

THE UNIVERSITY OF PRETORIA
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**THE SOUTH AFRICAN LAW OF CONTRACT AS INFLUENCED BY
THE NATIONAL CREDIT ACT 34 OF 2005: AN EVALUATION**

BY

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DEDICATION AND ACKNOWLEDGEMENTS

I dedicate this mini-dissertation to my personal Lord and savior, Jesus Christ of Nazareth, without your help, provision and guidance I would have not finished this work, thank you Father. I truly now know what it means to “Trust in the Lord with all your heart and lean not on your own understanding” indeed those who trust in the Lord shall never be put to shame.

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ABSTRACT

This mini-dissertation explores the South African law of contract as influenced by the National Credit Act 34 of 2005.

The National Credit Act has brought about a new era of consumer credit regulation and practice, which has introduced comprehensive changes to the consumer credit industry, as well as the law of contract. The Act provides for applied law of contract, in that, it only applies to credit agreements.

A contractual agreement will only be legally binding upon the parties if all the contractual requirements are complied with, which requirements include consensus, contractual capacity, certainty, possibility, legality and formalities.

This study illustrates specific provisions of the National Credit Act which have an influence or impact on the general principles of contract. This was done by considering specific provisions of the Act and by having regard to relevant case law.

Aspects that *inter alia* fell outside the scope of this dissertation were the influence of the National Credit Act on the general principles of certainty and possibility.

Finally, in view of the current consumer legislation and the common law position pertinent to contracts, recommendations were made where necessary in order to address shortcomings and problems with the National Credit Act.

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CHAPTER 1

GENERAL INTRODUCTION

1 1 Introduction

The National Credit Act 34 of 2005¹ introduced a new era of consumer credit regulation and practice, which brought about overall changes to the consumer credit industry, including the law of contract.² The Act came into full force and effect on 1 June 2007.³ The National Credit Act has repealed both the Credit Agreements Act 75 of 1980⁴ and the Usury Act 73 of 1968.⁵ It also amends or partly repeals 15 other Acts.⁶ The Act is an extensive piece of legislation which consists of 173 sections and three schedules.⁷ It also brings about a clean slate from the past showing divergence from its predecessors.⁸ The Act introduces into South African law new concepts which aim to protect credit consumers⁹ and has without a doubt made much needed advancements on the preceding legislative regime.¹⁰ The National Credit Act is more comprehensive and is written in a much simpler language in comparison to that of its predecessors.¹¹ Boraine and Renke state that “[t]he Act, as a general rule, applies to basically every credit agreement made within, or having an effect within, the Republic. The only qualification is that the parties to the credit agreement must be dealing at arm’s length.”¹²

The National Credit Act deals with applied law of contract in that the Act applies only to credit agreements.¹³ A contract may be defined as an agreement entered into by two or more persons with the intention of creating a legal obligation or obligations.¹⁴ The agreement must be one

¹Hereafter the National Credit Act or the Act.

²Campbell (2007) *SA Merc LJ* 251.

³GN 22 in *Government Gazette* 28824 of 11 May 2006. See also Scholtz in *Scholtzed* (2008) para 2.2.

⁴Hereafter the Credit Agreements Act.

⁵Hereafter the Usury Act.

⁶Scholtz in *Scholtzed* (2008) para 2.1.

⁷Otto and Otto (2013) 3.

⁸Otto and Otto (2013) 3.

⁹Otto and Otto (2013) 3.

¹⁰Scholtz in *Scholtzed* (2008) para 2.1.

¹¹Scholtz in *Scholtzed* (2008) para 2.1.

¹²Boraine and Renke (2007) *De Jure* 230.

¹³Van Zyl in *Scholtzed* (2008) para 4.2.

¹⁴Hutchison and Pretorius (2009) 6.

that the law recognises as being legally binding on the parties.¹⁵ Other requirements apart from consensus must be satisfied in order for a valid contract to come into existence.¹⁶

The following are the common law requirements for a valid contract:¹⁷

- (a) Consensus.
- (b) Contractual capacity.
- (c) Certainty.
- (d) Possibility.
- (e) Legalities.
- (f) Formalities.

If the above-mentioned requirements are met a valid and binding contract with a particular content comes into being.¹⁸ The terms or content of a contract are determined by the contractual parties.¹⁹ These contractual terms represent the intentions and options of the parties and may be categorised as *essentialia*, *naturalia* or *incidentalialia*.²⁰ The law of contract also regulates breach of contract and provides remedies for such breach.²¹ In terms of the common law parties to a contract may agree on and insert terms into their contract which will regulate remedies in the event of breach.²² Some remedies, however, are given *ex lege* by operation of law.²³ The parties need not agree on these remedies, for example, a warranty against latent defects.²⁴ The warranty will determine the remedies available to the innocent party who holds the *merx*(thing)with the latent defect.²⁵ An aggrieved or the innocent party has an election of remedies.²⁶ The innocent party may either enforce the contract by way of a claim

¹⁵Hutchison and Pretorius (2009) 6.

¹⁶Bhana, Bonthuys and Nortje (2013) 93.

¹⁷Bhana, Bonthuys and Nortje (2009) 15.

¹⁸Bhana, Bonthuys and Nortje (2009) 15.

¹⁹Bhana, Bonthuys and Nortje (2013) 187.

²⁰Bhana, Bonthuys and Nortje (2013) 189.

²¹Bhana, Bonthuys and Nortje (2009) 14.

²²Hutchison and Pretorius (2009) 308.

²³Barnard (2012) *De Jure* 456.

²⁴Barnard (2012) *De Jure* 457.

²⁵Barnard (2012) *De Jure* 456 – 457.

²⁶Bhana, Bonthuys and Nortje (2009) 214.

for specific performance, cancel the contract or claim contractual damages if the requirements of damages are satisfied.²⁷

Not much so far has been written about the impact that the National Credit Act has on the common law of contract.²⁸ It is for this reason that this dissertation seeks to evaluate the importance of the National Credit Act and the influence it has on the principles of contract.

1 2 Research Statement

The problem statement of this dissertation is to investigate the influence and impact of the National Credit Act on certain principles of the law of contract which are governed by the common law.²⁹ This dissertation further seeks to recommend legal reform where necessary, based on the policy objectives applicable to this field of law.

1 3 Research Objectives

Relevant research objectives have been formulated with reference to the above-mentioned research statement in order to define and restrict the scope of this dissertation. These are as follows:

- (a) The general principles of contract are a collection of rules.³⁰ It is therefore necessary for the purpose of this dissertation to unpack these rules and provide an overview of the common law principles of contract, in order to ultimately indicate the influence that has been brought about by the National Credit Act on these common law principles.

- (b) In light of the South African law of contract essentially being a modernised version of the Roman-Dutch law of contract,³¹ it is important for purposes of this dissertation to investigate whether the National Credit Act has influenced the general principles of contract and if so, to what extent.

²⁷Bhana, Bonthuys and Nortje (2009) 214.

²⁸Mathye LLM mini-dissertation (2011) 1.

²⁹Hutchison and Pretorius (2009) 11.

³⁰Van der Merwe, Van Huyssteen, Reinecke and Lubbe (2007) 1.

³¹Para 1 2 above.

- (c) The National Credit Act is a consumer credit enactment as its purpose is to protect consumers.³² The Act has introduced new forms of protection for consumers in South Africa.³³ This dissertation also seeks to investigate the application of the National Credit Act concerning the law of contract in the South African courts.
- (d) Finally, having regard to the current South African consumer credit legislation and the common law position applicable to contracts, recommendations will be made where necessary in order to address shortcomings and problems with the National Credit Act.

1 4 Delineations and Limitations

In the light of the stated objectives³⁴ of this research and the general contract principles noted above,³⁵ the following limitations must be noted:

- (a) Due to the wide scope of the law of contract and in order to restrict this study to the above-mentioned objectives,³⁶ an in-depth study and examination of all the common law principles of contract will not form part of this dissertation.
- (b) In spite of its significance in the context of this study, a discussion on the influence of the National Credit Act on the principles of certainty and possibility which form part of the requirements for a valid contract will not be relevant for purposes of this dissertation.

³²Otto and Otto (2013) 3.

³³Otto and Otto (2013) 4.

³⁴Para 1 3 above.

³⁵Para 1 1 above.

³⁶Para 1 3 above.

1 5 Overview of Chapters

- (a) Chapter 1 provides the background information to the dissertation and sets out the problem statement and the research objectives in relation to it.
- (b) Chapter 2 comprises of an overview of the common law principles governing the South African law of contract.
- (c) Chapter 3 comprises of the influence the National Credit Act has on specific common law principles of contract.
- (d) Chapter 4 will comprise of final integrated conclusions and recommendations made in regard to the research conducted in this study, with reference to the research objectives formulated in paragraph 1 3 above.

1 6 Terminology

In this dissertation the concepts “consumer”, “debtor” and “credit receiver” will be used interchangeably. The same holds true for the concepts “credit provider”, “creditor” and “credit grantor”.

The Act in section 1 defines “consumer” *inter alia* as a party to whom goods or services are sold, to whom money is paid or to whom credit is granted.³⁷ “Credit provider” is defined as a party who *inter alia* supplies goods or services or advances money or credit to another under different types of credit agreements. It also includes a party who has a right to be a credit provider in terms of a credit agreement after the credit agreement has been concluded.³⁸

³⁷S 1 of the National Credit Act. See also Renke LLD Thesis (2012) 382.

³⁸S 1 of the National Credit Act. See also Renke LLD Thesis (2012) 382.

1 7 Reference Techniques

- (a) For the sake of convenience the masculine form is used throughout this dissertation to refer to a natural person.

- (b) The full titles of the sources referred to in this study are provided in the bibliography, together with an abbreviated “mode of citation”. This mode of citation is used to refer to a particular source in the footnotes. However, legislation and court decisions are referred to in full.

- (c) The law as stated in this dissertation reflects the position as on 10 November 2014.

CHAPTER 2

GENERAL PRINCIPLES OF CONTRACT

2 1 Introduction

This chapter comprises of an overview of the common law requirements for a valid contract. The different forms of breach of contract as well as remedies for breach of contract will also be briefly discussed. A contract will only be legally binding upon the contracting parties if the following requirements are complied with: consensus, contractual capacity, certainty, possibility, legality and formalities.³⁹ The above requirements will be discussed next.

2 2 Consensus

Consensus is a process whereby an agreement has been reached between two or more persons.⁴⁰ Such agreement may be reached in terms of the rules of offer and acceptance.⁴¹ The contractual parties will usually enter into a negotiation process with each other and this process continues until an agreement has been reached between the parties.⁴² The contractual parties, must, however, have a serious intention to enter into a contract in order for consensus to be reached.⁴³ As a general rule once a contractual party develops a will or intention which coincides with the will or intention of the other contractual party consensus is said to have been reached,⁴⁴ therefore an acceptance of an offer constitutes consensus.⁴⁵ Consensus can be branched into three different categories, namely: true consensus, which is attained either expressly or through conduct, assumed consensus, which mainly consists of implied contractual terms and lastly consensus by operation of law, which means that the contractual terms come into being as a result of legislation, the common law or trade usage.⁴⁶ Having regard to the fact

³⁹Para 1 1 above.

⁴⁰Christie and Bradfield (2011) 23.

⁴¹Hawthorne and Hutchison in Hutchison and Pretorius *eds* (2009) 46.

⁴²Fouché in Fouché *ed* (1999) 45.

⁴³Otto and Prozesky-Kuschke in Nagel *ed* (2011) 48.

⁴⁴Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 18.

⁴⁵Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 20.

⁴⁶Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 18.

that the terms of a contract are determined by the aforementioned categories of consensus,⁴⁷ it is therefore safe to say that a contract comes into existence where the parties agree on creating between themselves obligations as well as where they agree on the particulars or content of the contract.⁴⁸

It is possible in certain circumstances for consensus to be improperly obtained.⁴⁹ This happens in situations whereby consensus was obtained under false impression, threats of harm, undue influence or even by bribery.⁵⁰ In these circumstances the contract can either be null and void or voidable and can be set aside at the instance of the innocent party.⁵¹

2 3 Contractual Capacity

Contractual capacity is the ability to execute a juristic act, for example, concluding a valid and binding contract.⁵² Such capacity is made up of two factors namely: the competence to formulate a will and the competence to act with a sober mind with regards to that will.⁵³ In order to establish which persons possess contractual capacity it is important to first define the term “person”.⁵⁴ A legal subject or person is the carrier of rights and obligations and accordingly, possesses legal capacity.⁵⁵ Legal capacity is the ability to have rights and duties.⁵⁶ All persons, whether natural or juristic, possess legal capacity⁵⁷ (a juristic person is an artificial person made up by the law).⁵⁸ It is assumed that parties entering into contracts have the legal capacity to enter into such contracts, unless the contrary may be proven.⁵⁹ A person’s contractual capacity is determined by his status, meaning that it is possible for all persons

⁴⁷ Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 25.

⁴⁸ Van Der Merwe, Van Huyssteen, Reinecke and Lubbe (2007) 21.

⁴⁹ Fouché in Fouchéed (2002) 58.

⁵⁰ Bhana, Bonthuys and Nortje (2009) 339-340.

⁵¹ Otto and Prozesky-Kuschke in Nagel *ed* (2011) 64.

⁵² Lotz, Nagel and Prozesky-Kuschkeed *Business law* (2011) 43.

⁵³ Lotz, Nagel and Prozesky-Kuschkeed *Business law* (2011) 43.

⁵⁴ Lotz, Nagel and Prozesky-Kuschkeed *Business law* (2011) 43.

⁵⁵ Lotz, Nagel and Prozesky-Kuschkeed *Business law* (2011) 43.

⁵⁶ Lotz, Nagel and Prozesky-Kuschkeed *Business law* (2011) 43. See also Strode, Slack and Essack (2010) *SAMJ* 247.

⁵⁷ Lotz, Nagel and Prozesky-Kuschkeed *Business law* (2011) 43.

⁵⁸ Lotz, Nagel and Prozesky-Kuschkeed *Business law* (2011) 43.

⁵⁹ Christie (2006) 227.

whether natural or juristic to have legal capacity but lack contractual capacity.⁶⁰ For example, a minor under the age of seven has legal capacity but has no contractual capacity whatsoever.⁶¹

This paragraph will focus mainly on the discussion of mentally ill persons and minors.

There is a presumption in our law that every person possesses the necessary mental capacity to enter into a contract, unless the person who alleges the contractual incapacity as a result of mental illness proves otherwise.⁶² However, there is also a rebuttable presumption that a person who had been declared mentally ill at the time of contracting did not have the capacity to contract and, therefore, the person who alleges contractual capacity must prove that such capacity existed.⁶³ Persons without contractual capacity are unable to conclude valid juristic acts⁶⁴ because they lack the ability to appreciate the nature and consequences of their conduct.⁶⁵ For example, a mentally ill person may not enter into a valid contract unless at the time of the conclusion of the contract such a person was experiencing a lucid moment.⁶⁶ Generally a curator is appointed to deal with the affairs of a mentally ill person.⁶⁷ The appointment of a curator does not, however, change the fact that the mentally ill person has no contractual capacity whatsoever.⁶⁸ Any agreement concluded by such a person without the assistance of the curator will be declared null and void⁶⁹ but not unlawful.⁷⁰

In the case of minors the Children's Act 38 of 2005 applies.⁷¹ A minor in terms of section 17 of the Children's Act is a person who has not attained the age of majority which is 18 years.⁷² A person who is above the age of 18 years therefore has full contractual capacity.⁷³ Minors below

⁶⁰Otto and Prozesky-Kuschke in Nagel *ed*(2011) 75.

⁶¹Fouché in Fouché *ed* (1999) 73.

⁶²Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 44.

⁶³Bhana, Bonthuys and Nortje (2013) 93. See also Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 44.

⁶⁴Kuschke in Hutchison and Pretorius *eds*(2009) 149.

⁶⁵Kuschke in Hutchison and Pretorius *eds*(2009) 149.

⁶⁶Bhana, Bonthuys and Nortje (2013) 93.

⁶⁷Fouché in Fouché *ed* (2002) 80.

⁶⁸Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 44.

⁶⁹Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 44.

⁷⁰Otto and Otto (2013) 52.

⁷¹Hereafter the Children's Act.

⁷²S 17 of the Children's Act.

⁷³S 17 of the Children's Act. See also Bhana, Bonthuys and Nortje (2013) 94.

the age of 7 years have no contractual capacity whatsoever and may not even conclude contracts which benefit them.⁷⁴ Minors who are older than the age of 7 years but have not yet reached the age of 18 years have limited contractual capacity and they may only conclude contracts with the assistance of their guardians.⁷⁵ If such minors conclude contracts without the assistance or consent of their guardians, such a contract is considered to be voidable and therefore not binding to the minor.⁷⁶ The contract can, however, be ratified after conclusion by the guardian or by the minor himself when he attains majority.⁷⁷ Such ratification renders the contract to be valid and binding upon the minor as from the day it was concluded.⁷⁸

A minor may be emancipated.⁷⁹ This renders him as being able to independently enter into certain contracts and business transactions.⁸⁰ Whether emancipation has been attained or not is a question of fact which is to be decided by the courts.⁸¹ If a minor fraudulently represents himself as a major or an emancipated minor, it constitutes a misrepresentation and the minor is held bound to his actions.⁸² In such a case the misled party may have a claim in delict.⁸³

2 4 Certainty

A contract must create certainty regarding its legal outcome and performance.⁸⁴ In terms of the common law the terms or conditions of an agreement must be certain or ascertainable.⁸⁵ A term in a contract will be certain if there is no doubt about the execution or performance of the term in the contract⁸⁶ and it will be ascertainable if it is capable of being discovered with certainty.⁸⁷ If the terms in the contract are ambiguously defined to the extent that it is not clear

⁷⁴Christie and Bradfield (2011) 240.

⁷⁵Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 45.

⁷⁶Kuschke in Hutchison and Pretorius *eds* (2009) 152.

⁷⁷Otto and Prozesky-Kuschke in Nagel *ed*(2011) 77-78.

⁷⁸Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 45.

⁷⁹Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 46. See the definition of “emancipation” in para 3 3 below.

⁸⁰Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 46.

⁸¹Fouché in Fouché *ed*(2004) 72.

⁸²Otto and Prozesky-Kuschke in Nagel *ed* (2011) 79.

⁸³Kuschke in Hutchison and Pretorius *eds*(2009) 152.

⁸⁴Van Der Merwe, Van Huyssteen, Reinecke and Lubbe (2007) 221.

⁸⁵Bhana, Bonthuys and Nortje (2009) 77.

⁸⁶Bhana, Bonthuys and Nortje (2013) 96.

⁸⁷Fouché in Fouché *ed*(2004) 93.

what the parties' agreement requires, the contract will be declared null and void.⁸⁸ However, instead of the contract being declared void for uncertainty the courts will attempt to interpret the contract as being valid.⁸⁹ Therefore, if the uncertain terms can be severed from the contract the rest of the contract will be valid⁹⁰ and the unclear terms will be overlooked.⁹¹

2 5 Possibility

It is a general requirement that at the time of the conclusion of the contract it must be possible to render the performance.⁹² If it is objectively impossible to render any of the performances, the contract does not create any legal obligations.⁹³ This therefore renders the contract void.⁹⁴ Subjective impossibility does not affect the validity of a contract.⁹⁵ Subjective impossibility is the inability of the debtor to perform while objective impossibility makes it impossible for anyone to render the performance.⁹⁶ If there is a legal rule which prevents performance, such performance will be objectively impossible.⁹⁷ This renders the contract invalid for lack of possibility.⁹⁸

2 6 Legality

Legality stipulates that a contract must not be in contravention of a statute or the common law.⁹⁹ Statutory illegality means that the contract is restricted by legislation and it is the intention of the legislature to render the contract void.¹⁰⁰ Common law illegality, on the other hand, is where the contract is against public policy.¹⁰¹ A contract which does not meet the

⁸⁸Fouché in Fouchéed (2004)93.

⁸⁹Du Plessis in Hutchison and Pretorius eds (2009) 213.

⁹⁰Du Plessis in Hutchison and Pretorius eds (2009) 213.

⁹¹Bhana, Bonthuys and Nortje (2013) 96.

⁹²Bhana, Bonthuys and Nortje (2009) 82.

⁹³Van Der Merwe, Van Huyssteen, Reinecke and Lubbe (2007) 186.

⁹⁴Fouché in Fouchéed (2004) 93.

⁹⁵Fouché in Fouchéed(1999) 102.

⁹⁶Van Der Merwe, Van Huyssteen, Reinecke and Lubbe (2007) 188.

⁹⁷Bhana, Bonthuys and Nortje (2009) 84.

⁹⁸Bhana, Bonthuys and Nortje (2009) 84.

⁹⁹Christie (2006) 337.

¹⁰⁰Bhana, Bonthuys and Nortje (2013) 128.

¹⁰¹Van Der Merwe, Van Huyssteen, Reinecke and Lubbe (2007) 196-197.

requirements of legality may be void and unenforceable.¹⁰² There are different consequences where the contract is void as a result of illegality: the maxim *ex turpiveliniustacausa non orituractio*, applies.¹⁰³ This maxim provides that the courts will not be of any help to parties who enter into unlawful contracts.¹⁰⁴ This rule applies in cases where no performance has been delivered and the party who wishes to enforce the performance cannot approach the court for such relief,¹⁰⁵ because an illegal contract can never be enforced.¹⁰⁶ For example, where a car thief fails to deliver a stolen vehicle to the purchaser even though the latter has already made payments, the court will not authorise such delivery.¹⁰⁷ The maxim *in pari delicto, potiores condition defendentis*, which is also known as the *par dilictum*-rule, applies where the parties to the contract have already rendered performance in terms of the contract prior to realising that their agreement is illegal.¹⁰⁸ In terms of this rule, restitution of the rendered performance cannot be recovered and as a result, where the parties are equally responsible for the illegal contract and one of them has already rendered the performance, he will not be entitled to recover his performance from the other party.¹⁰⁹ Accordingly where the parties are not equally to blame for the unlawful contract, the party with the lesser degree of fault may recover his performance where he has already performed in terms of the unlawful contract.¹¹⁰ The severance or divisibility rule provides that where a contract is divisible, the court may sever the illegal part of the contract from the legal parts,¹¹¹ therefore rendering the rest of the contract valid.¹¹²

The decision in *Sasfin (Pty) Ltd v Beukes*¹¹³ has been the leading case in terms of which parties have argued that a contract or clause in a contract is unfair and therefore against public

¹⁰²Floyd in Hutchison and Pretorius eds(2009) 174.

¹⁰³Fouché in Fouchéed(2004) 98.

¹⁰⁴Fouché in Fouchéed(2004) 98.

¹⁰⁵Fouché in Fouchéed(2004) 98.

¹⁰⁶Van Der Merwe, Van Huyssteen, Reinecke and Lubbe (2012) 173. See also Floyd in Hutchison and Pretorius eds(2009) 187.

¹⁰⁷Fouché in Fouchéed(2004) 98.

¹⁰⁸Fouché in Fouchéed(2004) 98.

¹⁰⁹Fouché in Fouchéed(2004) 98.

¹¹⁰Fouché in Fouchéed(2004) 98.

¹¹¹Bhana, Bonthuys and Nortje (2009) 100.

¹¹²Floyd in Hutchison and Pretorius eds(2009) 187.

¹¹³*Sasfin (Pty) Ltd v Beukes*1989 (1) SA 1(A).

policy.¹¹⁴ The argument succeeded in *Baart v Malan*¹¹⁵ where the court held that a maintenance agreement that had been included in a consent paper which was integrated in a divorce order was against public policy and therefore had to be deleted from the consent paper.¹¹⁶ The court applied the *Sasfin* principle and ruled that the agreement was inconsistent with public policy and thus void.¹¹⁷

It is clear from the above cases that contracts which are harmful to the interests of the community will not be enforced based on the grounds of public policy.¹¹⁸

2 7 Formalities

In terms of the law of contract, the formalities of a contract are the outward or discernible appearance of the contract, for example whether or not the contract is in writing and signed by the relevant parties.¹¹⁹ Generally there are no formalities that need to be complied with for the conclusion of a valid contract.¹²⁰ A contract can either be verbal, in writing or even tacit.¹²¹ Contractual parties may sometimes agree on making their agreement subject to a few formalities.¹²² These formalities are commonly known as self-imposed or agreed formalities and depending on the *animus* (intention) of the parties, there are two possible instances: firstly, the self-imposed formalities are preconditions to the validity of the agreement.¹²³ The agreement will only come into existence as soon as all the contractual requirements and formalities of such contract have been adhered to.¹²⁴ Secondly, the formalities are merely evidence of the parties' verbal agreement.¹²⁵ The contract will come into being once the parties reach consensus and comply with all the stipulated requirements for a valid contract, even if the self-imposed

¹¹⁴Lewis in *Boberged* (1990) 40.

¹¹⁵*Baart v Malan* 1990 (2) SA 862 (E). See also Lewis in *Boberged* (1990) 40.

¹¹⁶*Baart v Malan* 1990 (2) SA 862 (E). See also Lewis in *Boberged* (1990) 40.

¹¹⁷*Baart v Malan* 1990 (2) SA 862 (E). See also Lewis in *Boberged* (1990) 40.

¹¹⁸Floyd in *Hutchison and Pretorius eds* (2009) 174.

¹¹⁹Lotz, Nagel and Prozesky-Kuschke in *Nagel ed Business law* (2011) 57.

¹²⁰Fouché in *Fouchéed* (1999) 97.

¹²¹Van Der Merwe, Van Huyssteen, Reinecke and Lubbe (2007) 152.

¹²²Lotz, Nagel and Prozesky-Kuschke in *Nagel ed Business law* (2011) 57.

¹²³Lotz, Nagel and Prozesky-Kuschke in *Nagel ed Business law* (2011) 57.

¹²⁴Lotz, Nagel and Prozesky-Kuschke in *Nagel ed Business law* (2011) 57.

¹²⁵Lotz, Nagel and Prozesky-Kuschke in *Nagel ed Business law* (2011) 57.

requirements have yet to be adhered to.¹²⁶The contractual parties ‘might’ also agree on prescribing identical formalities for any alteration or consensual termination of the agreement, or for any waiver of rights emanating from the agreement.¹²⁷ Nonetheless, a written agreement does not need to be a formal document; it may be incorporated in a letter or invoice.¹²⁸ Statutorily-imposed formalities on the other hand are formalities imposed by legislation and they may sometimes require certain agreements to comply with the sanctioned formalities.¹²⁹ Non-compliance with the sanctioned formalities can invalidate the contract, render the contract voidable or have no impact on the legality of the contract whatsoever, but lead to one of the parties violating a statute.¹³⁰ Non-compliance may also influence the contract’s enforceability against other parties.¹³¹ The main objective of these statutorily imposed formalities is to protect consumers against ambiguity, conflict and misrepresentation.¹³²

Examples of contracts which are required by statute to comply with formalities are: contracts for sale of land, contracts where property is leased for a period longer than 10 years, contracts concluded in terms of the National Credit Act and contracts of suretyship.¹³³

Generally statutory formalities which apply to the conclusion of contracts also apply to the amendments of contracts.¹³⁴ There are no formalities prescribed for the termination or reinstatement of an agreement, except where the parties have agreed on such.¹³⁵

¹²⁶Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 57.

¹²⁷Floyd in Hutchison and Pretorius *eds* (2009) 157.

¹²⁸Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 57.

¹²⁹Floyd in Hutchison and Pretorius *eds* (2009) 158.

¹³⁰Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 57.

¹³¹Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 57.

¹³²Lotz, Nagel and prozesky-Kuschke in Nagel *ed Business law* (2011) 57.

¹³³Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 57.

¹³⁴Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 58.

¹³⁵Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 58.

2 8 Breach of contract

Breach of contract will normally take place when a party to a contract fails to perform his or her contractual obligations.¹³⁶ There are five forms of breach of contract, namely *moradebitoris*, *moracreditoris*, positive malperformance, repudiation and prevention of performance.¹³⁷

Mora debitoris occurs when a debtor fails to perform his obligations on time.¹³⁸ Where the creditor fails to perform his obligations to co-operate with the debtor in order to enable the debtor to perform *moracreditoris* is committed.¹³⁹ Positive malperformance occurs when a debtor performs in an inadequate or impaired manner.¹⁴⁰ Where either party to a contract decides without any legal or just cause not to honour the contractual agreement, repudiation is constituted.¹⁴¹ Prevention of performance takes place when either party renders his own performance impossible or renders performance of the other party impossible.¹⁴²

2 9 Remedies for breach of contract

2 9 1 Introduction

Where breach of contract occurs, the aggrieved party will be entitled to certain contractual remedies available either by operation of law (*ex lege*) or as a result of agreed remedies.¹⁴³

The *ex lege* remedies to which an aggrieved party is entitled to are specific performance, cancellation and damages.¹⁴⁴ Apart from these remedies, the contracting parties may agree on their own remedies (which are commonly known as agreed remedies) in order to regulate the consequences of contractual breach in their agreements.¹⁴⁵ These remedies are aimed at avoiding the practical problems and legal requirements associated with the implementation of

¹³⁶Otto and Prozesky-Kuschke in Nagel *ed* (2011) 123.

¹³⁷Fouché in Fouché *ed* (2002) 111.

¹³⁸Otto and Prozesky-Kuschke in Nagel *ed* (2011) 123.

¹³⁹Bhana, Bonthuys and Nortje (2013) 280.

¹⁴⁰Hutchison in Hutchison and Pretorius *eds* (2009) 276.

¹⁴¹Van Der Merwe, Van Huyssteen, Reinecke and Lubbe (2012) 311.

¹⁴²Bhana, Bonthuys and Nortje (2013) 121.

¹⁴³Para 1 1 above.

¹⁴⁴Para 1 1 above.

¹⁴⁵Para 1 1 above.

the remedies by operation of law.¹⁴⁶ The remedies that may be agreed upon by the contractual parties include the acceleration clause, the *lex commissoria* clause and the penalty clause.¹⁴⁷

Remedies are designed to either fulfil a contract or to terminate the contractual relationship.¹⁴⁸ In this paragraph the various forms of remedies (*ex lege* and agreed remedies) will be briefly discussed.

2 9 2 Specific performance

Specific performance is a natural remedy available to the aggrieved party,¹⁴⁹ as its main object is the fulfilment of a contract.¹⁵⁰ This remedy is used by an innocent party who is trying to bring about the anticipated results which were agreed upon at the beginning of the contract.¹⁵¹ The claim for specific performance is therefore aimed at forcing the guilty party, by a court order to deliver performance as agreed upon by the contractual parties in their original agreement.¹⁵² The performance may be claimed once the duty to perform is due and enforceable.¹⁵³ The innocent party does not have to wait until the debtor has fallen into *mora* before claiming for specific performance.¹⁵⁴ The defaulting party may, for example, be compelled to make payment for a particular sum of money (for example, the rental or purchase price); to hand over or construct something; to complete a certain task and to make payments for damages as an alternative to performance.¹⁵⁵ The circumstances of each case will be taken into account, for example, if the burden to deliver such performance is simple, the courts will easily award the order for specific performance.¹⁵⁶ However, the court will not award such an order if

¹⁴⁶ Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 69.

¹⁴⁷ Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 69.

¹⁴⁸ Bhana, Bonthuys and Nortje (2013) 304.

¹⁴⁹ Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 69.

¹⁵⁰ Bhana, Bonthuys and Nortje (2013) 304. See also Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 69.

¹⁵¹ Fouché in Fouché *ed* (2002) 118.

¹⁵² Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 70.

¹⁵³ Eiselen in Hutchison and Pretorius *eds* (2009) 319.

¹⁵⁴ Eiselen in Hutchison and Pretorius *eds* (2009) 319.

¹⁵⁵ Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 70.

¹⁵⁶ Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 71.

delivery of the performance results in severe difficulty for the guilty party or the community at large.¹⁵⁷

2 9 2 1 Acceleration clauses

The acceleration clause provides that, in the event of breach, the outstanding balance of the debt will be due immediately and payable in full.¹⁵⁸ The main aim or purpose of this clause is to bring about specific performance¹⁵⁹ and the party in whose favour the clause is included in the agreement has the discretion to decide whether or not to use such clause.¹⁶⁰

2 9 3 Cancellation

Cancellation is an extraordinary remedy that may only be used where a material breach has been committed.¹⁶¹ In terms of the common law a credit provider may either cancel a contract as a result of *moradebitoris* where time is of the essence or where he gains the right to cancel the contract.¹⁶² Cancellation on the ground of time is of the essence occurs whereby the date of performance was set in the contract and the debtor is responsible for the delay and time is important in terms of the contract.¹⁶³

A creditor may gain the right to cancellation by delivering a notice of rescission to the debtor providing him with another opportunity to render performance within a reasonable time.¹⁶⁴ Such notice must specify that the creditor intends to terminate the agreement if the debtor does not render the performance within the time given.¹⁶⁵ The innocent party himself may carry out the cancellation without the help or cooperation of the court, hence, the consequent court order will simply affirm the cancellation which has already been implemented by the innocent party.¹⁶⁶ In circumstances where the innocent party has the right to cancel he may choose not

¹⁵⁷Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 71.

¹⁵⁸Boraine and Renke (2007) *De Jure* 224.

¹⁵⁹Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 69.

¹⁶⁰Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 72.

¹⁶¹Kerr (2002) 703.

¹⁶²Prozesky-Kuschke in Nagel *ed Business law* (2011) 73. See also Boraine and Renke (2007) *De Jure* 224.

¹⁶³Prozesky-Kuschke in Nagel *ed Business law* (2011) 74.

¹⁶⁴Prozesky-Kuschke in Nagel *ed Business law* (2011) 74. See also Boraine and Renke (2007) *De Jure* 224.

¹⁶⁵Prozesky-Kuschke in Nagel *ed Business law* (2012) 74.

¹⁶⁶Christie (2006) 538-539.

to do so, but may rather claim for specific performance should he wish to do so.¹⁶⁷ The claim for specific performance must be done within a reasonable time frame after the breach of contract has been committed or after the innocent party becomes aware of such breach.¹⁶⁸ If the innocent party chooses to claim for specific performance instead of cancellation he cannot at a later stage change his mind.¹⁶⁹ However, were the innocent party chooses cancellation, he must notify the other party appropriately.¹⁷⁰ If the contract is cancelled, the obligations of the contract are also cancelled and the parties to the agreement no longer have to deliver performance in terms of the contract.¹⁷¹ The contractual parties must then restore performance received by them.¹⁷² Where the innocent party suffers a loss as a result of the defaulting party's breach, he will be entitled to claim for damages in order to compensate for such loss.¹⁷³

2 9 3 1 *Lexcommisoria*

The cancellation clause (*lexcommisoria*) regulates the parties' rights to terminate their contractual agreement.¹⁷⁴ It may, for example, provide that a party to the agreement has a right to cancel the contract in the event of breach no matter how small or inconsequential the breach may be.¹⁷⁵ The aggrieved party may then abandon the contract even if under ordinary circumstances he would not have been able to do so if the clause was not included in the agreement.¹⁷⁶

2 9 4 Damages

¹⁶⁷Van Der Merwe, Van Huyssteen, Reinecke and Lubbe (2007) 399. See also Fouché in Fouchéed(2004) 118.

¹⁶⁸Fouché in Fouchéed(2004) 118.

¹⁶⁹Fouché in Fouchéed(2004) 118.

¹⁷⁰Fouché in Fouchéed(2004) 118.

¹⁷¹Fouché in Fouchéed(2004) 119.

¹⁷²Fouché in Fouchéed(2004) 119.

¹⁷³Fouché in Fouchéed(2004) 119.

¹⁷⁴Otto and Prozesky-Kuschke in Nagel *ed*(2011) 132.

¹⁷⁵Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 73.

¹⁷⁶Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 73.

Damages may be defined as the amount of money paid by the breaching party for financial loss suffered by the innocent party as a result of the breach of contract.¹⁷⁷ The claim for damages is aimed at placing the aggrieved party in a position where he would have been if the breach of contract had not occurred.¹⁷⁸ The innocent party may only claim for damages if he can prove that he has suffered a financial loss as a result of the breach which was caused by the guilty party.¹⁷⁹ Damages may be claimed together with other relief, for example, the innocent party may claim for specific performance and damages or he can claim for cancellation and damages in cases where the guilty party failed to comply with a previous order of specific performance.¹⁸⁰

2 9 4 1 Penalty clauses

Penalty clauses are regulated by the Conventional Penalties Act 15 of 1962.¹⁸¹ In terms of this Act a penalty clause may be described as a clause in a contract which entails that the defaulting party in the contract will be accountable to pay a certain sum of money, to convey something, or to render performance to the innocent party that he would otherwise not have been entitled to.¹⁸² The penalty clause serves as an alternate claim for damages and it makes provision for the parties to reach consensus on the predetermined amount of money to be paid by the breaching party in the event of breach.¹⁸³ In order to be entitled to claim the penalty amount where a penalty clause is present in the contract, the innocent party needs only prove that there has been a breach by the other party.¹⁸⁴

CHAPTER 3

¹⁷⁷Fouché in Fouchéed(1999) 132.

¹⁷⁸Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 76.

¹⁷⁹Joubert (1987) 415.

¹⁸⁰Bhana, Bonthuys and Nortje (2013) 333-334.

¹⁸¹Hereafter the Conventional Penalties Act.

¹⁸²S 1(1) and (2) of the Conventional Penalties Act. See also Lotz, Nagel and Prozesky-Kuschke in Nagel *ed Business law* (2011) 78.

¹⁸³Fouché in Fouchéed (2004) 121.

¹⁸⁴Fouché in Fouchéed(2004) 121.

THE INFLUENCE OF THE NATIONAL CREDIT ACT ON THE GENERAL PRINCIPLES OF THE LAW OF CONTRACT

3 1 Introduction

The aim of this chapter is to investigate specific sections of the National Credit Act that have an influence on the general principles of the law of contract. This will be done by considering specific sections of the Act and by having regard to relevant court decisions.

3 2 The influence of the National Credit Act on the principle of consensus

As emphasised in paragraph 2 2, in order for parties to conclude a valid and binding contract they must reach consensus with each other and such consensus or agreement may be reached in terms of the rules of offer and acceptance.¹⁸⁵ As a general rule acceptance of an offer by a contractual party constitutes consensus.¹⁸⁶

The National Credit Act, however, amends this common law principle of consensus by providing that parties to an incidental credit agreement will be deemed to have concluded the agreement on the date which is 20 business days after a late payment fee or interest in respect of that account has been charged for the first time by the supplier of the goods or services¹⁸⁷ or a prearranged higher price for full payment of the account first becomes applicable, unless the settlement value has been fully paid by the consumer before that date.¹⁸⁸

It would seem as though regardless of the fact that the parties had reached initial consensus on the provision of goods or services, payment for the goods or services, deferment of payment (by tendering of an account) and the charging of interest, a credit agreement that is subject to the Act has not yet been concluded as far as the Act is concerned.¹⁸⁹ According to Renke, “[t]he agreement is only formed 20 business days after the date upon which the credit provider levies

¹⁸⁵ Para 2 2 above.

¹⁸⁶ Para 2 2 above.

¹⁸⁷ S 5(2)(a) of the National Credit Act. See also Renke (2011) *THRHR* 465 and Otto (2010) *THRHR* 647.

¹⁸⁸ S 5(2)(b) of the National Credit Act. See also Renke (2011) *THRHR* 465 and Otto (2010) *THRHR* 647.

¹⁸⁹ Renke (2011) *THRHR* 465.

a late payment fee or interest for the first time”.¹⁹⁰ The reasoning behind the 20 days gestation period is unclear.¹⁹¹ However, one possibility that was considered by the different authors was that “some form of a credit agreement does exist in the meantime (within the 20-day period) to which the Act does apply”.¹⁹² An agreement such as this can easily be accommodated under the widespread, comprehensive definition of a credit transaction in section 8(4)(f).¹⁹³ It was submitted, however, that such an argument is illogical and should be rejected as being downright incorrect.¹⁹⁴ It would be impractical to treat an incidental credit agreement as a different form of credit agreement for a few weeks and thereafter as a proper incidental agreement.¹⁹⁵ “For one thing, it would mean that the credit provider will have to register as a credit provider for purposes of this “other short term” agreement whereas it was clearly the legislature’s intention that providers of incidental credit should fall outside of the ambit of the Act as far as the registration requirements are concerned”.¹⁹⁶

It is nonetheless undisputed that in the meantime an underlying contract between the parties exists.¹⁹⁷ However, it does not yet qualify as a credit agreement for the purposes of the Act.¹⁹⁸

The incidental credit agreement in terms of the Act does not come into being despite the existence of an offer and acceptance until the 20 days gestation period has lapsed.¹⁹⁹ This is therefore an amendment of the common by the Act. The parties common law rights to negotiate the contractual terms in respect of the credit agreement is restricted by section 5(2) of the Act which makes provision for consensus to come into being by operation of law.²⁰⁰ The Act extends the common law in this regard in that there is no deemed consensus to form a

¹⁹⁰Renke (2011) *THRHR* 465.

¹⁹¹Otto and Otto (2013) 22.

¹⁹²Otto (2010) *THRHR* 647. See also Renke (2011) *THRHR* 465.

¹⁹³Otto (2010) *THRHR* 647. See also Renke (2011) *THRHR* 465.

¹⁹⁴Otto (2010) *THRHR* 647. See also Renke (2011) *THRHR* 465.

¹⁹⁵Otto (2010) *THRHR* 647.

¹⁹⁶Otto (2010) *THRHR* 647.

¹⁹⁷Otto and Otto (2013) 22.

¹⁹⁸Otto and Otto (2013) 22.

¹⁹⁹§ 5(2)(a) and (b) of the National Credit Act. See also Otto and Otto (2013) 22.

²⁰⁰Aucamp LLM mini-dissertation (2012) 21.

contract in terms of the common law. Contractual parties are required to reach consensus either expressly or tacitly.²⁰¹

3 3 The influence of the National Credit Act on the principle of contractual capacity

The common law recognises different classes of persons who do not have sufficient capacity to conclude valid contracts.²⁰² These persons include mentally ill persons, intoxicated persons, prodigals and minors.²⁰³ This paragraph will only focus on mentally ill persons as well as minors.

It was stated in paragraph 2 3 that a mentally unfit person cannot unilaterally conclude a valid and binding contract, unless at the time of contracting such a person was capable of understanding the nature and consequences of his conduct.²⁰⁴ Innes CJ pointed out in *Pheasant v Warne* that the principle of *animus* (intention) is an important element in the coming into existence of contractual obligations.²⁰⁵ He further stated that where it is clear that the required intelligence is not present, then *animus* cannot be construed as being present for there is no consenting mind.²⁰⁶ As a result, a contract concluded with a mentally unfit person in terms of the common law is void but not unlawful.²⁰⁷

“The National Credit Act has “elevated” contracts with persons declared mentally unfit to the status of unlawful contracts”,²⁰⁸ by providing that a credit agreement is unlawful if at the time the agreement was concluded, the consumer was subject to an order of a competent court declaring such person to be mentally unfit and the credit provider was aware or could have reasonably been aware that the consumer was subject to such an order.²⁰⁹ The Act particularly deals with credit agreements that have been concluded with persons who have been declared mentally unfit by a court of law.²¹⁰ Agreements concluded with mentally unfit persons but who

²⁰¹Para 2 2 above.

²⁰²Para 2 3 above.

²⁰³Bhana, Bonthuys and Nortje (2013) 93-94.

²⁰⁴Para 2 3 above.

²⁰⁵*Pheasant v Warne* 1922 AD 481-488. See also Christie and Bradfield (2011) 255.

²⁰⁶*Pheasant v Warne* 1922 AD 481-488. See also Christie and Bradfield (2011) 255.

²⁰⁷Para 2 3 above.

²⁰⁸§ 89(2)(a)(i) of the National Credit Act. See also Otto and Otto (2013) 52.

²⁰⁹§ 89(2)(a)(i) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 196.

²¹⁰Kelly-Louw in Kelly-Louw and Stoop (2012) 196.

have not been declared as such by a competent court are dealt with in terms of the principles of the law of contract.²¹¹

It would seem that the Act places a responsibility on the credit provider not to contract with a person who has been declared mentally unfit by a court of law. However, the Act does not set out guidelines that need to be followed by the credit provider in order to establish contractual capacity. The Act further provides that, where an agreement is unlawful in terms of this section, irrespective of any provision of the common law, any other legislation or any provision of an agreement which is inconsistent with this section, the court must order that the agreement is invalid and thus void as from the date the agreement was concluded.²¹² This means that the court cannot even consider the surrounding circumstances where a credit agreement has been concluded with a mentally unfit person.

If a credit agreement is concluded with a mentally unfit person, the credit provider will in terms of the Act be required to refund any money paid by the consumer to the credit provider in terms of the agreement with interest calculated at a rate which is stipulated in the agreement from the period which the consumer paid the money to the credit provider until such date that the money is reimbursed by the credit provider.²¹³ All rights of the credit provider under the credit agreement to recover any money or goods delivered to or on behalf of the consumer are either cancelled or forfeited to the state if the court is of the opinion that cancelling the rights would unjustly enrich the consumer.²¹⁴ However, where the consumer or person acting on behalf of the consumer directly or indirectly, by act or omission, causes the credit provider to believe that the consumer has the required capacity to conclude a contract or

²¹¹Kelly-Louw in Kelly-Louw and Stoop (2012) 196.

²¹²S 89(5)(a) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 198. The introductory part of s 89(5)(a) of the National Credit Act has been amended by s 27(a) of the National Credit Amendment Act 19 of 2014- see *Government Gazette* 37665 of 19 May 2014. However, the Amendment Act is not yet in operation but it shall come into operation on a date fixed by the President by proclamation in the Gazette. See for the substitution of s 89(5)(a) para 3 4 2 below.

²¹³S 89(5)(b)(i) and (ii) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 198. S 89(5)(b) of the National Credit Act has been deleted by s 27(b) of the National Credit Amendment Act, 19 of 2014. See for the discussion of this matter para 3 4 2 below.

²¹⁴S 89(5)(c)(i) and (ii) of the National Credit Act. S 89(5)(c) has been declared to be unconstitutional and has been deleted in terms of s 27(b) of the National Credit Amendment Act 19 of 2014 these matters are discussed in para 3 4 2 below. In this para the influence exerted by the National Credit Amendment Act, 19 of 2014, is discussed.

credit agreement,²¹⁵ the provisions of section 89(2) (a) discussed above will not apply to the credit agreement.²¹⁶

As mentioned before, in terms of the common law, a contract which is concluded with an unassisted minor is voidable and therefore not binding to the minor.²¹⁷ Where a minor fraudulently represents himself as a major in terms of the common law, such minor will be bound to the contract regardless of whether or not the contract is to his detriment and the minor will not be entitled to restitution.²¹⁸

The National Credit Act extends the common law position by providing that a credit agreement is unlawful if at the time the agreement was entered into the consumer was an unemancipated minor and was unassisted by his or her guardian.²¹⁹ The Act, however, does not provide a definition for the term emancipation. According to the common law emancipation is the situation whereby the parents or guardians of the minor expressly or tacitly give consent for the minor to independently conclude certain juristic acts.²²⁰

Consonant to the common law the National Credit Act also makes provision for the fraudulent minor to be bound to his actions²²¹ by providing a defence to the credit provider against such minor.²²² As a result, the contract in terms of the Act will be rendered lawful, the minor will be bound to the contract and therefore, no restitution to the minor will take place.²²³ In a roundabout way, the National Credit Act consequently also excludes restitution to the minor.

The consequences of concluding a credit agreement with an unemancipated minor are set out in section 89(5) of the Act, as discussed above.

²¹⁵§ 89(3)(a) and (b) of the National Credit Act.

²¹⁶§ 89(3)(a) and (b) of the National Credit Act.

²¹⁷Para 2 3 above.

²¹⁸Para 2 3 above.

²¹⁹§ 89(2)(a) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 196.

²²⁰See para 2 3 above. See also Otto and Prozesky-Kuschke in Nagel *ed* (2011) 79. See also Heaton and Pretorius (2007) *SALJ* 122 and Otto and Otto (2013) 52.

²²¹§ 89(3)(a) of the National Credit Act.

²²²§ 89(3)(a) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 196.

²²³§ 89(3)(a) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 196.

3 4 The influence of the National Credit Act on the principle of legality

It was mentioned above that a contract or the provisions of a contract should not be in contravention of a statute or the common law.²²⁴ It is for this reason that this paragraph will discuss the influence of the National Credit Act on unlawful credit agreements and unlawful provisions contained in credit agreements. The reason for discussing the latter is due to the fact that unlawful provisions in a credit agreement may render the agreement unlawful.

3 4 1 Unlawful credit agreements

Section 89 of the National Credit Act regulates unlawful credit agreements.²²⁵ This section is, however, not applicable to pawn transactions.²²⁶ The Act specifically lists certain agreements that were determined to be unlawful by the legislature. They are the following:²²⁷

- (a) Credit agreements which are entered into by unemancipated minors who are unassisted by their guardians.²²⁸
- (b) Credit agreements concluded with persons who have been declared as being mentally unfit by a competent court.²²⁹
- (c) Credit agreements concluded with persons who are under an administration order and are unassisted by the administrator concerned.²³⁰
- (d) Credit agreements which are concluded as a result of negative option marketing.²³¹
- (e) Supplementary agreements.²³²
- (f) Credit agreements which are entered into by unregistered credit providers that are required to be registered by the Act.²³³

²²⁴Para 2 6.

²²⁵§ 89 of the National Credit Act.

²²⁶§ 89(1) of the National Credit Act. See also Otto and Otto (2013) 52.

²²⁷§ 89(2)(a)-(e) of the National Credit Act. See also Otto and Otto (2013) 52.

²²⁸§ 89(2)(a) of the National Credit Act.

²²⁹§ 89(2)(a)(i) of the National Credit Act.

²³⁰§ 89(2)(a)(ii) of National Credit Act.

²³¹§ 74(1) of the National Credit Act. Negative option marketing takes place where the credit provider makes an offer to the consumer to enter into a credit agreement, or induces the consumer to enter into the credit agreement, on the basis that the agreement will automatically come into being unless the consumer refuses the offer.

²³²§ 89(2)(c) of the National Credit Act. In terms of s 91(a) a supplementary agreement is an agreement that adapts (but does not change) the original agreement.

(g) A credit agreement which was entered into by a credit provider who was subject to a notice from the National Credit Regulator or a provincial regulator to stop extending or making available credit under any credit agreement²³⁴ or to refrain from offering credit under a specific form of credit agreement utilised by the credit provider.²³⁵

3 4 2 Consequences of unlawful credit agreements

As discussed above,²³⁶ section 89(5) provides that, “if a credit agreement is unlawful in terms of this section, despite any provision of the common law, any other legislation or any provision of an agreement to the contrary, a court must order that the credit agreement is void as from the date the agreement was entered into”. Thus, a credit agreement is considered to be void as from the date it was concluded.²³⁷ However, only a court order can render the unlawful agreement void.²³⁸

It is apparent from the wording of sub-section (5) that the court has no discretion to grant a different order regarding a credit agreement stipulated to be unlawful in section 89(2).²³⁹ The consequences of concluding an unlawful credit agreement could be extremely onerous for a credit provider as may be seen in the case of *National Credit Regulator v Opperman and Others*.²⁴⁰ Mr Opperman, an unregistered credit provider, extended a loan of R7 million to Jacobus Boonzaaier in order to assist him in undertaking a property development in Cape Town.²⁴¹ Mr Boonzaaier then found himself in a situation where he could no longer meet his

²³³S 89(2)(d) of the National Credit Act. See also Otto in Scholtzed(2008) para 9.3.2.

²³⁴S 89(2)(e)(i) of the National Credit Act.

²³⁵The notice must not be subject to further appeal or review- s 89(e)(ii) of the National Credit Act.

²³⁶Para 3 3 above.

²³⁷See s 164 (1) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 198.

²³⁸Kelly-Louw in Kelly-Louw and Stoop (2012) 198.

²³⁹Kelly-Louw in Kelly-Louw and Stoop (2012) 199.

²⁴⁰*National Credit Regulator v Opperman and others* 2013 (2) SA 1 (CC).

²⁴¹The *Opperman*-case para4.

financial obligations and acknowledged this to Opperman,²⁴² who then applied for an order to have Boonzaaier's estate sequestered.²⁴³

It was held by the Western Cape High Court that the provisions of the Act allow for the arbitrary deprivation of property, contrary with section 25(1) of the Constitution of the Republic of South Africa, 1996²⁴⁴ because it disallows the credit provider any claim against the consumer for the repayment of the money extended by the credit provider to the consumer.²⁴⁵ The Court further held that the provisions of section 89(5)(c) could not be saved under section 36(1) of the Constitution.²⁴⁶ The Court therefore held that section 89(5)(c) is inconsistent with section 25(1) and therefore constitutionally invalid.²⁴⁷

The order of invalidity was opposed by the National Credit Regulator and the Minister of Trade and Industry.²⁴⁸ The National Credit Regulator argued that when the provisions of the Act are interpreted in accordance with the Constitution, such provisions allow the courts the discretion to decide whether or not to deny the credit provider a right to reclaim the money or not.²⁴⁹ The Minister argued that the provisions of this section do not infringe section 25(1) of the Constitution.²⁵⁰ Much as it results in deprivation, such deprivation is not erratic as there are acceptable reasons for it.²⁵¹

The majority of the Constitutional Court found the provision to be a punitive measure in order to provide protection to consumers against unregistered credit providers.²⁵² The Court further held that the provision forces a court to declare the agreement void and it also forces a court to disregard the unregistered credit provider's right to claim restitution.²⁵³ As the Act provides that the credit provider's right to restitution must either be cancelled or forfeited to the state if

²⁴²The *Opperman*-case para 4.

²⁴³The *Opperman*-case para 5.

²⁴⁴Hereafter the Constitution.

²⁴⁵The *Opperman*-case para 5.

²⁴⁶The *Opperman*-case para 10.

²⁴⁷The *Opperman*-case para 10.

²⁴⁸The *Opperman*-case para 6.

²⁴⁹The *Opperman*-case para 11.

²⁵⁰The *Opperman*-case para 11.

²⁵¹The *Opperman*-case para 11.

²⁵²The *Opperman*-case para 18.

²⁵³The *Opperman*-case para 18.

the consumer would be unjustly enriched, this provision gives no discretion to the court to keep a restitution claim intact.²⁵⁴

It was submitted by the Court that removing the credit provider's right to restitution deprives him of property.²⁵⁵ The reason provided for such deprivation was not sufficient and the measures taken to achieve the purpose of the provision were disproportionate.²⁵⁶ As a result, section 89(5)(c) randomly deprives the credit provider of property hence breaching section 25(1) of the Constitution.²⁵⁷ The Court held that this deprivation was not a reasonable and justifiable limitation as there are other less prohibitive means to achieve the provision's purpose.²⁵⁸ The order of the High Court was therefore confirmed by the majority judgment.²⁵⁹

However, in a dissenting judgment, Cameron J (Froneman and Jata JJ concurring) held that the approach that was taken by the majority judgment involved a reasoning that the provision was constitutionally invalid only by ignoring words important to its meaning.²⁶⁰ These words were "under the credit agreement", and could not be disregarded.²⁶¹ The minority judgment further held that "there is no particular constitutional imperative to squeeze a meaning from the provision. Rather we must accept the words of the provision for what they say, even at the cost of accepting that the provision is ineffectual. It is better in my view, to acknowledge the drafting error, and to leave parliament to correct it."²⁶² The minority judgment did not confirm the order of invalidity.²⁶³

The expression used in section 89(5) of the Act "despite any provision of common law" may illustrate the aim either to nullify the common law or administer the relationship between the credit provider and the consumer.²⁶⁴ In light of the National Credit Act's fixed objectives it is fair

²⁵⁴The *Opperman*-case para 18.

²⁵⁵The *Opperman*-case paras 58-70.

²⁵⁶The *Opperman*-case para 71.

²⁵⁷The *Opperman*-case para 72.

²⁵⁸The *Opperman*-case para 80.

²⁵⁹The *Opperman*-case para 91.

²⁶⁰The *Opperman*-case para 93.

²⁶¹The *Opperman*-case para 93.

²⁶²The *Opperman*-case para 94. See also Sedutla (2013) *De Rebus* 2.

²⁶³The *Opperman*-case para 106.

²⁶⁴The *Opperman*-case para 53.

to assume that the legislature will only intervene where it is necessary to do so.²⁶⁵ The need for intervention may arise where the provisions of the common law are inconsistent with the purposes of the Act, for example the right to restitution.²⁶⁶ The purposes of the Act may then expeditiously require the court to make special orders to assure the adequate protection of consumers.²⁶⁷ In this way the Act develops the common law.²⁶⁸

Section 89(5) clearly intends to differ substantially from how the common law administers unlawful credit agreements.²⁶⁹ The consequences stated in section 89(5) only apply to the unlawful credit agreements stated in section 89(2) of the Act.²⁷⁰ Any other agreements which are unlawful in terms of the common law are dealt with in terms of the common law.²⁷¹ In contrast with the provisions of section 89(5) the common law generally provides that where a contract is void for unlawfulness none of the contractual parties may have enforceable rights or obligations in terms of the contract.²⁷² In such cases and based on the rule *ex turpicausa non orituractio*, neither of the parties may institute a claim for promised performance in terms of the unlawful agreement.²⁷³ The said rule is never relaxed.²⁷⁴ The National Credit Act, however, imposes certain rights and obligations upon the contractual parties with regards to the unlawful contract.²⁷⁵ The Act places an obligation on the credit provider to refund to the consumer monies that have been paid by the consumer in respect of the unlawful credit agreement.²⁷⁶ In terms of the common law a contractual party who has already rendered performance with regards to an unlawful contract does not have a right to claim restitution.²⁷⁷ The court will not even recognise the contract.²⁷⁸ The *par delictum*-rule provides that where the contract is illegal

²⁶⁵The *Opperman*-case para 53.

²⁶⁶The *Opperman*-case para 53.

²⁶⁷Otto and Otto (2013) 7.

²⁶⁸Otto and Otto (2013) 7.

²⁶⁹Kelly-Louw in Kelly-Louw and Stoop (2012) 200.

²⁷⁰Kelly-Louw in Kelly-Louw and Stoop (2012) 200.

²⁷¹Kelly-Louw in Kelly-Louw and Stoop (2012) 200.

²⁷²Para 2 6 above.

²⁷³Para 2 6 above.

²⁷⁴Kelly-Louw in Kelly-Louw and Stoop (2012) 200.

²⁷⁵§ 89(5)(a)-(c) of the National Credit Act.

²⁷⁶§ 89(5)(b) of the National Credit Act.

²⁷⁷Para 2 6 above.

²⁷⁸Para 2 6 above.

and both the contractual parties are equally guilty in respect of such contract, the defendant (possessor) will have a stronger position.²⁷⁹ This means that the plaintiff's right to restitution will be refused.²⁸⁰ The *par delictum*-rule can, however, lead to erroneous results.²⁸¹ For this reason the courts have the discretion to relax the *par delictum*-rule.²⁸² The provisions of section 89(5), however, do not make provision for the courts to exercise their discretion in terms of relaxing the *par delictum*-rule.²⁸³

The Constitutional Court's decision in the *Opperman* case has a huge influence on unlawful credit agreements in that the common law rules or principles regarding claims for the recovery of performance carried out in terms of the unlawful contract now apply, except and until the National Credit Amendment Act 19 of 2014²⁸⁴ comes into operation.²⁸⁵ The credit provider therefore has a better chance of succeeding with his claim for restitution.²⁸⁶

In terms of section 27(a) of the National Credit Amendment Act section 89(5) of the National Credit Act is amended, by the substitution in subsection (5) for the words preceding paragraph (a) of the following words:

"If a credit agreement is unlawful in terms of this section, despite **[any provision of the common law,]** any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that-"; and²⁸⁷

(b) by the deletion in subsection (5) of paragraphs (b) and (c)."²⁸⁸

The outcome of this amendment is that the National Credit Amendment Act strengthens the common law position, by allowing the courts to exercise their discretion with regards to

²⁷⁹Para 2 6 above.

²⁸⁰Para 2 6 above.

²⁸¹Bhana, Bonthuys and Nortje (2013) 178.

²⁸²Kelly-Louw in Kelly-Louw and Stoop(2012) 200.

²⁸³Kelly-Louw in Kelly-Louw and Stoop (2012) 200. This is, however, no longer the case. See s 27 (a) and (b) of the National Credit Amendment Act 19 of 2014 discussed below.

²⁸⁴Hereafter the National Credit Amendment Act.

²⁸⁵Otto and Otto (2013) 53. See also Otto in Scholtz (2008) para 9.3.4.1.

²⁸⁶Otto in Otto (2013) 53. See also Otto in Scholtz (2008) para 9.3.4.1.

²⁸⁷See also Otto in Scholtz (2008) para 9.3.4.1.

²⁸⁸§ 27 (b) of the National Credit Amendment Act. See also Otto in Scholtz (2008) para 9.3.4.1.

the granting of restitution in terms of the unlawful agreement.²⁸⁹ This may consist of implementing or relaxing the *par delictum*-rule.²⁹⁰

It must be borne in mind, however, that the amendments to section 89(5) will not have a retrospective impact.²⁹¹ The harsh provisions, as mitigated by the decision in *National Credit Regulator v Opperman* will still hypothetically apply to agreements entered into prior to the amendment of the National Credit Act.²⁹² “The decision in *National Credit Regulator v Opperman* will still apply as far as section 89(5)(c) is concerned and section 89(5)(b) will still have to be declared unconstitutional by a court.”²⁹³

3 4 3 Unlawful provisions of credit agreements

As stated above, unlawful provisions in a credit agreement may render the agreement void *in toto*.²⁹⁴ This is due to the provisions contained in section 90(4) of the National Credit Act which provides that, in all matters before it concerning credit agreements which contain provisions stipulated in subsection (2), the court ought to²⁹⁵

- (a) separate the unlawful provision from the rest of the agreement, or amend it to the degree required to render it lawful, where it is reasonable to do so taking into account the entire agreement;²⁹⁶
- (b) declare the whole agreement unlawful starting from the date the agreement or modified agreement took effect, and make any other order that is fair and tolerable in the circumstances in order to render operative the principles of section 89(5) in terms of that unlawful provision, or the whole agreement, as it may be.²⁹⁷

²⁸⁹§ 27(a) of the National Credit Amendment Act. See also *Otto in Scholtz* (2008) para 9.3.4.1.

²⁹⁰*Otto in Scholtz* (2008) para 9.3.4.1.

²⁹¹*Otto in Scholtz* (2008) para 9.3.4.1.

²⁹²*Otto in Scholtz* (2008) para 9.3.4.1.

²⁹³*Otto in Scholtz* (2008) para 9.3.4.1.

²⁹⁴Para 3 4 above.

²⁹⁵§ 90(4) of the National Credit Act.

²⁹⁶§ 90(4)(a) of the National Credit Act. See also *Otto in Scholtz* (2008) para 9.3.4.2. See also *Kelly-Louw in Kelly-Louw and Stoop* (2012) 205.

²⁹⁷§ 90(4)(b) of the National Credit Act. See also *Otto in Scholtz* (2008) para 9.3.4.2 and *Kelly-Louw in Kelly-Louw and Stoop* (2012) 205.

The prohibited provisions are aimed at protecting the consumer in respect of different common law rights the consumer possesses. A few of these measures and the manner in which the consumer's particular common law rights are protected, will be indicated below.

The obligations which arise from a contract are directly attributed to the terms of the contract.²⁹⁸ As a result standard form contracts have the ability to impair the consumer's rights by including complicated and compromising clauses in the contract.²⁹⁹ Credit providers usually try to minimise the consumer's common law rights by inserting certain clauses in contractual agreements.³⁰⁰ This has an effect of creating an imbalance of bargaining powers between the credit provider and the consumer.³⁰¹ The National Credit Act therefore prohibits certain provisions in credit agreements.³⁰² In what follows, certain of the provisions which are prohibited by the Act will be considered.

3 4 3 1 Provisions which defeat the purposes of the Act³⁰³

In terms of the common law contractual parties have freedom of contract, meaning that the parties have the ability to determine the actual content of their contracts or credit agreements.³⁰⁴ This ability entails that the parties are free to decide on the nature of the contract, with whom to contract with and the terms to be included in the contract.³⁰⁵ The parties must, for example, in a contract of sale agree on the *merx* to be sold and the price of the *merx* to be sold.³⁰⁶ The parties may even agree on including certain conditions in their contracts, for example, "the full purchase price is payable 16 days after the death of the seller" or "the employee must remain in the service of his employer until he reaches the age of 65 years or until his death, whichever comes first".³⁰⁷

²⁹⁸Bhana, Bonthuys and Nortje (2013) 7.

²⁹⁹Renke, Roestoff and Haupt (2007) *Obiter* 251.

³⁰⁰Renke, Roestoff and Haupt (2007) *Obiter* 251.

³⁰¹Paper by Renke *Prevention of reckless lending* (2011).

³⁰²§ 90(1) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 200.

³⁰³§ 90(2)(a)(i) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 200.

³⁰⁴Para 2 2 above.

³⁰⁵Para 2 2 above.

³⁰⁶Prozesky-Kuschke in Nagel *ed Business law* (2011) 25.

³⁰⁷Prozesky-Kuschke in Nagel *ed Business law* (2011) 26-27.

The National Credit Act has developed the common law to the extent that it restricts the rights of parties entering into credit agreements.³⁰⁸ According to the Act where contractual parties enter into a credit agreement which contains a provision that generally defeats the purposes or policies of the Act, such provision of the agreement is unlawful and therefore void.³⁰⁹ An unlawful provision can only be rendered void by an order of the court.³¹⁰ The reason for such prohibition is to protect consumers against certain practices by credit providers.³¹¹

3 4 3 2 Provisions which deceive the consumer³¹²

According to the common law a misrepresentation occurs whereby an untrue statement of facts is made by one party to the other prior to the conclusion of the contract with the intention to coax the latter to enter into a contract.³¹³ The common law provides that if a party's consent to contract is obtained in an improper manner, for example, by means of a misrepresentation, then consent will be considered to be defective and therefore will render the contract voidable.³¹⁴ This means that the contract may be challenged.³¹⁵

The National Credit Act on the other hand provides that a provision in a credit agreement is unlawful if it is aimed at misleading or deceiving the consumer.³¹⁶ According to section 90(3) of the Act such provisions are void as from the date they were purported to be concluded.³¹⁷ This means that the contract may not be challenged.³¹⁸ Contrary to the common law the Act renders the provision void and not voidable it is in this way that the common law is elevated by the

³⁰⁸§ 90(1) of the National Credit Act.

³⁰⁹§ 90(2)(a)(i) of the National Credit Act. See also Otto in Scholtz (2008) para 9.3.4.2 and Kelly-Louw in Kelly-Louw and Stoop (2012) 200.

³¹⁰§ 164(1) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 205.

³¹¹The NCR Report (2007) 19.

³¹²§ 90(2)(a)(ii) of the National Credit Act. See also Otto in Scholtz (2008) para 9.3.3.

³¹³Para 2 2 above.

³¹⁴Para 2 2 above.

³¹⁵Para 2 2 above.

³¹⁶§ 90(2)(a)(ii) of the National Credit Act. See also Otto and Otto (2013) 54.

³¹⁷§ 90(3) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 205.

³¹⁸§ 90(3) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 205.

Act.³¹⁹ The unlawful provision could render the entire agreement void, but that will not necessarily be the case.³²⁰

3 4 3 Provisions that purport to waive any common law rights³²¹

The clauses provided for in a contract regulate which obligations ensue from the contract.³²² In terms of the common law parties to a contract have the right to contractual waiver.³²³ A party may alienate his or her rights in one of two ways, either by trading his or her rights or by giving away his or her rights.³²⁴ In terms of the law of contract the phrase “waiver” is usually associated with a party giving away his or her rights.³²⁵

In contrast, the National Credit Act, limits the freedom of contractual parties to waive any common law rights which are applicable to credit agreements and which have been prescribed in terms of section 90(5) of the Act.³²⁶ If a provision of a credit agreement provides for a waiver of the prescribed common law rights, the provision will be declared to be unlawful and thus void.³²⁷ In this regard the Act directly influences the common law.

Regulation 32 of the Act provides for common law rights or remedies that may not be waived by the consumer in credit agreements.³²⁸ These rights are as follows:

- (a) The *exceptio erroris calculi*, which is a defence that is based on an error in calculation.³²⁹
- (b) The *exceptio non numerate pecuniae*, which is used as a defence by a party who is sued on a promise to pay back money which he did not receive.³³⁰

³¹⁹S 90(3) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 205.

³²⁰Para 3 4 3 above.

³²¹S 90(2)(c) of the National Credit Act. See also Otto in Scholtz (2008) para 9.3.3.

³²²Bhana, Bonthuys and Nortje (2013) 187.

³²³Woolman (2008) SALJ 12.

³²⁴Woolman (2008) SALJ 12.

³²⁵Woolman (2008) SALJ 12.

³²⁶S 90(2)(c)(i)(ii) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 201.

³²⁷S 90(2)(c)(i)(ii) of the National Credit Act. See also reg 32 of the Regulations made in terms of the National Credit Act, published in GN R489, *Government Gazette* 28864 of 31 May 2006-hereafter the National Credit Regulations.

³²⁸Reg 32 of the National Credit Regulations.

³²⁹Reg 32(a) of the National Credit Regulations. See also The NCR Report (2007) 20.

³³⁰Reg 32(b) of the National Credit Regulations. See also The NCR Report (2007) 20.

(c) The *exceptio non causadebiti*, which is a defence that there is no basis or ground for the debt that is claimed.³³¹

In terms of the NCR report³³² “[t]he exceptions referred to above have the effect that the credit provider need not prove the substance of the relevant exceptions in detail when a credit agreement is being enforced”.

3 4 3 4 Provisions which authorise the credit provider to do anything that is unlawful in terms of the Act³³³

The *in duplum* rule has been rooted for many years in the South African common law and it briefly provides that interest ceases to run on a debt once the arrear and unpaid interest equals the outstanding capital.³³⁴ When the interest is paid and it drops below the outstanding capital, the interest once again begins to run until it equals the amount of the outstanding capital.³³⁵

The National Credit Act in its efforts to provide consumer protection has developed the common law *in duplum* rule by prescribing restrictions on the costs of credit which may be charged by credit providers.³³⁶ The Act has extended and codified the common law *in duplum* rule by providing that “[d]espite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101(1)(b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate exceed the unpaid balance of the principle debt under the credit agreement as at the time that default occurs”.³³⁷ Section 103(5) of the Act has broadened the scope of the *in duplum* rule in order to accommodate all types of consideration which the consumer may be required to pay in terms of section 101(1)(b) to (g) of the Act and in particular initiation fees, service fees, interest, any costs of credit insurance, collection costs and administration charges.³³⁸ The collective amounts

³³¹Reg 32(c) of the National Credit Regulations. See also The NCR Report (2007) 20.

³³²The NCR Report (2007) 20.

³³³§ 90(2)(b)(iv) of the National Credit Act.

³³⁴Campbell (2010) *SA Merc LJ* 3.

³³⁵Campbell (2010) *SA Merc LJ* 3-4.

³³⁶Campbell (2010) *SA Merc LJ* 1.

³³⁷§ 103(5) of the National Credit Act. See also Campbell (2010) *SA Merc LJ* 4.

³³⁸§ 101(1)(b)-(g) of the National Credit Act. See also Campbell (2010) *SA Merc LJ* 5.

that accumulate “during the time that the consumer is in default under the credit agreement may not exceed the unpaid balance of the principal debt”.³³⁹

The Act further provides that if a credit agreement contains a provision which allows a credit provider to charge extra costs or interest, such provision will be allowing the credit provider to do something that is illegal in terms of the Act.³⁴⁰ The provision will therefore be declared unlawful and thus void.³⁴¹

“The common law *in duplum* rule can be seen to amplify the rule set out in section 103(5), where the common law is not in conflict with the Act.”³⁴²

3 4 3 5 Provisions which purport to exempt the credit provider from liability³⁴³

An exemption clause is a term in a contract which aims to restrict the liability, accountability or remedies of a contractual party.³⁴⁴ These clauses concern an agreed diversion from the cardinal law with regards to contractual or delictual liability affecting the rights, liability, obligations and procedural remedies which usually arise from a distinct contract.³⁴⁵ For example, in terms of the common law, contractual parties may specifically exclude the warranty against latent defects in their agreement.³⁴⁶ This may be done by including a “*voetstoots*” clause or an exemption clause in the agreement stating that the *merx* is sold “as is”.³⁴⁷ A latent defect in the *merx* comprises of a hidden impairment that is not easily discovered by an ordinary person.³⁴⁸ The impairment renders the *merx* inadequate for the purpose for which it was created

³³⁹S 103(5) of the National Credit Act. See also Campbell (2010) *SA Merc LJ* 5.

³⁴⁰S 90(2)(b)(iv) of the National Credit Act. See also S 103(5) of the National Credit Act.

³⁴¹S 90(2)(b)(iv) of the National Credit Act. See also S 103(5) of the National Credit Act.

³⁴²Campbell (2010) *SA Merc LJ* 5.

³⁴³S 90(2)(g) of the National Credit Act. See also Otto and Otto (2013) 54. For examples of, prohibited provisions, see also Otto in Scholtzed(2008) para 9.3.3.

³⁴⁴Stoop (2008) *SA Merc LJ* 496.

³⁴⁵Stoop (2008) *SA Merc LJ* 496.

³⁴⁶Barnard (2012) *De Jure* 456.

³⁴⁷Barnard (2012) *De Jure* 456.

³⁴⁸Barnard (2012) *De Jure* 456.

for.³⁴⁹The courts and the legislature control the use of exemption clauses because of their potential to be abusive and misapplied.³⁵⁰

The National Credit Act prohibits the inclusion of exemption clauses in credit agreements.³⁵¹ Contractual parties may not agree on a provision purporting to waive any common law or *ex lege* warranties, if such warranties would otherwise be implied in the credit agreement in the absence of such a provision.³⁵² Some of the most common warranties are the warranty against latent defects, eviction in contracts of sale and the lessor's warranty that the lessor will enjoy uninterrupted use of the leased property.³⁵³ "If the credit agreement is a sale, a *voetstoots* clause or *pactum de evictione non prastanda* (a clause excluding liability for eviction), eg, will be void in terms of s 90(3)."³⁵⁴

Section 90(2)(g) unambiguously prohibits the credit provider from exempting or limiting his liability from any conduct, omission or representation by a person acting on the credit provider's behalf.³⁵⁵ If a provision in the credit agreement purports to exempt or limit the credit provider's liability, such a provision will be declared unlawful in terms of this Act.³⁵⁶

Section 90(2)(g) of the Act has a direct influence on the common law as, "[i]t is now apparent that exemption clauses are no longer a prerogative of the contractual parties but public policy has now been entrenched into legislation to avoid harsh consequences which are usually brought by exemption clauses."³⁵⁷

³⁴⁹Barnard (2012) *De Jure* 456.

³⁵⁰Sewsunker LLM Thesis (2012) 25.

³⁵¹§ 90(2)(g) of the National Credit Act.

³⁵²§ 90(2)(g)(ii) of the National Credit Act. See also Otto in Scholtzed (2008) para 9.3.3.

³⁵³Otto in Scholtzed (2008) para 9.3.3. See also Otto and Otto (2013) 54.

³⁵⁴Otto in Scholtzed(2008) para 9.3.3. See also Otto and Otto (2013) 54 and Kelly-Louw in Kelly-Louw and Stoop (2012) 202.

³⁵⁵§ 90(2)(g)(i) of the National Credit Act.

³⁵⁶§ 90(2)(g)(i)(ii) of the National Credit Act.

³⁵⁷Kanamugire and Chimuka (2014) *MJSS* 175.

3 4 3 6 Provisions which express an agreement by the consumer to forfeit any money to the credit provider³⁵⁸

It was stated before³⁵⁹ that, in terms of the common law, contractual parties have the right to agree on and regulate their own contractual provisions. However, there is a general principle in terms of the law of contract that a party may not independently terminate a contractual agreement simply because he wants to do so.³⁶⁰ There must be an authentic reason for such cancellation, for example, where a material breach of contract has been committed by the other party.³⁶¹

Consumer credit legislation has altered this general rule “but only to a limited extent and obviously only in so far as contracts subject to that legislation are concerned.”³⁶² Contrary to the common law in certain situations a consumer is granted a specific number of days during which he has the right to terminate the credit agreement without producing a reason and without being held liable for committing breach of contract.³⁶³ This right is known as the cooling-off right.³⁶⁴ The annulled Credit Agreements Act consisted of an identical cooling-off right and the Alienation of Land Act 68 of 1981³⁶⁵ still contains such a right where the sale of land on instalments is involved.³⁶⁶ Originally the cooling-off right was designed to protect the consumer against the refined and persuasive nature of the door-to-door salesperson.³⁶⁷ Later it was developed in order to accommodate the situation whereby the salesperson canvasses the consumer and where agreements are entered into at a place other than the credit provider’s place of business, for example, the consumer’s home.³⁶⁸

³⁵⁸§ 90(2)(i) of the National Credit Act.

³⁵⁹Para 2 2 above.

³⁶⁰Para 2 9 above.

³⁶¹Para 2 9 above.

³⁶²Otto and Otto (2013) 72.

³⁶³Kelly-Louw in Kelly-Louw and Stoop (2012) 223.

³⁶⁴Kelly-Louw in Kelly-Louw and Stoop (2012) 223. See also Otto and Otto (2013) 72.

³⁶⁵Hereafter the Alienation of Land Act.

³⁶⁶Kelly-Louw in Kelly-Louw and Stoop (2012) 223.

³⁶⁷Kelly-Louw in Kelly-Louw and Stoop (2012) 223.

³⁶⁸§ 121(1) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 223.

In terms of section 121 of the National Credit Act a consumer may within a specific period of time retract from the lease (of movables, such as a motor vehicle) or an instalment credit agreement only if it was entered into at a place other than the registered business premises of the credit provider.³⁶⁹ The consumer may do this within 5 business days succeeding the date on which the consumer signed the credit agreement.³⁷⁰ He may cancel the credit agreement in a manner prescribed in section 121(2)(a) and (b) of the Act.³⁷¹

When a credit agreement is cancelled in this way, the credit provider must reimburse any monies paid by the consumer in terms of the agreement within seven days succeeding the delivery of the cancellation notice³⁷² and the credit provider may in certain circumstances require payment from the consumer as stipulated in subsection (3)(b) of this section.³⁷³

In as much as the National Credit Act allows for the unilateral cancellation of a contract in terms of section 121 (which is contrary to the common law),³⁷⁴ the Act also makes provision for restitution to take place where the cooling-off right is exercised.³⁷⁵

For this reason section 90(2)(i) of the Act provides that a credit agreement is unlawful and thus void if it contains an agreement by the consumer to forfeit any money to the credit provider where such consumer exercises his or her cooling-off right in terms of section 121 of the Act.³⁷⁶ The aim of section 90(2)(i) is to prohibit credit providers from avoiding restitution as purposed by section 121(3)(a) of the Act.³⁷⁷ The only exceptions to restitution are laid down in sections 121(3)(b) and 90(2)(i)(ii) of the Act.³⁷⁸

It is interesting to note the impact that section 90(2)(i) has on the contractual parties' right to freely agree on their own contractual provisions.

³⁶⁹Kelly-Louw in Kelly-Louw and Stoop (2012) 223. See also s 121(1) and (2) of the National Credit Act.

³⁷⁰S 121(2) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 223.

³⁷¹S 121(2)(a) and (b) of the National Credit Act. See also Reg 37 of the National Credit Regulations.

³⁷²S 121(3)(a) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 223.

³⁷³S 121(3)(b)(i)(ii) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 223.

³⁷⁴S 121(2) of the National Credit Act. See also Otto and Otto (2013) 72.

³⁷⁵S 121(3)(a) of the National Credit Act.

³⁷⁶S 90(2)(i) of the National Credit Act.

³⁷⁷S 121(3)(a) of the National Credit Act.

³⁷⁸Ss 121(3)(b) and 90(2)(ii) of the National Credit Act.

3 5 The influence of the National Credit Act on the principle of formalities

As mentioned above, the outward or discernible appearance of a contract constitutes the formalities of a contract, such as writing and signature.³⁷⁹ As a general rule the common law does not prescribe any formalities for the conclusion of a valid contract.³⁸⁰ The National Credit Act's predecessor, the Credit Agreements Act, made provision for the formalities that had to be complied with in terms of credit agreements. The Credit Agreements Act provided that any credit agreement had to be reduced to writing and signed by, or on behalf of, every person that was a party to it, subject to the provisions of the Limitations and Disclosure of Finance Charge Act 73 of 1968.³⁸¹ Section 5(2) of the Credit Agreements Act further provided that "no person shall be a party to a credit agreement which does not comply with a requirement referred to in subsection (1): provided that a credit agreement which does not comply with any such requirement shall not merely for that reason be invalid."³⁸² It is submitted that where parties did not comply with the provisions of subsection (1), such parties were liable for an offence in terms of section 23 of the Credit Agreements Act.³⁸³ This section stipulated that any person who infringed on the provisions of the Act would be liable for an offence and upon conviction, would be accountable to pay a fine not exceeding R5 000, or imprisonment for a period not exceeding two years, or both.³⁸⁴

According to the National Credit Act, credit agreements must be in documentary form and must comply with the prescribed requirements applicable to the different categories of such agreements.³⁸⁵ The form of a document is determined by regulation.³⁸⁶ Although the Act does not specifically stipulate that the credit agreement must be in writing, it seems as though the credit agreement is in fact required to be in writing since the Act provides for the agreement to be transmitted by the credit provider to the consumer in paper form or in printable electronic

³⁷⁹Para 2 7 above.

³⁸⁰Para 2 7 above.

³⁸¹§ 5(1)(a) of the Credit Agreements Act. See also Grové and Otto (2002) 27.

³⁸²§ 5(2) of the Credit Agreements Act. See also Grové and Otto (2002) 27.

³⁸³§ 23 of the Credit Agreements Act. See also Grové and Otto (2002) 27.

³⁸⁴§ 23 of the Credit Agreements Act. See also Grové and Otto (2002) 27.

³⁸⁵§ 93(1)-(3) of the National Credit Act. See also regs 30-31 of the National Credit Regulations and Van Der Merwe, Van Huyssteen, Reinecke and Lubbe (2012) 139.

³⁸⁶Otto and Otto (2013) 51. See also Otto in Scholtzed(2008) para 9.2.1.

form.³⁸⁷ Where the credit provider fails to comply with these formalities, the validity of the agreement is not affected neither does it create an offence, however, it is possible for the credit provider to be liable to pay a fine of either R1 million or 10 per cent of its annual turnover of the previous financial year, whichever is more.³⁸⁸ The credit provider also bears the risk that the National Credit Regulator might terminate its registration as a credit provider.³⁸⁹

Contrary to the common law the National Credit Act, like its predecessor (the Credit Agreements Act), does not lean on the propensity of imposing contractual formalities as a precondition for the conclusion of a valid credit agreement but rather uses formalities as a way of protecting consumers.³⁹⁰

It was mentioned above³⁹¹ that, in terms of the common law, contractual parties 'might' prescribe formalities for any alterations emanating from the contract. It was also mentioned that, statutorily imposed formalities which apply to the conclusion of contracts also apply to the amendments of the contract.³⁹² In contrast to the common law, the National Credit Act, lays down strict conditions regarding changes to credit agreements as may be seen in sections 116, 117 and 120 of the Act.³⁹³ Any modification to a document containing a credit agreement or an amended credit agreement after it has been signed by the consumer is void unless the alterations decreases the consumer's liabilities in terms of the agreement,³⁹⁴ the changes are in writing and are signed by the parties to the agreement,³⁹⁵ any modifications made orally are recorded electromagnetically and are later reduced to writing³⁹⁶ or where a change is not

³⁸⁷S 93(1) of the National Credit Act. See also Otto in *Scholtzed* (2008) para 9.2.1 and Kelly-Louw in Kelly-Louw and Stoop (2012) 210.

³⁸⁸Kelly-Louw in Kelly-Louw and Stoop (2012) 210. See also Otto in *Scholtzed* (2008) para 9.2.4.

³⁸⁹Kelly-Louw in Kelly-Louw and Stoop (2012) 210. See also Otto in *Scholtzed* (2008) para 9.2.4.

³⁹⁰Van Der Merwe, Van Huyssteen, Reinecke and Lubbe (2012) 139-140.

³⁹¹Para 2 7 above.

³⁹²Para 2 7 above.

³⁹³Ss 116, 117 and 120 of the National Credit Act. See also Otto in *Nagel ed* (2011) 297.

³⁹⁴S 116(a) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 217 and Otto in *Scholtzed* (2008) para 9.4.2.

³⁹⁵S 116(c) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 217 and Otto in *Scholtzed* (2008) para 9.4.2.

³⁹⁶S 116 (d) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 217-218 and Otto in *Scholtzed*(2008) para 9.4.2.

effected in terms of section 119(1)(c)³⁹⁷ of the National Credit Act, the consumer must sign or initial in the margin opposite the change.³⁹⁸

Where parties to a credit agreement agree on changing their contractual terms, the credit provider must within 20 business days succeeding the date of the agreement, convey to the consumer a document that reflects their altered agreement and such agreement must comply with the requirements stipulated in section 93.³⁹⁹ This section, however, is not used in connection with a mere increase or decrease of a credit limit under a credit facility, subject to section 119(6)⁴⁰⁰ of the Act.⁴⁰¹

In terms of section 120 of the National Credit Act, a credit provider may not unilaterally change the duration for the repayment of the principal debt, except to increase it, or change the manner in which the due minimum payment is calculated periodically under a credit facility, subject to section 118(4)⁴⁰² of the Act.⁴⁰³ Except when provided for in section 104, the credit provider is required to render to the consumer a written notice of at least 5 business days of a unilateral alteration to a credit agreement and in that notice the credit provider must set out the particulars of the alteration.⁴⁰⁴ “This means that when a credit agreement provides for unilateral changes which are not specifically governed by the Act, and not against the principles of law of contract, the credit provider must give the consumer at least five business day’s written notice of such a change and set out the particulars of such a change.”⁴⁰⁵

³⁹⁷S 119(1)(c) of the National Credit Act provides that, a credit provider may unilaterally increase the credit limit under the credit facility only in terms of and subject to the restrictions laid out in subsection (4) of the Act.

³⁹⁸S 116(b) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 217 and Otto in Scholtzed(2008) para 9.4.2.

³⁹⁹S 117(a) and (b) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 218.

⁴⁰⁰S 119(6) of the National Credit Act provides that, if the credit provider amends any term of the credit agreement when increasing the credit limit under a credit facility, such credit provider is obliged to comply with the requirements laid out in ss 93 and 117 of the Act.

⁴⁰¹S 117(2) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 218.

⁴⁰²S 118(4) of the National Credit Act provides that, where a new credit limit takes effect with respect to this section and the settlement value under the credit facility is greater than the newly established credit limit, the credit provider is obligated not to treat that excess as an over-extension of credit for the intention of calculating the minimum payment that is due at any time.

⁴⁰³S 120(1) (a) and (b) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 221.

⁴⁰⁴S 120(2) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 221.

⁴⁰⁵Kelly-Louw in Kelly-Louw and Stoop (2012) 221-222.

The National Credit Act further develops the common law, by providing for certain formalities that have to be complied with where a consumer wishes to cancel a credit agreement by making use of his or her cooling-off right.⁴⁰⁶ The Act provides that a consumer may cancel a credit agreement (a lease or an instalment agreement) within a period of five business days after the date on which the agreement was signed by the consumer.⁴⁰⁷ The cooling-off right may only be exercised where the agreement was concluded at any place other than the credit provider's registered business place.⁴⁰⁸ The consumer is required to deliver a notice to the credit provider in the manner prescribed in regulation 37 in order to effect the cancellation.⁴⁰⁹

It is quite intriguing to observe that the National Credit Act does not specifically make provision for credit agreements to be reduced to writing as in the case of the Credit Agreements Act.⁴¹⁰ It is also interesting to note the divergence that the National Credit Act shows from the way the common law uses or administers contractual formalities.

3 6 The influence of the National Credit Act on the principle of remedies

3 6 1 Introduction

This paragraph will discuss the influence of the National Credit Act on the credit provider's remedies for breach of contract.

A consumer who has been granted credit in respect of a credit agreement has an obligation to repay the debt by means of instalments.⁴¹¹ As a result, failure to pay the instalments as they fall due constitutes breach of contract, in the form of *moradebitoris*.⁴¹² This is the most common form of breach of contract committed by consumers.⁴¹³ Having regard to the fact that credit providers are sometimes reluctant to rely on *ex lege* remedies in order to amend contractual breach by the consumer, it has become custom for credit providers to insert remedy clauses in

⁴⁰⁶Para 3 4 3 6 above.

⁴⁰⁷Para 3 4 3 6 above.

⁴⁰⁸Para 3 4 3 6 above.

⁴⁰⁹Para 3 4 3 6 above.

⁴¹⁰S 5(1)(a) of the Credit Agreements Act.

⁴¹¹Boraine and Renke (2007) *De Jure* 222.

⁴¹²Boraine and Renke (2007) *De Jure* 222.

⁴¹³Boraine and Renke (2007) *De Jure* 222.

contracts.⁴¹⁴ These clauses usually have a severe outcome for consumers and as a result one of the purposes of consumer credit legislation is to limit the exercise of the credit provider's contractual remedies in order to protect consumers.⁴¹⁵

The National Credit Act lays down a two-stage process to debt enforcement by differentiating between the prescribed procedures that have to be complied with prior to debt enforcement and other procedures that are handled as debt procedures in court.⁴¹⁶ Section 129 contains the compulsory procedures prior to debt enforcement and section 130 deals with the debt procedures in court.⁴¹⁷

Section 129(1)(a) of the National Credit Act provides that where a consumer is in default under a credit agreement, the credit provider may in writing draw the default to the attention of the consumer in order to advise the consumer of his rights to the various forms of relief which are available in terms of the Act.⁴¹⁸

Section 129(1)(b) unambiguously states that, subject to section 130(2), the credit provider may not begin any legal proceedings to enforce the agreement prior to first providing a section 129(1)(a) notice or a section 86(10) notice as the case may be and may not commence any legal proceeding before meeting any other requirements which are set out in section 130.⁴¹⁹

Section 130(1) allows a credit provider to approach a court for an order to enforce a credit agreement if:⁴²⁰

- (a) the consumer is currently in default;⁴²¹
- (b) 20 business days have elapsed since the default;⁴²²

⁴¹⁴Boraine and Renke (2007) *De Jure* 222.

⁴¹⁵Boraine and Renke (2007) *De Jure* 222-223.

⁴¹⁶Van Heerden in Scholtzed(2008) para 12.3.

⁴¹⁷Ss 129(1) and 130(1) of the National Credit Act. See also Van Heerden in Scholtzed(2008) para 12.3.

⁴¹⁸§ 129(1)(a) of the National Credit Act. See also Van Heerden in Scholtzed(2008) para 12.3.

⁴¹⁹§ 129(1)(b)(i) and (ii) of the National Credit Act. See also Van Heerden in Scholtzed(2008) para 12.3. S 19 of the Alienation of Land Act contains a similar provision to the effect that a letter of demand needs to be issued to the purchaser prior to an acceleration clause, penalty clause, cancellation clause or a claim for damages being enforced. See also Otto and Otto (2013) 107.

⁴²⁰§ 130(1) of the National Credit Act. See also Van Heerden in Scholtzed(2008) para 12.3.

⁴²¹§ 130(1) of the National Credit Act. See also Van Heerden in Scholtzed(2008) para 12.3.

- (c) 10 business days have elapsed since the credit provider sent a notice to the consumer in terms of sections 129(1) or 86(9) whichever may apply.⁴²³
- (d) the consumer has not reciprocated to the notice or has reciprocated by rejecting the credit provider's offers; and⁴²⁴
- (e) in terms of an instalment agreement, secured loan, or lease, the consumer has not delivered the relevant goods to the credit provider as envisaged in section 127.⁴²⁵

Section 129(1)(a) is aimed at placing a duty on the credit provider to provide information to the consumer as to the possible assistance which is available to the consumer prior to legal action being instituted.⁴²⁶ The section 129(1) notice is a prerequisite to any legal proceeding.⁴²⁷ As a result, it would seem that, should the consumer choose to make use of the rights provided for in terms of the notice or bring the outstanding payment up to date, the credit provider will then not be able to invoke any of his remedies.

As previously discussed,⁴²⁸ where breach of contract takes place the aggrieved party will be entitled to remedies available either by operation of law (*ex lege*) or agreed remedies. Both the *ex lege* and agreed remedies are discussed below.

⁴²²S 130(1) of the National Credit Act. See also Van Heerden in Scholtzed(2008) para 12.3.

⁴²³S 130(1)(a) of the National Credit Act. See also Van Heerden in Scholtzed(2008) para 12.3. S 130(1)(a) of the National Credit Act has been amended by s 33 of the National Credit Amendment Act 19 of 2014 by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86[(9)](10)”.

⁴²⁴S 130(1)(b)(i)(ii) of the National Credit Act. See also Van Heerden in Scholtzed(2008) para 12.3.

⁴²⁵S 130(1)(c) of the National Credit Act. See also Van Heerden in Scholtzed(2008) para 12.3.

⁴²⁶Kelly-Louw (2010) *SA Merc LJ570*.

⁴²⁷S 129(1) of the National Credit Act. See also Boraime and Renke (2008) *De Jure* 5.

⁴²⁸Para 2 9 1 above.

3 6 2 Specific performance

As mentioned above, in terms of the common law, specific performance is a remedy used by an innocent party who is trying to bring about the expected results that were agreed upon at the beginning of the contract.⁴²⁹

The National Credit Act has a direct influence on specific performance as it restricts the credit provider's right to exercise his remedy to specific performance.⁴³⁰ The credit provider is obliged to comply with the provisions of sections 129(1) and 130(1) of Act before he can enforce his right to specific performance.⁴³¹

3 6 2 1 Acceleration clauses

As stated above,⁴³² an acceleration clause provides that, where breach of contract occurs, the outstanding debt will be due immediately and payable in full.

The National Credit Act's predecessors, the Hire-Purchase Act 36 of 1942⁴³³ and the Credit Agreements Act, did not prohibit the credit provider's common law right to claim for specific performance, nor did it prohibit the right to include an acceleration clause (which is aimed at bringing about specific performance)⁴³⁴ in the contract.⁴³⁵ The Hire-Purchase Act, however, provided for restrictions on acceleration clauses.⁴³⁶ Section 12(a) of the Act stipulated that before an acceleration clause could be enforced a certain fraction of the purchase price had to be due and unpaid.⁴³⁷ Section 12(b) stipulated that a letter of demand had to be sent by the seller to the buyer in order to demand payment for the instalments which were in arrears prior

⁴²⁹Para 2 9 2 above.

⁴³⁰Ss 129(1)(a)-(b) and 130(1)(a)-(c) of the National Credit Act. See also Otto and Otto (2013) 107.

⁴³¹Ss 129(1)(a)-(b) and 130(1)(a)-(c) of the National Credit Act. See also Otto and Otto (2013) 107.

⁴³²Para 2 9 2 1 above.

⁴³³Hereafter the Hire-Purchase Act.

⁴³⁴Para 2 9 2 1 above.

⁴³⁵Grové and Jacobs (1993) 35. See also Boraine and Renke (2007) *De Jure* 226.

⁴³⁶§ 12(a) of the Hire-Purchase Act. See also Boraine and Renke (2007) *De Jure* 226.

⁴³⁷§ 12(a) of the Hire-Purchase Act. See also Boraine and Renke (2007) *De Jure* 226.

to the acceleration clause in the agreement being relied upon.⁴³⁸ The notice period which was given to the buyer had to be at least 10 days.⁴³⁹

The Credit Agreements Act on the other hand completely failed to regulate the use of acceleration clauses.⁴⁴⁰ This is perhaps one of its most alarming defects having regard to the fact that these clauses are burdensome to consumers.⁴⁴¹

The National Credit Act unlike its predecessor, the Hire-Purchase Act, does not have specific restrictions on acceleration clauses. This is one of the many defects of the Act, having regard to the fact that the use of these clauses can be extremely burdensome on consumers.

The Act has, however, developed the common law by putting into place prerequisites that have to be complied with before the credit provider may enforce his right to the use of an acceleration clause.⁴⁴²

Section 129(1), though not explicit, implicitly restricts a credit agreement from containing an immediate acceleration clause notice to the consumer.⁴⁴³ A credit provider cannot exercise such clause before the expiry of the 10 day notice period.⁴⁴⁴

It is clear from the above-mentioned that even though the National Credit Act provides for certain procedural prerequisites before debt enforcement, the Act does not adequately protect the consumer from the use of the acceleration clause as the Hire Purchase Act did. The Hire-Purchase Act warned the consumer that, should payments in arrears not be made, the acceleration clause will be used.⁴⁴⁵ The delivering of the section 129(1) notice does not necessarily warn the consumer that, should payments in arrears not be made the acceleration clause will be used in order to bring about specific performance.⁴⁴⁶

⁴³⁸S 12(a) of the Hire-Purchase Act. See also Boraine and Renke (2007) *De Jure* 226.

⁴³⁹S 12(b) of the Hire-Purchase Act. See also Boraine and Renke (2007) *De Jure* 226.

⁴⁴⁰Grové and Jacobs (1993) 35. See also Otto and Otto (2013) 107.

⁴⁴¹Grové and Jacobs (1993) 35-36.

⁴⁴²S 129(1)(a)-(b) of the National Credit Act. See also Boraine and Renke (2008) *De Jure* 3.

⁴⁴³S 129(1)(a) and (b) of the National Credit Act. See also Otto and Otto (2013) 111.

⁴⁴⁴S 129(1)(a) and (b) of the National Credit Act. See also Otto and Otto (2013) 118.

⁴⁴⁵S 12(b) of the Hire-Purchase Act. See also Grové and Jacobs (1993) 35.

⁴⁴⁶S 129(1) of the National Credit Act. See also S 12(a)(b) of the Hire-Purchase Act.

3 6 3 Cancellation

It was previously mentioned⁴⁴⁷ that, in terms of the common law, termination of a contract is a very harsh remedy. Therefore a party may not unilaterally cancel the contract simply because he has changed his mind. The aggrieved party may only cancel the contract as a result of *moradebitoris* where time is of the essence or where he has acquired the right to do so.⁴⁴⁸

In terms of the National Credit Act a credit provider may only cancel a credit agreement once the provisions of sections 129(1) and 130(1)⁴⁴⁹ have been complied with. The circumstances of each case and more importantly the provisions provided for in the relevant credit agreement will regulate which particulars must be contained in the section 129(1)(a) notice in order to provide the credit provider with a right to cancel the contract.⁴⁵⁰ Apart from the information contained in section 129(1)(a) the notice must be unambiguous regarding the breach of contract caused by the consumer and the effects of such breach.⁴⁵¹

The prerequisites of sections 129(1) and 130(1) of the Act extend the common law remedy for cancellation in that a credit provider is compelled to deliver the section 129(1) notice to the consumer before any cancellation may be sought.⁴⁵²

The National Credit Act also makes provision for the cooling-off right, which could be regarded as a statutorily established right to cancel a credit agreement under certain circumstances, without having to provide reasons for the cancellation.⁴⁵³

Section 123(1) of the National Credit Act further develops the common law by providing that a credit provider may unilaterally cancel a credit agreement before the time stipulated in the agreement.⁴⁵⁴ Regrettably the Act does not lay down the steps which the credit provider must

⁴⁴⁷Para 2 9 3 above.

⁴⁴⁸Para 2 9 3 above.

⁴⁴⁹Para 3 6 1 above.

⁴⁵⁰Boraine and Renke (2008) *De Jure* 4.

⁴⁵¹Boraine and Renke (2008) *De Jure* 5.

⁴⁵²Ss 129(1) and 130 (1) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 409.

⁴⁵³Para 3 4 3 6 above.

⁴⁵⁴§ 123(1) of the National Credit Act.

take in order to cancel the credit agreement before its stipulated time.⁴⁵⁵ The Act only makes provision for steps to be taken by the credit provider to cancel the agreement where the consumer is in default under a credit agreement.⁴⁵⁶ Such steps are laid out in sections 129 and 130 of Act.⁴⁵⁷

3 6 3 1 *Lexcommissoria*

Contractual parties may agree on including a cancellation clause known as the *lexcommissoria* in their agreement.⁴⁵⁸ The *lexcommissoria* provides that an innocent party has a right to cancel a contract where a breach of contract has occurred, irrespective of whether or not such breach was of a material nature.⁴⁵⁹ This clause entitles the innocent party to cancel the contract even if he would not have had the right to do so if the clause was not present.⁴⁶⁰

Lexcommissoria clauses are not dealt with at all by the National Credit Act, however, such clauses are still valid.⁴⁶¹ In the case of *ABSA Bank Ltd v Havenga*⁴⁶² the Court held that the actual right to cancel a contract stems from the application of contract rules.⁴⁶³ The provisions of sections 123 and 129 are merely procedural in nature, prescribing the procedure that needs to be followed where a party enjoys a right of cancellation irrespective of how the right arises.⁴⁶⁴

Though procedural in nature the provisions of section 129(1) of the Act are compulsory and must be complied with before a credit provider may institute any legal proceedings to enforce the agreement.⁴⁶⁵ It is clear from the use of the word “any” in section 129(1)(b) of the Act that the provisions of section 129(1) also include the enforcement of the *lexcommissoria* clause.⁴⁶⁶

3 6 4 Damages

⁴⁵⁵Kelly-Louw in Kelly-Louw and Stoop (2012) 226.

⁴⁵⁶Para 3 6 1 above.

⁴⁵⁷Para 3 6 1 above.

⁴⁵⁸Para 2 9 3 1 above.

⁴⁵⁹Para 2 9 3 1 above.

⁴⁶⁰Para 2 9 3 1 above.

⁴⁶¹Kelly-Louw in Kelly-Louw and Stoop (2012) 225.

⁴⁶²*ABSA Bank Ltd v Havenga and similar cases* 2010 (5) SA 533 (GPN) page 537 C-D.

⁴⁶³The *Havenga*-case page 537 C-D. See also para 3 4 above.

⁴⁶⁴The *Havenga*-case page 537 C-D. See also para 3 4 above.

⁴⁶⁵Para 3 6 1 above.

⁴⁶⁶§ 129(1)(b) of the National Credit Act. See also Kelly-Louw in Kelly-Louw and Stoop (2012) 409.

In terms of the common law, an aggrieved party may have a claim for damages for losses sustained as a result of breach of contract.⁴⁶⁷ The National Credit Act confirms the common law by making provision for the credit provider to claim for damages were a loss has been suffered by him as a result of breach of contract.⁴⁶⁸ However, before the claim for damages may be instituted the provisions of sections 129(1) and 130(1) must be complied with.⁴⁶⁹

3 6 4 1 Penalty clauses

It was discussed above that, in the case of penalty clauses, the Conventional Penalties Act applies.⁴⁷⁰ However, where the provisions of the Act are inconsistent with those of the National Credit Act, the provisions of the latter Act will apply.⁴⁷¹

Having regard to the onerous effect which penalty clauses may have on credit receivers, the Usury Act and the Credit Agreements Act provided for numerous provisions which were aimed at protecting the credit receiver from the severe consequences of penalty clauses.⁴⁷² The outcome of these protection measures was that the credit grantor was only entitled to claim the actual sum of patrimonial loss incurred regardless of the sum of the penalty contained in the contract as a result of contractual breach.⁴⁷³

The National Credit Act also allows for the inclusion of penalty clauses in credit agreements.⁴⁷⁴ However, the credit provider may only enforce the penalty clause once the provisions of sections 129(1) and 130(1) have been complied with.⁴⁷⁵

The National Credit Act confirms the Conventional Penalties Act by providing that, “[i]f a court makes an attachment order with respect to property that is the subject of a credit agreement,

⁴⁶⁷Para 2 9 4 above.

⁴⁶⁸Boraine and Renke (2008) *De Jure* 2.

⁴⁶⁹Para 3 6 1 above.

⁴⁷⁰Para 2 9 4 1 above.

⁴⁷¹Schedule 1 to the National Credit Act. See also Van Huyssteen, Van Der Merwe and Maxwell (2010) 139.

⁴⁷²Ss 4-5 of the Usury Act. See also ss 14-15 of the Credit Agreements Act. See also Boraine and Renke (2007) *De Jure* 229. See also Grové and Otto (2002) 50.

⁴⁷³Ss 4-5 of the Usury Act. See also ss 14-15 of the Credit Agreements Act. See also Boraine and Renke (2007) *De Jure* 229.

⁴⁷⁴Schedule 1 to the National Credit Act. See also Bhana, Bonthuys and Nortje (2013) 357.

⁴⁷⁵Para 3 6 1 above.

section 127(2) to (9) and section 128, read with the changes required by the context, apply with respect to any goods attached by that order” .⁴⁷⁶

Section 127 of the National Credit Act deals with voluntary surrender by the consumer specifically provides that, after the credit provider has sold the goods in terms of this section, the credit provider must in writing *inter alia* inform the consumer of the “net proceeds of the sale after deducting the credit provider’s permitted default charges, if applicable, and reasonable costs allowed under paragraph (a).”⁴⁷⁷

The National Credit Act in section 127(5)(b)(iii) unambiguously allows for the credit provider to deduct “permitted default charges” from the net proceeds of the sale.⁴⁷⁸ Although the term “default charge” is not defined in section 1 of the Act, it is correct to assume that the term refers to a penalty charge contained in a penalty clause as stipulated in section 1(1) and (2) of the Conventional Penalties Act.⁴⁷⁹ It was indicated before⁴⁸⁰ that section 1(2) of the Conventional Penalties Act provides that “[a]ny sum of money for the payment of which or anything for the delivery or performance of which a person may so become liable, is in this Act referred to as a penalty”.

It is important to note that the National Credit Act, though it confirms the Conventional Penalties Act, does not like its predecessors, the Usury Act and the Credit Agreements Act, provide for provisions which are aimed at protecting the consumer from the potentially onerous consequences of penalty clauses.

⁴⁷⁶S 131 of the National Credit Act. See also Van Heerde in Scholtzed(2008) para 12.8.3.2.

⁴⁷⁷S 127(5)(b)(iii) of the National Credit Act.

⁴⁷⁸S 127(5)(b)(iii) of the National Credit Act.

⁴⁷⁹Para 2 9 4 1 above.

⁴⁸⁰Para 2 9 4 1 above.

CHAPTER 4

FINAL CONCLUSIONS AND RECOMMENDATIONS

The stated purpose of this dissertation was to evaluate the provisions of the National Credit Act 34 of 2005 which have an influence on the general principles of the law of contract.⁴⁸¹ It is visible from the research carried out in this dissertation that the Act has a huge impact on the

⁴⁸¹Para 1 2.

general principles of contract such as consensus, contractual capacity, legality, formalities and lastly, remedies.⁴⁸²

It was shown that the National Credit Act has a direct influence on consensus by providing that parties to an incidental credit agreement will be deemed to have concluded the agreement on the date which is 20 business days after a late payment fee or interest in respect of that account has been charged for the first time by the supplier of the goods or services or a prearranged higher price for full payment of the account first becomes applicable, unless the settlement value has been fully paid by the consumer before that date.⁴⁸³ The reasoning behind the 20 days gestation period is unclear.⁴⁸⁴ It is nonetheless undeniable that section 5(2) of the Act restricts the parties' common law right to negotiate contractual terms in respect of credit agreements by making provision for consensus to come into being by operation of law.⁴⁸⁵

The National Credit Act has a candid influence on the common law principle of contractual capacity by specifically providing that a credit agreement is unlawful, if at the time of its conclusion, the consumer was an unemancipated minor who was unassisted by his guardian or the consumer was subject to an order of a competent court declaring him or her to be mentally unfit.⁴⁸⁶ The Act develops the common law by elevating the status of a contract concluded with an unemancipated minor from that of voidable to unlawful and of a mentally unfit person from that of no contractual capacity and void to unlawful and void.⁴⁸⁷ It appears as though the Act places a responsibility on the credit provider not to contract with an unemancipated minor or a mentally unfit person.⁴⁸⁸ The Act, however, does not set out any guidelines that need to be followed by the credit provider in order to establish contractual capacity.⁴⁸⁹ Perhaps this is a lacuna in the law.

⁴⁸²Para 3 1.

⁴⁸³Para 3 2.

⁴⁸⁴Para 3 2.

⁴⁸⁵Para 3 2.

⁴⁸⁶Para 3 3.

⁴⁸⁷Para 3 3.

⁴⁸⁸Para 3 3.

⁴⁸⁹Para 3 3.

It is submitted that the legislature should amend the Act in order to provide guidelines for credit providers to establish with certainty the mental stability of particular consumers. Having such guidelines would avail credit providers of the trouble of having to deal with disputes as to whether or not at the time of contracting the consumer had the mental capacity to do so.

The National Credit Act influences legality. Section 89 of the Act regulates unlawful credit agreements.⁴⁹⁰ This section expressly contains a list of all credit agreements which are restricted by the Act.⁴⁹¹ It was shown that section 89(5) directly develops the common law by providing that where a credit agreement is unlawful in terms of the section irrespective of any provision of the common law, any other legislation or any provision of an agreement to the contrary, the court must order that the agreement is void as from the date the agreement was concluded.⁴⁹² This means that if a credit agreement is unlawful in terms of this section such agreement will remain unlawful irrespective of any common law principle.⁴⁹³ Therefore, the provisions of the common law will be of no avail to the unlawful credit agreement.⁴⁹⁴ Where the provisions of the common law are inconsistent with those of the National Credit Act, the provisions of the Act will apply.⁴⁹⁵ It is in this regard that the Act influences the common law.⁴⁹⁶

The ramifications of entering into an unlawful credit agreement in terms of the National Credit Act may be quite harsh and may also lead to erroneous results as was seen in the case of *National Credit Regulator v Opperman and Others*, where the Constitutional Court correctly upheld the Western Cape High Court's decision of invalidity, thus finding the provisions of section 89(5) of the Act to be a punitive measure in order to provide protection to consumers against unregistered credit providers.⁴⁹⁷

The result of the Constitutional Court's decision in the *Opperman*-case is that the common law rules regarding claims for the reinstatement of performance delivered in terms of the unlawful

⁴⁹⁰Para 3 4 1.

⁴⁹¹Para 3 4 1.

⁴⁹²Para 3 4 2.

⁴⁹³Para 3 4 2.

⁴⁹⁴Para 3 4 2.

⁴⁹⁵Para 3 4 2.

⁴⁹⁶Para 3 4 2.

⁴⁹⁷Para 3 4 2.

contract now apply.⁴⁹⁸ Consequently the credit provider now has a greater chance of succeeding with his claim for restitution.⁴⁹⁹

It was indicated that section 27 of the National Credit Amendment Act 19 of 2014 amends section 89(5) of the National Credit Act by the substitution in subsection (5) and by the deletion in subsection (5) of paragraphs (b) and (c).⁵⁰⁰ The effect of this amendment is that the National Credit Amendment Act reiterates the common law position, by allowing the courts to exercise their discretion with regards to the granting of restitution in terms of the unlawful agreement.⁵⁰¹

It was mentioned that certain provisions in credit agreements are prohibited by the Act, such as provisions which generally defeat the purpose of the Act,⁵⁰² aim to deceive the consumer,⁵⁰³ aim to waive any common law right,⁵⁰⁴ authorise the credit provider to do anything that is unlawful in terms of the Act,⁵⁰⁵ purport to exempt the credit provider from liability⁵⁰⁶ and lastly, provisions which express an agreement by the consumer to forfeit any money to the credit provider.⁵⁰⁷ Where a provision in any credit agreement is unlawful in terms of this Act, such provision will be declared void as from the date it purported to take effect.⁵⁰⁸ The court must if it is reasonable to do so, separate the unlawful provision from the agreement, or amend it to the extent required to render it lawful, or declare the entire agreement or amended agreement to be unlawful as from the date that the agreement took effect.⁵⁰⁹ The court may also make any other order that is just and equitable in the circumstances to give effect to the principles of section 89(5) with respect to that unlawful provision or entire agreement as the case may

⁴⁹⁸ Para 3 4 2.

⁴⁹⁹ Para 3 4 2.

⁵⁰⁰ Para 3 4 2.

⁵⁰¹ Para 3 4 2.

⁵⁰² Para 3 4 3 1.

⁵⁰³ Para 3 4 3 2.

⁵⁰⁴ Para 3 4 3 3.

⁵⁰⁵ Para 3 4 3 4.

⁵⁰⁶ Para 3 4 3 5.

⁵⁰⁷ Para 3 4 3 6.

⁵⁰⁸ Para 3 4 3.

⁵⁰⁹ Para 3 4 3.

be.⁵¹⁰The prohibition of these terms and stipulations are aimed at protecting the different common law rights which the consumer possesses.⁵¹¹These prohibitions also have the effect of restricting the contractual parties' freedom of contract.⁵¹²It is in this way that the common law is influenced by the Act.

It was further shown that the National Credit Act has a significant impact on the formalities of a contract.⁵¹³ However, the Act, unlike its predecessor (the Credit Agreements Act) does not make provision for the formalities that have to be complied with when concluding credit agreements.⁵¹⁴ The Credit Agreements Act provided that all credit agreements had to be reduced to writing and signed by or on behalf of every person who was a party to it.⁵¹⁵ According to the National Credit Act, credit agreements must be in documentary form and must comply with the different requirements applicable to the different categories of such agreements.⁵¹⁶ From this one can make the assumption that even though the Act does not specifically mandate the agreements to be in writing, they are in actual fact required to be in writing since the Act makes provision for the credit agreement to be transmitted to the consumer in paper form or in printable electronic form.⁵¹⁷ The Act further lays down strict conditions that have to be adhered to where modifications of credit agreements are concerned and where a consumer decides to exercise his cooling off right.⁵¹⁸

The fact that the National Credit Act does not specifically make provision for credit agreements to be reduced to writing as in the case of the Credit Agreements Act, leaves too much room for speculation as to whether or not credit agreements are in fact required to be in writing. This leads to uncertainty and may have an effect on the measure of consumer protection afforded by the Act.

⁵¹⁰Para 3 4 3.

⁵¹¹Para 3 4 3.

⁵¹²Para 2 2.

⁵¹³Para 3 5.

⁵¹⁴Para 3 5.

⁵¹⁵Para 3 5.

⁵¹⁶Para 3 5.

⁵¹⁷Para 3 5.

⁵¹⁸Para 3 5.

It is submitted that the legislature should make the appropriate amendments to the Act in order to expressly make provision for credit agreements to be reduced to writing as was the case with the Credit Agreements Act. Having the National Credit Act expressly providing for credit agreements to be reduced to writing will extinguish any assumptions or ambiguity surrounding the formalities of credit agreements in terms of the Act.

Finally, the National Credit Act also has an influence on the remedies (*ex lege* and agreed) for breach of contract.⁵¹⁹ It has been shown that the Act has developed the common law by introducing new prerequisites that the credit provider has to comply with before debt enforcement.⁵²⁰ These prerequisites are set out in sections 129 and 130 of the Act.⁵²¹

Section 129(1)(a) briefly provides that if a consumer is in default under a credit agreement, the credit provider may in writing bring the default to the attention of the consumer in order to advise the consumer of his rights to the various forms of relief which are available in terms of the Act.⁵²² Section 129(1)(b) further provides that subject to section 130(2), a credit provider may not begin any legal proceedings to enforce an agreement prior to first providing a section 129(1)(a) or section 86(10) notice (whichever the case may be) and may not institute any legal proceedings before meeting any other requirements set out in section 130.⁵²³

It was shown that as a result of this, the National Credit Act has a direct influence on specific performance and on acceleration clauses in that, before a credit provider may exercise his right to enforce specific performance or an acceleration clause in circumstances where the consumer is in default the credit provider is first required to comply with the provisions of sections 129(1) and 130(1) of the Act.⁵²⁴

It is submitted that the National Credit Act like its predecessor the Hire-Purchase Act should contain a provision which warns the consumer that if payments in arrears are not made, the acceleration clause will be used in order to bring about specific performance.

⁵¹⁹Para 3 6 1.

⁵²⁰Para 3 6 1.

⁵²¹Para 3 6 1.

⁵²²Para 3 6 1.

⁵²³Para 3 6 1.

⁵²⁴Para 3 6 2 and para 3 6 2 1.

The Act likewise has an influence on the common law remedy of cancellation in that the credit provider may only cancel an agreement once the prerequisites set out in sections 129 and 130 of the Act have been met.⁵²⁵

The provisions of sections 129(1) and 130(1) of the Act extend the common law by compelling the credit provider to deliver a section 129(1) notice to the consumer before any cancellation may be sought, whereas the common law provides that an agreement may be cancelled as soon as the credit provider acquires the right to do so.⁵²⁶ The National Credit Act further makes provision for what is commonly known as the “cooling-off” right, this is whereby the consumer may cancel an agreement in terms of section 121 of the Act.⁵²⁷ The “cooling-off” right shows divergence from the common law position insofar as a party may not unilaterally terminate a contract simply because they have changed their mind.⁵²⁸ However, because of the need to protect consumers section 121 of the Act has developed the common law in order to allow a consumer to unilaterally set aside a valid contract without any breach having occurred.⁵²⁹

The Act also develops the common law by allowing the credit provider to unilaterally terminate a credit agreement before its agreed time.⁵³⁰ The Act, however, makes no provision for the procedure to be followed by a credit provider who wishes to prematurely cancel an agreement in terms of section 123(1) of the Act.⁵³¹

It is submitted that the Act should enact a procedure that will be followed by the credit provider who wishes to exercise his right to cancel a credit agreement in terms of section 123 of the Act.

It was seen from this dissertation that *lex commissoria* clauses are not dealt with at all by the National Credit Act, even though such clauses are valid.⁵³² However, it was also seen from the

⁵²⁵Para 3 6 3.

⁵²⁶Para 3 6 3.

⁵²⁷Para 3 6 3.

⁵²⁸Para 3 6 3.

⁵²⁹Para 3 6 3.

⁵³⁰Para 3 6 3.

⁵³¹Para 3 6 3.

⁵³²Para 3 6 3 1.

wording of the Act in section 129(1)(b) that *lex commissoria* clauses are no exception to the all-encompassing provisions of section 129(1) of the Act.⁵³³

Prior to any claims for damages being instituted by the credit provider the provisions of sections 129 and 130 must once again be complied with.⁵³⁴ The same procedure must be followed where the credit provider wishes to enforce a penalty clause.⁵³⁵

It is submitted that the legislature should amend the National Credit Act in order to incorporate specific provisions as in the case of the Usury Act and the Credit Agreements Act which will be aimed at providing adequate protection to the consumer against the potentially severe effects of penalty clauses.

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