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**ASPECTS OF DEBT ENFORCEMENT UNDER THE
NATIONAL CREDIT ACT 34 OF 2005**

by

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Abstract

This dissertation investigates the procedural aspects of debt enforcement under the National Credit Act 34 of 2005 (the “NCA”). It identifies some problematic areas that existed in the debt enforcement process which were clarified by the recent court decisions and the proposed National Credit Amendment Act 19 of 2014. It further identifies certain aspects relating to enforcement procedures that still needs the legislature’s attention and proposes potential solutions thereto.

As discussed in this research, the NCA introduced compulsory debt enforcement procedures. It must be pointed out that although the repealed Credit Agreements Act 75 of 1980 had similar provisions, the enforcement provisions contained in the NCA are more extensive and differ significantly from those in the repealed credit legislation. These enforcement procedures are in line with the main purpose of the NCA which is to protect consumers. A balanced interpretation of the provisions of the NCA must, however, be maintained in order to protect the interests of both the consumer and the credit provider.

It is clear from the provisions of the NCA that the legislature considered the protection of consumers as a priority. However, some ambiguities in the NCA provisions have allowed this intention to protect consumers to be subjected to legal scrutiny by means of legal proceedings and in the result, disadvantaging the same consumers it seeks to protect.

This research further illustrates that although the NCA is designed to protect consumers, it is not one of the well drafted legislations. There are still some areas of concern regarding the interpretation of its provisions. In conclusion, it has been recommended that certain provisions of the NCA should be considered for amendment in order to clear ambiguities that may have been created by poor draftsmanship.

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1 GENERAL INTRODUCTION

1 1 Background information

1 1 1 Promulgation of the National Credit Act 34 of 2005

During the year 2002 the Department of Trade and Industry established a task team to review the consumer credit legislation then in existence, the Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968.¹ The main purpose of the review was, among other things, to address the protection of consumers, the imbalances in information and bargaining power between business and consumers with the intention to create a fair and transparent market environment.² A detailed report and policy framework that underlined the need for new legislation were published and eventually culminated in the National Credit Act 34 of 2005,³ which was assented to by the President of the Republic of South Africa on 10 March 2006.⁴

The Act came into operation in a piece meal fashion on 1 June 2006, 1 September 2006 and 1 June 2007.⁵ This was to allow credit providers an opportunity to get their financial systems and other relevant contract documents in place and, of utmost importance, to register with the National Credit Regulator as credit providers.⁶ Some of the provisions of the Act have since been amended by the National Credit Amendment Act 19 of 2014.⁷

¹ Boraine and Renke (2007) *De Jure* 223. The Credit Agreements Act 75 of 1980 (hereinafter the Credit Agreements Act) and the Usury Act 73 of 1968 (hereinafter the Usury Act) were repealed on 1 June 2006 by s 172(4)(a) and (b) of the National Credit Act.

² Policy Framework (2004) 11. See also the Crowther Report (1971) 231-236 regarding the protection of the consumer in credit transactions.

³ Hereinafter the National Credit Act, the NCA or the Act.

⁴ GN 230 in GG 28619 of 15 March 2006.

⁵ Proc 22 in GG 28824 of 11 May 2006.

⁶ Otto and Otto (2013) 8.

⁷ Hereinafter the National Credit Amendment Act. See GN 389 in GG 37665 of 19 May 2014. The date of commencement of the National Credit Amendment Act has not been fixed yet.

1 1 2 Field of application of the NCA

Except for a few agreements that are excluded from the Act's scope of application,⁸ the Act applies to every credit agreement between a consumer and a credit provider dealing at arm's length⁹ and made within or having an effect within the Republic.¹⁰ The Act has a wider field of application than the repealed credit enactments¹¹ as it applies to a greater number of credit agreements.¹²

1 1 3 Purposes of the Act

The purposes of the Act as they appear in section 3 are “to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers”. The NCA can be classified as consumer credit protection legislation since its main purpose is to protect consumers and level the playing field between credit providers and consumers.¹³

⁸ S 4(1)(a)-(d). The following credit agreements are excluded from the scope of the Act's application (a) an agreement in which the consumer is a juristic person whose asset value or annual turnover at the time of the agreement equals or exceeds R1 million; (b) an agreement in which the consumer is the state, or an organ of the state; (c) a large agreement as described in s 9(4) concluded by a consumer which is a juristic person with an asset value or annual turnover of less than R1 million; (d) an agreement in which the credit provider is the Reserve Bank; (e) an agreement in respect of which the credit provider is located outside the RSA and exemption has been approved by the Minister.

⁹ In the following transactions the parties are not dealing at arm's length and therefore the Act does not apply (a) a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider; (b) a loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has controlling interest in that juristic person, as consumer; (c) a credit agreement between natural persons who are in a familial relationship and there is dependency between them; and (d) any other arrangement that has been declared in law to be between the parties who are not dealing at arm's length. S 4(2)(b).

¹⁰ S 4(1).

¹¹ The Credit Agreements Act and the Usury Act respectively.

¹² S 8(1)(a)-(d). An agreement constitutes a credit agreement in terms of the Act if it is (a) a credit facility, eg, credit cards and overdrawn cheque accounts; (b) a credit transaction, eg, instalment agreements; (c) a credit guarantee, eg, suretyship; (d) any combination of a credit facility, credit guarantee or credit transaction. See also Kelly-Louw (2012) 28 and Renke, Roestoff and Haupt (2007) *Obiter* 229 for the definitions of the different credit agreements to which the NCA applies.

¹³ S 3. See also Boraine and Renke (2007) *De Jure* 223.

In the spirit of protecting the interests of consumers, the Act prohibits certain credit marketing practices and reckless granting of credit.¹⁴

According to section 2(1) the Act must be interpreted in a manner that gives effect to the purposes set out in section 3. International and appropriate foreign law may be considered in interpreting or applying the Act.¹⁵ Otto and Otto¹⁶ are of the opinion that the Act must not, however, be interpreted in a one sided manner as if the credit provider is not a party to the agreement. This view requires a balance of interests of both the consumer and the credit provider when interpreting the National Credit Act.

1 1 4 Obligations of the consumer

The duties of the consumer may be set out in the credit agreement and the common law or be in terms of the Act. The consumer's main obligation is payment of the deferred amount by means of instalments, on the agreed date.¹⁷ The deferred amount may include other fees or charges and interest that may be levied by the credit provider as a result of deferral of payment.¹⁸ In many instances consumers would commit breach of contract by failure to pay the required instalments on the agreed date.¹⁹ Under common law, a credit provider has certain remedies for such eventualities, such as claims for specific performance and cancellation of the contract. In instances where the credit provider elects to enforce payment by means of a claim for specific performance or to cancel the agreement, he may also claim damages, if any was suffered.²⁰

¹⁴ See the preamble of the Act.

¹⁵ S 2(2).

¹⁶ Otto and Otto (2013) 8. See also Fuchs (2013) *PER/PELJ* 389/390 who is of the view that the Act should be interpreted in manner that will equally benefit the consumer and the credit provider.

¹⁷ Van Heerden in Scholtz ed (2008) par 6.3. There are other duties of the consumer that have been created by the Act, eg, the duty to disclose the location of goods (s 97) and the duty to provide the credit provider with a new address (s 96). See also Otto and Otto (2013) 78 for the other duties of the consumer.

¹⁸ Ss 102 and 103.

¹⁹ Renke, Roestoff and Haupt (2007) *Obiter* 260.

²⁰ Christie (2011) 544-583. See also Hutchison *et al* (2012) 309- 350 for the remedies available for breach of contract.

1 1 5 Debt enforcement

The National Credit Act introduced compulsory debt enforcement procedures under Chapter 6 Part C that a credit provider must follow before formal legal proceedings may be instituted against the consumer.²¹ As stated above,²² one of the Act's objectives is to protect consumers. This purpose is attained by, *inter alia*, "providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements, and providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements".²³ The enforcement measures are in line with the objectives of the Act.²⁴

The enforcement procedures prescribed by civil procedural law need to be read together with the provisions of the Act in order to ensure compliance with the relevant prescripts of the Act by credit providers.²⁵ Although it is acknowledged that the debt enforcement measures should improve the position of consumers in many ways, there are certain ambiguities that have been created by the interpretation of some of the provisions of the Act.

1 2 Research statement

The broad research objective of this dissertation is to investigate and evaluate aspects of debt enforcement under the Act, with the view of ultimately proposing legal reform or review where applicable. Case law, where relevant, will be considered.

²¹ These provisions appear in sections 129 to 133 of the Act and are set out in par 2 below.

²² Par 1 1 3.

²³ S 3(h) and (i).

²⁴ S 3.

²⁵ Boraine and Renke (2008) *De Jure* 2. See also Policy Framework (2004) 6, where reference was made to the importance of effective enforcement mechanisms as part of the SA government's new policy framework for consumer protection.

1 3 Research objectives

In order to define and restrict the scope of this research, the following research objectives have been formulated

- (a) One of the remedies available to credit providers under common law when the debtor breaches the contract is to cancel the contract and claim damages suffered, if any. Sections 129 and 130 of the Act provide for the procedures to be followed in enforcing debt by way of repossession or judgment in cases where the consumer is in default. The first question that arises and will be investigated by this research is whether the phrase “debt enforcement” in Chapter 6 Part C of the Act should be interpreted in a wide sense so as to include the cancellation of credit agreements. Alternatively, should a narrow meaning be attached to the words to mean the enforcement of the contract by means of specific performance only.
- (b) Section 129(1)(a) on the one hand, provides that the creditor may²⁶ draw the default to the notice of the consumer in writing. The credit provider may also propose that the consumer refers the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction to resolve the dispute under the agreement, or to develop and agree on a plan to bring the arrear payments up to date.

Section 129(1)(b) on the other stipulates that the creditor may not commence any legal proceedings to enforce the agreement unless a notice in terms of sub-section (1)(a) has been delivered to the consumer. The aspects that will be investigated in this regard are

- (i) what the purpose of the section 129(1)(a) notice is, and

²⁶ Words that are underlined present own emphasis, wherever they appear in this research.

- (ii) whether compliance with the notice is a prerequisite before debt enforcement may take place.

- (c) The next objective concerns an examination of the contents of the section 129(1)(a) notice, the time limits involved, the method of notification that must be used and the address to be used for the notification.

- (d) The question of whether the section 129(1)(a) notice is effective only if it has reached the consumer will be investigated.

- (e) The interplay between debt enforcement and debt review, in particular the influence of the section 129(1)(a) notice in this regard will also be addressed.

- (f) Finally, submissions and recommendations that may be considered by the South African law makers in addressing the challenges and gaps in the current credit legislation will be made.

1 4 Delineation and limitations

In the light of the research statement and research objectives stated above, the following must be noted:

- (a) The scope of this research will be limited to the mentioned aspects of debt enforcement under the Act only. Debt procedures in court will not be addressed except where required in the context.

- (b) Debt review also falls outside the scope of this research as debt review does not constitute debt enforcement under the Act but rather an alternative

debt relief measure.²⁷ However, where and as far as debt review relates to the study objectives above,²⁸ such interrelation will be considered.

- (c) The repossession of goods, compensation for the credit provider, prohibited collection and enforcement practices and dispute settlements other than debt enforcement fall outside the scope of this research.

1 5 Overview of Paragraphs

- (a) Paragraph 1 provides the background information to the research, sets out the problem statement and the research objectives in relation to it.
- (b) Paragraph 2 deals with the investigation of the phrase “debt enforcement” used in Chapter 6 Part C of the Act. The question of whether or not the phrase “debt enforcement” should be interpreted in a wide sense so as to include cancellation of credit agreements is addressed.
- (c) Paragraph 3 covers the purpose of the section 129(1)(a) notice and whether compliance with such notice is a pre-requisite before debt enforcement.
- (d) Paragraph 4 addresses the contents of the section 129(1)(a) notice, the time limits applicable, the method of notification that must be used and the address to be used for the notification.
- (e) Paragraph 5 investigates the question of whether the section 129(1)(a) notice must reach the consumer for it to be effective.
- (f) Paragraph 6 deals with the interplay between debt enforcement and debt review. The influence of the section 129(1)(a) notice in this regard is investigated.

²⁷ To, eg, sequestration and the administration process in terms of the Magistrates’ Courts Act 32 of 1944.

²⁸ Par 1 3.

- (g) Finally, paragraph 7 contains the final integrated conclusions and recommendations with regard to the research conducted.

1 6 Terminology

In this research, the following shall have the meaning assigned to them unless the context indicates otherwise

- (a) “Consumer” means the debtor under a credit agreement.²⁹
- (b) “Credit provider” means the creditor under the credit agreement.³⁰
- (c) “Credit agreement” means an agreement entered into between the credit provider and the consumer which meets the criteria set out in section 8.³¹

1 7 Reference techniques

- (a) For the sake of convenience, the masculine form is used throughout this study 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 cases are referred to in full.
- (c) The law as stated in this dissertation reflects the position as at 31 August 2014.

²⁹ “Consumer” is defined in s 1.

³⁰ “Credit provider” is defined in s 1.

³¹ S 1.

2 THE MEANING OF THE PHRASE “ENFORCE” IN TERMS OF SECTIONS 129 AND 130 OF THE NATIONAL CREDIT ACT

Chapter 6 Part C of the NCA deals with debt enforcement by way of repossession or judgment. The NCA does not define the phrase “enforce” used in sections 129 and 130 and that creates uncertainty as to the exact meaning of this phrase.³² It is not clear whether the phrase refers to enforcement of the contract by credit providers using any of the remedies available to them, including cancellation of a credit agreement, or if it only relates to the enforcement of the agreement by claiming arrear payments by means of a claim for specific performance.³³

Section 129(1), under the heading “required procedures before debt enforcement”, provides that in the event the consumer is in default under a credit agreement, the credit provider

- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date, and
- (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-
 - (i) first providing notice to the consumer, as contemplated in paragraph (a), or section 86(10), as the case may be, and
 - (ii) meeting any further requirements set out in section 130.

³² Van Heerden and Otto (2007) *TSAR* 655.

³³ Otto and Otto (2013) 113. See also Renke, Roestoff and Haupt (2007) *Obiter* 260.

Section 130(1) stipulates as follows

Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time; the consumer is in default and has been in default under that credit agreement for at least 20 business days and-

- (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be,
- (b) in the case of a notice contemplated in section 129(1), the consumer has-
 - (i) not responded to that notice, or
 - (ii) responded to the notice by rejecting the credit provider's proposals, and
- (c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.

The question is whether the phrase “debt enforcement” used in the above mentioned context should be interpreted broadly to include cancellation of credit agreements or should it be limited only to claims for specific performance.³⁴

According to Otto and Otto³⁵ “enforcement” in the ordinary legal language would mean enforcement of rights such as payment or any obligation, but in the context of the NCA it may include enforcement by the credit provider using any of the remedies available to him. They further submit that “enforcement” may include the implementation of a *lex commissoria*. A *lex commissoria* can be defined as an express or implied term that deals with cancellation of a contract with immediate effect in the event of breach or default.³⁶

³⁴ Boraine and Renke (2008) *De Jure* 2.

³⁵ Otto and Otto (2013) 113.

³⁶ Hutchison ed (2010) 290.

Renke, Roestoff and Haupt³⁷ are of the opinion that a narrow interpretation of the word “debt enforcement” would mean that credit providers who want to use more drastic remedies such as cancellation will not have to comply with the NCA’s provisions regarding debt enforcement. They further submit that the phrase “debt enforcement” should be interpreted broadly so as to include cancellation of the agreement and other remedies available to the credit provider such as a claim to repossess the goods.³⁸

Boraine and Renke³⁹ and Van Heerden and Coetzee⁴⁰ are also of the view that “enforcement” means exercising of the totality of a credit provider’s contractually agreed or common law remedies, which include cancellation of the contract.

The view of a wide interpretation is also supported by section 123 which deals with termination of agreements by the credit provider before the time provided in that agreement. Section 123(2) states that “[i]f a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6 to enforce and terminate that agreement”.

A point to be noted from the above-mentioned section is that a credit provider has an option of terminating the credit agreement in the event of breach by the consumer. Further, when so terminating, the credit provider must follow the procedure set out in section 129. This means that a credit provider must first bring the default to the attention of the consumer.

Section 123(2) must be read with section 129(3) which is part of the enforcement procedures. Section 129(3) provides that a consumer may, at any time before the credit provider has cancelled the agreement that is in default, re-instate a

³⁷ Renke, Roestoff and Haupt (2007) *Obiter* 260.

³⁸ Renke, Roestoff and Haupt (2007) *Obiter* 260.

³⁹ Boraine and Renke (2008) *De Jure* 2.

⁴⁰ Van Heerden and Coetzee (2010) *Obiter* 774. See also Van Heerden and Otto (2007) *TSAR* 660. They are also of the view that delivery of a section 129(1)(a) notice is a prerequisite for cancellation of credit agreements that are subject to the NCA.

credit agreement by paying all the amounts that are overdue. Although the NCA does not define the word “terminate” used in section 123, it is submitted that the meaning of the word “terminate” is equivalent to the word “cancel” used in section 129(3).⁴¹ These two words have the same effect on application in that they bring the agreement to an end.

In *Absa Bank v De Villiers*⁴² the court found that the phrase “enforce” was intended to be used in a wide sense, meaning the exercising of any of its remedies by a credit provider. The court pointed out that in the event of default under a credit agreement, the credit provider who wishes to invoke any remedy at his disposal in terms of the relevant credit agreement will have to comply with the requirements laid down in sections 129 and 130.⁴³ The court further remarked that the legislature did not intend to alter the common law principles relating to cancellation of agreements.⁴⁴

In *Naidoo v Absa Bank Ltd*⁴⁵ the court held that sequestration is not enforcement; therefore the requirements in section 129 and 130 of the NCA are not applicable. The wide meaning of “enforce” was approved by the court in *Nedbank v National Credit Regulator*⁴⁶ where it was held that “enforce” “includes a reference to all contractual remedies including cancellation and ancillary reliefs, and means the enforcement of those remedies by judicial means”.

It is submitted that the court decisions⁴⁷ and the opinion of authors with regards to the meaning of “enforce” are correct. A wide meaning should be attached to the phrase “enforce” so as to cover all remedies available to the credit provider including cancellation, in the event of breach of the credit agreement by the consumer.

⁴¹ Boraine and Renke (2008) *De Jure* 2 fn 131.

⁴² 2009 (5) SA 40 (C) par 13.

⁴³ The *De Villiers*-case par 14.

⁴⁴ The *De Villiers*-case par 34 .

⁴⁵ 2010 (4) SA 597 (SCA) par 8.

⁴⁶ 2011 (3) SA 581 (SCA) par 12.

⁴⁷ *De Villiers and Nedbank*-cases.

3 THE PURPOSE OF THE SECTION 129(1)(a) NOTICE AND WHETHER COMPLIANCE WITH THE NOTICE IS COMPULSORY

3 1 The Purpose of the notice

In terms of section 129(1)(a), a credit provider is obliged to draw the default to the notice of the consumer in writing.⁴⁸ While the NCA's predecessor, the Credit Agreements Act, determined procedures to be followed prior to enforcement of debts arising out of credit agreements, it only required the credit grantor to first issue a demand or notice prior to a claim for return of goods.⁴⁹ Under common law, a letter of demand may be addressed to the defaulting party before initiating legal proceedings in order to put the defaulting party in *mora*.

Van Heerden and Otto⁵⁰ submit that the purpose of the letter of demand under section 11 of the Credit Agreements Act differs significantly from the purpose of the section 129(1)(a) NCA notice. They aver that the purpose of the section 11 demand was to bring the default to the attention of the credit receiver in cases where the credit grantor wanted to claim the return of financed goods. This was to afford the credit receiver an opportunity to remedy the breach, failing which the credit grantor would be entitled to proceed and claim the return of the goods. The section 129(1)(a) notice on the contrary, merely requires that a consumer be informed of his default under a credit agreement and proposals be made with the intent to resolve the dispute or to develop and agree on a plan to bring the payments under a credit agreement up to date.⁵¹

It is submitted that the main purpose of the section 129(1)(a) notice is to place an obligation on the credit provider to advise the consumer of the alternative dispute resolution methods available at his disposal before formal legal action is

⁴⁸ Par 2 above.

⁴⁹ S 11 of the Credit Agreements Act.

⁵⁰ Van Heerden and Otto (2007) *TSAR* 660. See also Van Heerden in Scholtz ed (2008) par 12.4.1.

⁵¹ Par 2 above.

instituted.⁵² The notice must propose that the consumer refer the credit agreement in default to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with the powers to deal with the matter.⁵³ The intention of referral to any of these institutions is to resolve any dispute under the credit agreement or to develop and agree on a plan to bring the payments under the agreement up to date.⁵⁴

Van Heerden and Boraine⁵⁵ are of the opinion that the section 129(1)(a) notice gives a consumer an opportunity to consider other alternatives in which a debt could possibly be resolved, before turning to litigation which might be costly and often protracted. They point out that where a section 129(1)(a) notice is not provided before the commencement of legal proceedings, the objective of considering other means of resolving the dispute in order to avoid litigation may be defeated.⁵⁶

It should also be noted that section 129(1)(a) notice “does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order”.⁵⁷ In *Nedbank & Others v National Credit Regulator*⁵⁸ the court held that the notice required in terms of section 129(1)(a) deals with one credit agreement and seeks to bring about a consensual resolution relating to that specific agreement. It does not, however, contemplate a general debt re-arrangement as envisaged by sections 86 and 87 of the NCA.⁵⁹

In *Firststrand Bank Ltd t/a Honda Finance v Owens*⁶⁰ the court stated that in terms of section 129(1)(a) the credit provider had to draw to the consumer’s attention

⁵² Kelly-Louw and Stoop (2012) 411.

⁵³ S 129(1)(a). See par 2 above.

⁵⁴ S 129(1)(a) quoted in par 2 above.

⁵⁵ Van Heerden and Boraine (2011) *SA Merc LJ* 52.

⁵⁶ Van Heerden and Boraine (2011) *SA Merc LJ* 52.

⁵⁷ S 129(2).

⁵⁸ 2011 (3) SA 581 (SCA) par 9. See also Kelly-Louw and Stoop (2012) 412.

⁵⁹ The *Nedbank*-case par 9.

⁶⁰ 2013 (2) SA 325 (SCA) par 10.

the possible methods of resolving the debt. It is submitted that the section 129(1)(a) notice gives the consumer an opportunity to consider various options that may be affordable to him in resolving the dispute, prior to engaging in an expensive civil litigation.

3 2 Is compliance with the notice in terms of section 129(1)(a) a prerequisite for debt enforcement?

3 2 1 Introduction

Although a letter of demand is generally not a prerequisite for debt enforcement,⁶¹ there are certain statutes that may require a demand to be served before the institution of legal proceedings.⁶²

As pointed out above,⁶³ the credit legislation repealed by the NCA did not explicitly require a credit grantor to send a demand to the credit receiver in the event of default as a prerequisite for enforcement of payment in terms of the contract. A letter of demand was limited to a claim for the return of goods.⁶⁴ The credit grantor had to use an acceleration clause in the contract, if any, to claim performance and *lex commissoria* to cancel the contract.⁶⁵ In the absence of an acceleration clause he had to rely on the common law.⁶⁶

A consumer has certain obligations to perform in terms of the credit agreement which in the majority of cases is payment of the debt by means of instalments.⁶⁷ It is common practise for consumers to commit breach of contract by failure to honour payment as required by the credit agreement. This is evidenced by the

⁶¹ Coetzee (2009) *SA Merc LJ* 28. See also par 3 1 above.

⁶² Eg, the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 and the Alienation of Land Act 68 of 1981.

⁶³ Par 31 above.

⁶⁴ S 11 of the Credit Agreements Act.

⁶⁵ See Otto and Otto (2013) 106. See also par 2 for the definition of a *lex commissoria*.

⁶⁶ Nagel ed (2011) par 9.45-9.52.

⁶⁷ Par 1 1 4 above. See also Renke, Roestoff and Haupt (2007) *Obiter* 260.

fact that almost 50% of about 21 million credit consumers' records in South Africa are impaired and many are currently unable to access employment and credit as a result of negative credit records.⁶⁸

Credit providers have certain remedies available to them in terms of the common law and the NCA in the event of breach by the consumer. Those remedies include claims for specific performance and cancellation of the contract.⁶⁹ The question that will be addressed in this paragraph is whether a section 129(1)(a) notice is a legal requirement before a credit provider can exercise any of the remedies available to him.

3 2 2 Compliance with section 129(1)(a) compulsory

The NCA has brought some pre-enforcement rights to consumers and limited the rights of credit providers to enforce credit agreements that fall within the scope of the Act's application. Section 129(1)(a)⁷⁰ stipulates that if the consumer is in default under a credit agreement, the credit provider "may" bring the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to various alternative dispute resolution mechanisms. The use of the word "may" in this subsection is misleading in that it creates an impression that a credit provider is not compelled to inform the consumer about default prior to debt enforcement proceedings.⁷¹

In order to comprehend the proper meaning of section 129(1)(a), one must read it holistically with section 129(1)(b) and section 130(1). Section 129(1)(b) provides that the credit provider "may not" commence any legal proceedings to enforce a credit agreement unless a section 129(1)(a) notice has been delivered to the consumer.

⁶⁸ Presentation on the National Credit Amendment Bill by the Minister of Trade and Industry (Febr 2014).

⁶⁹ See Christie (2011) 544-583.

⁷⁰ See par 2 above.

⁷¹ Otto and Otto (2013) 112. See also Van Heerden and Borraine *SA Merc LJ* (2011) 47.

It is submitted that the words “may not” in this subsection are equivalent to “must not”. This view was confirmed in *Minister of Environmental Affairs and Tourism & another v Pepper Bay Fishing (PTY) Ltd.*⁷² The court found that the word “may” is not permissive and does not create discretion when in combination with the word “not”. It is prescriptive in the sense of “cannot”.⁷³ What section 129(1)(b) conveys in the light of the case of *Pepper Bay Fishing* is that a credit provider cannot commence any legal proceedings to enforce the agreement before first providing the notice to the consumer in terms of section 129(1)(a).

In support of the peremptory wording of section 129(1)(b), section 130(1) provides that a credit provider may approach the court for an order to enforce a credit agreement only if the prescribed days have elapsed since the credit provider delivered a notice to the consumer as required by section 129(1). The wording of section 130(1) suggests that section 129(1) notice must be delivered to the consumer before a credit provider may approach the court for an order enforcing a credit agreement.⁷⁴

Taking into account the provisions of section 129(1)(b) and 130(1) it is submitted that a credit provider is prohibited from enforcing a credit agreement to which the NCA applies without first providing a section 129(1)(a) notice to the consumer. The notice is therefore a prerequisite before enforcement of debt under the NCA and should be provided to all types of consumers who enjoy the protection of the Act.⁷⁵

This view was confirmed by the courts in a number of cases. In *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors*⁷⁶ the court concluded that the section 129(1)(a) notice is a prerequisite to commence legal proceedings in respect of a credit agreement to which the NCA applies. It has been pointed out that if the

⁷² (2003) ALL SA Law Reports 528.

⁷³ The *Pepperbay*-case par 34.

⁷⁴ The meaning of the word “delivered” will be dealt with under par 4 3 2 below.

⁷⁵ Kelly-Louw and Stoop (2012) 409 and for a similar view see Otto and Otto (2013) 112- 113.

⁷⁶ 2009 (2) SA 512 (D) par 35.

notice is not delivered, the consumer may except to the summons on the basis that the credit provider has not followed the prescribed procedure.⁷⁷

In *Absa Bank Ltd v De Villiers*⁷⁸ the court found that a credit provider is precluded from commencing legal proceedings relating to a specific agreement that is in arrears without complying with the notice requirement of section 129(1)(a), as well as the requirements of section 130(1).

In *Rossouw v Firstrand Bank*⁷⁹ the court per Maya JA held that

[i]n the circumstances, the bank did not prove that it delivered the notice. As pointed out earlier, ss 129(1)(b)(i) and 130(1)(b) make this a peremptory prerequisite for commencing legal proceedings under a credit agreement, and a critical cog in a plaintiff's cause of action. Failure to comply must, of necessity, preclude a plaintiff from enforcing its claim; this despite the fact that in this matter it was not disputed that the appellants were in arrears and thus breached their contractual obligations.

The decision in the case of *Rossouw* was followed in *Nedbank v National Credit Regulator & another*⁸⁰ where the court concluded that despite the use of the phrase “may” in section 129(1)(a), the notice referred to therein is indeed a compelling requirement prior to enforcement of a credit agreement.

The burden of proof will be on the credit provider to satisfy the court that in the proceedings that are subject to the NCA the procedure required by section 129(1)(a) has been complied with. This means the credit provider must allege and prove that a section 129(1)(a) notice was delivered prior to the commencement of enforcement proceedings.

⁷⁷ Otto and Otto (2013) 113.

⁷⁸ 2009 (5) SA 40 (C) par 14.

⁷⁹ 2010 (6) SA 439 (SCA) par 38.

⁸⁰ 2011 (3) SA 581 (SCA) par 8.

Renke, Roestoff and Haupt⁸¹ submit that compliance with the provisions of sections 129 and 130 is a prerequisite in the event of breach of contract by the consumer, irrespective of whether the credit provider chooses to claim arrear payment or cancel the agreement and claim the return of goods.

3 2 3 The implications of non-compliance with section 129

As shown above,⁸² compliance with section 129(1)(a) is compulsory before the commencement of legal proceedings relating to enforcement of debt. Failure to comply with the provisions of section 129(1)(a) may render the summons excipiable on the basis that it does not disclose a complete cause of action.⁸³

In *African Bank Ltd v Myambo*⁸⁴ the court held that by virtue of section 129(1)(b) the credit provider's cause of action is not complete unless the section 129(1)(a) notice has been provided to the consumer prior to the commencement of the legal proceedings.

This view was confirmed in *Beets v Swanepoel*⁸⁵ where the court pointed out that the notice referred to in section 129(1)(b)(i) is a statutory peremptory pre-enforcement requirement and as a general rule, a plaintiff suing on a cause of action arising in circumstances where the NCA applies, must aver compliance with the applicable notice provisions. The court further held that in the absence of section 129(1)(a) notice no legal enforcement is possible.⁸⁶

In as much as section 129(1)(b) read with section 130(1)(a) makes it clear that a section 129(1)(a) notice is a prerequisite before debt enforcement, non-

⁸¹ Renke, Roestoff and Haupt (2007) *Obiter* 265.

⁸² Par 3 2 2.

⁸³ Van Heerden and Boraine (2011) *SA Merc LJ* 62.

⁸⁴ 2010 (6) SA 298 (GNP) 311A-B.

⁸⁵ [2010] JOL 26422 (NC) par 18.

⁸⁶ The *Swanepoel*-case par 18.

compliance, however, does not amount to a valid defence on merits.⁸⁷ This is so because section 130(4)(b) stipulates that, if the court determines that the credit provider has not complied with the relevant provisions of the NCA as contemplated in section 130(3)(a),⁸⁸ the court must adjourn the matter before it and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed. The only effect of non-compliance is therefore suspension of the proceedings and not the dismissal of the whole cause of action of the credit provider.

In *Standard Bank v Rockhill*⁸⁹ the court found that while non-compliance with section 129(1)(a) is an impediment to commencing any legal proceedings to enforce a credit agreement, it does not constitute a valid defence of the nature required by the rules of the court. Once it is established that there was no compliance, the court is bound to act in accordance with the provisions of section 130(4)(b) which envisages the resumption of the proceedings in future.⁹⁰

Van Heerden and Borraine⁹¹ are of the opinion that compliance with the section 129(1)(a) notice seem to be compulsory prior to the commencement of enforcement, however, non-compliance is not fatally defective to the credit provider's pleadings. This is as a result of the duty placed on the court by section 130(4)(b) with regards to the orders it may make in the event of non-compliance.⁹²

It is submitted that the opinion of Van Heerden and Borraine is correct in that the sanction for non-compliance does not support the peremptory wording of section 129(1)(b) since the credit provider will still have a cause of action despite the fact that there was no compliance with section 129(1)(a).

⁸⁷ Van Heerden and Borraine (2011) *SA Merc LJ* 60.

⁸⁸ Requiring compliance with the procedures *inter alia* required by s 129.

⁸⁹ 2010 (5) SA 252 (GSJ).

⁹⁰ The *Rockhill*-case par 17.

⁹¹ Van Heerden and Borraine (2011) *SA Merc LJ* 62.

⁹² Van Heerden and Borraine (2011) *SA Merc LJ* 62.

4 THE CONTENTS OF THE SECTION 129(1)(a) NOTICE, TIME LIMITS, METHOD OF NOTIFICATION AND APPLICABLE ADDRESS

4 1 The contents of the notice

4 1 1 Introduction

Although the NCA requires the credit provider to bring the default arising from a credit agreement to the attention of the consumer in writing,⁹³ it does not prescribe the information that should be contained in the notice.⁹⁴ A notice in terms of section 129(1)(a) does not have to be a separate document, it may be incorporated in a letter of demand sent to a defaulting consumer.⁹⁵

4 1 2 Information to be included in the section 129(1)(a) notice

In accordance with section 129(1)(a), the notice must-

- (a) inform the consumer about the default;
- (b) contain a proposal that the consumer refers the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction;
- (c) indicate that the intention of the referral is to resolve the dispute under the particular agreement or to develop and agree on a plan to bring the payments up to date; and

⁹³ S 129(1)(a).

⁹⁴ See also Kelly-Louw and Stoop (2012) 413.

⁹⁵ Van Heerden in Scholtz (2008) par 12.4.9. See also Van Heerden and Otto (2007) *TSAR* 666 and Van Heerden and Borraine (2011) *SA Merc LJ* 51.

- (d) inform the consumer that debt enforcement will follow should he fail to respond within ten business days to the notice or reject the proposals suggested therein.⁹⁶

In *BMW Financial Services (Pty) Ltd v Dr MB Mulaudzi inc*⁹⁷ the court reasoned that it was not the intention of the legislature merely to have the credit provider duplicating section 129(1)(a) in the notice without any flesh being added to the skeleton. The notice must contain proposals aimed at resolving the dispute and to prevent the agreement from being cancelled or to avoid legal action taken against the consumer. If no proposals are made, the credit provider would not have complied with the NCA.⁹⁸

The *Mulaudzi* decision was followed in *African Bank Ltd v Myambo*⁹⁹ where the court held that the section 129(1)(a) notice should bring meaningful and understandable facts in plain language to the notice of the consumer. It must convey meaningful proposal aimed not only at resolving the dispute but also at ways of bringing the payment up to date. The court added further that the section 129(1)(a) notice should also provide the names and contact details of the person that the consumer may contact to discuss the proposal.¹⁰⁰

Section 64(2) stipulates that a document is in plain language if it is reasonable to ascertain that any ordinary person with average literacy skills for whom the document is intended, could be expected to understand the content, significance and import of the document without undue hardship. In determining whether the document is in plain language, regard should be taken to, among other things, the context, organisation, vocabulary, use of any illustrations, examples and other aids to reading and understanding.¹⁰¹

⁹⁶ Van Heerden in Scholtz (2008) par 12.4.9. See also Van Heerden and Otto (2007) TSAR 666.

⁹⁷ 2009 (3) SA 348 (B).

⁹⁸ The *Mulaudzi*-case par 13.

⁹⁹ 2010 (6) SA 298 (GNP).

¹⁰⁰ The *Myambo*-case 313D-314A.

¹⁰¹ S 64(2)(a)-(d).

In *Standard Bank of South Africa v Maharaj t/a Sanrow Transport*¹⁰² the court disagreed with the conclusion in the *Mulaudzi* case and was of the view that Mogoeng JP intended to lay a legal requirement that the proposal by a credit provider in terms of section 129(1)(a) contain more information than what is explicitly provided in the Act.

Kelly-Louw¹⁰³ agrees with the decision in *Maharaj*. She submits that the judgment delivered on the wording of section 129(1)(a) notice in the case of *Maharaj* was correct and that the judgments in *Mulaudzi* and *Myambo* seek to place an unnecessary obligation on credit providers that is not expressly required by the NCA.

It is submitted that the views expressed in *Mulaudzi* decision are correct. Compliance with the provisions of section 129(1)(a) is not about re-writing the section but achieving a resolution of the dispute without the parties getting involved in a costly legal battle. The notice, therefore, has to give sufficient information that the consumer is able to understand and must also clearly point out the consequences of non-compliance.

It may appear as if the courts in *Mulaudzi* and *Myambo* expect too much from credit providers and they are putting an unnecessary burden on them. It must however, be noted that in the light of the main purpose of the NCA which is to protect the consumer¹⁰⁴ that information is necessary.

4 1 3 Information relating to the execution of consumer's home

Section 26 of the Constitution¹⁰⁵ provides that everyone has the right to have access to adequate housing. It stipulates further that no one may be evicted

¹⁰² 2010 (5) SA 518 (KZP) par 13.

¹⁰³ Kelly-Louw (2010) *SA Merc LJ* 573.

¹⁰⁴ S 3.

¹⁰⁵ Constitution of the Republic of South Africa, 1996- hereinafter the Constitution.

from his home, or have his home demolished without an order of court and no legislation may permit arbitrary evictions.

It becomes very important that in cases involving mortgage agreements, the section 129(1)(a) notice should include information advising the consumer that he may end up losing his home by way of a sale in execution in the event that judgment is obtained against him.¹⁰⁶ In this regard, and particularly where the historically disadvantaged and indigent consumers are involved, the section 129(1)(a) notice should also inform the consumer about his right to access to adequate housing in terms of section 26 of the Constitution.

In *Firststrand Bank Ltd v Maleke*¹⁰⁷ the court remarked that section 129(1)(a) notices addressed to the consumers did not expressly warn them that their homes may be sold in execution in the event they fail to respond. The court held that the courts should, in cases where historically disadvantaged consumers are involved, be astute to protect their rights when it comes to the application of the provisions of the Act.¹⁰⁸ The court concluded that the courts have an obligation to consider the constitutional implications of section 26 of the Constitution when applying the provisions of the NCA.¹⁰⁹

In *Van Rooyen v Stoltz and others*¹¹⁰ it was decided that the court may in certain circumstances refuse to order the execution of a consumer's home if there are other alternative ways to recover the debt without the execution. This view is concurred with.

¹⁰⁶ Kelly-Louw and Stoop (2012) 415.

¹⁰⁷ 2010 (1) SA 143 (GSJ) par 6.

¹⁰⁸ The *Maleke*-case par 9.

¹⁰⁹ The *Maleke*-case par 10.

¹¹⁰ 2005 (2) SA 140 (CC) par 56.

4 2 The time limits applicable to the section 129 notice

Section 129 compels the credit provider to inform the consumer about the default in writing before instituting legal proceedings.¹¹¹ However, it does not specify the time limits applicable to the notice.¹¹² Section 130(1)(a)¹¹³ provides clarity to this aspect. It stipulates that a credit provider may approach the court for an order to enforce a credit agreement only if, at that time,¹¹⁴ the consumer is still in default and has been in default under such an agreement for at least 20 business days and at least 10 business days have elapsed since the credit provider delivered the section 129(1)(a) notice to the consumer.¹¹⁵

It is clear from the provisions of section 130(1)(a) that a consumer has at least 10 business days after the delivery of the notice to respond to it. The credit provider may approach the court if the consumer has either not responded to the notice or responded by rejecting the proposals in the notice.¹¹⁶ In the case of an instalment agreement, secured loan or lease the consumer must not have surrendered the relevant property in terms of section 127.¹¹⁷

The days referred to in section 130(1)(a) do not run consecutively but may run concurrently.¹¹⁸ That means the 20 business days (from the date of default) and the ten business days (from the date of delivery of the notice) may run together.

¹¹¹ Par 2 above.

¹¹² See also Van Heerden and Borraine (2011) *SA Merc LJ* 47.

¹¹³ Par 2 above.

¹¹⁴ The time of issuing summons.

¹¹⁵ S 2(5) determines how the 10 days' notice period must be calculated. This section provides that the day on which the first event occurs must be excluded, but the day on or by which the second event is to occur be included and public holiday, Saturday or Sunday that falls on or between the first event and the second event respectively must be excluded.

¹¹⁶ S 130(1)(b).

¹¹⁷ S 130(1)(c). Subsection (2) provides for additional circumstances under which a credit provider may approach the court for an order enforcing the agreement in respect of instalment agreements, secured loans, or lease agreements. Eg, where the relevant property has been sold pursuant to an attachment order or surrender of property in terms of s 127 and the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the credit agreement.

¹¹⁸ Van Heerden and Otto (2007) *TSAR* 662. Renke, Roestoff and Haupt (2007) *Obiter* 262 fn 329 share the same opinion.

This is effected by delivering the section 129(1)(a) notice soon after the default has occurred.

In *Standard Bank of South Africa Ltd v Rockhill*¹¹⁹ the court found that section 130(1)(a) did not prevent the parties from incorporating into their agreements additional protection for the consumer by extending the period by which the notices are deemed received as that is not repulsive to the general purpose of the NCA.

The credit provider may not enforce a credit agreement prior to the expiry of 10 business days prescribed by section 130(1). In *Standard Bank of South Africa Ltd v Bekker*¹²⁰ the court pointed out that when the credit provider approaches the court for an order to enforce the credit agreement, the full period of 10 business days referred to in section 130(1)(a) must have elapsed after the deemed receipt of the section 129 notice by the consumer.

The section 129(1)(a) notice should expressly indicate that the consumer must respond within 10 business days after delivery thereof, failing which the credit provider will proceed with debt enforcement.¹²¹ This needs to be clear in the notice considering that the NCA does not provide for condonation in the event the consumer's response is out time.

In *BMW Financial Services (SA) (Pty) Ltd v Forefront Trading*¹²² the court held that the credit provider was not bound by the Act to accept a belated and out of time response from the consumer. The court concluded further that a belated referral to an alternative dispute agent does not preclude the credit provider from

¹¹⁹ 2010 (5) SA 252 (GSJ) par 13.

¹²⁰ 2011 (6) SA 111 (WCC) par 35.

¹²¹ Van Heerden in Scholtz ed (2008) 12.4.9. See also Van Heerden and Otto (2007) TSAR 662.

¹²² Unreported case nr 12331/09 (KZD) decided on 17 March 2010. See par 10.

exercising his rights to cancel the credit agreement if he is lawfully entitled to do so.¹²³

4 3 Method of notification

4 3 1 Introduction

Section 129 requires a notice to be provided to the consumer prior to the institution of legal proceeding but is silent on how that notice should be provided.¹²⁴ In this regard section 129 must be read with section 130(1)(a) which stipulates that a credit provider may approach the court to enforce the credit agreement if, at that time, at least 10 business days have elapsed since the credit provider delivered the notice. Although section 130(1)(a) envisages delivery of the notice prior to the commencement of debt enforcement, it does not indicate how the delivery should occur.

In this sub-paragraph, the legal position relating to the mode of delivery of a section 129(1)(a) notice prior to the National Credit Amendment Act and after the Amendment Act will be considered. It will also be considered whether any uncertainties that may have existed prior to the Amendment have now been resolved.

4 3 2 Delivery of the section 129(1)(a) notice

The lack of clarity on the method of delivery of section 129(1)(a) notice led to different reasoning by the courts and writers. Section 65 which deals with the right to receive documents was considered relevant. This section stipulates as follows

¹²³ The *Forefront Trading*-case par 10.

¹²⁴ S 129(1)(a) see par 2. See also Otto and Otto (2013) 115, Kelly-Louw and Stoop (2012) 419 and Van Heerden and Boraine (2011) *SA Merc LJ* 48.

- (1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.
- (2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must-
 - (a) make the document available to the consumer through one or more of the following mechanisms-
 - (i) in person at the business premises of the credit provider, or at any other location designed by the consumer but at the consumer's expense, or by ordinary mail,
 - (ii) by fax,
 - (iii) by email, or
 - (iv) by printable web-page, and
 - (b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).

Section 65(1) thus requires a document to be delivered in the prescribed manner. If no method is prescribed, the document must be delivered in accordance with one of the methods listed in subsection (2)(a). Section 1 of the NCA defines “prescribed” used in section 65(1) to mean “prescribed by regulation”.

Regulation 1 of the Regulations made in terms of the National Credit Act¹²⁵ contains a definition of the word “delivered” used in sections 130(1)(a) and 65. It provides that “delivered” means, unless otherwise provided for, sending a document by hand, by fax, by email, or registered mail to an address chosen in the agreement by the proposed recipient and if no such address is available, the recipient's registered address.

Section 168 which appears to be also relevant provides that

¹²⁵ GN R489 in GG 28864 of 31 May 2006, as amended- hereinafter the NCA Regulations.

Unless otherwise provided for in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either-

- (a) delivered to that person, or
- (b) sent by registered mail to that person's last known address.

The failure to define “delivery” in the NCA gives rise to the question of whether the definition in the Regulations can be applied in the NCA. In *Starita v Absa Bank Ltd*¹²⁶ the court as per Gautshi AJ pointed out that to apply a definition in the Regulations to an expression used in the Act is fallacious. The Minister is not empowered to define the expressions in the Act when making Regulations. The court went further to state that the definition of the word “delivered” in the NCA Regulations does not appear to contain a “prescribed manner” for delivery. It is simply a definition and indicates the meaning to be attached to the word “delivered” as used in the Regulations.¹²⁷

According to the court the closest that comes to a “prescribed manner” of delivery of documents in terms of section 65(1) is section 168.¹²⁸ The court reasoned that there is no substantial difference between the words “delivered” used in section 65(1) and “served” used in section 168. Accordingly, it concluded that in terms of section 168(b), the notice would have been properly delivered when it had been, among other things, sent by registered mail to that consumer's last known address.¹²⁹

The reasoning in *Starita* was followed in *Rossouw v First National Bank Ltd*¹³⁰ where Maya JA stated that

The use of the expression ‘[i]n these regulations’, which to my mind strongly suggests that the definitions in reg 1 are operative only for purposes of the regulations, poses

¹²⁶ 2010 (3) SA 443 (GSJ).

¹²⁷ The *Starita*-case par 4.

¹²⁸ The *Starita*-case par 5.

¹²⁹ The *Starita*-case par 6.

¹³⁰ 2010 (6) SA 439 (SCA) par 26.

difficulty for me. This is especially so as the regulation makes no mention of s 65(1) or the word 'prescribed' used in that subsection. It may be so that such a cross-reference may not be necessary where it is not required by the empowering statute, but that apart, there clearly is need for the definition in the regulations themselves since the terms 'delivered', 'deliver' or 'delivery' are interspersed throughout their body.

However, an opposite view was taken in *Marimuthu Munien v BMW Financial Services (SA) (Pty) Ltd*¹³¹ where the court concluded that the manner of delivery was prescribed in the NCA but the method must be in accordance with the definition of "delivered" in the NCA Regulations. The court further held that the NCA Regulations prescribe that a document is delivered if it is sent by registered post to the address chosen by the consumer, whether it is received or not.¹³²

Van Heerden and Coetzee¹³³ agree with the reasoning and motivation by Wallis J in the *Munien* case. They submit that "delivery" for the purposes of section 65(1) of the NCA means the document has to be delivered in accordance with regulation 1. This view is based on the fact that section 1 of the NCA defines the word "prescribe" to mean "prescribed by regulation".

It is submitted that the decisions of *Starita and Rossouw* are correct in that, by virtue of separation of powers, the Executive is generally not permitted to dictate on matters in the domain of the legislature. The definition of "delivered" in the NCA Regulations is meant for use when interpreting the Regulations and is not prescribing any method of delivery in accordance with section 65(1), 129 and 130.

It is observed from the three court decisions above that although the courts differ in reasoning they all agree that the preferred method of delivery of a section 129(1)(a) notice in practice is registered post. This method is not included in section 65(2) as one of the methods of delivery. It is not clear why it was left out

¹³¹ 2010 (1) SA 549 (KZD).

¹³² The *Munien*-case par 12.

¹³³ Van Heerden and Coetzee (2009) *PER/PELJ* 352.

as the courts have acknowledged that registered post is one of the most reliable means of delivery and is to be preferred above ordinary mail.

In *Maharaj v Tongaat Development Corporation (Pty) Ltd*¹³⁴ Wessels JA remarked

In prescribing a method whereby the seller is required to send a letter to the purchaser by registered post, the legislature no doubt accepted that that method is almost invariably employed where important letters or other documents are sent to an addressee through the post. Whilst registered letters no doubt do go astray, there is, at least, a high degree of probability that most of them are delivered.

In *Standard Bank v Maharaj t/a Sanrow Transport*¹³⁵ the court pointed out that delivery by registered post does not constitute a material departure from the provisions of section 65(2) and the fact that the letter is delivered by registered mail makes it more likely to reach the consumer.

The use of the registered mail as one of the preferred methods of delivery was stressed by the court in *Sebola v Standard Bank*.¹³⁶ The court found that where the mail is used as a manner of delivery, the credit provider must establish delivery by registered post to the consumer's relevant post office.

It is submitted that in a case where the document cannot be served by hand, for the purposes of ensuring proper service or delivery of documents, section 65(2) should be read with section 168 and regard should also be taken to the method of delivery chosen by the consumer in the credit agreement.¹³⁷

¹³⁴ 1976 (4) SA 994 (A) 1001A-B.

¹³⁵ 2010 (5) SA 518 (KZP) par 16.

¹³⁶ 2012 (5) SA 142 (CC) par 83.

¹³⁷ *Otto and Otto* (2013) 115. This should be the position as the National Credit Amendment Act is not in operation. It is expected that when consumers exercise their right to choose a mode of delivery in the agreement, they will consider registered mail as well.

The legislature has closed the gap on the method of delivery of the section 129(1)(a) notice in the National Credit Amendment Act. Section 32(c) of the Amendment Act adds new subsections to section 129. The proposed subsection (5) provides that the notice must be delivered to the consumer by registered mail or hand delivered to an adult person at the address nominated by the consumer. Subsection (6) compels the consumer to select the preferred manner of delivery in writing. Subsection (7) stipulates that proof of delivery of the section 129(1)(a) notice is satisfied by one of the following

- (a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or
- (b) the signature or identifying mark of the recipient contemplated in subsection (5)(b).

4 4 Address for notification

It is not clear in terms of sections 129(1)(a) or 130(1) which address should be used for delivery of the notice to the consumer. Van Heerden and Otto¹³⁸ are of the view that the section 129(1)(a) notice may qualify as a legal notice for the purposes of section 96 since it is provided in contemplation of legal proceedings. This means section 96, which deals with the address for service, may also apply to the section 129(1)(a) notice. Section 96 states that

(1) Whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at—

- (a) the address of that party as set out in the agreement, unless paragraph (b) applies; or*

(b) the address most recently provided by the recipient in accordance with subsection (2).

¹³⁸ Van Heerden and Otto (2007) *TSAR* 664. This view was supported by Loggerenberg, Dicker and Malan (2008) *De Rebus* 40.

(2) A party to the credit agreement may change their address by delivering to the other party a written notice of the new address by hand, registered mail or electronic mail, if that other party has provided an email address.

It is submitted that the section 129(1)(a) notice must be delivered by the credit provider at the address of the consumer as indicated in the agreement or at the address most recently provided by the recipient in accordance with section 96(2).

In *Absa Bank v Prochaska t/a Bianca Cara Interiors*¹³⁹ the court found that in order for the credit provider to be properly compliant with section 129(1)(a), the notice, if dispatched by post, has to be sent to the correct address as chosen by the consumer in the credit agreement.

In *Greef v Firstrand Bank*¹⁴⁰ the court held that the sending of the section 129(1)(a) notice by registered mail to an address not chosen by the recipient could never have constituted proper service since it was clear that the parties chose different addresses for the method of posting on the one hand and for the method of service, on the other. It then follows that a credit provider may not decide to use another address that was not selected by the consumer in the agreement.

It has been noted that unlike the Credit Agreements Act, the NCA does not expressly provide that the address set out in the credit agreement will serve as *domicilium citandi et executandi*.¹⁴¹ However, it is submitted that section 90 which prohibits unlawful provisions in a credit agreement does not prohibit the contracting parties from agreeing that the address set out in the agreement shall serve as *domicilium citandi et executandi*.¹⁴² In this regard, the parties may

¹³⁹ 2009 (2) SA 512 (D) par 55.

¹⁴⁰ 2012 (3) SA 157 (NCK) par 43.

¹⁴¹ S 5(4) of the Credit Agreements Act provides that the addresses stated in a credit agreement for all purposes of that credit agreement served as *domicilium citandi et executandi* of the parties thereto. See also Van Heerden and Otto (2007) TSAR 665.

¹⁴² Van Heerden and Otto (2007) TSAR 665.

include a clause providing that the address of the consumer in the agreement would also serve as *domicilium citandi et executandi*.

Section 96(2) gives the parties to a credit agreement a right to change their addresses. The party changing the address must give the other party a written notice of the new address. The notice containing a new address may be delivered to the other party by hand, registered mail, or electronic mail, if an email address has been provided. It is not clear why the legislature added “registered mail” as one of the delivery methods of notice in respect of change of address under section 96(2) but failed to provide for this method as one of the options for delivery in section 65(2)(a).¹⁴³

¹⁴³ Van Heerden and Otto (2007) *TSAR* 664.

5 IS THE SECTION 129(1)(a) NOTICE EFFECTIVE ONLY IF IT HAS REACHED THE CONSUMER?

5 1 Introduction

As discussed above,¹⁴⁴ when providing the section 129(1)(a) notice, the credit provider should have regard to the method of delivery and address as chosen by the consumer in the agreement. The question that had to be answered by the courts was whether the section 129(1)(a) notice must in fact reach the consumer in order to be effective.

5 2 Analysis of court decisions

This question came up for decision in various court cases and the case law was divided on whether the notice had to be received by the consumer for it to be effective. It must be pointed out that under the Credit Agreements Act, the courts had held that if the notice was sent by registered post to the chosen address there had been statutory compliance.¹⁴⁵

In *Absa Bank v Prochaska t/a Bianca Cara Interiors*¹⁴⁶ the court interpreted the words “draw the default to the notice of the consumer”, “providing notice” and “delivered a notice” which appear in sections 129 and 130 to reflect an intention of the law maker to place an obligation on the credit provider which requires much more than the mere sending of the section 129(1)(a) notice to the consumer in a manner contemplated in the Act and the NCA Regulations. Accordingly, the court decided that the credit provider was obliged to draw the default to the attention of the consumer in a manner that satisfied the court that the default had indeed been brought to the consumer’s notice in compliance with

¹⁴⁴ Par 4 3 and 4 4.

¹⁴⁵ See *Marques v Unibank Ltd* 2001 (1) SA 145 (W) 153.

¹⁴⁶ 2009 (2) SA 512 (D).

the procedural requirements of sections 129 and 130.¹⁴⁷ Effectively, this decision requires that the notice be received by the consumer.¹⁴⁸

A different approach was taken in *Munien v BMW Financial Services*¹⁴⁹ where the court per Wallis J held that the Act does not require the section 129(1)(a) notice to be received by the consumer. The credit provider would have discharged its obligations of delivering the notice if it was sent to the address chosen by the consumer, in the manner selected by the consumer and if such manner was one prescribed in section 65(2)(a).¹⁵⁰ This decision was supported by the courts in various cases.¹⁵¹

The view in *Prochaska t/a Bianca Cara Interiors* was followed in *FirstRand Bank v Dhlamini*¹⁵² where the court concluded that the NCA requires that the section 129(1)(a) be brought to the actual attention of the consumer and that failure by the credit provider to do so will prevent the institution of legal proceedings with the result that any action instituted before then will be considered premature.¹⁵³

In *Rossouw v FirstRand Bank Ltd*¹⁵⁴ the court pointed out that the parties had agreed about the address and mode of delivery of the section 129(1)(a) notice in the agreement as required by sections 65(2) and 96.¹⁵⁵ The court found that sending of documents by registered post as preferred by the consumer in the agreement constitutes proper delivery.¹⁵⁶ It follows that the consumer had a right to choose the manner of delivery of the notice he should therefore bear the risk of non-receipt thereof. The court held that the despatch of the notice in the

¹⁴⁷ The *Prochaska t/a Bianca Cara Interior*-case par 55.

¹⁴⁸ See Van Heerden and Boraine (2011) *SA Merc LJ* 49.

¹⁴⁹ 2010 (1) SA 549 (KZD).

¹⁵⁰ The *Munien*-case par 22.

¹⁵¹ Eg, *Starita v Absa Bank* 2010 (3) SA 443 (GSJ) par 19, *Standard Bank v Rockhill* 2010 (5) SA 252 (GSJ) par 5, *Standard Bank v Maharaj* 2010 (5) SA 518 (KZP) paras 15 and 16.

¹⁵² 2010 (4) SA 531 (GNP).

¹⁵³ The *Dhlamini*-case par 31.

¹⁵⁴ 2010 (6) SA 439 (SCA).

¹⁵⁵ The *Rossouw*-case par 30.

¹⁵⁶ The *Rossouw*-case par 31.

manner chosen by the consumer constitutes compliance with the provisions of section 129(1)(a). The court concluded that the credit provider did not have to bring the notice to the actual attention of the consumer.¹⁵⁷

It is submitted that the finding in *Rossouw* is correct. The NCA must be interpreted in a well-balanced manner in order to benefit both a consumer and the credit provider.¹⁵⁸ It would be unfair to expect the credit provider to go beyond properly sending the notice to the last address chosen by the consumer. The consumer also has to exercise caution that the address of record with the credit provider is the latest one and further take responsibility to collect correspondence from the chosen address.

The controversy on whether the notice must reach the consumer to be effective was authoritatively settled by the court in *Rossouw* until the Constitutional Court decision in *Sebola v Standard Bank*.¹⁵⁹ The court in *Sebola* held that a mere sending of the section 129(1)(a) is not sufficient even if it was sent to the correct address. A credit provider must prove on a balance of probabilities that the notice was not only sent to the consumer by registered post, but that it was received by the correct post office for delivery to the consumer.¹⁶⁰

The court further found that if the section 129(1)(a) notice reached the relevant post office, a court may accept that there was delivery of the notice to the defaulting consumer. However, if the consumer alleges that the notice did not reach him, the court must investigate the correctness of that claim and if it is found that the credit provider did not comply with section 129(1)(a), the court must act in accordance with section 130(4)(b).¹⁶¹

¹⁵⁷ The *Rossouw*-case par 32.

¹⁵⁸ See *Otto and Otto* (2013) 8.

¹⁵⁹ 2012 (5) SA 142 (CC).

¹⁶⁰ The *Sebola*-case par 87.

¹⁶¹ The *Sebola*-case par 87.

The *Sebola* decision was criticised and interpreted in different and contracting views.¹⁶² Otto and Otto¹⁶³ are of the opinion that the Constitutional Court in *Sebola* went too far in its interpretation of the NCA and its requirements. They argue that the manner in which the Act is applied in the field of debt enforcement does not support its objectives which include promoting accessible and sustainable credit market.¹⁶⁴

Fuchs¹⁶⁵ agrees with Otto and Otto that the Constitutional Court overstepped the mark in interpreting compliance with the section 129(1)(a) notice in *Sebola*. He is of the opinion that the courts need to balance the rights of both the consumer and credit provider when interpreting the requirements of compliance with the NCA so that both parties can enjoy equal protection under the NCA.

In *Nedbank Ltd Binneman*¹⁶⁶ Griessel J had to decide in the light of *Sebola* case whether it was enough to prove delivery of the section 129(1)(a) notice at the correct post office and how the credit provider should deal with cases where the notice was returned to sender.¹⁶⁷ It was held that if the notice was sent by registered post, to the address chosen by the consumer and it reached the appropriate post office then the credit provider had complied with the requirements of section 129. The consumer should bear the risk of non-receipt under those circumstances.¹⁶⁸ The *Rossouw* decision was thus followed.

The matters of *ABSA Bank Ltd v Mkhize*, *ABSA Bank Ltd v Chetty* and *ABSA Bank v Mlitha*¹⁶⁹ also followed after the *Sebola* judgment. The court interpreted the *Sebola* decision and concluded that if the consumer did not receive the section 129(1)(a) notice, even if the credit provider is able to prove that it was

¹⁶² See below.

¹⁶³ Otto and Otto (2013) 117.

¹⁶⁴ Otto and Otto (2013) 118.

¹⁶⁵ Fuchs (2013) *PER/PELJ* 389/390.

¹⁶⁶ 2012 (5) SA 569 (WCC).

¹⁶⁷ The *Binneman*-case par 2.

¹⁶⁸ The *Binneman*-case par 8.

¹⁶⁹ 2012 (5) SA 574 (KZD).

sent to the correct post office, the credit provider will not be successful in its case.¹⁷⁰ The matters were accordingly postponed *sine die* to allow the credit provider to start the process afresh and to make use of the available methods of delivery of documents in terms of section 65(2), including registered post.¹⁷¹

In *ABSA Bank v Peterson*¹⁷² the court per Binns-Ward J criticised the *Sebola* judgment and decided to follow the *Binneman* case. The court held as follows

To the best of my knowledge *Binneman* has been followed without exception in this court. It has also been applied in cases in which the credit agreement did not have a presumption of receipt clause. I think that the reasoning for doing so in those cases has been that it seems to follow from the majority judgment in *Sebola* as interpreted in *Binneman* (i) that it may be presumed when a registered item arrives at the addressee's local post office that notification of its arrival will probably have been given by the post office to the consumer and that a reasonable consumer would ensure its retrieval; (ii) *ergo* that non-collection of the item in the circumstances is on the face of it an indication of unreasonable indifference by the addressee; (iii) the risk of non-receipt in the circumstances of the credit provider having taken '*reasonable measures to bring the notice to the attention of the consumer*' is on the consumer; and (iv) in any event, a presumption of receipt clause could not trump the requirements of s 129.

The issue of delivery and receipt of notice in terms of section 129(1)(a) again served before the Constitutional court. In *Kubyana v Standard Bank of South Africa Ltd*¹⁷³ the court had to decide on what must a credit provider prove in order to convince the court that it had discharged its obligations in terms of section 129 and 130.¹⁷⁴ The section 129(1)(a) notice was sent to *Kubyana* by registered mail after his account regularly remained in arrears and according to the track and trace report from the post office the notice reached the correct post office.¹⁷⁵ *Kubyana* failed to collect the notice and it was returned to the sender as

¹⁷⁰ The *ABSA Bank Ltd v Mkhize*, *ABSA Bank Ltd v Chetty* and *ABSA Bank v Mlipha* cases par 45.

¹⁷¹ The *ABSA Bank Ltd v Mkhize*, *ABSA Bank Ltd v Chetty* and *ABSA Bank v Mlipha* cases par 60.

¹⁷² 2013 (1) SA 481 (WCC) par 18.

¹⁷³ 2014 (3) SA 56 (CC).

¹⁷⁴ The *Kubyana*-case par 1.

¹⁷⁵ The *Kubyana*-case paras 4 and 5.

unclaimed item.¹⁷⁶ The bank issued summons against *Kubyana* for the cancellation of the agreement, the return of the motor vehicle and claimed damages. *Kubyana* filed a special plea alleging that the bank had failed to comply with its obligations of delivering a notice before the institution of legal proceedings.¹⁷⁷

The High Court held that it had no obligation to investigate whether or not the notice reached *Kubyana*. The court further found that the duty to explain non-receipt of the notice rests with *Kubyana*. The claim of the bank was upheld.¹⁷⁸

Kubyana approached the Constitutional Court for leave to appeal after the Supreme of Appeal dismissed his leave to appeal.¹⁷⁹ The Constitutional Court per Mhlantla AJ dismissed the appeal. The court held that it is sufficient for the credit provider to prove that the notice was despatched in a manner agreed to by the consumer in the agreement and that the notification was sent by the appropriate post office to the consumer to collect the notice.¹⁸⁰ It follows that it is not necessary for the credit provider to prove the actual receipt of the notice. Mhlantla AJ puts the legal position as follows

Once a credit provider has produced the track and trace report indicating that the section 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office, that credit provider will generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the consequences of that notice. And it makes sense for the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the reasonableness of her conduct generally lies solely within her knowledge. In the absence

¹⁷⁶ The *Kubyana*-case par 5.

¹⁷⁷ The *Kubyana*-case par 6.

¹⁷⁸ The *Kubyana*-case par 8.

¹⁷⁹ The *Kubyana*-case par 9.

¹⁸⁰ The *Kubyana*-case par 56.

of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the section 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour.

The case of *Kubyana* clarified the position with regards to whether the notice has to reach the consumer or not. It is submitted that the manner in which the *Sebola* decision was interpreted by the court¹⁸¹ was not in line with the goals of the NCA which is to, *inter alia*, promote "equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers". As *Otto and Otto*¹⁸² correctly put, this interpretation was going to create headaches for the credit providers.

It must be pointed out that section 32(c) of the National Credit Amendment Act adds a new subsection to section 129 which clarifies the issue regarding whether or not the section 129(1)(a) notice should reach the actual attention of the consumer for it to be effective.¹⁸³ According to the proposed section 129(7), proof of delivery of the section 129(1)(a) notice will be satisfied by a written confirmation by the relevant postal service or its authorised agent, where registered mail was used. This means that it will suffice for the credit provider to provide a printout form from the postal service confirming that the notice reached the relevant post office and the notification was sent to the consumer to collect the notice. If the consumer claims that he never received the notice, he will bear the burden of rebutting the inference of delivery. The *Kubyana* decision was thus followed by the legislature in the proposed amendments.

¹⁸¹ In *ABSA Bank Ltd v Mkhize, ABSA Bank Ltd v Chetty and ABSA Bank v Mlipha*.

¹⁸² *Otto and Otto* (2013) 118.

¹⁸³ See par 4.3 above.

6 THE INTERPLAY BETWEEN DEBT ENFORCEMENT AND DEBT REVIEW

6 1 introduction

Although this research does not focus on debt review, it is important to deal with the issue of whether a consumer may apply for debt review after receipt of the section 129(1)(a) notice. In this paragraph, the legal position prior to the National Credit Amendment Act and the position in terms of the said Act will be considered.

6 2 Can a consumer apply for debt review after receiving section 129(1)(a) notice?

Debt review is one of the measures introduced by the NCA aimed at resolving over-indebtedness,¹⁸⁴ while Part C of Chapter 6 prescribes procedures to be followed by a credit provider prior to enforcement of the agreement in a court. There is a degree of interaction between debt review and debt enforcement in that the existence of the one process suspends the other.¹⁸⁵

Using the prescribed form and in the prescribed manner, a consumer who believes that he is over-indebted may apply to a debt counsellor to be declared over-indebted.¹⁸⁶ Section 86(2) provides that

An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement.

¹⁸⁴ S 86. See also Renke, Roestoff and Haupt (2007) *Obiter* 247. A consumer is over-indebted if the information available at the time a determination is made shows that he is or will not be able to fulfill all the obligations under all his credit agreements in a timely manner. When determining whether the consumer is over-indebted or not, regard must be taken to the consumer's financial means, prospects and obligations; and probable propensity to satisfy all obligations under all his credit agreements in a timely manner, as shown by his history of debt repayment.

¹⁸⁵ Otto and Otto (2013) 107.

¹⁸⁶ S 86(1).

The reverse side is that a credit provider who receives a notice of court proceedings or application for debt review in accordance with sections 83 and 85 may not exercise or enforce any right by litigation or other judicial process or security under that particular credit agreement until the consumer is in default under the credit agreement and one of the events listed in section 88(1)(a) to (c) have occurred.¹⁸⁷ In terms of section 130(3)(c)(i) the court is also precluded from entertaining proceedings in respect of a debt that has been referred to debt review until that process is completed.

It does appear from the above citation of section 86(2) that a consumer is prohibited from making an application for debt review if the credit provider under that specific credit agreement has proceeded to take the steps in terms of section 129 to enforce that agreement.¹⁸⁸ It was not clear though whether reference in section 86(2) to the taking of steps in terms of section 129 to enforce a credit agreement is a reference to the commencement of legal proceedings mentioned in section 129(1)(b) and does not include steps taken in terms of section 129(1)(a). This uncertainty gave rise to different interpretations.

Otto and Otto¹⁸⁹ had initially expressed the opinion that the consumer's right to apply for debt review in terms of section 86(1) expires from the moment the credit provider draws the consumer's attention to the default in writing as contemplated by section 129(1)(a). They, however, reconsidered this opinion in the second edition of their work¹⁹⁰ and stated that the reference in section 86(2) is reference to section 129(1)(b) and not to section 129(1)(a). This means that the commencement of legal proceedings would bar a consumer from applying for debt review and not a notice issued in terms of section 129(1)(a).

¹⁸⁷ S 88(3).

¹⁸⁸ S 86(2).

¹⁸⁹ Otto and Otto(2006) fn 85.

¹⁹⁰ Otto and Otto (2013) 107-108.

Renke, Roestoff and Haupt¹⁹¹ submitted that reference in section 86(2) to the taking of steps in terms of section 129 to enforce a credit agreement is a reference to the issuing of summons to enforce the debt and not merely to the serving of the section 129(1)(a) notice. According to these authors, the consumer is therefore only barred from applying for debt review the moment a summons is issued by the credit provider. They based their view on the fact that the section 129(1)(a) notice should advise the consumer to refer the credit agreement to a debt counsellor.¹⁹²

The question then was how could it be that as soon as the consumer acts in accordance with the proposal and consult a debt counselor is barred from doing so. The opinion of these authors make sense, more so because a section 129(1)(a) notice is merely a notice, it does not lock the parties in the litigation process, it is only upon issuing and service of summons that the matter is before court.¹⁹³

Van Heerden and Otto¹⁹⁴ agreed with the view expressed by Renke, Roestoff and Haupt¹⁹⁵ and Boraine and Renke.¹⁹⁶ They were of the opinion that an amendment to section 186(2) in which reference to section 129 is substituted with reference to section 130 might resolve the uncertainty.¹⁹⁷

Coetzee¹⁹⁸ also agreed with Renke, Roestoff and Haupt.¹⁹⁹ She submitted that the legislature could never have intended that the mere provision of a section 129(1)(a) notice suspends an application for debt review. She further submitted that enforcement proceedings commence upon service of summons and not

¹⁹¹ Renke, Roestoff and Haupt (2007) *Obiter* 262 fn 325. See also Boraine and Renke (2008) *De Jure* 9.

¹⁹² Renke, Roestoff and Haupt (2007) *Obiter* 262 fn 325.

¹⁹³ *Mills v Starwell Finance (Pty) Ltd* 1981(3) SA 84 (N) 90G-H.

¹⁹⁴ Van Heerden and Otto (2007) *TSAR* 668.

¹⁹⁵ Renke, Roestoff and Haupt (2007) *Obiter* 262.

¹⁹⁶ Boraine and Renke (2008) *De Jure* 9.

¹⁹⁷ Van Heerden and Otto (2007) *TSAR* 668.

¹⁹⁸ Coetzee (2009) *SA Merc LJ* 85.

¹⁹⁹ Renke, Roestoff and Haupt (2007) *Obiter* 262.

upon mere issuing thereof. She concluded that the steps referred to in section 86(2) refer to service of summons.²⁰⁰

Roestoff, Haupt, Coetzee and Erasmus²⁰¹ were of the opinion that debt enforcement commences upon “issuing and service of a summons” and that will be after the credit provider has complied with the procedure contemplated in section 129(1) read with 130(1). They further pointed out that delivery of a notice by the credit provider to the consumer does not constitute enforcement, but instead, it is a procedure required prior to enforcement.²⁰²

Van Heerden and Coetzee²⁰³ submitted that an interpretation that section 86(2) refers to section 129(1)(a) has absurd results in that it prevents a specific credit agreement from inclusion in the debt restructuring process which is a more comprehensive process designed to relate to all the consumer’s debts arising out of credit agreements. They added that in the case where the application for debt review coincides with the exact date as service of summons to enforce the obligations under a credit agreement, the application for debt review should take precedent.²⁰⁴

The view expressed by the writers above that a consumer should not be precluded from applying for debt review after receipt of a section 129(1)(a) notice is correct and concurred with. It is submitted that it should be after a summons has been issued and served to the consumer that a consumer is precluded from applying for debt review.

The courts had, however, delivered conflicting decisions on whether or not section 129(1)(a) bars a consumer from applying for debt review. In *ABSA Bank*

²⁰⁰ Coetzee (2009) *SA Merc LJ* 88.

²⁰¹ Roestoff, Haupt, Coetzee and Erasmus (2009) *PER/PELJ* 260.

²⁰² Roestoff, Haupt, Coetzee and Erasmus (2009) *PER/PELJ* 261.

²⁰³ Van Heerden and Coetzee (2010) *Obiter* 768. See also Coetzee (2009) *SA Merc LJ* 86.

²⁰⁴ Van Heerden and Coetzee (2010) *Obiter* 768.

*v Prochaska t/a Bianca Cara Interiors*²⁰⁵ the court found that if the credit provider had already proceeded to take steps in terms of section 129(1)(a), the consumer is precluded from making an application for debt review in accordance with section 86(2).

In *Starita v ABSA Bank*²⁰⁶ the court concluded that “the proper construction of section 86(2) is that the steps taken under section 129 as referred to in section 86(2) are the steps taken after the notice has been given, starting with the issue of summons”.

In *Nedbank v National Credit Regulator*²⁰⁷ the court held that the reference in section 86(2) to the credit provider taking steps suggests a series of an ongoing process of which section 129(1)(a) notice is the first step. The court found that by giving the notice envisaged in section 129(1)(a) the credit provider has proceeded to take steps contemplated in section 129 to enforce the agreement and the consumer is prohibited from referring that specific agreement to debt review.²⁰⁸

In terms of section 26(a) of the National Credit Amendment Act section 86(2) is amended by substituting the reference to section 129 with a reference to section 130. This means that the issue discussed above has now been resolved by the legislature and that the issuing and/or serving of summons will bar an application for debt review. However, there is still uncertainty on whether the issuing or servicing of summons or both will prevent debt review.

²⁰⁵ 2009 (2) SA 512 (D) par 29.

²⁰⁶ 2010 (3) SA 443 (GSJ) par 12.

²⁰⁷ 2011 (3) SA 581 (SCA).

²⁰⁸ The *Nedbank*-decision par 14.

7 CONCLUSION AND RECOMMENDATIONS

7 1 General conclusion

This research investigated aspects of debt enforcement under the National Credit Act. The Act introduced some new debt enforcement procedures aimed at protecting consumers. This research has identified some problematic areas with regard to aspects of debt enforcement and indicated that there still certain provisions that need to be clarified. Solutions are therefore proposed .

The lack of clarity and uncertainty with regards to the interpretation of certain provisions of the Act can be attributed to the poor draftsmanship. This situation has led to the significant number of litigation cases in the credit industry and case law development since the promulgation of the Act. It must, however, be acknowledged that the courts and authors in certain instances did provide guidance.

There is no doubt that the Act has a wide field of application and therefore affords protection to more consumers than its predecessors. This is to be welcomed. As discussed in the research, it is clear that the Act did not only aim at affording greater consumer protection but it also introduced some procedures to achieve that objective.

7 2 Summary of findings

The meaning of the phrase “enforce” was investigated and it was established that the phrase should be interpreted in a broader sense in order to include cancellation of the credit agreement by the credit provider. This is commendable as consumer protection in respect of the enforcement of all remedies is ensured.²⁰⁹

It has been submitted that the purpose of section 129(1)(a) notice is to resolve a dispute relating to a credit agreement or develop and agree on a plan to bring payments up to date prior to resorting to an expensive and time consuming litigation process. Once again, the consumer is protected in respect of the incurrance of unnecessary litigation costs.²¹⁰

The study has found that compliance with section 129(1)(a) notice is a prerequisite before debt enforcement may take place and the notice should be provided to all types of consumers who enjoy the protection of the Act. The credit provider must ensure that the notice was delivered to the consumer prior to commencing legal action. It has also been established that the powers of the courts are limited in cases where the credit provider has not complied with section 129(1)(a). This limitation does not support the peremptory wording of sections 129(1)(b) and 130(1)(a). It may, therefore, be necessary to amend the Act in order to give the courts more discretionary powers.²¹¹

The contents of the section 129(1)(a) notice were examined. It has been concluded that in as much as it is important to include the information contained in section 129(1)(a) in the notice, it is not necessary to reproduce section

²⁰⁹ Par 2.

²¹⁰ Par 3 1.

²¹¹ Par 3 2.

129(1)(a) without adding the flesh to the skeleton.²¹² It is therefore submitted that, in addition to the wording of section 129(1)(a), the notice should also

- (a) contain the names and contact details of the person that the consumer could contact to discuss the proposal;
- (b) bring meaningful and understandable facts in plain language to the attention of the consumer;
- (c) notify the consumer that should action be instituted and judgment be obtained against him, execution against his residence may ordinarily follow and may lead to eviction, and
- (d) inform the consumer that debt enforcement will follow should the consumer fail to respond to the notice within 10 business days.

It has been established further that the time period applicable to the section 129(1)(a) notice is prescribed under section 130(1) of the Act. According to this section the credit provider will not be entitled to commence legal proceedings unless ten business days have elapsed since delivery of the notice and the consumer has been in default for at least twenty business days. It has been pointed out in the study that the ten business day period may run concurrently with the twenty business days.²¹³

With regards to the method of notification where previously uncertainty existed on how the section 129(1)(a) notice should be delivered, it is to be welcomed that clarity is now provided by the legislature in terms of the proposed section 129(5) of the National Credit Amendment Act.²¹⁴

²¹² Par 4 1.

²¹³ Par 4 2.

²¹⁴ Par 4 3.

The study has also considered the address to be used for service of the section 129(1)(a) notice and it was concluded that the notice must be delivered by the credit provider at the address of the consumer as set out in the agreement or at the address most recently provided by the consumer in accordance with section 96(2). It has been established that the contracting parties may agree that the address set out in the agreement will serve as *domicilium citandi et executandi*.²¹⁵

The research has shown that the credit provider would generally have proved that there was compliance with the Act if the notice was hand delivered to the consumer or to an adult person at the address selected by the consumer and the recipient acknowledged receipt by signing for the notice. In the event where the notice is to be delivered by mail, a registered post is the preferred method of delivery and in that case the credit provider must ensure that the notice is delivered to the correct address as chosen by the consumer in the agreement. Further, a credit provider must obtain a written confirmation from the relevant postal service or its authorised agent confirming that a notification was sent to the consumer's correct address.

The actual receipt of the notice by the consumer is therefore not relevant. If the consumer alleges that he never received the notice, he must bear the burden of proof against delivery. It has been noted that the proposed section 129(5) and (7) of the National Credit Amendment Act prescribe the same methods of delivery and the same manner of proving compliance with those prescribed methods of delivery.²¹⁶

This dissertation has further established that there is (until the National Credit Amendment Act becomes effective) a degree of interplay between debt

²¹⁵ Par 4 4.

²¹⁶ Par 5.

enforcement and debt review.²¹⁷ It is to be welcomed that section 86(2) is amended in terms of the National Credit Amendment Act. However, it was found that uncertainty still exists.

7 3 Recommendations

In the light of the above findings, the following amendments to the NCA are proposed

- (a) A definition of the phrase “enforce” should be added under section 1.
- (b) The word “may” under section 129(1)(a) must be replaced by the word “must” and the word “must” should be replaced by “may” under section 130(4)(b).
- (c) The Act should clearly spell out what contents should be included in a section 129(1)(a) notice. A standard form could be used for this purpose.
- (d) Clarity should be provided whether the issuing or servicing of summons or both will bar debt review application.

²¹⁷ Par 6.

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ABBREVIATIONS

Eg – For example

Febr - February

Fn - Footnote

Par - Paragraph

Paras - Paragraphs

S - Section

Ss - Sections