1)(a) notice or the section 86(9)

¹³⁶ *Vide* chapter 3.

notice has been delivered.¹³⁷ In the case of the section 129(1)(a) notice, if the consumer has not responded or has rejected the proposals made by the credit provider, the credit provider may continue with the enforcement of the debt.¹³⁸ Further, the consumer should not have surrendered the property, in terms of section 127, if it was an instalment agreement, secured loan or lease.¹³⁹ Van Heerden¹⁴⁰ interprets this section by submitting that the criteria referred to in section 130(1)(a) and (b) should be adhered to and compliance proved by the credit provider in order for him to approach a court. She further submits that the twenty business days' default and ten business days since delivery of the section 129(1)(a) notice, referred to in section 130(1), run concurrently and not consecutively. She also submits that the reference to section 86(9) in section 130(1)(a) must actually be a reference to section 86(10) and not to subsection 9.

It is submitted that this submission is correct, since section 130(1)(a) refers to the credit provider, and section 86(9) refers to a debt counsellor without any reference to the credit provider, whereas section 89(10) refers to both the credit provider and the notice.

Section 130(2) stipulates that, in addition to subsection 1, for an instalment agreement, secured loan, or lease, the credit provider may obtain a court order to enforce the remaining obligations of a consumer under a credit agreement, at any time if all relevant property has been sold pursuant to an attachment order or surrender of property in terms of section 127, and the net proceeds of the sale were insufficient to meet all the consumer's obligations in terms of the agreement.

It is notable that section 130(2) refers to "in addition" to the circumstances contemplated in section 130(1). Van Heerden¹⁴¹ is of the view that this can be interpreted to mean that the credit provider cannot only approach a court to enforce the credit agreement, but can also approach a court for enforcement of the remaining obligations. It is submitted that this interpretation is correct since section 130(2) refers

¹³⁷ S 130(1)(a).

¹³⁸ S 130(1)(a)(i) and s 130(1)(a)(ii).

¹³⁹ S 130(1)(c).

¹⁴⁰ Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2009-loose leaf) 12.7.2.

¹⁴¹ Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2009-loose leaf) 12.7.3.

to “in addition to subsection 1”, and sub section 1 contains the provisions relating to the enforcement of the credit agreement. Therefore it is submitted that in addition to the enforcement of the credit agreement in a court, the court can also be approached at any stage for the enforcement of the remaining obligations. The question is, however, if a section 129(1)(a) must be send to the consumer if the credit provider wishes to enforce the remaining obligations in terms of section 130(2)? Van Heerden¹⁴² is of the opinion that the section 129(1)(a) notice must be send before the remaining obligations can be enforced, since such a notice is required for the section 130(1) procedure. She submits that the consumer cannot be deprived of the right to be notified of his options. Boraine and Renke¹⁴³ do not agree with van Heerden, and they submit that the section 129(1)(a) is not required for an order to enforce the remaining obligations. They submit that section 129(b) renders itself subject to section 130(2) and where the property has been sold pursuant to an attachment order, section 127(7) read with section 127(8)(a) prescribes a notice that demand performance of the remaining obligations before enforcement of the shortfall. They conclude that it will not make sense if a section 129(1)(a) notice is required and also a section 127(7) must be send for the enforcement of the remaining obligations.

It is submitted that it does not make sense to send a section 129(1)(a) notice to the consumer for the enforcement of the remaining obligations. Firstly it is clear that when a section 129(1)(a)notice has been send to the consumer, the consumer can no longer approach a debt councillor for debt review procedures.¹⁴⁴ Secondly if the consumer is in dispute about the shortfall, he may approach the tribunal to resolve such a dispute and therefore he is not deprived of any right which he would have gotten in terms of the section 129(1)(a) notice.¹⁴⁵ Thirdly it is submitted that Boraine and Renke are correct in that the consumer must be informed of the shortfall and a demand of the remaining obligations can be send in terms of section 127(7) read with section 127(8). In conclusion it is submitted that the sending of the section 129(1)(a) notice is not required in terms of the section 130(2) proceedings and it will not serve any purpose if it is send.

¹⁴² Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2009-loose leaf) 12-26.

¹⁴³ Boraine and Renke 2008 *De Jure* 1 at 6 n 160.

¹⁴⁴ *Vide* para 3.2.5 *supra*.

¹⁴⁵ S 128(1).

It is further noteworthy that mortgage agreements have been left out of the application of section 130(2). It is not clear why the legislature excluded mortgage agreements, since the effect of this exclusion would seem to be that the credit provider cannot approach the court for an order to enforce the remaining obligations of a consumer under a mortgage agreement. The implication of this provision, according to Otto and Otto,¹⁴⁶ are that mortgage agreements have been left out on purpose from section 130(2) and that credit providers may therefore only claim the proceeds of the property. It is submitted that the legislature should amend the Act by including “mortgage agreements” in section 130(2), otherwise it would result in a situation where, if a credit provider has enforced a mortgage agreement, and there is a shortfall, the credit provider might be left without any further recourse in terms of the Act. This is particularly relevant in view of the fact that section 130(2) only commenced on 1 June 2007¹⁴⁷ and that it applies retrospectively to agreements.¹⁴⁸ This implies that agreements concluded prior to and after 1 June 2007 fall under the ambit of section 130(2). When enforcing such an agreement concluded prior to the date referred to, the applicant must make an allegation that the agreement is a pre-existing agreement to which the Act applies. When one considers that mortgage agreements are normally agreements of which the payment period is twenty years or longer, the effect will be that mortgage agreements concluded as long ago as June 1987 will also fall under the ambit of the Act.

It is submitted that such mortgage agreements form the bulk of the current mortgage agreements in South Africa. Therefore this implies that the bulk of credit providers will not have any recourse in terms of section 130(2), and accordingly the legislature must include mortgage agreements in the scope of section 130(2).

Another aspect that needs consideration is the reference in section 130(2)(a) to “relevant property”. Relevant property is not defined in the Act, and, according to Otto and Otto,¹⁴⁹ it could be interpreted to mean the property that forms the subject of the specific credit agreement. It is not clear why the legislature did not use consistent language to describe the subject of the credit agreement. In section 127, for example,

¹⁴⁶ Otto and Otto (2010) 114.

¹⁴⁷ *Vide* Proc 22 in GG 28824 of 2006-05-11.

¹⁴⁸ *Vide* table to item 4(2) in sch 3 to the National Credit Act.

¹⁴⁹ Otto and Otto (2010) 114.

there is a reference to “goods”, in section 129(4) there is a reference to “property” and in section 130(2) there is a reference to “relevant property”. The intention appears to be the same in all these cases, namely the subject of the credit agreement, despite the confusing and inconsistent terminology. It is submitted that the legislature should amend the Act to refer throughout to “the subject of the credit agreement”. It is further submitted that when the legislature included section 130(2), it had the provisions of section 127 in mind, since the application of section 127(1) with respect to the different credit agreements is the same as that of section 130(2), and the effect of section 127(7) to (9) is the same as that of section 130(2).

The provisions of section 130(3) stipulate various aspects that the court must consider before it may hear any matter relating to the enforcement of a credit agreement. The court must be satisfied that, where section 127, 129 or 131 applies, the provisions of that section have been complied with, and that the matter is not currently before a tribunal that could influence the decision by the court.¹⁵⁰ Furthermore, the court must be satisfied that the credit provider did not approach the court at a time when the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or ombud,¹⁵¹ and that the consumer, despite the fact that he had surrendered the property to the credit provider, had, before it had been sold, agreed to a proposal in terms of section 129(1)(a), complied with an agreed plan in terms of section 129(1)(a), or brought the payments of the credit agreement up to date.¹⁵² If the court determines that the provisions of section 130(3) have not been complied with, it must make a ruling in terms of section 130(4).

Section 130(4) sets out the powers and prerogative of the court with respect to the enforcement of a debt. The Act stipulates that if the court determines that the debt is reckless in terms of section 80, the court must give an order contemplated in section 83.¹⁵³ However, for the purposes of this dissertation, reckless credit will not be discussed.

¹⁵⁰ S 130(3)(a)-(b).

¹⁵¹ S 130(3)(c) and s 130(3)(c)(i).

¹⁵² S 130(3)(c)(ii)(aa) to s 130(3)(c)(ii)(dd).

¹⁵³ S 130(4) and s130(4)(a).

When the credit provider has not complied with the provisions of subsection 130(3)(a) or when the court was approached under the circumstances as contemplated under subsection 130(3)(c), the court must adjourn the matter and provide an order that sets out the steps to be taken by the credit provider before the court may be re-approached.¹⁵⁴ If the credit agreement is subject to a pending debt review, the court may either postpone the matter until a final recommendation has been made following the debt review process, or order the debt counsellor to report directly to the court and subsequently make a decision,¹⁵⁵ or, if there is only one credit agreement that binds the consumer, order that the debt review be discontinued, and provide an order in terms of section 85(b).¹⁵⁶ When there is a matter pending before a tribunal, the court may adjourn the matter until the matter has been finalised by the tribunal, or order the tribunal to adjourn the matter in order for it to be heard in that court.¹⁵⁷

It is interesting to note that the court's authority has been limited in section 130(3) and (4). When any of the proceedings under these sections are heard, the court has an obligation to ensure that the procedures set out in the relevant sections, as referred to in section 130(3), have been complied with. Moreover, section 130(4) stipulates certain actions the courts must take and certain rulings they must make. It is submitted that the legislature has incorporated these actions and rulings to ensure that, in the first place, a court ensures that the matter before it is procedurally correct, and, secondly, to ensure that the courts make consistent decisions on these issues. Of course, the decision-making authority of the court is restricted by section 130(4), since the court may only act and make an order as stipulated in this section, subject to certain circumstances, and therefore it effectively renders the discretion of the court obsolete. However, it is submitted that sections 130(3) and (4) should not be interpreted as restricting the discretion of the court, but rather as ensuring that the court makes a consistent ruling on procedural aspects in the circumstances stipulated in the section.¹⁵⁸

¹⁵⁴ S 130(4)(b)(i)-(ii).

¹⁵⁵ S 130(4)(c)(i)-(ii).

¹⁵⁶ S 130(4)(c)(4)(iii).

¹⁵⁷ S 130(4)(d)(i)-(ii).

¹⁵⁸ For a detailed discussion see Van Heerden in Scholtz (2009) 12-34 to 12-35; Van Heerden and Otto (2007) *TSAR* at 677.

4.3 The provisions of section 131

Section 131 stipulates that if an attachment order is issued by a court for the subject of a credit agreement, the provisions of section 127(2) to (9) and section 128, read with the changes required by the context, will apply to those goods. The provisions of section 128 will not apply, since section 128 pertains primarily to disputes following a section 127 sale.

In order to analyse the provisions of section 131, it is necessary to provide the provisions of section 127(2) to (9), since the application of section 127(2) to (9), read in the context of attachment orders, will differ from the provisions for the surrender of goods stipulated in section 127. Section 127(2) to (9) will have the following effect on attachment orders:

The credit provider must, within ten business days after the attachment, give the consumer written notice of the estimated value, and/or any other prescribed information.¹⁵⁹

- a) The provisions of section 127(3) and section 127(4)(a) will not apply, since the goods were not voluntarily surrendered.
- b) The contextual change obliges the credit provider to sell the goods as soon as possible and for the best price reasonably obtainable.¹⁶⁰
- c) The credit provider is obliged, once the goods are sold, to:
 - i) Credit the consumer with the selling price of the goods and debit the consumer with the reasonable costs of the sale;
 - ii) Provide a written notice to the consumer indicating:
 - aa) the settlement value before the sale;
 - bb) the amount obtained for the sale of the goods;
 - cc) the proceeds of the sale, if any, and the reasonable cost of the sale; and
 - dd) the amount that was credited and debited to the consumer's account.¹⁶¹
- d) If an amount is received that is more than the settlement value, and

¹⁵⁹ S 127(2).

¹⁶⁰ S 127(4)(b).

¹⁶¹ S 127(5).

- i) There is a credit agreement under another credit provider with the same goods, such credit must be referred to the tribunal. The tribunal may order that the credit be distributed in a way that is just and reasonable: or
 - ii) Where no other credit provider has registered the same credit agreement with the same goods with the consumer, the credit provider must give such credit back to the consumer, which effectively terminates the credit agreement.¹⁶²
- e) If an amount is received that is less than the settlement value, or if, as a result of the sale, the consumers account is still in debt, the credit provider may demand payment of the remaining outstanding amount.¹⁶³
- f) If the consumer –
- a) does not pay the remaining amount within ten business days after the demand contemplated in section 127(7), the credit provider may enforce the remaining obligations; or
 - b) pays the amount as demanded before judgement is obtained under paragraph (a), the agreement is terminated upon receiving such amount.¹⁶⁴
- g) In any of the circumstances stipulated in section 127(8), interest is payable by the consumer in accordance with the interest rate as prescribed by the credit agreement. Such interest rate will also apply to the demand referred to in section 127(7) from the date of demand until the date of payment of the total outstanding amount.¹⁶⁵

4.3.1 Perspectives on section 131

It is noteworthy that section 131 refers to “the subject of the credit agreement” and to “goods”. There is no definition in the Act for “goods” or for “the subject of a credit

¹⁶² S 127(6)(a) and (b).

¹⁶³ S 127(7).

¹⁶⁴ S 127(8)(a) and (b).

¹⁶⁵ S 127(9).

agreement”. One tends to think that this is simply a matter of semantics and might be a mere oversight by the legislature, but this cannot be established with certainty, since the intention of the legislature is unknown. However, it is clear that, since section 131 does not exclude any credit agreement, it applies to all the credit agreements stipulated in the Act.¹⁶⁶ This is especially relevant because mortgage agreements have been left out of the application of section 130(2), with the result that the credit provider cannot approach the court for an order to enforce the remaining obligations of a consumer under a mortgage agreement. In addition, since the limitations on the application of certain listed agreements stipulated in section 127(1) do not apply to section 131 procedures, it is submitted that it would be possible to obtain an attachment order for immovable property under a mortgage agreement. The limitation that section 130(2) brought about by not including mortgage agreements in its provisions has the result that, with the attachment order and the sale of such goods, where the proceeds of such sale is less than the settlement value, no recourse will be available to the credit provider to claim the remaining settlement amount from the consumer. It is recommended that the Act be amended to make provision for mortgage agreements in section 130(2).

Also excluded in terms section 131 is the application of section 127(10). Section 127(10) stipulates that failure to comply with the provisions of section 127 will constitute an offence. Van Heerden¹⁶⁷ therefore submits that, after obtaining an attachment order, non-compliance with the procedures of section 127 does not constitute an offence and that sections 156 to 160 do not make provision for an offence in the case of non-compliance with a court order. It is submitted that the submission made by Van Heerden¹⁶⁸ is incorrect since the provisions of section 131 expressly stipulate that sections 127(2) to (9) “apply with respect to any goods attached in terms of that order”,¹⁶⁹ thereby effectively conferring a duty on the applicant to comply with the procedures set out in section 127(2) to (9). It is therefore

¹⁶⁶ *Vide* Coetzee “Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005” 2010 *THRHR* 577, where it is submitted that “property” should be read in the context of s 131 to include both moveable and immovable property.

¹⁶⁷ Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2009-loose leaf) 12.8.4.2 at fn 157.

¹⁶⁸ *Ibid.*

¹⁶⁹ S 131.

submitted that non-compliance with these procedures will not constitute an offence *per se* as stipulated in the Act, but will constitute contempt of court.

An important question that arises is whether, since section 131 refers to the procedures of sections 127(2) to (9), this procedure now effectively replaces the civil execution procedure. Taken at face value, the procedures set out in section 127 do not contain a detailed process, but it is submitted that it should rather be seen as additions to the civil execution procedure in an attempt to provide more consumer protection. It is noteworthy that the consumer must be informed in writing of all the steps in the entire execution process.¹⁷⁰ In addition, the credit provider must sell the goods as soon as possible for the best possible price.¹⁷¹ Finally, the consumer may even approach the tribunal under certain circumstances if he is not satisfied with the sale.¹⁷² It follows logically that the legislature had the best interest of the consumers at heart when minimising the possibility for the credit providers to abuse the process. Should there be a surplus after the sale, such surplus amount must first go to the tribunal to be distributed to other credit providers, who have a registered credit agreement with the same consumer for the same goods.¹⁷³ Only when there is no other credit provider with a registered credit agreement for the consumer for the same goods, the consumer is entitled to such surplus amount.¹⁷⁴

A further question that arises is what the influence of “reinstatement” as stipulated in section 129(3)(a) will be with respect to attachment orders. Section 129(3)(a) has been discussed in chapter 3. It is clear from the application of section 129(3)(a) that, if the consumer is in default and the agreement has not been cancelled, the agreement may be reinstated when the required amounts are paid. Section 131 does not require that the agreement must be cancelled before an attachment order is provided. What is also interesting is that section 127(6)(b) indicates that the “agreement is terminated upon remittance of the amount”. This leaves the question whether the consumer may “reinstate” the agreement before an attachment order is issued in terms of section 131.

¹⁷⁰ *Vide* for example s 127(2).

¹⁷¹ S 27(4)(b).

¹⁷² S 128.

¹⁷³ S 127(6)(a).

¹⁷⁴ S 127(6)(b).

The court, in *ABSA Bank Ltd v De Villiers*,¹⁷⁵ following an application for a final attachment order for the goods, held that the common law requirement that the credit agreement must be terminated before attachment of the goods is necessary for a consistent and harmonised system of debt enforcement, and protects the consumer's rights. Therefore, the court held that it is a requirement first to terminate the credit agreement before the goods can be attached.¹⁷⁶ With respect to the provisions of section 127(6)(b) relating to the time of termination of the agreement, it is submitted that when this is read in context, it applies only to the surrender of goods.¹⁷⁷

The question whether a right should be vested in the credit provider to cancel the credit agreement follows from the question whether the agreement must be terminated before an attachment order is granted. In *ABSA Bank Ltd v de Villiers*,¹⁷⁸ the court indicated that if the credit agreement does not contain a cancellation clause, the founding affidavit or particulars of claim should contain an allegation of compliance with section 123 and section 129. However, in *ABSA Bank Ltd v Havenga*¹⁷⁹ the court did not agree with the decision in *ABSA Bank Ltd v de Villiers*¹⁸⁰ and held that the right to cancel an agreement vests in the application of the rules of the law of contract. The provisions of section 123 and 129 stipulate only the procedures to be followed by the credit provider where he has obtained a cancellation right, regardless of how such a right arose. Boraïne and Renke¹⁸¹ submit that, in order to avoid the burden of having to acquire the right to cancel an agreement, the parties may insert a *lex commissoria* in the contract, which allows the cancellation of the agreement in the event of a breach of the agreement.

It is submitted that one can come to no other conclusion than that the courts gave the correct interpretation in both *ABSA Bank Ltd v de Villiers* and *ABSA Bank Ltd v Havenga*,¹⁸² but with the emphasis on different aspects. Firstly, following the decision

¹⁷⁵ Vide para 3.2.3 *supra* at par 24-27.

¹⁷⁶ Vide *Nedbank Ltd v Barnard* at para 3.5 *supra*; Vide *BMW Financial Services SA (Pty) Ltd v Donkin* at para 3.3 *supra* where the court concluded that the right to retain possession of the object of the credit agreement was terminated by the cancellation of the agreement by the plaintiff.

¹⁷⁷ S 127.

¹⁷⁸ Vide para 3.2.3 *supra* at par 19-42.

¹⁷⁹ 2010 5 SA 533 (GNP) at par 4-10.

¹⁸⁰ Vide para 3.2.3 *supra*.

¹⁸¹ Boraïne and Renke 2007 *De Jure* 224.

¹⁸² Vide para 3.2.3 and para 4.3 *supra*.

in *ABSA Bank Ltd v de Villiers*,¹⁸³ it must be alleged that the agreement was cancelled, otherwise the agreement would still be valid and in such circumstances attachment can only be seen as an interim attachment. Secondly, I concur with the court's view in *ABSA Bank Ltd v Havenga*¹⁸⁴ in that cancellation of an agreement is based on the rules of the law of contract. This view would therefore allow the submission of Borraine and Renke¹⁸⁵ that a *lex commissoria* can be included in a credit agreement, since the *lex commissoria* does form part of the rules of the law of contract.¹⁸⁶

It is interesting to note that section 131 does not make provision for interim attachment orders, and the question therefore arises whether the Act recognises interim attachment orders. According to Otto and Otto¹⁸⁷ it is not clear, but section 129(3)(b) might be interpreted to allow for interim attachment orders. He suggests that the courts must follow the procedures that applied to interim attachment orders before the promulgation of the Act. Van Heerden¹⁸⁸ submits that section 129(3)(b) might be construed to allow for the granting of an interim attachment order.

Borraine and Renke¹⁸⁹ submit that if an interim interdict is seen as a legal procedure to enforce an agreement, then the provisions of section 129(1)(b) must be complied with. However, they recommend that the interim interdict should not be seen as legal procedure and they submit that the common law should be followed for an application for an interim attachment order. The common law will then provide the substance for interim attachment orders, and the respective court procedures will prescribe the procedure to be followed for obtaining an interim attachment order.¹⁹⁰

¹⁸³ *Vide* para 3.2.3 *supra* at par 19.

¹⁸⁴ *Vide* para 4.3 *supra* at par 10.

¹⁸⁵ *Vide* para 4.3 *supra*.

¹⁸⁶ Hutchison *et al* (2009) 323; *Vide* s 123 stipulating the instances when a credit agreement may be terminated.

¹⁸⁷ Otto and Otto (2010) 113.

¹⁸⁸ Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2009-loose leaf) 12.8.4.1.

¹⁸⁹ Borraine and Renke 2008 *De Jure* 12.

¹⁹⁰ *Vide* Coetzee 2010 *THRHR* 583, where it is submitted that the procedures followed in *Santam Bpk v Dempers* 1987 4 SA 639 (O) should be followed, in that the sheriff remains in possession of the goods until a final attachment order is provided.

The issue of interim attachment orders was addressed in *SA Taxi Securitisation v Chesane*,¹⁹¹ where the court was of the opinion that there is no express indication in the Act that the common law remedy (interim attachment order) has been abrogated. The court indicated that the function and purpose of an interim attachment order are to protect the leased goods against damage or depreciation and safekeeping the goods until that matter has been resolved between the parties. The court concluded that the purpose of an interim attachment order is not to enforce remedies or obligations under the credit agreement and the remedy (interim attachment order) does not form part and parcel of the debt enforcement process envisaged under the Act. It is submitted that this decision is correct. The question raised by Boraine and Renke¹⁹² with respect to whether an interim attachment order will constitute legal proceedings for debt enforcement and whether section 129(1)(b) would therefore be applicable was also answered in this decision. It is clear that an interim attachment order does not constitute a debt enforcement procedure.

4.4 The provisions of section 132

In essence, section 132(1) stipulates that if a credit provider could not successfully resolve a dispute with the consumer about the cost of the attachment of property via dispute resolution mechanisms, such credit provider may approach the court for compensation for costs for repossession in excess of the permitted costs in terms of section 131. The court may then grant an order if it is satisfied that the consumer misled, delayed or frustrated the credit provider's right to repossess the property,¹⁹³ and as a result the credit provider experienced exceptional costs.¹⁹⁴ Otto and Otto indicate that it is possible that the legislature wanted to compensate the credit providers when there is a delay, but he recommends that this should be clarified.¹⁹⁵

It is submitted that the sole purpose of section 132 is to make an additional remedy available to the credit provider to recover costs that are exceptional and not normally associated with the repossession of goods. Unfortunately the Act does not define

¹⁹¹ 2010 6 SA 557 (SGJ) at par 9 -10.

¹⁹² *Vide* para 4.3 *supra*.

¹⁹³ S 132 (2)(a)(i) and (ii).

¹⁹⁴ S 132(2)(b).

¹⁹⁵ Otto and Otto (2010) 75.

“exceptional costs” and merely provides a guideline by indicating that it is those costs in excess of that which is permitted by the provisions of section 131. An example could be the recovery costs incurred by the credit provider to locate the goods when the goods could not be found at the address provided by the consumer, and the consumer effectively frustrates the repossession process.¹⁹⁶ Surely such costs should be deemed to be exceptional, since the credit provider incurred additional costs to recover the goods. It is recommended that the legislature clarify section 132 in order to create legal certainty.

4.5 Conclusion

This chapter dealt with the procedural in-court debt enforcement processes. It provided the minimum periods before the court may be approached, the various aspects the court must consider before it may hear any debt enforcement matter, and the chapter considered the decision-making authority of the court on debt enforcement matters. It further dealt with the enforcement of the obligations that remain after the sale of the goods, the aspects surrounding attachment orders, and the additional recourse available to the credit provider to recover attachment costs.

This chapter further indicated that section 130(1)(a) incorrectly refers to section 86(9), instead of section 86(10).¹⁹⁷ It was further established that it is not clear if a section 129(1)(a) notice must be sent for the section 130(2) proceedings.¹⁹⁸ Additionally it was established that mortgage agreements are excluded from the ambit of section 130(2),¹⁹⁹ and that the use of inconsistent language such as “the subject of the credit agreement” and “goods” in the Act, leads to interpretational problems.²⁰⁰ This chapter also indicated that there is still uncertainty with respect to whether a *lex commissoria* can be included in a credit agreement.²⁰¹

¹⁹⁶ S 97 forces the consumer to, *inter alia*, inform the credit provider if the address where the goods are regularly kept changes.

¹⁹⁷ *Vide* para 4.2 *supra*.

¹⁹⁸ *Vide* para 4.2 *supra*.

¹⁹⁹ *Vide* para 4.2 *supra*.

²⁰⁰ *Vide* para 4.3.1 *supra*.

²⁰¹ *Vide* para 4.3.1 *supra*.

CHAPTER 5: CONCLUSION

5.1 General

This dissertation investigated the formal procedural requirements for debt enforcement in terms of the Act. It identified some areas that had been problematic in the debt enforcement process and which had been clarified by recent court decisions. It further identified problems currently experienced with the interpretation of the Act, with specific reference to debt enforcement, and discussed the opinions of other authors in order to resolve such problems.

The South African credit industry is worth more than a trillion rand and a delicate balance must be maintained in the regulation of the industry in order to protect both the consumer's interest and that of the credit provider, since it would inevitably affect the South African economy if the balance favoured only one of the parties.

It is clear from the provisions of section 3 of the Act, and the discussions throughout this dissertation, that the legislature's first priority was to protect the consumers.²⁰² The field of application of the Act indicates that the majority of transactions fall within the ambit of the Act.²⁰³ As a result, it was necessary to analyse the pre-court debt enforcement procedures contained in the Act²⁰⁴ and to provide the current interpretations and recommendations on in court debt enforcement procedures.²⁰⁵

5.2 Summary of findings

²⁰² *Vide* Chapter 1 *supra*.

²⁰³ *Vide* Chapter 2 *supra*.

²⁰⁴ *Vide* Chapter 3 *supra*.

²⁰⁵ *Vide* Chapter 4 *supra*.

It was established in chapter 3 of this dissertation that clarification is required on how the section 129(1)(a) notice should be brought to the attention of the consumer.²⁰⁶ It was further established that it is not clear if the consumer can be compelled to provide the *domicillium citandi et exetandi* address in the credit agreement.²⁰⁷ Finally, it was indicated that confusion still exists with respect to the term “reinstatement of an agreement”.²⁰⁸

It was established in chapter 4 of this dissertation that section 130(1)(a) incorrectly refers to section 86(9).²⁰⁹ It was further established that it is not clear if a section 129(1)(a) notice must be send for the section 130(2) proceedings.²¹⁰ It was established that mortgage agreements are excluded from the ambit of section 130(2),²¹¹ and that the use of inconsistent language in the Act leads to interpretational problems.²¹² Finally, it was established that there is still uncertainty with respect to whether a *lex commisorica* can be included in a credit agreement.²¹³

5.3 Recommendations

Following the research conducted the following recommendations are made in order to provide legal certainty:

- a) It is submitted that the sending of the section 129(1)(a) notice, as elected by the consumer in the credit agreement, should be regarded as the correct method of bringing the section 129(1)(a) notice to the attention of the consumer. However, the court should use its discretion in terms of section 30(3)(a) to satisfy itself that the provisions of section 129 have fully been complied with.²¹⁴

- b) It is submitted that if a consumer must provide his *domicillium citandi et executandi* address, such a clause would force the consumer to supply a specific address, where

²⁰⁶ *Vide* para 3.2.5 *supra*.

²⁰⁷ *Vide* para 3.2.6 *supra*.

²⁰⁸ *Vide* para 3.5 *supra*.

²⁰⁹ *Vide* para 4.2 *supra*.

²¹⁰ *Vide* para 4.2 *supra*.

²¹¹ *Vide* para 4.2 *supra*.

²¹² *Vide* para 4.3.1 *supra*.

²¹³ *Vide* para 4.3.1 *supra*.

²¹⁴ *Vide* para 3.2.5 *supra*.

he is supposed to receive legal documents, and not merely any address he selects. This would therefore neither be in line with the decision in *Rossouw v FirstRand Bank Ltd*, nor with the provisions of section 96(1).²¹⁵

- c) It is submitted that the “reinstatement” of the agreement in fact means the “rectification” of the default by the consumer. It is clear from the provisions of section 129(3)(a) that when the consumer complies with the prescribed provisions and the agreement is not yet cancelled, the provisions of section 129(3)(b) come into effect and the consumer may resume possession of the property. Therefore, the consumer has rectified the breach and the parties can continue with their normal contractual obligations.²¹⁶
- d) It is submitted that the reference to section 86(9) in section 130(1)(a) must actually be a reference to section 86(10) and not to subsection 9. This is since section 130(1)(a) refers to the credit provider, and section 86(9) refers to a debt counsellor without any reference to the credit provider, whereas section 89(10) refers to both the credit provider and the notice.²¹⁷
- e) It is submitted that it does not make sense to send a section 129(1)(a) notice to the consumer for the enforcement of the remaining obligations for various reasons. It is further submitted that the sending of the section 129(1)(a) notice is not required in terms of the section 130(2) proceedings and it will not serve any purpose if it is send.
- f) It is submitted that the legislature should amend the Act by including “mortgage agreements” in section 130(2), otherwise it would result in a situation where, if a credit provider has enforced a mortgage agreement, and there is a shortfall, the credit provider will be left without any further recourse in terms of the Act.²¹⁸

²¹⁵ *Vide* para 3.2.6 *supra*.

²¹⁶ *Vide* para 3.5 *supra*.

²¹⁷ *Vide* para 4.2 *supra*.

²¹⁸ *Vide* para 4.2 *supra*.

- g) It is submitted that “the subject of the credit agreement” and “goods” should be defined and clarified.²¹⁹
- h) It is submitted that a *lex commissoria* may be included in a credit agreement by the credit provider. This is based on the court’s view in *ABSA Bank Ltd v Havenga*, in that cancellation of an agreement is based on the rules of the law of contract. Therefore the submission of Borraine and Renke, that a *lex commissoria* can be included in a credit agreement, since the *lex commissoria* does form part of the rules of the law of contract is valid.²²⁰

²¹⁹ *Vide* para 4.3.1 *supra*.

²²⁰ *Vide* para 4.3.1 *supra*.

Bibliography

Books

Hutchison D *et al* (2009) *The law of contract in South Africa* [S.1] Oxford

Otto JM and Otto RL (2010) *The National Credit Act explained* (2nd ed) Durban: *LexisNexis*

Scholtz JW *et al* (2009) *Guide to the National Credit Act* Durban: *LexisNexis*

Legislation

Credit Agreements Act, 75 of 1980

National Credit Act, 34 of 2005

Regulations

Regulations of the National Credit Act

Government Gazette

South Africa (2006) Determination of thresholds. *Government Gazette* 28893, June 1 (Regulation Gazette No 713).

Table of cases

ABSA Bank Ltd v De Villiers 2009 (5) SA 40 (C)

ABSA Bank Ltd v Havenga 2010 (5) SA 533 (GNP)

ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors 2009 (2) SA 512 (D)

BMW Financial Services (Pty) Ltd v Donkin 2009 (6) SA 63 (KZD)

BMW Financial Services (Pty) Ltd v Dr MB Mulaudzi Inc 2009 (3) SA 348 (B)

First Rand Bank Ltd v Carl Beck Estates (Pty) Ltd 2009 (3) SA 384 (T)

Hicklin v Secretary for Inland Revenue 1980 (1) SA 481 (A)

Marques v Unibank Ltd 2001 (1) SA 145 (W)

Munien v BMW Financial Services (Pty) Ltd 2010 (1) SA 549 (KZD)

Nedbank Ltd v National Credit Regulator 2011 (3) SA 581 (SCA)

Nedbank Ltd v Barnard 2009 JOL 24159 (ECP)

Rossouw v FirstRand Bank Ltd 2010 (6) SA 439 (SCA)

Santam Bpk v Dempers 1987 (4) SA 639 (O)

SA Taxi Securitisation v Chesane 2010 (6) SA 557 (SGJ)

Standard Bank of SA Ltd v Hunkydory Investments 194 (Pty) Ltd 2010 (1) SA 627 (C)

Standard Bank v Rockhill (unreported case, No 56251/2009 (GSJ))

Starita v ABSA Bank Ltd 2010 (3) SA 443 (GSJ)

Van Niekerk v Favel 2006 (4) SA 548 (W)

Articles

Boraine A and Renke S “Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005” (Part 1) (2007) *De Jure* 222.

Boraine A and Renke S “Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005” (Part 2) (2008) *De Jure* 1.

Boraine A and Van Heerden C “The conundrum of the non-compulsory/compulsory notice in terms of section 129(1)(a) of the National Credit Act” (2011) *SAMLJ* 1.

Coetzee H “The impact of the National Credit Act on civil procedural aspects relating to debt enforcement” (2009) *SA MERC LJ* 272 277.

Coetzee H “Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005” (2010) *THRHR* 583.

Roestoff M, Haupt F, Coetzee H and Erasmus M “The debt counselling process- closing the loopholes in the National Credit Act 34 of 2005” (2009) *PELJ* 247.

Van Heerden C and Coetzee H “Debt counselling v debt enforcement: some procedural questions answered” (2010) *Obiter* 756.

Van Heerden CM and Otto JM “Debt enforcement in terms of the National Credit Act 34 of 2005” (2007) *TSAR* 655.

Renke S, Roestoff M and Haupt F “The National Credit Act: new parameters for the granting of credit in South Africa” (2007) *Obiter* 229.

Report

Report of the Committee Consumer Credit, chaired by Lord Crowther volume 1 Cmnd 4596 London (1971)

South African Law Commission Working Paper 46 Project 67 *The Usury Act and Related Matters* Report 1993

World Wide Web

<http://www.ncr.org.za> (accessed 9 April 2012)

http://www.ncr.org.za/pdfs/ANR2010/Annual_Report_2010.pdf (accessed 9 April 2012)

http://www.ncr.org.za/index.php?option=com_content&view=article&id=8(accessed 9 April 2012)

