

**UNIVERSITY OF PRETORIA**

**FACULTY OF LAW**

**THE FACTORS INFLUENCING THE FORMATION OF A VALID AND  
BINDING CONTRACT IN TERMS OF THE SOUTH AFRICAN LAW  
AND THE INFLUENCE OF THE NATIONAL CREDIT ACT ON THEM**

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## PREFACE

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## DECLARATION

I, **FANNIE DICHEDI MOLAUDZI**, declare that this dissertation is my original work. It has not been submitted before to any other university or institution. I have provided references where I have used works of other writers. I hereby present this work in partial fulfilment for the award of the LLM Degree in Mercantile Law.

Signed

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FANNIE DICHEDI MOLAUDZI

23 FEBRUARY 2017

PRETORIA

SOUTH AFRICA

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# CHAPTER 1

## GENERAL INTRODUCTION

### 1.1 Introduction

The law of South Africa is known as the common law and has developed under the influence of other legal structures.<sup>1</sup> South African law has its origin from Roman Dutch law which is commonly characterised as the common law of South Africa.<sup>2</sup> However, other legal systems such as English law contributed to our current legal system.<sup>3</sup>

In terms of the common law a contract is defined as an agreement which is entered into by two or more parties who have the serious intention to create legally binding obligations which comply with the common law principles for the establishment of a valid contract.<sup>4</sup> Parties who enter into an agreement with the intention of creating a social obligation do not give rise to a valid contract.<sup>5</sup>

The contract does not need to be conducted in writing in order to constitute a valid contract. An oral agreement results in a valid contract as well.<sup>6</sup> For example, a tacit contract where the parties do not express their intention by words or in writing is also considered a valid contract as long as it meets the common law requirements for the creation of a valid contract.<sup>7</sup>

In terms of the South African common law the parties are considered to have concluded a legally enforceable contract if the following requirements are complied with:<sup>8</sup>

- (a) The parties to the contract must reach consensus with regard to the terms of the contract by making their intentions known to each other with a view of creating rights and duties which bind them legally.<sup>9</sup>
- (b) The contracting parties must be legally qualified to enter into a contract which creates rights and obligations.<sup>10</sup>

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<sup>1</sup> Fouché (2007) 5. See also Nagel *ed* (2015) 23.

<sup>2</sup> Fouché (2007) 5. See also Nagel *ed* (2015) 23.

<sup>3</sup> Fouché (2007) 5. See also Nagel *ed* (2015) 23.

<sup>4</sup> Fouché (2007) 37. See also Havenga *ed* (2007) 49; Bhana (2009) 2 and Van der Merwe *et al* (2007) 8.

<sup>5</sup> Nagel *ed* (2015) 40. See also Bhana (2009) 2 and Havenga *ed* (2007) 49.

<sup>6</sup> Bhana (2009) 2.

<sup>7</sup> Bhana (2009) 2.

<sup>8</sup> Havenga *ed* (2007) 49. See also Nagel *ed* (2015) 41 and Fouché (2007) 37.

<sup>9</sup> Havenga *ed* (2007) 49-50. See also Nagel *ed* (2015) 41; Fouché (2007) 37 and Bhana (2009) 15.

<sup>10</sup> Havenga *ed* (2007) 50. See also Nagel *ed* (2015) 41; Fouché (2007) 37 and Bhana (2009) 16.

- (c) The contract must be lawful or legal, which implies that the rights and duties that are created by the agreement must be allowed in terms of the common law.<sup>11</sup>
- (d) The agreement must be physically possible. This means that the rights and duties arising from the contract must be objectively possible to be carried out.<sup>12</sup>
- (e) Formalities are generally not a requirement for the formation of a valid contract. However, if formalities are prescribed in terms of legislation or are agreed on by the contracting parties as a validity requirement, a valid and binding contract will only come into being once the prescribed or agreed on formalities have been complied with.<sup>13</sup>

Once the above-mentioned requirements have been complied with, the parties will be legally bound to perform in terms of the contract.<sup>14</sup> The party who no longer wants to perform or fails to execute his contractual obligations will be guilty of breach of contract.<sup>15</sup> Breach of contract may take on one of five forms, namely<sup>16</sup>

- (a) default by the debtor;<sup>17</sup>
- (b) default by the creditor;<sup>18</sup>
- (c) positive malperformance;<sup>19</sup>
- (d) repudiation;<sup>20</sup> or
- (e) prevention of performance.<sup>21</sup>

The aggrieved party has certain remedies in terms of the common law which can be enforced when a breach of contract happens.<sup>22</sup> For example, he may elect to claim for specific

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<sup>11</sup> Havenga *ed* (2007) 50. See also Nagel *ed* (2015) 41; Fouché (2007) 37 and Bhana (2009) 17.

<sup>12</sup> Havenga *ed* (2007) 50. See also Nagel *ed* (2015) 41; Fouché (2007) 37 and Bhana (2009) 16.

<sup>13</sup> Havenga *ed* (2007) 50. See also Nagel *ed* (2015) 41; Fouché (2007) 37 and Bhana (2009) 17.

<sup>14</sup> Bhana (2009) 18. See also Fouché (2007) 38 and Havenga *ed* (2007) 50.

<sup>15</sup> Bhana (2009) 18. See also Nagel *ed* (2015) 127.

<sup>16</sup> Havenga *ed* (2007) 119; See also Nagel *ed* (2015) 127; Fouché (2007) 113 and Van der Merwe *et al* (2007) 336. Cf Bhana (2009) 213, who is of the opinion that the South African law distinguishes 4 different categories of breach of contract.

<sup>17</sup> Havenga *ed* (2007) 119; See also Nagel *ed* (2015) 127; Fouché (2007) 113 and Van der Merwe *et al* (2007) 336.

<sup>18</sup> Havenga *ed* (2007) 119; See also Nagel *ed* (2015) 129; Fouché (2007) 113 and Van der Merwe *et al* (2007) 336.

<sup>19</sup> Havenga *ed* (2007) 119; See also Nagel *ed* (2015) 131; Fouché (2007) 113; Van der Merwe *et al* (2007) 336 and Bhana (2009) 213.

<sup>20</sup> Havenga *ed* (2007) 119; See also Nagel *ed* (2015) 132; Fouché (2007) 113; Van der Merwe *et al* (2007) 336 and Bhana (2009) 213.

<sup>21</sup> Havenga *ed* (2007) 119; See also Nagel *ed* (2015) 133; Fouché (2007) 113; Van der Merwe *et al* (2007) 336 and Bhana (2009) 213.

<sup>22</sup> Nagel *ed* (2015) 135. See also Fouché (2007) 113.

performance and enforce his contractual rights.<sup>23</sup> Alternatively, he may choose to rescind from or cancel the contract.<sup>24</sup> In the case of both these remedies, damages, if any were suffered, could be claimed as a combination.

Governments around the world introduce legislation, called consumer credit legislation, which aims at curbing the above-mentioned practice of excluding or changing the common law remedies and at strengthening the common law protection afforded to the contracting parties.<sup>25</sup> South Africa is no exception. South Africa has a long history of consumer credit legislation,<sup>26</sup> with the National Credit Act 34 of 2005<sup>27</sup> the enactment currently in force. The NCA, which became effective incrementally,<sup>28</sup> repealed the Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968.<sup>29</sup> Where the Credit Agreements Act regulated the contractual aspects of the credit agreements and the Usury Act governed the financial side of consumer credit agreements, the NCA now does both.<sup>30</sup> The NCA could therefore exert an influence on the common law principles of the law of contract.

However, the National Credit Act only regulates a consumer credit agreement if the Act, according to its own rules, is applicable.<sup>31</sup> The National Credit Act has a much broader application than its predecessors which is a good thing because it means that more credit consumers now enjoy the protection afforded by this type of legislation.<sup>32</sup>

## 1.2 Research statement

The aim of this dissertation is to investigate the influence, if any, of the National Credit Act on the general principles of the South African law of contract. In order to achieve this goal, the latter principles will be discussed briefly. Where applicable, recommendations will be made in order to suggest improvements to the consumer protection measures in the NCA relating to the topic of this dissertation.

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<sup>23</sup> Nagel *ed* (2015) 135. See also Bhana (2009) 18 and Fouché (2007) 113.

<sup>24</sup> Nagel *ed* (2015) 135. See also Bhana (2009) 18 and Fouché (2007) 113.

<sup>25</sup> Otto in Scholtz *ed* (2008), ch 1 (par 1.2.1). See also Otto and Otto (2016) 1.

<sup>26</sup> Otto and Otto (2016) 2ff.

<sup>27</sup> Hereafter “the National Credit Act”, “the NCA” or “the Act”. Unless indicated differently, all references here after to section numbers and regulations will be to section numbers of and regulations in terms of the National Credit Act.

<sup>28</sup> 1 June 2006, 1 September 2006 and 1 June 2007. See also Renke LLD Thesis (2012) 400.

<sup>29</sup> See s 174. See also Renke LLD Thesis (2012) 403.

<sup>30</sup> Kelly-Louw and Stoop (2012) 11.

<sup>31</sup> In terms of s 4(1) the NCA applies to all credit agreements between parties dealing at arm’s length and made within or having an effect within the Republic. For a full discussion of the Act’s field of application, see Otto and Otto (2016) 19ff. See also Kelly-Louw and Stoop (2012) 19ff ;Van Zyl in Scholtz *ed* (2008) ch 4 and Otto in Scholtz *ed* ch 8.

<sup>32</sup> Kelly-Louw and Stoop (2012) 19. See also Otto and Otto (2016) 19.



### 1.3 Research objectives and overview of chapters

Relevant research objectives have been identified in respect of the above mentioned research statement in order to define and restrict the scope of this dissertation study.

These objectives and the sequence in which they will be addressed in this dissertation, are as follows:

- (a) As has been mentioned above, in terms of the South African common law, certain requirements have to be complied with in order for a contract to constitute a valid and binding contract between the contracting parties. These requirements, and the influence exerted by the National Credit Act on them, if any, will be discussed in Chapter 2.
- (b) In Chapter 3, attention will be paid to the content of the agreements, and therefore credit agreements, in terms of the common law and in terms of the National Credit Act.
- (c) Chapter 4 will focus on the forms of breach of contract and on credit provider's remedies in the event of breach of contract, where after the provisions of the National Credit Act restricting or amending the common law remedies, will be discussed and evaluated.
- (d) Finally, based on the research chapters preceding it, recommendations and final remarks will be made in Chapter 5.

### 1.4 Delineation and limitations

It has already been mentioned that the South African common law distinguishes five forms of breach of contract<sup>33</sup>.

However, no further detailed attention will be paid to the forms of breach of contract in this dissertation. It has already been mentioned<sup>34</sup> that the common law principles will only be discussed briefly, to the extent necessary to enable an investigation of the National Credit Act on them.

### 1.5 Terminology

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<sup>33</sup> Par 1.1 above. Fouché (2007) 113. See also Nagel *ed* (2015) 127; Bhana (2009) 213 and Van der Merwe *et al* (2007) 336.

<sup>34</sup> Par 1.2

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

## **1.6 Reference techniques**

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

## CHAPTER 2

# THE FACTORS INFLUENCING THE FORMATION OF A VALID AND BINDING CONTRACT IN TERMS OF THE SOUTH AFRICAN LAW

## 2.1 Introduction

As mentioned above,<sup>35</sup> an agreement is regarded as a valid and binding contract in terms of the South African law when it is concluded with the intention of creating a legal obligation with rights and duties between the parties as soon as the parties reach consensus, have the necessary contractual capacity to enter into a contract, the agreement is legal, physically possible and conform to the stipulated formalities, if any.<sup>36</sup> The purpose of Chapter 2 is to briefly examine the aforementioned common law requirements in order to constitute a valid and binding agreement and to consider the influence, if any, of the Act on each of those requirements.

## 2.2 Consensus

### 2.2.1 The common law

The basis of every contract in terms of the common law requirements is consensus.<sup>37</sup> An agreement will come into being (provided that the other requirements are complied with) if the parties to the agreement have the same intention to be contractually bound to each other on all the terms of the contract and have communicated their intention to each other.<sup>38</sup>

The parties are considered to have reached consensus when the following features exist:<sup>39</sup>

- (a) The parties must seriously intend to be bound contractually.<sup>40</sup>
- (b) The parties must have the same intention and commitment in mind.<sup>41</sup>

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<sup>35</sup> See par 1.1 above.

<sup>36</sup> Nagel *ed* (2015) 40. See also Fouché (2007) 37; Bhana (2009) 2; Van der Merwe *et al* (2007) 8 and Havenga *ed* (2007) 49.

<sup>37</sup> Havenga *ed* (2007) 53. See also Bhana (2009) 24; Fouché (2007) 44; Van der Merwe *et al* (2007) 19 and Nagel *ed* (2015) 48.

<sup>38</sup> Havenga *ed* (2007) 53. See also Bhana (2009) 24; Fouché (2007) 43; Van der Merwe *et al* (2007) 21 and Nagel *ed* (2015) 48.

<sup>39</sup> Havenga *ed* (2007) 53. See also Bhana (2009) 24; Fouché (2007) 43; Van der Merwe *et al* (2007) 21 and Nagel *ed* (2015) 48.

<sup>40</sup> Havenga *ed* (2007) 53. See also Bhana (2009) 24; Fouché (2007) 43; Van der Merwe *et al* (2007) 21 and Nagel *ed* (2015) 48.

<sup>41</sup> Havenga *ed* (2007) 53. See also Bhana (2009) 24; Fouché (2007) 43; Van der Merwe *et al* (2007) 21 and Nagel *ed* (2015) 48.

(c) The parties must make their intentions known to each other by way of communication.<sup>42</sup>

The common way for the parties to an agreement of communicating their intentions to each other is by way of an offer and an acceptance thereof where the party who makes a proposal is called the offeror and the other party who agrees to the proposal or accepts it is known as the offeree.<sup>43</sup> The acceptance of an offer by the other party constitutes consensus between the parties. An offer alone cannot give rise to a contract.<sup>44</sup> Be that as it may, in terms of the common law consensus cannot be reached and therefore a valid and binding contract cannot come into being without an offer being made by the offeror which is accepted by the offeree.

The offeror must make an offer with the intention that he is legally bound should the offeree accepts it.<sup>45</sup> An offer which is made in a jokingly manner cannot be said that it is a true offer and consequently cannot be accepted by the offeree as it is made without the intention of being legally bound upon the acceptance thereof.<sup>46</sup> The same applies to the offeree in that his acceptance must be made with the intention of being legally bound to the offer as it is.<sup>47</sup> In other words, his acceptance of the offer must be the unconditional acceptance of all the terms in the offer.<sup>48</sup>

The parties must further create contractual obligations or duties to which they both agree to.<sup>49</sup> This means that they must have the same intention to contract with each other as well as to establish the same legal relationship.<sup>50</sup>

The parties may reach consensus either expressly or impliedly. Express consensus may take place either verbally or in writing.<sup>51</sup> For instance, the parties are regarded as having reached consensus expressly, if A & B signed a written contract in terms of which A buys a motor vehicle from B for R150 000.<sup>52</sup>

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<sup>42</sup> Havenga *ed* (2007) 53. See also Bhana (2009) 24; Fouché (2007) 43; Van der Merwe *et al* (2007) 21 and Nagel *ed* (2015) 48.

<sup>43</sup> Fouché (2007) 44. See also Havenga *ed* (2007) 54 and 55.

<sup>44</sup> Fouché (2007) 44. See also Christie (2011) 29; Bhana (2009) 25 and Havenga *ed* (2007) 55.

<sup>45</sup> In *Efroiken v Simon* 1921 CPD 367, the court made a decision that an offer which does not include the intention to do business cannot be regarded as a valid contract.

<sup>46</sup> Havenga *ed* (2007) 55 & 56, See also Fouché (2007) 45 & 46; Van der Merwe *et al* (2007) 21.

<sup>47</sup> Havenga *ed* (2007) 55 & 56, See also Fouché (2007) 45 & 46; Van der Merwe *et al* (2007) 21.

<sup>48</sup> Havenga *ed* (2007) 55 & 56, See also Fouché (2007) 45 & 46; Van der Merwe *et al* (2007) 21.

<sup>49</sup> Havenga *ed* (2007) 54.

<sup>50</sup> Havenga *ed* (2007) 54.

<sup>51</sup> Fouché (2007) 43 & 44.

<sup>52</sup> Fouché (2007) 43 & 44.

The offeror can impliedly communicate his intention to contract by his actions or behaviour.<sup>53</sup> For example, the offeror can raise his hand at an auction to make an offer and the offeree by nodding his head to show acceptance thereof.<sup>54</sup> However, it is not easy to conclude that consensus was reached impliedly in this regard and it depends on the facts of each case.<sup>55</sup>

The common law accepts that either the express or the implied communication can be made as a way in which the offeror or the offeree can make his intentions known to the other party unless it is prescribed that the communication must be in a particular way.<sup>56</sup> For instance, where A makes an offer to B and requires that the acceptance should be in writing should B accept the offer.<sup>57</sup>

An advertisement, for example, does not constitute an offer by the offeror as it lacks the intention to be bound upon acceptance thereof by the offeree.<sup>58</sup> It is generally speaking regarded as an invitation to do business.<sup>59</sup> In other words, it is only a communication by the offeror of his intention to sell at the price he advertises and it is not his obligation to sell to any customer.<sup>60</sup>

### **2.2.2 The influence of the National Credit Act**

The National Credit Act, as a general rule, applies to credit agreements between parties dealing at arm's length and made within, or having an effect within, the Republic, unless an exception is applicable.<sup>61</sup> One of the credit transactions to which the Act applies is the so-called "incidental credit agreement"<sup>62</sup> which is defined in terms of section 1 of the Act as an agreement in terms of which an account was presented for goods or services which have been

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<sup>53</sup> Fouché (2007) 44.

<sup>54</sup> Fouché (2007) 44.

<sup>55</sup> Fouché (2007) 44.

<sup>56</sup> Fouché (2007) 44.

<sup>57</sup> Fouché (2007) 44.

<sup>58</sup> Fouché (2007) 46.

<sup>59</sup> Fouché (2007) 46.

<sup>60</sup> Fouché (2007) 46. See also *Crawley v R* 1909 TS 1105. An advertisement was made by a shopkeeper wherein he advertised tobacco at a special price. Some of the tobacco was bought by Crawley and he later came to buy some more but the shopkeeper refused to sell to him and refused to leave the store until the police came and removed him and a charge of trespassing was laid against him. South J said "[t]he mere fact that a tradesman advertises the price at which he sells goods, does not appear to me to be an offer to any member of the public to enter the shop and purchase goods, nor do I think a contract is constituted when any member of the public comes in and tenders the price mentioned in the advertisement... It seems to me to amount simply to an announcement of his intention to sell at the price he advertises. There is nothing so far as I know which obliges a tradesman to sell to any customer who chooses to present himself in his shop."

<sup>61</sup> S 4 (1).

<sup>62</sup> S 8(4)(b). It is important to note that s 8(4)(b) states "subject to section 5(2). I will come back to this requirement below.

provided to the consumer, or that are to be provided to a consumer over a period of time, and either or both of the following conditions are applicable:<sup>63</sup>

- (a) A fee, charge or interest became payable when the amount charged in the account tendered to the consumer was not paid before a stipulated date in the account.<sup>64</sup>
- (b) Two settlement prices for the account were quoted, where the lower price would be applicable if the account is paid before a determined date and where the higher price would apply after that date.<sup>65</sup>

As was stated above, incidental credit agreements are subject to section 5(2) of the Act. In terms of section 5(2) of the National Credit Act the parties to an incidental agreement are deemed to have concluded the agreement 20 business days<sup>66</sup> after a late payment fee or interest is first charged by the supplier of the goods or services or after a pre-determined higher price first becomes payable for full settlement of the account.<sup>67</sup>

The National Credit Act therefore makes provision for a deemed provision. An incidental credit agreement, in contrast to the other credit agreements that are subject to the Act, does not come into being as a result of acceptance of an offer. It only becomes applicable after the 20 business days period provided for in section 5(2) has expired.<sup>68</sup>

Consequently, the charging of a fee or interest or the payment of a pre-determined higher price is a requirement for the existence of an incidental credit agreement.<sup>69</sup> As stated above,<sup>70</sup> the exception is where the consumer has made payment in full before the 20 days period, then an incidental credit agreement cannot be deemed to have been concluded.<sup>71</sup> However, the reason for the 20 business days gestation period is unknown and unclear.<sup>72</sup> There is no reason

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<sup>63</sup> See in general Otto and Otto (2016) 22; Kelly-Louw and Stoop (2012) 39; Otto in Scholtz *ed* (2008), ch 9 (par 9.1.2) and Renke LLD Thesis (2012) 387. For a complete discussion of the “incidental credit agreement”, see Otto (2010) *THRHR* 637 ff; Renke (2011) *THRHR* 464 and Aucamp (2013) *THRHR* 383.

<sup>64</sup> For instance, within 14 days of the date of the account.

<sup>65</sup> S 1.

<sup>66</sup> “Business days” are defined in s 2(5) as the number of days that are calculated by excluding the first day of the happening of an event and including the day of the second event and exclude any public holidays, Saturday or Sunday that falls on or between the said days.

<sup>67</sup> S 5(2)(a) and (b) respectively. The exception to s 5(2)(b) is where the consumer has fully paid the settlement value in terms of the account before the date upon which the higher price became applicable.

<sup>68</sup> Otto and Otto (2016) 51. See also Otto in Scholtz *ed* (2008), ch 9 (par 9.1.2) and Renke LLD Thesis (2012) 387.

<sup>69</sup> Renke LLD Thesis (2012) 387. See also s 5(3).

<sup>70</sup> See par 2.2.2 above.

<sup>71</sup> Otto in Scholtz *ed* (2008), ch 9 (par 9.1.2).

<sup>72</sup> Otto in Scholtz *ed* (2008), ch 9 (par 9.1.2). See also Otto and Otto (2016) 24; Otto (2010) *THRHR* 647; Renke (2011) *THRHR* 472 and Aucamp (2013) *THRHR* 389.

why the incidental credit agreement could not have been concluded as soon as a fee or interest is levied for the first time.<sup>73</sup>

An example of an incidental credit agreement would be where a medical practitioner renders a medical service and gives an account to the client and the account specifies that if it is not settled in full on or before a stipulated date then a fee or interest becomes payable.<sup>74</sup> The incidental credit agreement is concluded 20 business days after the date upon which the doctor first charges any interests or a late payment fee.

## 2.3 Contractual capacity

### 2.3.1 The common law

Not all the common law principles in respect of contractual capacity will be discussed here but only those principles in respect of which the National Credit Act may have an influence. The parties to an agreement must have the necessary contractual capacity in order for them to achieve consensus.<sup>75</sup> Contractual capacity means the capacity to execute legal acts such as entering into a valid contract.<sup>76</sup> It consists of two components, namely the ability to form a will and to act in accordance with that will with sound judgment.<sup>77</sup>

Contractual capacity must be distinguished from legal capacity. The latter means persons who have rights and duties created by law.<sup>78</sup> Therefore, all persons, whether natural or legal person have legal capacity. For example, a child whose age is less than seven years old has full legal capacity.<sup>79</sup> Natural persons refer to all human beings while on the other hand legal persons also known as juristic persons, refer to an imaginary person. However, not all persons have contractual capacity. A person's contractual capacity is determined by aspects such as the person's status.

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<sup>73</sup> Otto in Scholtz *ed* (2008), ch 9 (par 9.1.2). See also Otto and Otto (2016) 24; Otto (2010) *THRHR* 647 and Renke (2011) *THRHR* 472.

<sup>74</sup> Renke LLD Thesis (2012) 387. See also Renke (2011) *THRHR* 465, where it is indicated that a person may only charge a fee or interest with regard to an unpaid account in terms of an incidental credit agreement if the credit provider has disclosed such a fee or interest to the consumer on or before the date on which the goods were supplied or services were rendered. S 5 (3).

<sup>75</sup> Bhana (2009) 75. See also Havenga *ed* (2007) 71 and Fouché (2007) 67.

<sup>76</sup> Havenga *ed* (2007) 71. See also Bhana (2009) 75 and Nagel *ed* (2015) 77.

<sup>77</sup> Nagel *ed* (2015) 77.

<sup>78</sup> Nagel *ed* (2015) 77.

<sup>79</sup> Nagel *ed* (2015) 77. See also Havenga *ed* (2007) 71.

It is not permitted for persons without contractual capacity to enter into contracts, not even with the assistance of another person.<sup>80</sup> There are different categories of natural persons, such as persons without contractual capacity, persons who have limited contractual capacity and the other group of persons who have full contractual capacity.<sup>81</sup> The so-called “mental health care users” or then also known as mentally unfit persons fall under the category of persons without contractual capacity.<sup>82</sup> A person is deemed to be of sound mind unless the opposite is proven.<sup>83</sup> In other words, it has to be proven that a person is mentally ill before it is said that he does not have contractual capacity.<sup>84</sup> However, if a person has been declared mentally ill, the person who claims that the declared mentally ill person has contractual capacity has the burden to prove it as there is a rebuttable presumption that he does not have the capacity to conclude contracts.<sup>85</sup>

It is important to note that in terms of the common law, a contract entered into with a mentally unfit person is null and void. This consequence is reiterated in terms of the Consumer Protection Act 68 of 2008<sup>86</sup> (when applicable) which provides that a contract concluded with a mentally unfit person is null and void, if the person who entered into a contract with a mentally ill person knew or should have reasonably known that fact.<sup>87</sup> However, should the mentally unfit person led the other person to believe that he is of sound mind and as a result has contractual capacity, then (section 39 does not apply) the contract is not declared null and void.<sup>88</sup>

Lack of contractual capacity does not only relate to persons who have been declared mentally unfit.<sup>89</sup> There are other categories of mental disorder such as persons who are born mentally disturbed, and while others suffer from schizophrenia which prevents them from acting in accordance with the will they have formed.<sup>90</sup> As mentioned earlier, all persons have legal capacity including the mental health care users, even though they lack contractual capacity.<sup>91</sup>

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<sup>80</sup> Fouché (2007) 68. See also Bhana (2009) 75; Nagel *ed* (2015) 77 and Havenga *ed* (2007) 73.

<sup>81</sup> Nagel *ed* (2015) 77. See also Fouché (2007) 67; Havenga *ed* (2007) 71.

<sup>82</sup> Nagel *ed* (2015) 78. See also Fouché (2007) 67; Havenga *ed* (2007) 71.

<sup>83</sup> Nagel *ed* (2015) 78. See also Bhana (2009) 75.

<sup>84</sup> Nagel *ed* (2015) 78. See also Bhana (2009) 75.

<sup>85</sup> Nagel *ed* (2015) 78. See also Bhana (2009) 75.

<sup>86</sup> S 39.

<sup>87</sup> Nagel *ed* (2015) 78. See also Fouché (2007) 99; Havenga *ed* (2007) 91 and Van der Merwe *et al* (2007) 201.

<sup>88</sup> Nagel *ed* (2015) 78. See also Fouché (2007) 99; Havenga *ed* (2007) 91 and Van der Merwe *et al* (2007) 201.

<sup>89</sup> Nagel *ed* (2015) 78. See also Bhana (2009) 75.

<sup>90</sup> Nagel *ed* (2015) 78. See also Bhana (2009) 75.

<sup>91</sup> See par 2.3.1 above.



Certain persons only have limited contractual capacity. Persons with limited contractual capacity must be assisted when they enter into agreements.<sup>92</sup> The reason that the common law requires persons with limited contractual capacity to be assisted is to help them with their poor or inadequate judgment.<sup>93</sup> An important example of persons having limited contractual capacity for purposes of my discussion is minors. A minor is a person that is already seven years old but who has not yet attained the age of 18 years.<sup>94</sup> Certain contracts are binding on minors and others are not. Examples of the former are where the minor acts with the consent or assistance of his guardian<sup>95</sup> or where the guardian acts on behalf of the minor.<sup>96</sup>

Another important instance where a contract concluded by a minor will be binding on the minor is where the minor is emancipated. Emancipation of a minor means that the parent or guardian gives consent expressly or tacitly, which may be retracted at any moment, to conduct a particular business.<sup>97</sup> The parent or guardian's lack of interest in the minor does not amount to consent.<sup>98</sup> The emancipated minor's status will then change back to one of limited contractual capacity if the consent is retracted.<sup>99</sup> Emancipation is limited only to the particular business transactions and does not cause the minor to have full contractual capacity where he can enter into any type of contract.<sup>100</sup> The test to determine emancipation is that the minor is required to show his ability to act independently.<sup>101</sup>

An instance where a contract will not bind a minor is where the minor enters into the contract acting on his own without consent or assistance from his guardian or parent.<sup>102</sup>

Where a contract is entered into by a minor without consent or assistance, the contract is not void but voidable.<sup>103</sup> Such a contract can be ratified later by the minor himself when he turns 18 or by his guardian on his behalf before the minor turns 18.<sup>104</sup> In the case of ratification consent is given after the conclusion of the contract has occurred. Ratification by the minor's

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<sup>92</sup> Fouché (2007) 68. See also Nagel *ed* (2015) 79.

<sup>93</sup> Nagel *ed* (2015) 79.

<sup>94</sup> Nagel *ed* (2015) 80. See s 17 of the Children's Act 38 of 2005.

<sup>95</sup> The guardian is usually the parent of the minor or a person the court has appointed as a guardian. Nagel *ed* (2015) 80-81.

<sup>96</sup> Nagel *ed* (2015) 81.

<sup>97</sup> Nagel *ed* (2015) 81. See also Havenga *ed* (2007) 76.

<sup>98</sup> Nagel *ed* (2015) 81. See also Havenga *ed* (2007) 76.

<sup>99</sup> Nagel *ed* (2015) 81.

<sup>100</sup> Nagel *ed* (2015) 81. *Cf* Havenga *ed* (2007) 76, who is of the opinion that if the guardian consents to the minor to have complete freedom to conclude contracts involving his lifestyle or in-economic activities, the minor is emancipated in all spheres of his legal acts and as a result attains the full capacity to act.

<sup>101</sup> Nagel *ed* (2015) 82. See also Havenga *ed* (2007) 76.

<sup>102</sup> Nagel *ed* (2015) 82.

<sup>103</sup> Bhana (2009) 76. See also Fouché (2007) 69.

<sup>104</sup> Bhana (2009) 76. See also Nagel *ed* (2015) 82.

guardian renders the contract valid and binding as if the contract was concluded with the necessary consent or assistance at the time of entering into the contract.<sup>105</sup>

In those cases where a contract is binding on the minor, for instance where the contract was concluded with the necessary consent or assistance of a guardian, the minor as a general rule may always claim restitution<sup>106</sup> if the contract he has entered into was to his disadvantage at the time of its conclusion.<sup>107</sup> However, the minor cannot claim restitution in the following circumstances:<sup>108</sup>

- (a) Where the minor entered into a contract under the pretence of being a major.
- (b) Where the minor ratifies the contract after reaching the age of majority.
- (c) Where the action has become prescribed.

### **2.3.2 The influence of the National Credit Act**

Section 89 of the National Credit Act is entitled “unlawful credit agreements”. The said section is not applicable to pawn transactions.<sup>109</sup> In section 89(2) of the National Credit Act credit agreements are listed that are proclaimed to be unlawful by the legislature and are consequently prohibited in terms of the Act.<sup>110</sup> In terms of this closed-list a credit agreement is regarded to be unlawful if

- (a) it was concluded by an unemancipated minor consumer who was unassisted by a guardian;<sup>111</sup>
- (b) the agreement was entered into with a mentally unfit consumer who has been declared as such by an order of a competent court;<sup>112</sup>

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<sup>105</sup> Nagel *ed* (2015) 81.

<sup>106</sup> It means that the contract is set aside and that the parties are entitled to be placed in the position they were in before conclusion of the contract consented to.

<sup>107</sup> Bhana (2009) 76.

<sup>108</sup> Nagel *ed* (2015) 82.

<sup>109</sup> S 89(1). “Pawn transaction” is defined in s 1 of the Act and this makes the Act applicable to typical pawn-broker contracts, where something is pawned as security where credit was granted or where money was lent to the consumer.

<sup>110</sup> For a complete discussion of s 89(2), see Otto in Scholtz *ed* (2008), ch 9 (par 9.3.2). See also Otto & Otto (2016) 54-55 and Kelly-Louw and Stoop (2012) 196-197.

<sup>111</sup> S 89(2)(a). However, if the credit provider was deceived by the consumer into believing that the consumer had contractual capacity, the contract is lawful. S 89(3)(a).

<sup>112</sup> S 89(2)(a)(i). However, if the credit provider was deceived by the consumer into believing that the consumer had contractual capacity, the contract is lawful. S 89(3)(a). The same applies where the consumer attempted to obscure or suppress the fact that he only has limited contractual capacity. S 89(3)(b).

- (c) the agreement was concluded with a person whose estate was placed under an administration order in terms of section 74 of the Magistrates' Courts Act and the administrator did not give his consent to the agreement;<sup>113</sup>
- (d) the particular credit agreement came into being as a result of negative option marketing;<sup>114</sup>
- (e) a supplementary agreement prohibited in terms of section 91(a) of the National Credit Act is involved;<sup>115</sup>
- (f) a credit provider who was unregistered at the time of the contract and who ought to have been registered, entered into the credit agreement;<sup>116</sup> or
- (g) the credit provider involved was subject to a section 54 National Credit Act notice issued by the National Credit Regulator or a provincial regulator informing that credit provider to stop offering credit, making credit available and so forth, and the notice was final, in other words no longer subject to a section 56 review.<sup>117</sup>

Where a credit agreement is unlawful in terms of section 89 of the Act, the court must make a just and equitable order, including (but not limited to) an order that the unlawful agreement is void as from the date when the agreement was concluded. This is in spite of any provision of the agreement or any other legislation to the contrary.<sup>118</sup> The order that the unlawful agreement is void is therefore a compulsory order. It is important to note that a credit agreement listed in section 89(2) will only be unlawful and void once declared to be unlawful and void by a court.<sup>119</sup> It is further important to note that once the unlawful agreement has been declared void by the court, the normal common law consequences in respect of illegal contracts ought to apply. This means that the court will probably apply the *ex turpi causa* and *par delictum* maxims discussed below.<sup>120</sup>

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<sup>113</sup> S 89(2)(a)(ii). The contract is lawful if the consumer attempted to suppress or obscure the fact that the consumer was subject to the s 74 order. S 89(3)(b).

<sup>114</sup> S 89(2)(b).

<sup>115</sup> S 89(2)(c). A supplementary agreement is a separate agreement which has a prohibited provision that could not have been included in the original agreement itself. See s 91.

<sup>116</sup> S 89(2)(d).

<sup>117</sup> S 89(2)(e).

<sup>118</sup> S 89(5)(a), as amended in terms of s 27 of the National Credit Amendment Act 19 of 2014 (hereafter the Credit Amendment Act). S 27 of the Credit Amendment Act also repealed s 89(5)(b) and (c) which determined that "all the credit provider's purported contractual rights to recover money paid or goods delivered are, by court order, either cancelled, unless the court decides that this would unjustly enrich the consumer, or forfeited to the state if the court concludes that cancelling the said rights would enrich the consumer". Before its repeal s 89(5)(b) and (c) was declared to be unconstitutional. See *Opperman v Boonzaaier* unreported case no 24887/2010 (WCC) (17 April 2012); *Chevron (Pty) Ltd v Wilson* unreported case no CCT 88/14 (CC) and *Otto and Otto* (2016) 55-56.

<sup>119</sup> S 164(1).

<sup>120</sup> Par 2.5.1 above. See also *Otto and Otto* (2016) 55.

A credit agreement not listed under section 89(2) may of course be unlawful on other grounds, for instance because it is contrary to statute or the common law. Where the contract is contrary to a statute, the question whether the contract is invalid depends on the particular statute.<sup>121</sup> In most cases contracts contrary to the common law are contracts that are contrary to the good morals of society or contrary to the public interest.<sup>122</sup> Where a contract is illegal in terms of the common law, it is null and void and the *ex turpi causa* and *par delictum* maxims discussed below<sup>123</sup> apply.

## **2.4 Performance must be possible and determinable**

### **2.4.1 The common law**

The parties must clearly define their respective performances and obligations because vague and obscure performance will render the contract void.<sup>124</sup> Therefore, performance must be certain or reasonably ascertainable.<sup>125</sup>

Further, the performance agreed to by the contracting parties must be physically possible, and if performance is impossible, the contract will be void.<sup>126</sup> If the thing which must be delivered does no longer exist or had never existed, it cannot be traded and performance will be rendered impossible.<sup>127</sup>

### **2.4.2 The influence of the National Credit Act**

The National Credit Act, as far as I could ascertain, does not have an influence on this common law requirement for the formation of a valid and binding contract.

## **2.5 The contract must not be against the law**

### **2.5.1 The common law**

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<sup>121</sup> Nagel *ed* (2015) 93.

<sup>122</sup> See Nagel *ed* (2015) 94.

<sup>123</sup> Par 2.5.1 above.

<sup>124</sup> Fouché (2007) 95. See also Nagel *ed* (2015) 99; Havenga *ed* (2007) 92 and Bhana (2009) 77. A contract which is void as a result of uncertainty may still be valid if the parties addressed the uncertainty.

<sup>125</sup> Fouché (2007) 95. See also Havenga *ed* (2007) 92; Van der Merwe *et al* (2007) 221; Nagel *ed* (2015) 100 and Bhana (2009) 77.

<sup>126</sup> Fouché (2007) 95. See also Bhana (2009) 82; Havenga *ed* (2007) 92; Nagel *ed* (2015) 100 and Van der Merwe *et al* (2007) 186.

<sup>127</sup> Fouché (2007) 96. See Nagel *ed* (2015) 100. It is important to note that subjective impossibility will not affect the validity of the contract. The contract will only be invalid if performance is objectively impossible.

It has already been stated above<sup>128</sup> that a contract may be illegal because it is contrary to statute. It has also been stated that the consequences in such a case will depend on the particular statute.<sup>129</sup> A lawful contract must also be in agreement with the common law, and if the contract is contrary to public policy<sup>130</sup> or good moral standards<sup>131</sup> it is regarded as illegal.<sup>132</sup> However, whether a contract is against good morals or the public interest is not so easy to determine and is a decision for the particular court to make, as good morals and public policy differ from time to time and from community to community.<sup>133</sup>

If a contract is illegal in terms of the common law, it is void.<sup>134</sup> The first consequence of an illegal contract which is void in terms of the common law is that none of the parties acquire enforceable rights or duties and neither party may institute an action against the other party.<sup>135</sup> In addition, a party is not allowed to claim restitution if he has already rendered performance in terms of such a contract.<sup>136</sup> Such a party is also prohibited to reclaim his performance on the basis of undue enrichment because of the rule contained in the maxim *in pari delicto potior est condition possidentis*<sup>137</sup> (commonly known as the *par delictum* rule).<sup>138</sup> The rule means that if both parties acted improperly, no party is entitled to performance in terms of the unlawful contract and the person in possession of the performance has the stronger right.<sup>139</sup> The application of the *par delictum* rule can sometimes lead to unfairness and hence the courts have indicated that they may relax its harsh consequences in order “to do simple justice between man and man”. The court may therefore order the return of performance when circumstances and equity permit such relaxation.<sup>140</sup>

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<sup>128</sup> See par 2.3.2 above.

<sup>129</sup> See par 2.3.2 above.

<sup>130</sup> Public policy refers to a broader concept and it includes the good morals of society. A contract is contrary to public interest if it, for example, can injure the State or the public service and defeat or obstruct the administration of justice. See also par

<sup>131</sup> Good moral standards normally refer to sexual conduct, honesty and so forth.

<sup>132</sup> Fouché (2007) 87. See also Bhana (2009) 104; Havenga *ed* (2007) 85; Nagel *ed* (2015) 92 and Van der Merwe *et al* (2007) 192.

<sup>133</sup> Nagel *ed* (2015) 95. See also Havenga *ed* (2007) 86.

<sup>134</sup> Nagel *ed* (2015) 95.

<sup>135</sup> Kelly-Louw and Stoop (2012) 200. See also Otto and Otto (2016) 55; Otto in Scholtz *ed* (2008), ch 9 (par 9.3.4.1); Havenga *ed* (2007) 91 and Van der Merwe *et al* (2007) 201. This rule which is never relaxed is found in the maxim *ex turpi causa non oritur action* (known as the *ex turpi causa* rule) and means that no action comes into being as a result of a shameful cause.

<sup>136</sup> Kelly-Louw and Stoop (2012) 200. See also Otto and Otto (2016) 55 and Otto in Scholtz *ed* (2008), ch 9 (par 9.3.4.1).

<sup>137</sup> Where there is equal guilt between the parties, the possessor of performance is in the strongest position.

<sup>138</sup> Kelly-Louw (2012) 200. See also Otto and Otto (2016) 55 and Otto in Scholtz *ed* (2008), ch 9 (par 9.3.4.1).

<sup>139</sup> Kelly-Louw and Stoop (2012) 200. See also Otto and Otto (2016) 55 and Otto in Scholtz *ed* (2008), ch 9 (par 9.3.4.1).

<sup>140</sup> Kelly-Louw and Stoop (2012) 200. See also Otto and Otto (2016) 55 and Otto in Scholtz *ed* (2008), ch 9 (par 9.3.4.1). See also *Jajbhay v Cassim* 1929 AD 537.

## 2.5.2 The influence of the National Credit Act

Unlawful credit agreements and the consequences thereof in terms of the National Credit Act have already been discussed above.<sup>141</sup> Due to the fact that unlawful provisions in a credit agreement could also cause the unlawfulness of the credit agreement, this aspect has to be mentioned as well. A credit agreement in terms of section 90(1) of the Act must not contain unlawful provisions.<sup>142</sup> A list of 30 prohibited contractual provisions which are considered unlawful are contained in section 90(2) of the National Credit Act.<sup>143</sup> The consequence of an unlawful provision in a credit agreement is that such a provision is considered void as from the date on which the provision appears to have taken effect.<sup>144</sup> The National Consumer Tribunal does not have the power to state that a provision in a credit agreement is unlawful and void. It is therefore only the courts that can declare a provision void and unlawful.<sup>145</sup> In terms of section 90(4) a court must sever that unlawful provision from the agreement, or change the provision to make it lawful if it is reasonable to do so or declare the entire agreement unlawful as from the date on which the agreement took effect.<sup>146</sup>

## 2.6 Formalities

### 2.6.1 The common law

The general rule in terms of the common law is that there are no formalities required in order for the parties to enter into a valid contract.<sup>147</sup> Formalities refer to the contract being reduced to writing and being signed by the parties, alternatively require a formal act such as the conclusion of the contract in the presence of a notary or the registration of the contract.<sup>148</sup>

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<sup>141</sup> See par 2.3.2 above.

<sup>142</sup> Kelly-Louw and Stoop (2012) 200. See also Otto and Otto (2016) 57 and Otto in Scholtz *ed* (2008), ch 9 (par 9.3.3).

<sup>143</sup> Kelly-Louw and Stoop (2012) 200. See also Otto and Otto (2016) 57 and Otto in Scholtz *ed* (2008), ch 9 (par 9.3.3).

<sup>144</sup> S 90(3). See also Kelly-Louw and Stoop (2012) 205; Otto and Otto (2016) 60 and Otto in Scholtz *ed* (2008), ch 9 (par 9.3.4.2).

<sup>145</sup> Kelly-Louw and Stoop (2012) 205. See also Otto and Otto (2016) 60 and Otto in Scholtz *ed* (2008), ch 9 (par 9.3.4.2).

<sup>146</sup> See also Kelly-Louw and Stoop (2012) 205; Otto and Otto (2016) 60 and Otto in Scholtz *ed* (2008), ch 9 (par 9.3.4.2).

<sup>147</sup> Fouché (2007) 91. See also Bhana (2009) 86; Van der Merwe *et al* (2007) 152; Nagel *ed* (2015) 104 and Havenga *ed* (2007) 98.

<sup>148</sup> Nagel *ed* (2015) 104. See also Fouché (2007) 91 and Van der Merwe *et al* (2007) 153.

In terms of the common law the parties are given the freedom to prescribe whatever formalities in respect to their contract.<sup>149</sup> The parties may agree to reduce their contract to writing with one of two purposes in mind: the first is that the writing will serve as a requirement for the validity of their contract.<sup>150</sup> If the contract is not written down, no contract will exist until such time as it has been reduced to writing.<sup>151</sup> However, if the parties agree that their contract should be reduced to writing only to proof the terms of such contract, then the contract comes into being as soon as the verbal agreement is concluded.<sup>152</sup> If the parties' intention cannot be established as to whether the writing was a requirement for validity or not, it is assumed that the writing was not a prerequisite for validity.<sup>153</sup>

## 2.6.2 The influence of the National Credit Act

Legislation prescribes formal requirements in respect of certain contracts contrary to the common law situation.<sup>154</sup> The reasons are to prevent uncertainty, disputes and fraud and to ensure that the parties who enter into such (usually important) contracts have certainty with regard to the terms of the contract.<sup>155</sup>

One of the predecessors to the National Credit Act, the Credit Agreements Act 75 of 1980,<sup>156</sup> required that a credit agreement which was subject to that Act had to be reduced to writing and signed by or on behalf of the contracting parties. An agreement which was not reduced to writing was not invalid as a result of that.<sup>157</sup> However, failure to reduce the agreement to writing was an offence.<sup>158</sup> The Alienation of Land Act 68 of 1981<sup>159</sup> regards a contract for the alienation of land, which is not reduced to writing, as void.<sup>160</sup>

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<sup>149</sup> Havenga *ed* (2007) 99. See also Nagel *ed* (2015) 106; Fouché (2007) 92; Van der Merwe *et al* (2007) 153 and Bhana (2009) 91.

<sup>150</sup> Fouché (2007) 92. See also Bhana (2009) 91; Van der Merwe *et al* (2007) 153; Nagel *ed* (2015) 106 and Havenga *ed* (2007) 99.

<sup>151</sup> Fouché (2007) 92. See also Bhana (2009) 91; Van der Merwe *et al* (2007) 153; Nagel *ed* (2015) 106 and Havenga *ed* (2007) 99. *Meter Motors (Pty) Ltd v Cohen* 1966 2 SA 735 (T).

<sup>152</sup> Fouché (2007) 92. See also Bhana (2009) 91; Van der Merwe *et al* (2007) 153; Nagel *ed* (2015) 106 and Havenga *ed* (2007) 99.

<sup>153</sup> Nagel *ed* (2015) 106. See also Bhana (2009) 92; Van der Merwe *et al* (2007) 153 and Fouché (2007) 92.

<sup>154</sup> Nagel *ed* (2015) 105. See also Bhana (2009) 86; Van der Merwe *et al* (2007) 162-163; Havenga *ed* (2007) 98 and Fouché (2007) 92.

<sup>155</sup> Nagel *ed* (2015) 105. See also Van der Merwe *et al* (2007) 152 fn 3 and Havenga *ed* (2007) 98.

<sup>156</sup> S 5(1)(a). This Act is hereafter referred to as the Credit Agreements Act.

<sup>157</sup> S 5(2). See also Kelly-Louw and Stoop (2012) 210.

<sup>158</sup> S 23 of Credit Agreements Act. See Otto in Scholtz *ed* (2008), ch 9 (par 9.2.4). Legislation providing formalities for certain contracts normally lays down sanctions for non-compliance with the formality requirements. These sanctions may differ from Act to Act. Sometimes the contract is declared void as a result of failure to comply with the formalities. In other instances, the contract is considered valid and enforceable between the parties, but unenforceable against third parties. In extra-ordinary circumstances the sanction for non-compliance may even be of a criminal nature.

The National Credit Act does not require writing as a requirement for the validity of a credit agreement.<sup>161</sup> However, it is presumed from the provisions of the National Credit Act that writing and signing of the credit agreement by both parties is a formal requirement.<sup>162</sup> Section 93 of the Act prescribes that a document that records a credit agreement must be in the prescribed form and the credit provider must furnish the consumer with a copy of the agreement, either in a paper form, or in a printable electronic form, irrespective of the form of the credit agreement.<sup>163</sup> The credit provider is liable for a fine of up to either R1million or 10 per cent of its annual turnover during the preceding financial year whichever is greater, for failure to comply with these formalities, but does not affect the validity of the agreement nor does it create an offence. However, such a credit provider runs the risk that the National Credit Regulator might cancel its registration.<sup>164</sup>

## 2.7 Evaluation

The general principles of the law of contract are still applicable to a credit agreement which is governed by the National Credit Act.<sup>165</sup> However, the National Credit Act has an influence on the application of some of these common law rules on the credit agreement.<sup>166</sup>

In one instance the National Credit Act has an influence on the common law principles in respect to consensus in one instance. The common law provides that the contracting parties must reach consensus<sup>167</sup> before their agreement can be regarded as a valid contract, whereas the National Credit Act allows for the conclusion of a valid incidental credit agreement without the parties having reached consensus.<sup>168</sup> The incidental credit agreement is deemed to have been concluded, not at the time the parties have reached consensus, but 20 business days after the happening of a particular event.<sup>169</sup>

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<sup>159</sup> S 2. Hereafter the Alienation of Land Act.

<sup>160</sup> Otto and Otto (2016) 53. See also Kelly-Louw and Stoop (2012) 210; Nagel *ed* (2015) 105; Havenga *ed* (2007) 98 and Fouché (2007) 92.

<sup>161</sup> Havenga *ed* (2007) 98.

<sup>162</sup> Havenga *ed* (2007) 98. See also Kelly-Louw and Stoop (2012) 210 and Bhana (2009) 89.

<sup>163</sup> Havenga *ed* (2007) 98. See also Kelly-Louw and Stoop (2012) 210; Nagel *ed* (2011) 103 and Otto in Scholtz *ed* (2008), ch 9 (par 9.2.4).

<sup>164</sup> In terms of s 151. See also ss 57 and 161. Kelly-Louw and Stoop (2012) 210. *Cf* Havenga *ed* (2007) and Bhana (2009) 89 who are of the opinion that non-compliance to have the agreement in writing constitutes a criminal offence by the credit provider but will not lead to the invalidity of the credit agreement.

<sup>165</sup> Kelly-Louw and Stoop (2012) 194.

<sup>166</sup> Kelly-Louw and Stoop (2012) 194.

<sup>167</sup> See par 2.2.1. above.

<sup>168</sup> See par 2.2.2. above.

<sup>169</sup> See par 2.2.2. above.



The National Credit Act also has an influence on the common law principles as far as contractual capacity and illegality are concerned. In terms of the common law a contract concluded with an unemancipated minor person without consent or assistance is not binding on the minor. However, the contract is not regarded to be unlawful and void.<sup>170</sup> However, in terms of the National Credit Act,<sup>171</sup> such an agreement is unlawful and void. The common law regards a contract that is concluded with a mentally unfit person as void, but due to a lack of contractual capacity and not as a result of illegality.<sup>172</sup> The National Credit Act deems such contracts to be unlawful and therefore void.<sup>173</sup> The legislature accordingly changed the status of credit agreements that are subject to the Act and that are concluded with the aforementioned minors or mentally unfit persons. The legislature here therefore intertwines two of the common law principles of the law of contract.

Other credit agreements, for various reasons are also deemed to be unlawful in terms of section 89 of the National Credit Act. However, as far as the consequences are concerned, the National Credit Act, after its 2015 amendment, corresponds with the common law. The agreement is void and the common law maxims *ex turpi causa* and *par delictum* apply.<sup>174</sup>

The National Credit Act, for obvious reasons, does not have anything to say regarding the common law requirement that performance must be possible and determinable. In respect of formalities, the influence of the Act is unclear.<sup>175</sup> The reason is that the National Credit Act, in contrast to the Credit Agreements Act, does not specifically require that a credit agreement should be reduced to writing and signed in order to be valid and binding. The Act as a result is also not clear in respect of the consequences of non-compliance with the formality requirements.

In summary, the National Credit Act only has an impact on the common law principles of consensus, contractual capacity and that the contract must be lawful.

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<sup>170</sup> Par 2.3.1 above.

<sup>171</sup> Par 2.3.2 above.

<sup>172</sup> Par 2.3.1 above.

<sup>173</sup> Par 2.3.2 above.

<sup>174</sup> Par 2.5.2 above.

<sup>175</sup> Par 2.4.2 above.

## CHAPTER 3

# THE INFLUENCE OF THE NATIONAL CREDIT ACT ON THE CONTENTS OF THE CREDIT AGREEMENT ITSELF

### 3.1 Introduction

When an offer to enter into a contract is accepted without any conditions or qualifications, a valid contract is concluded.<sup>176</sup> Every contract which is validly entered into must have a clear and unambiguous content.<sup>177</sup> The content of an agreement is wider than simply that to which the parties agreed to at the time the contract was entered into.<sup>178</sup> Consensus between the parties determines the contents of the contract.<sup>179</sup> Although the parties to the contract prescribe the terms that will form part of their agreement, there are certain terms<sup>180</sup> that form part of the contract without the parties physically observing them.<sup>181</sup>

Not all the terms of a contract create legal obligations between the parties. There are some terms of a contract which are descriptive, for example, a recital clause which describes the background to the agreement.<sup>182</sup> Other terms of a contract facilitate proof of certain facts, for instance, a clause in which the creditor admits receiving performance.<sup>183</sup>

The terms which form part of the contents of a contract due to real consensus can be divided into *essentialia*<sup>184</sup> and *incidentalia*.<sup>185</sup> Real consensus can be reached expressly or by means of conduct.<sup>186</sup> There are some terms which form part of a contract as a result of the common

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<sup>176</sup> Nagel *ed* (2015) 61. See also Havenga *ed* (2007) 56; Bhana (2009) 43 and Fouché (2009) 48.

<sup>177</sup> Nagel *ed* (2015) 61. See also Bhana (2009) 43; Fouché (2007) 45 and Havenga *ed* (2007) 55.

<sup>178</sup> Nagel *ed* (2015) 61. See also Fouché (2007) 107 and Van der Merwe *et al* (2007) 244-245.

<sup>179</sup> Nagel *ed* (2015) 61.

<sup>180</sup> A term refers to a provision in a contract which imposes one or more contractual obligations on a contracting party to act in a specific way or to prohibit him to perform a particular act. In other words, it defines the contractual obligations to which the parties bind themselves and which they can enforce against each other, or it provides the time when or the circumstances in which the obligations either become enforceable or are terminated. Nagel *ed* (2015) 61. See also Fouché (2007) 107 and Van der Merwe *et al* (2007) 244-245.

<sup>181</sup> Nagel *ed* (2011) 61. See also Havenga *ed* (2007) 107 and Van der Merwe *et al* (2007) 244.

<sup>182</sup> Bhana (2009) 143. See also Havenga *ed* (2007) 101.

<sup>183</sup> Bhana (2009) 143.

<sup>184</sup> *Essentialia* are those terms the law requires to place a contract into a particular category, for example, the *essentialia* of a contract of sale are to purchase and sell a particular item at a certain price. Fouché (2007) 107-108. See also Havenga *ed* (2007) 103; Bhana (2009) 145; Nagel *ed* (2015) 62 and Van der Merwe *et al* (2007) 282-283. See par 3.2.1 below.

<sup>185</sup> *Incidentalia* are those terms the parties incorporate in the contract to meet their mutual arrangements. For example, a provision in the contract of the time and place of performance. Bhana (2009) 145, 152 and 153. See also Fouché (2007) 108 and Nagel *ed* (2015) 62. See also par 3.2.3 below.

<sup>186</sup> Nagel *ed* (2015) 61.

law, legislation<sup>187</sup> or trade usage,<sup>188</sup> without the parties having reached consensus on these terms in their agreement.<sup>189</sup> Consensus is reached or created through operation of law.<sup>190</sup> These terms are automatically included in the contract in terms of the operation of law, without the parties specifically having to pronounce their intention to do so.<sup>191</sup> Terms that automatically form part of a contract in terms of the principles of the common law are known as the *naturalia*<sup>192</sup> of the contract and will, as was said, automatically form part of the contract through the operation of law, unless the parties expressly exclude these *naturalia* by the use of *incidentalia*.<sup>193</sup>

Finally, consensus is presumed in certain situations. Some or all contractual stipulations can be affected by presumed consensus.<sup>194</sup> So-called ticket contracts<sup>195</sup> and tacit terms constitute examples. In the latter case the court, by implication, and only in limited circumstances,<sup>196</sup> includes a missing term in a contract. In such a case the parties to the contract did not reach consensus expressly or through conduct.

## 3.2 The common law

### 3.2.1 *Essentialia*

The stipulations which categorise a contract as belonging to a certain type or category are called “essential terms” and are commonly known as the *essentialia* of the contract.<sup>197</sup> The parties must reach express consensus on these essential terms or characteristics in order for the contract between them to be a specific nominate contract.<sup>198</sup> An example of a nominate contract is a contract of sale. Except for having to reach consensus to purchase and sell, a contract of sale has two other *essentialia* or essential terms, namely that the seller binds

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<sup>187</sup> Sometimes, for reasons such as consumer protection, the legislature requires certain contracts to have, or not to have, specific terms. See Nagel *ed* (2015) 63. The National Credit Act constitutes an example of this. The influence of the National Credit Act on the content of credit agreements is discussed in par 3.3.2 below.

<sup>188</sup> A trade usage could also form part of a contract, even though the parties have not reached express or tacit consensus to include the stipulation in the contract. See for more detail Nagel *ed* (2015) 63.

<sup>189</sup> Nagel *ed* (2015) 63. See also Fouché (2007) 108.

<sup>190</sup> Nagel *ed* (2015) 63-64.

<sup>191</sup> Nagel *ed* (2015) 64. See also Fouché (2007) 108.

<sup>192</sup> *Naturalia* are those terms included in a contract by operation of law. The parties do not have to agree on them. An example is a tacit warranty against latent defects in the contract of sale. Fouché (2007) 108. See also Havenga *ed* (2007) 103; Bhana (2009) 145, 152 and 153 and Van der Merwe *et al* (2007) 283. See also par 3.2.2 below.

<sup>193</sup> Havenga *ed* (2007) 101. See also Fouché (2007) 108; Nagel *ed* (2015) 62 and Bhana (2009) 145.

<sup>194</sup> Nagel *ed* (2015) 62.

<sup>195</sup> See Nagel *ed* (2015) 63.

<sup>196</sup> Nagel *ed* (2015) 62.

<sup>197</sup> Havenga *ed* (2007) 103. See also Van der Merwe *et al* (2007) 282-283; Nagel *ed* (2015) 62; Fouché (2007) 107 and Bhana (2009) 145.

<sup>198</sup> Nagel *ed* (2015) 62.

himself to deliver something to the buyer, and the buyer in turn binds himself to pay a sum of money in exchange for the promised item.<sup>199</sup> A contract of sale does not come into being if the buyer does not undertake to pay a price but promise to deliver something in exchange for the promised item because in such a case one of the *essentiale* of a contract of sale is absent.<sup>200</sup> However, a contract of exchange may be pertinent in this scenario.<sup>201</sup> The purpose of the essential terms of a contract is to identify a contract as belonging to a particular class or category.<sup>202</sup> It is important for a contract to be identified as belonging to a certain category as such identification determines the *naturalia* of a particular contract.<sup>203</sup> For instance, certain consequences or *naturalia* would follow naturally in terms of the operation of law if the essential terms of a contract of sale are present.<sup>204</sup> However, it is important to indicate that the *essentialia* of a contract are not a requirement for the conclusion of a valid contract.<sup>205</sup>

### 3.2.2 *Naturalia*

*Naturalia* are the terms which the law assign to every contract of a particular category.<sup>206</sup> The parties to an agreement do not have to reach consensus on the *naturalia*, since they are not required for the validity of the contract and form part of the contract by operation of law.<sup>207</sup> *Naturalia* of a contract assist to regulate the rights and duties of the contracting parties as well as the effects and consequences of their contract.<sup>208</sup> The *naturalia* of numerous contracts originate from the Roman law and therefore form part of our common law.<sup>209</sup> However, the parties to an agreement may generally exclude the operation of the *naturalia* terms in their contract.<sup>210</sup> This is done by means of an *incidentale*. For example, a warranty against latent defects is implied by the law into all contracts of sale as a *naturale*, unless it is specifically excluded by the parties by means of a “voetstoots” or “as is” clause, an *incidentale*.<sup>211</sup>

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<sup>199</sup> Havenga *ed* (2007) 103. See also Van der Merwe *et al* (2007) 283 and Nagel *ed* (2015) 62. The parties must in other words reach express consensus regarding the thing sold and the purchase price.

<sup>200</sup> There must be a sum of money that the buyer is willing to pay.

<sup>201</sup> Havenga *ed* (2007) 103. See also Van der Merwe *et al* (2007) 283 and Nagel *ed* (2015) 62.

<sup>202</sup> Havenga *ed* (2007) 103. See also Van der Merwe *et al* (2007) 283 and Nagel *ed* (2015) 62.

<sup>203</sup> Havenga *ed* (2007) 103. See also Van der Merwe *et al* (2007) 283.

<sup>204</sup> Havenga *ed* (2007) 103. See also Van der Merwe *et al* (2007) 283.

<sup>205</sup> Van der Merwe *et al* (2007) 283 and Nagel *ed* (2015) 62.

<sup>206</sup> Havenga *ed* (2007) 103. See also Bhana (2009) 145 and 153; Van der Merwe *et al* (2007) 283; Nagel *ed* (2015) 64 and Fouché (2007) 108.

<sup>207</sup> Havenga *ed* (2007) 103. See also Bhana (2009) 145 and 153; Van der Merwe *et al* (2007) 283; Nagel *ed* (2015) 64 and Fouché (2007) 108.

<sup>208</sup> Havenga *ed* (2007) 103. See also Bhana (2009) 145 and 153; Van der Merwe *et al* (2007) 283; Nagel *ed* (2015) 64 and Fouché (2007) 108.

<sup>209</sup> Havenga *ed* (2007) 103. See also Van der Merwe *et al* (2007) 283.

<sup>210</sup> Havenga *ed* (2007) 103. See also Van der Merwe *et al* (2007) 283 and Bhana (2009) 145.

<sup>211</sup> Havenga *ed* (2007) 103. See also Van der Merwe *et al* (2007) 283.

### 3.2.3 *Incidentalia*

The parties may add further terms and provisions to their agreement which are called the *incidentalia* of the contract.<sup>212</sup> The *incidentalia* are expressly agreed to and can include terms, conditions, assumptions, warranties, modal clauses and others.<sup>213</sup> This is allowed as long as the terms, conditions and provisions do not fall foul of the common law requirements regarding the legality of contracts.<sup>214</sup> As was stated in the previous sub-paragraph, an *incidentale* may be used by the parties to a contract to exclude a *naturale*.

## 3.3 The influence of the National Credit Act

### 3.3.1 General

It is logical that the contents of a credit agreement, similar to that of any other type of contract, can be determined by means of real consensus, presumed consensus and consensus through operation of law.<sup>215</sup> To illustrate the point: in order for a credit agreement to constitute a sale contract, such as the so-called instalment agreement,<sup>216</sup> the parties to the credit agreement will have to reach consensus on the *essentialia* of a sale contract.<sup>217</sup> The instalment sale agreement will also contain a warranty against latent defects through the operation of law as a *naturale*,<sup>218</sup> unless the parties exclude it in their agreement by means of an as is clause, as an *incidentale*.<sup>219</sup>

It has already been mentioned<sup>220</sup> that the legislature in certain situations requires contracts to contain, or not to contain, specific stipulations or terms. In the former case the inclusion of the terms is therefore rendered compulsory as a result of legislation.<sup>221</sup> The National Credit Act serves as an example of a piece of legislation that contains provisions having a direct influence on the contents of the agreements subject to the Act, namely credit agreements.

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<sup>212</sup> Otto in Scholtz *ed* (2008), ch 9 (par 9.2.1). See also Havenga *ed* (2007) 103; Nagel *ed* (2015) 62; Bhana (2009) and Fouché (2007) 108.

<sup>213</sup> Nagel *ed* (2015) 62. See also Nagel *ed* (2015), ch 8 for the meaning of these particular contractual terms.

<sup>214</sup> Otto in Scholtz *ed* (2008), ch 9 (par 9.2.1). See also Havenga *ed* (2007) 103; Nagel *ed* (2015) 62; Bhana (2009) and Fouché (2007) 108.

<sup>215</sup> See par 3.1 above.

<sup>216</sup> Instalment agreements are defined in s 1 of the Act. For a discussion of this type of credit agreement, see Otto in Scholtz *ed* (2008), ch 8 (par 8.2.3.4).

<sup>217</sup> See pars 3.1 and 3.2.1 above.

<sup>218</sup> See pars 3.1 and 3.2.2 above.

<sup>219</sup> See pars 3.1 and 3.2.3 above.

<sup>220</sup> Par 3.1 above.

<sup>221</sup> Bhana (2009) 154. See also Nagel *ed* (2015) 64.

The Policy Framework (2004) of the Department of Trade and Industry (DTI) set out a new consumer credit policy framework for South Africa. This in turn gave rise to the National Credit Act.<sup>222</sup> But to go a step back: the predecessors to the National Credit Act, the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980, were outdated and largely ineffective.<sup>223</sup> A Technical Committee was therefore established by the DTI in March 2002 to do a review of the legislation that preceded the National Credit Act.<sup>224</sup> As a result a detailed report on the weaknesses in the consumer credit market was published and handed to the DTI in October 2003.<sup>225</sup> This report contained recommendations for an improved and changed credit law dispensation for South Africa. This was followed by the publication by the DTI of Policy Framework (2004), a Policy Framework for Consumer Credit, in August 2004. In March 2005 the National Credit Bill was tabled in Parliament, which was adopted in December 2005.<sup>226</sup> The Bill was assented to by the President on 10 March 2006 where after the National Credit Act<sup>227</sup> was promulgated and put into operation on different dates.<sup>228</sup>

It has already been said that the predecessors to the National Credit Act were outdated and, to a large extent, ineffective. The same was true for the disclosure requirements in these pieces of legislation.<sup>229</sup> This matter therefore also had to be addressed by the government. Policy Framework (2004) is divided into different chapters dealing with various matters, such as helping consumers make informed choices. Some of the issues related to the disclosure of information that were identified were that credit providers used standard contracts, containing complex and compromising clauses.<sup>230</sup> In addition, some credit providers attempted to sign away the common law rights of consumers by making use of certain clauses in their credit agreements.<sup>231</sup> As part of the drive to rectify the problems experienced with the previous credit laws, it was *inter alia* foreseen that consumers should be protected more effectively against the use of standard contracts, in addition to measures that would ensure full disclosure of information to them.<sup>232</sup> Policy Framework (2004) envisaged, and this is important, that these aims could be achieved by the prohibition of certain clauses in credit agreements and by

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<sup>222</sup> See Renke LLD Thesis (2012) 533.

<sup>223</sup> Policy Framework (2004) 13.

<sup>224</sup> Policy Framework (2004) 8.

<sup>225</sup> Policy Framework (2004) 8.

<sup>226</sup> Renke LLD Thesis (2012) 406.

<sup>227</sup> Policy Framework (2004) 26.

<sup>228</sup> Renke LLD Thesis (2012) 406.

<sup>229</sup> Policy Framework (2004) 26.

<sup>230</sup> Policy Framework (2004) 26.

<sup>231</sup> Policy Framework (2004) 26.

<sup>232</sup> Policy Framework (2004) 27.

making the insertion of certain other clauses in a credit agreement compulsory.<sup>233</sup> According to the preamble to the National Credit Act, one of the aims of the Act is to improve the standards of consumer information. This also includes the information disclosed in the contract document itself.<sup>234</sup> And, one of the main purposes of the National Credit Act is to protect the consumer, *inter alia* by “addressing and correcting imbalances in negotiating power between consumers and credit providers by providing consumers with adequate disclosure of standardised information in order to make informed choices”.<sup>235</sup>

### 3.3.2 The compulsory content of credit agreements

Section 93 and regulations 30 and 31<sup>236</sup> are of importance in connection with the compulsory content of credit agreements that are subject to the National Credit Act.<sup>237</sup> Section 93 is entitled “Form of credit agreements”. The section deals more with the form or content of credit agreements than with formality prescriptions.<sup>238</sup> Section 93(2) determines that a document that records a small credit agreement<sup>239</sup> must be in the prescribed form. The form for small credit agreements is prescribed in regulation 30. Regulation 30(1) in turn requires that a document that sets out a small agreement, must contain all the information as reflected in Form 20.2. To summarise the prescriptions of Form 20.2, the information which has to be disclosed to the consumer concerns the personal details of the contracting parties, the financial details of the particular credit agreement and certain of the rights and duties of the parties in terms of the National Credit Act.<sup>240</sup> An example of such a consumer right is the right to cool-off or to rescind a credit agreement in terms of section 121.

As far as the compulsory content of intermediate<sup>241</sup> or large<sup>242</sup> credit agreements is concerned: section 93(3) read with regulation 31 is of importance. In terms of regulation

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<sup>233</sup> Policy Framework (2004) 27.

<sup>234</sup> This is the second stage of disclosure. Pre-agreement disclosure and disclosure after the contract has been entered into, respectively form the first and third stage of disclosure. See Renke LLD Thesis (2012) 537.

<sup>235</sup> S 3(e)(ii).

<sup>236</sup> Of the Regulations promulgated in terms of the Act. See GN R489, GG 28864 dated 31 May 2006.

<sup>237</sup> For a detailed discussion, see Renke LLD Thesis (2012) 552ff.

<sup>238</sup> Formality prescriptions in terms of the Act were dealt with in par 2.6.2 above.

<sup>239</sup> Small agreements are pawn transactions, credit facilities with a credit limit of R15 000 and below, credit transactions with a principal debt of R15 000 or below (except a mortgage) or a credit guarantee in respect to one of these agreements. S 9(2) read with Determination of thresholds in GN 713, GG 28893 dated 1 June 2006, the Threshold Regulations. See Renke LLD Thesis (2012) 396.

<sup>240</sup> Renke LLD Thesis (2012) 552. See also Kelly-Louw and Stoop (2012) 211.

<sup>241</sup> A credit agreement which is a credit facility with a credit limit above R15 000 or any credit transaction (except a pawn or mortgage transaction) with a principal debt above R15 000 and below R250 000 or a credit guarantee in respect to one of these agreements. S 9(3) read with the Threshold Regulations. See Renke LLD Thesis (2012) 396.

31(1)(a) the information that is disclosed in respect of intermediate and large credit agreements must be “comprehensive, clear, concise and in plain language”. Regulation 31(2) prescribes detailed and comprehensive information that must be disclosed in the contract document. Once again the parties’ personal information and the financial details of the credit contract must be disclosed. In addition, basically every right consumers have in terms of the Act has to be disclosed as well, with the result that intermediate and large agreements are “very lengthy and verbose”.<sup>243</sup> No specific sanctions are provided for in the Act in order to enforce the consumer’s rights in respect to the disclosure of information in the credit agreement.<sup>244</sup>

### 3.3.3 The prohibited content of credit agreements

Section 90, which has already been discussed above<sup>245</sup> in connection with legality, is of importance here.<sup>246</sup> Section 90(1) prohibits unlawful clauses in credit agreements that are subject to the National Credit Act. Section 90(2) lists more or less 30 contractual clauses that are prohibited and provides that the prohibited clauses are unlawful. A clause in terms whereof a consumer waives his protection in terms of the Act, serves as an example.<sup>247</sup> Another important example is section 90(2)(g)(ii), which provides as follows: “A provision of a credit agreement is unlawful if it purports to exempt the credit provider from liability, or limit such liability, for any guarantee or warranty that would, in the absence of such a provision, be implied in a credit agreement.” This means that a credit agreement falling under the Act may not contain any *incidentale* that would exclude a guarantee or warranty that would automatically have formed part of the contract through operation of law, as a *naturale*. An as is clause that excludes the warranty against latent defects is therefore prohibited in a credit agreement that is subject to the National Credit Act.

In contrast to the situation with regard to the compulsory content of credit agreements where no sanctions are prescribed for non-compliance: in terms of section 90(3), a provision in a credit agreement that is unlawful in terms of section 90(2) is void as from the date that the provision purported to take effect. Section 90(4) empowers a court dealing with a credit

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<sup>242</sup> A credit agreement is a large agreement if it is a mortgage agreement or any credit transaction (except a pawn transaction) with a principal debt of R250 000 or above or a credit guarantee in respect to one of these agreements. S 9(4) read with the Threshold Regulations. See Renke LLD Thesis (2012) 396.

<sup>243</sup> Otto and Otto (2016) 53 .

<sup>244</sup> Renke LLD Thesis (2012) 556.

<sup>245</sup> Par 2.5.2 above.

<sup>246</sup> For a detailed discussion, see Renke LLD Thesis (2012) 558ff.

<sup>247</sup> S 90(2)(b)(i).



agreement containing an unlawful provision to *inter alia* sever the unlawful provision from the credit agreement and to still give effect to the rest of the agreement.

### 3.4 Evaluation

As far as the common law principles of the law of contract are concerned, it was seen that the contents of a credit agreement that is subject to the National Credit Act, similarly to other types of contracts, is determined by means of real or presumed consensus or by means of consensus that is reached through operation of law.<sup>248</sup> However, the Act does have an influence on the exclusion of *naturalia* via *incidentalia*. A credit agreement that is subject to the Act may, for instance, not contain an as is clause.<sup>249</sup> The Act also have an effect on *incidentalia* in the sense that the parties are forced via section 93 read with the regulations to include a prescribed content into their credit agreement.<sup>250</sup> The aim is to protect the consumer in respect of the misuse of standard contracts by the credit provider.<sup>251</sup>

One instance where the National Credit Act does not have an influence on the common law principles, is in respect of the essential terms of the nominate contracts that fall under the Act, such as the contracts of sale and the lease. Although these contracts fall under the Act, their essential terms remain the same as for any other nominate contract in terms of the common law.<sup>252</sup>

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<sup>248</sup> Par 3.3.1 above.

<sup>249</sup> Par 3.3.3 above.

<sup>250</sup> Par 3.3.2 above.

<sup>251</sup> Par 3.3.1 above.

<sup>252</sup> Par 3.3.1.

## CHAPTER 4

### BREACH OF CONTRACT AND REMEDIES

#### 4.1 Introduction

The purpose of this chapter is to investigate the influence of the National Credit Act on the common law principles of breach of contract<sup>253</sup> and the remedies of the injured party in the event of breach of contract.<sup>254</sup> The focus will be placed on the credit provider as the injured party. Where applicable, the debt enforcement procedures in terms of the National Credit Act,<sup>255</sup> in other words the procedures to be followed by a credit provider to enable the latter to enforce his contractual remedies in court, will be referred to briefly. The early termination of credit agreements, which is in a sense related to the remedies for breach of contract, and more in particular to cancellation,<sup>256</sup> will also be discussed briefly.<sup>257</sup> However, the focus will fall on the consumer's right to terminate a credit agreement that is subject to the Act in advance.

#### 4.2 Breach of contract

##### 4.2.1 The common law

It is the intention of the parties to bring about a certain outcome when they enter into a contract.<sup>258</sup> However, breach of contract takes place when one of the parties fails to bring about a certain outcome in terms of the agreement as a result of his acts or omissions.<sup>259</sup> A breach of contract may take on one of the following five forms:<sup>260</sup>

(a) *Mora debitoris*.<sup>261</sup>

(b) *Mora creditoris*.<sup>262</sup>

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<sup>253</sup> Par 4.2 below.

<sup>254</sup> Par 4.3 below.

<sup>255</sup> Part C of Chapter 6.

<sup>256</sup> Because it brings the contract to an end.

<sup>257</sup> Par 4.4 below.

<sup>258</sup> Fouché (2007) 113. See also Havenga *ed* (2007) 119.

<sup>259</sup> Fouché (2007) 113. See also Havenga *ed* (2007) 119; Bhana (2009) 213; Nagel *ed* (2015) 127 and Van der Merwe *et al* (2007) 326.

<sup>260</sup> Nagel *ed* (2015) 127. See also Fouché (2007) 113; Havenga *ed* (2007) 119 and Van der Merwe *et al* (2007) 336. *Cf* Bhana (2009) 213 where mention is made of four different categories of breach.

<sup>261</sup> Also referred to as a default by the debtor. It means that the debtor does not perform at the agreed time and the delay is due to the debtor's fault. Fouché (2007) 113. See also Havenga *ed* (2007) 120 and Nagel *ed* (2015) 127-129. An example is where the debtor has to pay the purchase price for the car on/before 15 February 2016 and the debtor fails to pay in time.

(c) Repudiation.<sup>263</sup>

(d) Rendering performance impossible.<sup>264</sup>

(e) Positive malperformance.<sup>265</sup>

## 4.2.2 The influence of the National Credit Act

The forms of breach of contract in terms of the common law<sup>266</sup> also apply in the case of breach of contract of a credit agreement that is subject to the National Credit Act. The Act accordingly does not have an influence in this regard. It is interesting to note that in most cases breach of contract in the case of a credit agreement is committed by the consumer in the form of *mora debitoris*.<sup>267</sup> The consumer usually fails to pay his credit instalments. However, breach of contract can naturally be committed by the credit provider as well.<sup>268</sup>

## 4.3 The remedies for breach of contract

### 4.3.1 General

The injured party is entitled to certain remedies when breach of contract occurs. Due to the fact that a contract creates a legal obligation, the law, *ex lege*, entitles a party to certain remedies.<sup>269</sup> However, the parties may, by means of consensus, decide to include remedies in their agreement, the so-called agreed remedies.<sup>270</sup> The remedies an injured party is entitled to

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<sup>262</sup> Also referred to as a default by the creditor. This form of breach occurs where the creditor causes the debtor's performance to be delayed. Fouché (2007) 113. See also Havenga *ed* (2007) 122; Nagel *ed* (2015) 129-131; Bhana (2009) 215 and Van der Merwe *et al* (2007) 337. An example is where the creditor is not at home on 16 February 2016, the date upon which the debtor has to pay for the car, and the debtor therefore cannot deliver his performance in terms of the contract. *Mora creditoris* cancels *mora debitoris*. Nagel *ed* (2015) 131.

<sup>263</sup> Any behaviour by a party to a contract suggesting that he will dishonour the obligations in terms of the agreement, constitutes this form of breach of contract. Havenga *ed* (2007) 124. See also Fouché (2007) 116; Nagel *ed* (2015) 132-133; Bhana (2009) 226 and Van der Merwe *et al* (2007) 358. An example is where the one party to the contract phones the other party and informs the latter that he no longer has the intention to perform in terms of their agreement.

<sup>264</sup> This means that one of the parties to the contract has caused performance to become impossible. It is also called prevention of performance, which causes an absolute objective impossibility of the party's own performance – Nagel *ed* (2015) 133-134. An example is where a party, who has contractually agreed to deliver a car on 16 February 2016, totals the car in order to claim from his insurer.

<sup>265</sup> This form of breach of contract occurs when the debtor commits an act which is contrary to the terms of the contract, in other words the debtor does perform but his performance is for some or other reason not correct. Havenga *ed* (2007) 123. See also Fouché (2007) 117; Nagel *ed* (2015) 133; Bhana (2009) 235 and Van der Merwe *et al* (2007) 349. An example is where the debtor pays for the car on 16 February 2016, but he does not pay the full amount.

<sup>266</sup> Discussed in par 4.2.1 above.

<sup>267</sup> See Boraine and Renke (2007) *De Jure* 222.

<sup>268</sup> Van der Merwe *et al* (2007) 326. See also Havenga *ed* (2007) 119.

<sup>269</sup> Nagel *ed* (2015) 135. See also Fouché (2007) 113; Bhana (2009) 243 and Van der Merwe *et al* (2007) 381.

<sup>270</sup> Nagel *ed* (2015) 135.

in the event of breach of contract are claims for fulfilment of a contract, cancellation (or rescission) of the contract and damages.<sup>271</sup> Damages is usually a combination remedy which is applied with a claim for fulfilment of the contract or with cancellation. However, a claim for damages can constitute a separate remedy.<sup>272</sup> In what follows claims for fulfilment of the contract<sup>273</sup> in terms of the common law will be discussed first, followed by the agreed remedy and by the influence of the National Credit Act, if any. A similar approach will then be followed in respect of cancellation<sup>274</sup> and claims for damages.<sup>275</sup> The common law remedies will only be discussed to the extent that is necessary to enable a discussion of the influence of the National Credit Act.

### **4.3.2 Claims for fulfilment of the contract**

#### **4.3.2.1 The common law**

Two remedies aimed at the fulfilment of a contract are interdicts and claims for specific performance.<sup>276</sup> These remedies are aimed at forcing the other party to the contract by means of an order of court to fulfil his contractual obligations.<sup>277</sup> As far as interdicts are concerned, it will suffice to say that an interdict “is an order of court by which a party is restrained from performing the forbidden act,<sup>278</sup> or by which he is ordered to undo what he has done in contravention of his contractual obligations”.<sup>279</sup> Specific performance is a remedy directed at the realisation of the contract when it is claimed by the injured party with the intention of achieving the result expected at the conclusion of the contract.<sup>280</sup> Specific performance is the primary and natural remedy for breach of contract and is in principle available to the injured party.<sup>281</sup> The court will generally grant an order for specific performance except where there are exceptional circumstances which justify the refusal of such an order.<sup>282</sup>

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<sup>271</sup> Nagel *ed* (2015) 135.

<sup>272</sup> Nagel *ed* (2015) 135.

<sup>273</sup> Par 4.3.2 below.

<sup>274</sup> Par 4.3.3 below.

<sup>275</sup> Par 4.3.4 below.

<sup>276</sup> Nagel *ed* (2015) 136.

<sup>277</sup> Nagel *ed* (2015) 136.

<sup>278</sup> This is where a party to a contract realises that the other party to the contract intends to perform an act or performs an act in contravention of a contractual undertaking to refrain from performing that act.

<sup>279</sup> Nagel *ed* (2015) 136.

<sup>280</sup> Fouché (2007) 119. See also Havenga *ed* (2007) 127 and Nagel *ed* (2015) 137. For instance the party who commits breach of contract is compelled to pay an amount of money such as the purchase price or rental, to deliver performance or complete certain work.

<sup>281</sup> Van der Merwe *et al* (2007) 380.

<sup>282</sup> This will for instance be where it is difficult for the court to have control over the specific performance and over the compliance or non-compliance of the court order or where specific performance has become

#### 4.3.2.2 Agreed remedies

The consumer is normally permitted in terms of a number of agreements to make payments to the creditor by means of future payments.<sup>283</sup> However, in terms of the common law, the creditor is only entitled to claim payments of instalments that are already due and payable and he is therefore not allowed to claim the payment of future instalments as well.<sup>284</sup> In order to overcome this problem the creditor could insert an acceleration clause in the contract which provides that the creditor may immediately claim all future payments upon non-payment of any instalment due and payable by the consumer.<sup>285</sup> The creditor who has incorporated such a clause in the credit agreement has the choice whether or not to make use thereof.<sup>286</sup> The acceleration clause is thus a drastic remedy that can result in dire consequences for the party who is in breach of contract, the consumer or the purchaser.<sup>287</sup> In the words of Grové and Otto,<sup>288</sup> “[a]cceleration clauses are, without doubt, burdensome”.

#### 4.3.2.3 The influence of the National Credit Act

The credit provider must in terms of section 129(1)(a) of the National Credit Act notify the consumer in writing of his default if the consumer has defaulted in terms of the agreement and recommend that the consumer refer the credit agreement to a consumer court, alternative dispute resolution agent, ombud or a debt counsellor with the intention that the parties sort out the dispute in terms of the agreement or initiate a plan to assist the consumer to bring his outstanding payments under the agreement up to date.<sup>289</sup> The credit provider must send the section 129(1)(a) notice to the consumer before he will be allowed to institute legal proceedings to enforce the agreement and claim, for instance, payment of the instalments due and payable under the agreement.<sup>290</sup> The same applies to the enforcement of an acceleration

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impossible. It will also be the case where the court order for specific performance creates unnecessary suffering for the defaulting party or the public at large. For example, a local authority refuses to supply a farmer with more than a certain quantity of water during a severe drought will not be compelled to deliver more water to this farmer when to do so would cause unnecessary suffering to the people of that town. See Nagel *ed* (2015) 137. See also Fouché (2007) 120.

<sup>283</sup> Nagel *ed* (2015) 139.

<sup>284</sup> Nagel *ed* (2015) 139.

<sup>285</sup> Nagel *ed* (2015) 139.

<sup>286</sup> Nagel *ed* (2015) 139.

<sup>287</sup> For instance, if a consumer in terms of an instalment agreement which contains an acceleration clause purchases a car to the value of R2 million and fails to pay the first instalment, the R2 million becomes due and payable immediately.

<sup>288</sup> Grové and Otto (2002) 42.

<sup>289</sup> For a discussion, see Kelly-Louw and Stoop (2012) 408. See also Van Heerden in Scholtz *ed* (2008), ch 12 (par 12.3) and Otto and Otto (2016) 117.

<sup>290</sup> S 129(1)(a) read with s 129(1)(b) and s 130, in particular s 130(1). See *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009(2) SA 512 (D) where it was confirmed that compliance with the mentioned sections is a

clause in a credit agreement. Except for the aforementioned, the section 129(1)(a) notice which provides the consumer with an opportunity to rectify his breach of contract in order to avoid legal action, the National Credit Act provides no other protection in respect of acceleration clauses. This is in contrast with one of its predecessors, the Hire-Purchase Act 36 of 1942, which contained direct measures in order to curb the drastic effect of acceleration clauses in credit agreements. The Hire-Purchase Act, in section 12, laid down requirements that had to be met in order for an acceleration clause in a credit agreement to become operative.<sup>291</sup> As an example, a certain number and percentage of instalments had to be due and unpaid before such a clause could be put into operation.<sup>292</sup> And also, a demand for payment had to be made by means of a ten days written notice to warn the debtor that the acceleration clause could be put into operation if the breach of contract is not rectified.<sup>293</sup> The Credit Agreements Act, which repealed the Hire-Purchase Act, did not contain any of the mentioned protective measures. Grové and Otto<sup>294</sup> regarded the Credit Agreements Act's lack of statutory protection in respect of acceleration clauses to be "one of the most serious shortcomings of the Credit Agreements Act".

### 4.3.3 Cancellation

#### 4.3.3.1 The common law

The parties to a contract generally enter into an agreement in order to achieve the desired result in terms of the agreement.<sup>295</sup> However, cancellation as a remedy is aimed at the termination of the consequences of a contract entered into validly.<sup>296</sup> Therefore it is regarded as a remedy which is extraordinary and that should only be utilised in certain circumstances.<sup>297</sup> The injured party may only cancel the contract if the law entitles him to do so.<sup>298</sup> A party may cancel a contract in the following two instances if the contract does not have a cancellation clause:<sup>299</sup> (a) where time is of the essence<sup>300</sup> or (b) where the creditor

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prerequisite for debt enforcement. See also Kelly-Louw and Stoop (2012) 409; Van Heerden in Scholtz *ed* (2008) par 12.3 and Otto and Otto (2016) 117.

<sup>291</sup> See in general Grové and Otto (2002) 42.

<sup>292</sup> S 12(a).

<sup>293</sup> S 12(b).

<sup>294</sup> Grové and Otto (2002) 42.

<sup>295</sup> Bhana (2009) 259. See also Van der Merwe *et al* (2007) 399.

<sup>296</sup> Bhana (2009) 259. See also Van der Merwe *et al* (2007) 399.

<sup>297</sup> Bhana (2009) 259. See also Nagel *ed* (2015) 140; Havenga *ed* (2007) 130; Fouché (2007) 120 and Van der Merwe *et al* (2007) 399.

<sup>298</sup> Nagel *ed* (2015) 140. See also Havenga *ed* (2007) 130-131.

<sup>299</sup> For a complete discussion, see Nagel *ed* (2015) 140ff.

acquires the right to cancel.<sup>301</sup> The cancellation of a contract will be ineffective and the contract will still remain valid if the other party tries to cancel the contract without sufficient justification.<sup>302</sup> Further, the party who tries to cancel the contract without good grounds will be guilty of repudiation.<sup>303</sup> For this reason, it is significant for the party that wants to exercise this remedy to first find out whether he has the right to cancel the contract or not.<sup>304</sup>

The injured party has the option to cancel the contract or claim specific performance which is aimed at the fulfilment of the contract and must use this choice within a reasonable period after the breach of contract has been committed.<sup>305</sup> Once his choice has been made, he cannot change his mind.<sup>306</sup> He must inform the other party of his intention to cancel the contract, if he elects cancellation as an option.<sup>307</sup>

As has been mentioned above, the result of cancellation of a contract is that the obligations in terms of the contract are terminated and that the parties no longer have to perform in terms of their contract.<sup>308</sup> Restitution<sup>309</sup> of any performance already received, must be made by both parties.<sup>310</sup>

#### 4.3.3.2 Agreed remedies

A cancellation clause may be included by the parties in their contract that provides the circumstances in which either of them may cancel the contract.<sup>311</sup> For example, the parties may incorporate a clause known as the *lex commissoria* to provide that any party has the right

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<sup>300</sup> It means a date for performance was mentioned in the agreement and the other party delayed to deliver performance on that date. It is an additional requirement that time is of the essence in the contract. This will be true where in the circumstances of the particular case it is crucial for the performance to be delivered on time and where late performance will render the performance useless – Nagel *ed* (2015) 141.

<sup>301</sup> Where time is not of the essence, the creditor or debtor (in the case of *mora debitoris* or *mora creditoris*) may acquire a right of cancellation by delivering a notice of demand to the other party. Bhana (2009) 259. See also Van der Merwe *et al* (2007) 401 and Nagel *ed* (2015) 141-142. The common law also contains rules for cancellation in the event of the other forms of breach of contract. See Nagel *ed* (2015) 142-143.

<sup>302</sup> For example, the breach is not serious enough. Bhana (2009) 259.

<sup>303</sup> Bhana (2009) 259.

<sup>304</sup> Bhana (2009) 259.

<sup>305</sup> Fouché (2007) 120. See also Havenga *ed* (2007) 132 and Van der Merwe *et al* (2007) 399.

<sup>306</sup> Fouché (2007) 120.

<sup>307</sup> An election to cancel the contract may be exercised in so many words or by any form of conduct from which the decision to resile from the contract is evident. Fouché (2007) 120. See also Van der Merwe *et al* (2007) 401; Havenga *ed* (2007) 133 and Bhana (2009) 262.

<sup>308</sup> Fouché (2007) 121. See also Van der Merwe *et al* (2007) 405; Havenga *ed* (2007) 133 and Bhana (2009) 263.

<sup>309</sup> Whatever has been performed by the other party in terms of the agreement must be returned to him.

<sup>310</sup> Fouché (2007) 121. See also Van der Merwe *et al* (2007) 402-403; Havenga *ed* (2007) 133; Nagel *ed* (2015) 144 and Bhana (2009) 263.

<sup>311</sup> This clause is known as *lex commissoria*. Nagel *ed* (2015) 140. See also Van der Merwe *et al* (2007) 399 and Fouché (2007) 122.

to cancel the agreement even if a negligible breach occurs.<sup>312</sup> The injured party may under these circumstances resilie from the contract even if he would not have been permitted to do so in the absence of such clause.<sup>313</sup>

#### 4.3.3.3 The influence of the National Credit Act

One of the remedies frequently used by credit providers in the event of breach of contract by the consumer is cancellation of the credit agreement.<sup>314</sup> In order to side step compliance with the common law rules for cancellation, discussed in the previous sub-paragraph, it is common practice for credit providers to incorporate a cancellation clause or a *lex commissoria* in the credit agreement, which gives the credit provider the option or right to terminate the credit agreement in the case of the consumer's breach of contract.<sup>315</sup> The question is whether the National Credit Act protects consumers in respect of the cancellation of credit agreements, and, in particular, in respect of a *lex commissoria* in the agreement.

Section 123(1) provides that a credit provider may terminate a credit agreement before the time provided for in that agreement only in accordance with section 123. Section 123(2) stipulates that if a consumer is in default in terms of a credit agreement, the credit provider may take the steps contained in Part C of Chapter 6 to enforce and terminate that agreement. Part C of Chapter 6 is entitled "Debt enforcement by repossession or judgment". Reference has already been made<sup>316</sup> to the section 129(1)(a) National Credit Act notice, which is one of the required procedures in terms of the Act before debt enforcement may take place and which forms part of Part C of Chapter 6. The question arose whether the term "debt enforcement" includes the cancellation of the credit agreement and therefore whether a section 129(1)(a) notice is required before cancellation of the agreement may take place. The answer is yes. The term "enforce"<sup>317</sup> is a wide concept and means the enforcement of all the credit provider's remedies by means of legal proceedings.<sup>318</sup> Otto and Otto are of the opinion that the ordinary meaning of "enforce" refers to the enforcement of payment or of another obligation, but in the context of the National Credit Act it may well refer to the credit

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<sup>312</sup> Nagel *ed* (2015) 140-141. See also Havenga *ed* (2007) 131.

<sup>313</sup> Nagel *ed* (2015) 141.

<sup>314</sup> Kelly-Louw and Stoop (2012) 225. See also Otto and Otto (2016) 110.

<sup>315</sup> The consumer has for instance failed to pay his instalments in terms of the contract. Kelly-Louw and Stoop (2012) 225.

<sup>316</sup> Par 4.3.2.3 above.

<sup>317</sup> Renke, Roestoff and Haupt (2007) *Obiter* at 260 and 262. See also Boraine and Renke (2008) *De Jure* 1 at 2 and Otto (2009) *THRHR* 473.

<sup>318</sup> Van Heerden in Scholtz *ed* (2008), ch 12 (par 12.1). See also Kelly-Louw and Stoop (2012) 406 and Otto and Otto (2016) 118.



provider using his remedies, including the application of *lex commissoria*.<sup>319</sup> The implication of this is that, similar to the enforcement of acceleration clauses or any other remedy of the credit provider, the section 129(1)(a) notice affords protection to the consumer in the sense that the notice informs the consumer of his default and affords the consumer the opportunity to rectify the default before the cancellation of the credit agreement may take place.

However, in *Absa Bank Ltd v Havenga*<sup>320</sup> the court indicated that before a credit provider can cancel a credit agreement, there has to be a right which entitles the credit provider to do so.<sup>321</sup> It was argued in this case that where the agreement does not contain a cancellation clause, the allegations in the particulars of claim or founding affidavit that the credit provider had complied with the provisions of section 123 and 129 of the Act were sufficient to found an action for cancellation because those provisions afforded the credit provider a right to cancellation.<sup>322</sup> However, the court rejected this argument and held that the right to cancel an agreement stem from the common law rules of the law of contract<sup>323</sup> and that section 123 and 129 are procedural in their nature and prescribe the procedure that the credit provider must follow in those instances where he has the right to cancellation, irrespective of how the right was founded.<sup>324</sup>

An order cancelling an agreement is usually accompanied by an attachment order to repossess the goods. In this respect section 131 of the Act is of importance. It provides that “[i]f a court makes an attachment order with respect to property that is the subject of a credit agreement, section 127(2) to (9) apply with respect to any goods attached in terms of that order”. Section 127 concerns the consumer’s right to surrender the goods. Once the goods have been surrendered to the credit provider and sold to a third party, the prescribed realisation process in terms of section 127((2) to (9) has to be followed by the credit provider.

This process therefore also has to be followed in the case of attachment of the goods in terms of an attachment order. It boils down to the fact that if the goods are sold to a third party for more than the outstanding balance in terms of the credit agreement at the time of the

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<sup>319</sup> Otto and Otto (2016) 118 .

<sup>320</sup> 2010 (5) SA 533 (GNP).

<sup>321</sup> At 535 G-H. Van Heerden in Scholtz *ed* (2008), ch 12 (par 12.8.4). See also Kelly-Louw and Stoop (2012) 457-458.

<sup>322</sup> At 535 G-H. Van Heerden in Scholtz *ed* (2008), ch 12 (par 12.8.4). See also Kelly-Louw and Stoop (2012) 457-458.

<sup>323</sup> The right to cancel such an agreement must have vested in the credit provider either by way of the agreement or in terms of the common law.

<sup>324</sup> At 537 B-D. Van Heerden in Scholtz *ed* (2008), ch 12 (par 12.8.4). See also Kelly-Louw and Stoop (2012) 457-458.

surrender (attachment), the credit provider has to remit that amount to the consumer. However, if there is a shortfall, the consumer must pay the shortfall to the credit provider. What is of importance is that this protection is also afforded to a consumer in the case of cancellation of a credit agreement and the attachment of the goods.

In *Absa Bank Ltd v De Villiers*<sup>325</sup> the applicant argued that section 131 of the National Credit Act authorised the granting of a final attachment order of goods that were the subject of an instalment agreement. The applicant argued further that the legislature intended to change the common law by the inclusion of section 127(2) to (9), in order to get rid of the requirement that the instalment agreement has to be cancelled first before the financed goods can be repossessed in terms of that agreement. The court rejected this argument and pointed out that the cancellation of the credit agreement is still necessary in terms of the common law and that if the legislature intended to change the common law, it would have done so in clear and certain terms and not by means of assumption. Therefore the court held that the applicant was not entitled to a final attachment order in terms of section 131 of the Act because of the lack of a claim for cancellation of the instalment agreement.<sup>326</sup>

For the sake of completeness, where a consumer is in default under a so-called credit facility,<sup>327</sup> the credit provider may close that credit facility<sup>328</sup> by furnishing a written notice to the consumer of at least ten business days<sup>329</sup> before the credit facility will be closed.<sup>330</sup>

#### **4.3.4 Damages**

##### **4.3.4.1 The common law**

Damages can be defined as an amount of money which is paid by the party who committed breach of contract to the aggrieved party in order to make up for the latter's financial losses suffered because of the breach of contract.<sup>331</sup> However, the aggrieved party must first prove that he suffered financial loss before the other party must compensate him for his losses.<sup>332</sup>

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<sup>325</sup> (2008) JOL 22874 (C).

<sup>326</sup> Van Heerden in Scholtz *ed* (2008), ch 12 (par 12.8.4).

<sup>327</sup> Defined in s 8(3) of the Act. For a discussion of this credit agreement, see Otto in Scholtz *ed* (2008), ch 8 (par 8.2.2).

<sup>328</sup> Subject to s 123(4)-(6).

<sup>329</sup> As defined in s 2(5). Business days are working days.

<sup>330</sup> S 123(3)(b). See also Kelly-Louw and Stoop (2012) 227.

<sup>331</sup> Fouché (2007) 122. See also Van der Merwe *et al* (2007) 415; Havenga *ed* (2007) 134 and Bhana (2009) 271.

<sup>332</sup> Fouché (2007) 122. See also Van der Merwe *et al* (2007) 415; Havenga *ed* (2007) 134 and Bhana (2009) 271.

Rules of the common law influence the recoverability of damages. The same holds for the extent of the claim.<sup>333</sup> The plaintiff must for instance prove the extent of the damages and only patrimonial losses, in other words damages that affect the assets and liabilities of the injured party, can be claimed in terms of the common law.<sup>334</sup> This makes it difficult and sometimes even impossible to succeed with a claim for damages in terms of the common law.<sup>335</sup>

#### 4.3.4.2 Agreed remedies

In order to avoid the common law rules and problems in respect of claims for damages, the parties to an agreement often include a penalty clause, an agreed remedy, in their contracts.<sup>336</sup> The same holds for credit providers, who will usually include a penalty stipulation in their credit agreements. A penalty clause stipulates that the aggrieved party will pay a specific penalty which is normally a sum of money when breach of contract occurs.<sup>337</sup> The performance that has to be delivered as a penalty must be clearly described as well as the trigger that will cause the penalty clause to become effective.<sup>338</sup> The aggrieved party has to prove that the other party has breached the contract in order to become entitled to the penalty amount if a penalty clause has been included in the agreement.<sup>339</sup> It is not necessary for the aggrieved party to prove that he has suffered damages, nor does he have to prove the extent of the damages as required in terms of the common law.<sup>340</sup> One of the benefits of a penalty clause is that it may allow the injured party to claim more than his real damages.<sup>341</sup>

The Conventional Penalties Act 15 of 1962 regulates penalties and refers to a penalty clause as a clause in terms whereof it promises to make payment of a sum of money or to deliver or perform something when breach of contract occurs, either by way of a penalty or as liquidated damages.<sup>342</sup> A penalty clause can take on the form of a forfeiture clause.<sup>343</sup> A

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<sup>333</sup> See Nagel *ed* (2015) 145-148 in this regard.

<sup>334</sup> Nagel *ed* (2015) 145. See also Fouché (2007) 122; Van der Merwe *et al* (2007) 416 and Havenga *ed* (2007) 134.

<sup>335</sup> Nagel *ed* (2015) 145.

<sup>336</sup> Nagel *ed* (2015) 148. See also Bhana (2009) 294 and Fouché (2007) 123.

<sup>337</sup> Bhana (2009) 294 and Fouché (2007) 123. See also Nagel *ed* (2015) 148, where it is stated that a penalty may also entail that the party who has committed breach of contract, has to deliver something or has to make some or other performance or has to forfeit it.

<sup>338</sup> Nagel *ed* (2015) 148.

<sup>339</sup> Fouché (2007) 123. See also Nagel *ed* (2015) 144 and Bhana (2009) 295.

<sup>340</sup> Fouché (2007) 123. See also Nagel *ed* (2015) 144 and Bhana (2009) 295.

<sup>341</sup> Nagel *ed* (2015) 148. See below.

<sup>342</sup> S 1. See Fouché (2007) 123 and Bhana (2009) 295.

<sup>343</sup> S 4 of the Conventional Penalties Act refers to a forfeiture clause as a term in terms whereof the withdrawing party to an agreement will forfeit the right to claim restitution of any performance made by him in terms of the agreement, alternatively that he will remain liable for performance in terms of the contract. Bhana (2009) 295.

forfeiture clause in a credit agreement usually states that if the consumer defaults with his instalments in terms of the agreement, the goods are repossessed and the consumer forfeits all the monies he has already paid.<sup>344</sup> Damages can either be claimed in terms of a penalty clause or in terms of the common law, but not in terms of both.<sup>345</sup>

Section 3 of the Conventional Penalties Act provides important protection in respect of penalty stipulations. It provides that, if the court is of the view that the penalty is out of proportion to the prejudice suffered by the creditor, the court may reduce the penalty in its discretion.<sup>346</sup> The meaning of prejudice is wider than patrimonial loss or damage. Aspects such as harm to the creditor's reputation may therefore also be taken into consideration by the court.<sup>347</sup>

#### **4.3.4.3 The influence of the National Credit Act**

The National Credit Act prohibits a forfeiture clause in a credit agreement in two instances specifically provided for in the Act. A clause or a term in a credit agreement that is subject to the National Credit Act that expresses an agreement by the consumer to forfeit any money to the credit provider where the consumer makes use of his section 121 cooling-off right, is prohibited, unlawful and void.<sup>348</sup> Section 121(2) and (3) provides for restitution to take place where the consumer makes use of the statutory right to rescind the credit agreement or to cool-off.

The same prohibition applies to a provision in a credit agreement that expresses an agreement by the consumer to forfeit any money to the credit provider if the consumer fails to comply with a provision of the credit agreement before the consumer receives any goods or services in terms of the agreement.<sup>349</sup> Grové and Otto,<sup>350</sup> with reference to a similar provision in the Credit Agreements Act, remark that the provision applies where the consumer commits breach of contract before the credit provider has performed. However, if the credit provider has already performed, such a provision will constitute a penalty provision.<sup>351</sup>

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<sup>344</sup> Fouché (2007) 123.

<sup>345</sup> S 2(1) of the Conventional Penalties Act. A penalty clause may provide that the injured party would be entitled to waive the penalty right and rather claim damages in terms of the common law.

<sup>346</sup> See Fouché (2007) 123; Nagel *ed* (2015) 149 and Bhana (2009) 295.

<sup>347</sup> Nagel *ed* (2015) 149.

<sup>348</sup> S 90(1) read with s 90(2)(i)(i) and s 90(3).

<sup>349</sup> S 90(1) read with s 90(2)(i)(ii) and s 90(3).

<sup>350</sup> Grové and Otto (2002) 30.

<sup>351</sup> Grové and Otto (2002) 30.

As far as protection in the Act in respect of claims for damages in terms of the common law or in terms of a forfeiture or penalty clause is concerned: once again, in terms of section 129(1)(a) the consumer has to be warned that he is in breach of contract and that he has to rectify the breach in order to prevent debt enforcement in court.<sup>352</sup> If a credit agreement has not formally been cancelled by the credit provider yet, the reinstatement of the agreement in terms of section 129(3) could have an influence on a penalty clause in the credit agreement. In terms of section 129(3), the consumer may remedy the default in such credit agreement by paying all amounts that are overdue and legal costs to enforce the agreement up to the time the default was remedied.

## **4.4 The early termination of credit agreements**

### **4.4.1 General**

A credit agreement, like any other contract, may be terminated in various ways. Performance by both parties is the most common way of termination.<sup>353</sup> Unilateral termination by means of cancellation in the event of breach of contract is another way to terminate the agreement.<sup>354</sup> However, cancellation aside, the question is whether the parties to a credit agreement are allowed to terminate the agreement prematurely.

### **4.4.2 The common law**

As far as the early settlement of a credit agreement by a consumer is concerned, the common law principles are as follows: if the date for payment of the debt was postponed in the interest of the debtor, the latter is entitled to pay or settle the debt in advance.<sup>355</sup> However, if the date for payment was postponed in the interest of the credit provider, the debtor may only prepay or settle the debt with the creditor's consent.<sup>356</sup> According to Otto this is usually the case where a debt is interest-bearing, as in the case of a credit agreement.<sup>357</sup> The debtor then has to pay all the future interest if he wants to prepay the whole debt.<sup>358</sup>

### **4.4.3 The influence of the National Credit Act**

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<sup>352</sup> Also see pars 4.3.2.3 and 4.3.3.3 above.

<sup>353</sup> Otto in Scholtz *ed* (2008), ch 9 (par 9.5.1).

<sup>354</sup> See par 4.3.3 above.

<sup>355</sup> Otto in Scholtz *ed* (2008), ch 9 (par 9.5.3.1).

<sup>356</sup> Otto in Scholtz *ed* (2008), ch 9 (par 9.5.3.1).

<sup>357</sup> Otto in Scholtz *ed* (2008), ch 9 (par 9.5.3.1).

<sup>358</sup> Otto in Scholtz *ed* (2008), ch 9 (par 9.5.3.1).

The National Credit Act contains various rights allowing a consumer to terminate a credit agreement in advance. One such a right<sup>359</sup> is the right to settle the credit agreement in terms of section 125 of the Act. In terms of section 125(1) a consumer is entitled to settle the credit agreement at any time, with or without advance notice to the credit provider. All that a consumer has to pay to settle the credit agreement in advance is the unpaid balance of the principal debt at the time of the settlement and the unpaid interest charges and other fees and charges that are payable by the consumer up to the settlement date.<sup>360</sup> The credit provider's consent is therefore not required to settle and no early termination charges (or penalty for settling) are payable.<sup>361</sup> And, as has been stated above, interest is only payable up to date of settlement.

#### 4.5 Evaluation

In the previous paragraphs the forms of breach of contract in terms of the general principles of the law of contract were discussed. The same was done with the credit provider's remedies in terms of the common law or as agreed on in the credit contract in the event of breach of contract by the consumer. In addition, in each instance the influence of the National Credit Act was considered.

It was seen that the National Credit Act does not have an influence on the forms of breach of contract. However, the situation is different with respect to the credit provider's remedies. The Act affords overall protection to the consumer in respect to all the credit provider's remedies by means of the section 129(1)(a) notice which is a prerequisite for enforcing the credit provider's remedies in court.<sup>362</sup>

As far as claims for fulfilment of the credit agreement is concerned, and more in particular acceleration clauses, the Act, in contrast to one of its predecessors, the Hire-Purchase Act, does not contain any additional statutory protection.<sup>363</sup>

The National Credit Act does not interfere with the credit provider's right to cancel a credit agreement in the event of breach of contract. However, where the goods are repossessed after cancellation in terms of an attachment order, section 131 affords consumer protection in

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<sup>359</sup> The others are the cooling-off right referred to in par 4.3.4.3 above and the right to surrender the goods. See par 4.3.3.3 above.

<sup>360</sup> S 125(2)(a) and (b).

<sup>361</sup> In terms of s 125(2)(c) early termination charges may be payable in the case of a large credit agreement if no advance notification of the intention to settle on a future date was given to the credit provider.

<sup>362</sup> Pars 4.3.2.3, 4.3.3.3 and 4.3.4.3 above.

<sup>363</sup> Par 4.3.2.3. above.

respect of the proceeds of the goods after the goods have been sold by the credit provider. At the end of the day the credit provider is only entitled to the outstanding amount in terms of the credit agreement.<sup>364</sup> Where the consumer is in default in terms of a credit facility, the credit provider is empowered to close the credit facility.<sup>365</sup>

Where a credit provider has inserted a penalty or forfeiture clause in his credit agreement, the Conventional Penalties Act affords protection.<sup>366</sup> There is a possibility that the consumer's right to reinstate a credit agreement in terms of section 129(3) of the National Credit Act could have an influence on the enforcement of a penalty clause in the agreement.<sup>367</sup> Notice should be taken of the prohibition on the two *ad hoc* forfeiture clauses in section 90(2).<sup>368</sup>

Finally, the National Credit Acts amends the common law principles in respect of the early termination of a credit agreement by means of settlement.

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<sup>364</sup> Par 4.3.3.3 above.

<sup>365</sup> Par 4.3.3.3 above.

<sup>366</sup> Par 4.3.4.2 above.

<sup>367</sup> Par 4.3.4.3 above.

<sup>368</sup> Par 4.3.4.3. above.

## CHAPTER 5

### FINAL CONCLUSIONS AND RECOMMENDATIONS

The aim of this dissertation was to investigate and evaluate the influence, if any, of the provisions of National Credit Act on the common law principles or the general principles of the law of contract in South Africa.<sup>369</sup> The related aim was to identify lacunae in this area, if any, in respect of the Act's protection as far as the credit consumer is concerned and to make recommendations to remedy such lacunae.<sup>370</sup> However, the aim was not to give a comprehensive exposition of the general principles of the South African law of contract, but only to provide sufficient detail to enable an investigation of the National Credit Act's impact. Only those instances where the Act does have an influence on the common law principles will be addressed below.

In respect to the five requirements influencing the formation of a valid and binding contract in terms of the South African law: consensus is the basis of every contract.<sup>371</sup> The same, of course, applies for consumer credit agreements. The National Credit Act amends the common law principles of consensus in respect of the so-called incidental agreement, where the agreement, in contrast with the general rule, does not come into being on acceptance of the offer to enter into the contract.<sup>372</sup> The legislature instead works with a deemed provision, section 5(2), and deems the incidental agreement to have come into existence 20 business days after the occurrence of a certain event.<sup>373</sup> It was seen that the reason for this 20 business days gestation period is unclear but that it probably has to do with the nature of the incidental credit agreement. It was never the intention of the parties to conclude an agreement in terms whereof credit is being granted and the agreement comes into existence incidentally.<sup>374</sup> In any event, the Act deviates in this respect from the common law and there is nothing more to say in this regard.

In respect to contractual capacity only those common law principles that could be influenced by the National Credit Act were discussed.<sup>375</sup> The general principles provide that a contract concluded with a mentally unfit person is null and void.<sup>376</sup> The legal position in respect of

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<sup>369</sup> Par 1.2.

<sup>370</sup> Par 1.2.

<sup>371</sup> Par 2.2.1.

<sup>372</sup> Par 2.2.2.

<sup>373</sup> Par 2.2.2.

<sup>374</sup> Par 2.2.2.

<sup>375</sup> Par 2.3.1.

<sup>376</sup> Par 2.3.1.



minors, persons with limited contractual capacity, as well as the emancipation of minors, were also addressed. A contract concluded with a minor without consent or assistance by his parent or guardian is voidable, but not void.<sup>377</sup> The reason is that such a contract is not binding on the minor. Section 89(2) of the National Credit Act<sup>378</sup> renders a credit agreement with an unemancipated minor consumer who was unassisted by a guardian unlawful. The same is true for a mentally unfit consumer who has been declared as such by an order of a competent court. In both instances the court must make a just and equitable order, including the compulsory order that the credit agreement is void as from the date when the agreement was concluded. When declared void, the common law consequences in respect of illegal contracts will apply, in other words the *ex turpi causa* and the *par delictum* rules.<sup>379</sup> A further requirement to constitute a valid and binding agreement in terms of the general principles is that the contract must not be against the law or illegal.<sup>380</sup> If a contract is illegal in terms of the common law, it is void and the maxims referred to above apply.<sup>381</sup> The National Credit Act therefore changes the common law principles as far as the consequences of a credit agreement entered into with an unemancipated minor person are concerned. The common law renders a contract with a mentally unfit person void as a result of lack of contractual capacity, not illegality. The Act provides that such a contract is unlawful or illegal and therefore changes<sup>382</sup> the status of these agreements. The Act intertwines the common law principles of contractual capacity and legality. The fact that credit agreements entered into with unemancipated minors who are unassisted by a guardian are unlawful and void in terms of the Act, is endorsed. It affords consumer protection in line with the objectives of the Act and gives certainty regarding the consequences. It should also act as a deterrent to credit providers not to enter into such contracts.

The general principles of our law<sup>383</sup> do not require compliance with formality prescriptions such as writing and signature in order for a valid contract to come into being. Where the parties do prescribe formalities the effect thereof depends on their intention. They may reach consensus that writing will serve as a requirement for the validity of the contract, in which instance no contract will exist until such a time as the contract has been reduced to writing.

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<sup>377</sup> Par 2.3.1.

<sup>378</sup> Par 2.3.2.

<sup>379</sup> Pars 2.5.1 and 2.5.2. In par 2.5.2 reference was made to the fact that unlawful provisions in a credit agreement that is subject to the Act could cause the entire agreement to be unlawful and void.

<sup>380</sup> This was discussed in par 2.5.

<sup>381</sup> Par 2.5.1.

<sup>382</sup> Pars 2.3, 2.5. and 2.7.

<sup>383</sup> Par 2.6.1.

The National Credit Act<sup>384</sup> does not specifically require writing or signature as validity requirements for credit agreements. However, writing and signature as formal requirements may be presumed. Non-compliance with formalities does not affect the validity of the credit agreement nor does it constitute an offence. The National Credit Act is therefore, in contrast with one of its predecessors, the Credit Agreements Act,<sup>385</sup> not clear on formality prescriptions or the consequences of non-compliance with formalities.<sup>386</sup> This is a pity if one has regard to the reasons for these prescriptions, *inter alia* to create certainty and to avoid disputes between the contracting parties. It is therefore suggested that the National Credit Act must be amended to specifically require writing and signature of a credit agreement that is subject to the Act.

The influence of the National Credit Act on the general principles of our law as far as the contents of the contract is concerned was discussed in chapter 3. Paragraph 3.1 provides an exposition of the types of consensus the parties can reach and the different contractual terms which can form part of the contents of a contract as a result thereof, namely *essentialia*, *incidentalia* and *naturalia*. The influence that legislation could have on the terms of agreements was also discussed. I elaborated on the concepts *essentialia*, *incidentalia* and *naturalia* and in particular on the common law principles in respect thereof<sup>387</sup> and thereafter the influence of the National Credit Act was considered.<sup>388</sup> The contents of a credit agreement which is subject to the Act, similarly to other contracts, is also determined by means of real consensus, presumed consensus or consensus through operation of law.<sup>389</sup> Importantly, the National Credit Act serves as an example of an enactment in terms whereof the legislature requires contracts to contain, or not to contain, a specific content.<sup>390</sup> The underlying policy considerations in this regard were addressed, *inter alia* to protect consumers more effectively against the use of standard contracts by credit providers. Another aim with the Act was to make the disclosure of information to consumers, and also disclosure in the agreement itself, more effective.<sup>391</sup>

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<sup>384</sup> Par 2.6.2.

<sup>385</sup> The Credit Agreements Act specifically required that a credit agreement which was subject to that Act, had to be reduced to writing and signed. Failure was an offence. In terms of the Alienation of Land Act a failure to reduce a contract for the sale of land to writing renders the contract void. – par 2.6.2.

<sup>386</sup> Pars 2.6.2 and 2.7.

<sup>387</sup> Pars 3.2.1, 3.2.2. and 3.2.3.

<sup>388</sup> Par 3.3.

<sup>389</sup> Par 3.3.1.

<sup>390</sup> Par 3.3.1.

<sup>391</sup> Par 3.3.1.

The measures in section 93 read with the regulations<sup>392</sup> that prescribe a compulsory content for credit agreements that are subject to the Act are to be welcomed. Effect is given to the policy consideration to improve the disclosure of information in the contract document itself. However, the regulations and in particular regulation 31, probably require too much information to be disclosed which could have a negative effect on effective disclosure. Consumers struggle to read contracts, let alone lengthy and verbose contracts. This is therefore an aspect that could be addressed by the legislature. The same holds true for the failure to prescribe sanctions for non-compliance with the provisions of section 93 and its regulations.<sup>393</sup>

The prohibited provisions in terms of the section 90 of the National Credit Act<sup>394</sup> are to be endorsed. For instance, the exclusion of an as is clause in a credit agreement that is subject to the Act affords important consumer protection and is therefore in line with the Act's objectives in section 3. The same is true for the other prohibitions in section 90 and effect is given to the aim of the legislature to prevent the misuse of standard contract clauses in credit agreements by credit providers.<sup>395</sup> The powers given to the courts in respect of an unlawful provision in a credit agreement<sup>396</sup> are submitted to be sufficient and are to be welcomed.

To conclude the part on the influence of the Act on the contents of credit agreements: the Act has an influence on the exclusion of *naturalia* by means of *incidentalia*. It also has an influence on *incidentalia*, in that the credit provider is forced to include certain terms in the credit agreement. However, the Act does not have an influence on the *essentialia* of particular credit agreements such as the sale agreements.<sup>397</sup> For that matter, the National Credit Act does not influence the common law pertaining to the contents of agreements.

Chapter 4 concerned the influence of the National Credit Act on breach of contract and on the remedies of the injured party (usually the credit provider in terms of a credit agreement) in terms of the common law or as agreed on in the credit contract in the event of such breach. The early termination of credit agreement, from a consumer's perspective, was also looked into.<sup>398</sup>

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<sup>392</sup> Par 3.3.2.

<sup>393</sup> See par 3.3.2.

<sup>394</sup> Par 3.3.3.

<sup>395</sup> Par 3.3.3.

<sup>396</sup> Par 3.3.3.

<sup>397</sup> Par 3.4

<sup>398</sup> Par 4.1.

The National Credit Act does not have an influence on the forms of breach of contract.<sup>399</sup> However, the situation is different as far as the credit provider's remedies are concerned.<sup>400</sup> The Act, first of all, affords overall protection to the consumer in respect to all the credit provider's remedies by means of the section 129(1)(a) notice. This notice is a prerequisite for enforcing the credit provider's remedies in court and gives an opportunity to the consumer to rectify his breach of contract within the time limit set out in the notice, in order to, for instance, avoid the cancellation of the credit agreement and the enforcement of a penalty clause.<sup>401</sup> The protection is procedural of nature. When focusing on particular remedies, acceleration clauses, aimed at the fulfilment of the agreement, are drastic remedies that can lead to dire consequences for the party who is in breach of contract, the consumer.<sup>402</sup> The National Credit Act, in addition to the section 129(1)(a) procedural protection, does not afford additional protection in connection with acceleration clauses.<sup>403</sup> This is in contrast with one of the Act's predecessors, the Hire-Purchase Act, which contained provisions specifically aimed at consumer protection in respect of acceleration clauses.<sup>404</sup> The Act that repealed the Hire-Purchase Act, the Credit Agreements Act, did not contain similar protection than its predecessor which caused Grové and Otto to remark that that failure by the Credit Agreements Act was one of the most serious shortcomings of the Credit Agreements Act.<sup>405</sup> It is submitted that the same can be said of the National Credit Act. One of the main aims of the Act is to protect the consumer and consumer deserve extra protection in respect of acceleration clauses, due its drastic effects.

It was seen that the National Credit Act does not interfere with the credit provider's right in terms of the common law or in terms of a *lex commissoria* to cancel a credit agreement in the event of breach of contract.<sup>406</sup> The only protection given to the consumer is that in terms of the section 129(1)(a) notice.<sup>407</sup> However, the protection afforded to the consumer in terms of section 131 in respect of the proceeds of the sale after the goods have been sold by the credit provider where the goods are repossessed after cancellation pursuant to an attachment order,

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<sup>399</sup> Par 4.2.1. See also par 4.5.

<sup>400</sup> See par 4.5.

<sup>401</sup> Pars 4.3.2.3, 4.3.3.3 and 4.3.4.3.

<sup>402</sup> Par 4.3.2.2. The one example that was mentioned was that a certain number and percentage of instalments had to be due and unpaid before the credit provider could put an acceleration clause into operation.

<sup>403</sup> Par 4.3.2.3.

<sup>404</sup> Par 4.3.2.3.

<sup>405</sup> Par 4.3.2.3.

<sup>406</sup> Par 4.3.3.3.

<sup>407</sup> Par 4.3.3.3.

is to be welcomed. At the end of the day the credit provider is only entitled to the outstanding amount in terms of the credit agreement.<sup>408</sup>

It was seen that the parties to a credit agreement (in practice the credit provider) usually includes a penalty clause, which may also take on the form of a forfeiture clause, in a credit agreement to sidestep the common law rules pertaining to claims for damages, which rules could have an influence on the recoverability of damages.<sup>409</sup> Once again, except for the section 129(1)(a) protection, the National Credit Act does not afford additional consumer protection in respect of common law claims for damages or in respect of penalty or forfeiture clauses in a credit agreement.<sup>410</sup> However, there is a possibility, which must be investigated further, that the consumer's right to reinstate a credit agreement in terms of section 129(3) could have an influence on penalty clauses.<sup>411</sup> The protection afforded by the Conventional Penalties Act<sup>412</sup> is of course also available to credit consumers in respect of their credit agreements and therefore to be welcomed.

As far as the consumer's rights to terminate a credit agreement prematurely are concerned,<sup>413</sup> these rights are to be welcomed as they protect the interests, and in particular the financial interests, of the consumer. The same is true for the National Credit Act's amendment of the common law in respect of the consumer's right to settle a credit agreement subject to the Act in advance.<sup>414</sup>

Finally, the prohibition on the two *ad hoc* forfeiture clauses in terms of section 90(2) should be mentioned again for completeness sake as the consumer is protected against the misuse of particular terms in standard term contracts.<sup>415</sup>

To conclude: as indicated in this dissertation, the National Credit Act does exert an influence on the general principles of the South African law of contract. However, there are instances where the Act can do better, in order to improve one of its main objectives, namely the protection of the South African credit consumer.

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<sup>408</sup> Par 4.3.3.3.

<sup>409</sup> Pars 4.3.4.1 and 4.3.4.2.

<sup>410</sup> Par 4.3.4.3.

<sup>411</sup> Par 4.3.4.3.

<sup>412</sup> Par 4.3.4.2.

<sup>413</sup> Par 4.4.3.

<sup>414</sup> Par 4.4.3.

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