

**The early termination of credit agreements in terms of the
National Credit Act 34 of 2005: An evaluation**

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SUMMARY

This dissertation discusses and investigates the early termination of credit agreements by consumer in terms of the National Credit Act 34 of 2005 (National Credit Act). The dissertation aims to critically analyse and interrogate the rights of consumers to terminate agreement before the time allowed for in the credit agreement.

My dissertation consists of four chapters. Chapter 1 is a general background and introduction to the dissertation and also provides the problem statement together with the research objectives. A short overview regarding the aspects which will be discussed in each subsequent chapter are also addressed in this chapter.

Chapter 2 discusses the overview of the general principles (common law) of early termination of credit agreements in South Africa.

Chapter 3 concerns the investigation of consumer's rights in terms of the National Credit Act to terminate the credit agreements early. The National Credit Act, drastically, gives the consumer a right to terminate the credit agreements and therefore it is necessary for purposes of this dissertation to fully dissect the circumstances under which the consumer can exercise the right to terminate the credit agreements early. This dissertation, to a certain extent, also seeks to demonstrate the changes or influence that the National Credit Act has brought on the common law principles regarding the termination of credit agreements.

Chapter 4 involves my comprehensive final conclusions and recommendations in relation to the heightened consumer protection by the National Credit Act as well as areas that requires further improvement to strengthen the consumer rights to terminate the credit agreements early.

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CHAPTER 1: GENERAL INTRODUCTION

1.1 Introduction

In this dissertation I seek to analyse the rights of consumers to terminate a credit agreement early or in advance, in other words prior to the date of termination thereof agreed on by the parties when they concluded the agreement. For instance, if the parties to a credit agreement reach consensus that the contract will come to an end in four years' time, the question arises as to whether or not the consumer is or should be empowered to terminate the agreement after a year (or two) or even after a day from the day of the conclusion thereof. In answering this question, a distinction will be drawn between consumer rights in the aforementioned regard in terms of the common law and the National Credit Act 34 of 2005.¹ The National Credit Act is the consumer credit enactment currently in force in South Africa, having the aim to regulate the South African credit industry. This piece of legislation, which became fully effective on 1 June 2007 and which repealed the Credit Agreements Act 75 of 1980² and the Usury Act 73 of 1968³, in section 3 lists consumer protection as one of its main purposes. Consequently, the National Credit Act ushered in new mechanisms of consumer protection,⁴ including rights to terminate a credit agreement in advance that did not exist in terms of its predecessors.

The National Credit Act confers various rights on a consumer to terminate a credit agreement in advance, namely the right to (a) rescind or cancel certain credit agreements,⁵ (b) settle the debt in terms of a credit agreement,⁶ (c) effect early

¹ Hereafter "the National Credit Act", "the NCA" or "the Act".

² Hereafter "the Credit Agreements Act". The Credit Agreements Act regulated the contractual aspects of the credit agreements that were subject to it, such as the content of the said contracts and the consumer's so-called "cooling-off" right. See Otto "Commentary" 1991 *Credit Law Service* (hereafter *Credit Law Service*) 1-5.

³ Hereafter "the Usury Act". This enactment had as its purpose the regulation of the financial aspects of credit agreements, such as interest rates and other credit costs. See *Credit Law Service* 1-5.

⁴ Otto and Otto *The National Credit Act Explained* (2016) 3.

⁵ S 121 read with reg 37 of the Regulations to the National Credit Act, GN R 489 in GG 28864 of 31 May 2006. Hereafter "the NCA Regulations".

⁶ S 125.

payments⁷ and (d) surrender the goods.⁸ These rights will be discussed in detail in chapter 3 below. It is important to realise that these early terminations rights, as is the case with any other rights (and obligations) in terms of the NCA, are only available to the consumer (or the credit provider, as the case may be) where the Act finds application in accordance with its own provisions.⁹ It further has to be realised that the concept “consumer”¹⁰ person referred to in the Act is by and large an individual or a small juristic¹¹ concluding small or intermediate credit agreements.¹² Where the National Credit Act is not applicable, the rules of the common law and the provisions of the contract will determine the parties’ legal position in respect to the early termination of a credit agreement. However, if the NCA finds application, the question arises as to whether or not the Act amends the common law general principles of contract in respect of a consumer’s rights to terminate credit agreements earlier than agreed upon

1.2 Research statement

The research statement of this dissertation is to investigate the consumer’s rights in terms of the National Credit Act to terminate the credit agreement subject to the Act in advance. The same holds for such rights under circumstances where the NCA does not apply to the credit agreement. The dissertation further seeks to compare the position under the National Credit Act in the aforementioned respect with that in terms of the common law general principles and, to a certain extent, the Credit Agreements Act and the Usury Act.

⁷ S 126 provides for this right.

⁸ In terms of s 127. This right, as will be discussed later, only applies in the case of certain credit agreements.

⁹ See in this respect ss 4-11 read with the definitions in s 1 of the Act. In terms of s 4(1) the NCA applies to every credit agreement concluded in SA or having an effect in SA provided that the parties to the credit agreement concluded the contract at arm’s length and that no exceptions to the Act’s field of application apply. For a detailed discussion of the scope of application of the National Credit Act, see Scholtz (ed) *Guide to the National Credit Act* (2008) chs 4 and 8.

¹⁰ See the definition of “consumer” in par 1.5 below.

¹¹ Scholtz (ed) pars 1.1 and 4.5. S 1 defines “juristic person” for purposes of the NCA to include partnerships, associations of other bodies of persons, corporate or unincorporated, and certain trusts, where the trust has three or more individual trustees or where the trustee of the trust itself is a juristic person (such as a company). The concept “juristic person” therefore has an extended meaning in terms of the Act and entails more than companies and close corporations.

¹² See s 9(2) and (3) read with the Determination of Threshold Regulations in terms of the NCA, GN 713 GG 28893 of 1 Jun 2006. Hereafter “the Threshold Regulations”.

1.3 Research objectives and overview of chapters

The pertinent research objectives below have been structured in accordance with the above-mentioned research statement in order to delineate and confine the scope of this dissertation. The research objectives are as follows:

- (a) Chapter 1 provides the introduction information to the dissertation and outlines the problem statement and the research objectives pertinent to the background information.
- (b) Chapter 2 consists of an overview of the common law general principles of the early termination of credit agreements. As part of this discussion, a distinction will be drawn between so-called pro-debtor and pro-creditor contracts.¹³
- (c) Chapter 3 concerns an investigation of the consumer's rights in terms of the National Credit Act to terminate a credit agreement which is subject to the Act in advance. Such rights will be compared and contrasted with each other, *inter alia* with reference to their scope of application. The dissertation also seeks to demonstrate the changes to or amendments of (if any) the common law principles by the National Credit Act regarding the early termination of agreements.
- (d) Chapter 4 comprises my final conclusions and recommendations (if any) made in relation to the research carried out in this dissertation, with particular reference to the research objectives.

1.4 Delineation and limitations

With reference to the research objectives¹⁴ of this dissertation it should be noted that the Credit Agreements Act and the Usury Act will only be referred to in passing and

¹³ See pars 2.2, 2.3 and 2.4.3 below.

¹⁴ See par 1.3 above.

will not be discussed in detail. In addition, due to the wide scope of the principles of the law of contract and in order to confine this dissertation to the research objectives, the discussion is for the most part focused on the common law principles in respect to the early termination of agreements, the cancellation of a contract by the consumer/debtor and the early settlement of his debt by the consumer (advanced payment of debt). The common law requirements for a valid contract (consensus, contractual capacity, certainty, possibility, legality and formalities) will not be discussed unless the context necessitates such a discussion.

1.5 Definitions, terms and key references

In this dissertation words and terms are defined in accordance with the definition ascribed to them by the National Credit Act unless specified otherwise. The concepts “consumer”, “credit provider” and “credit agreement” are defined in section 1 of the National Credit Act as follows:

“consumer”, in respect of a credit agreement to which this Act applies, means-

- (a) the party to whom goods or services are sold under a discount transaction; incidental credit agreement or instalment agreement;
- (b) the party to whom money is paid, or credit granted, under a pawn transaction;
- (c) the party to whom credit is granted under a credit facility;
- (d) the mortgagor under a mortgage agreement;
- (e) the borrower under a secured loan;
- (f) the lessee under a lease;
- (g) the guarantor under a credit guarantee; or
- (h) the party to whom or at whose direction money is advanced or credit granted under any other credit agreement.

“credit provider”, in respect of a credit agreement to which this Act applies, means-

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

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

In this dissertation the concepts “agreements and contracts”, “credit consumer/consumer and debtor” will be used interchangeably. The masculine form is used throughout this dissertation to refer to a natural person.

Finally, the law stated in this dissertation reflects the position as on 30 November 2017.

CHAPTER 2: THE EARLY TERMINATION OF CREDIT AGREEMENTS: THE COMMON LAW PRINCIPLES

2.1 Introduction

The aim of this chapter is to discuss the principles that are involved in terms of the common law when terminating an agreement (and therefore also credit agreements) in advance.¹⁵ With this purpose in mind, a distinction should first be drawn between so-called “pro-debtor” and “pro-creditor” agreements. As will be seen below, this distinction is important in relation to the common law principles of the advanced termination of contracts.

2.2 Pro-debtor agreements

Pro-debtor agreements are in the main those credit agreements that provide relief to the consumer or debtor. For instance, where a date for payment is postponed in favour of the debtor, the debtor is entitled to advance payment of a debt in terms of the common law without the creditor’s prior permission.¹⁶ Credit agreements may also contain a provision which provides the debtor with a cooling-off right and this statutory right, to a limited extent, is more favourable to the debtor.¹⁷ In addition, the pro-debtor agreements may contain a cancellation clause (*lex commissoria*) which provides the debtor with a right to cancel the contract in the event of breach by the creditor.¹⁸

2.3 Pro-creditor agreements

In contra-distinction to pro-debtor contracts, a pro-creditor agreement is a contract where a date for payment is postponed in favour of the creditor. Generally speaking, credit agreements are always pro-creditor because the credit provider stands to benefit more in interest and other costs for rendering the credit to the debtor. In other words, the longer the contract runs, the more the creditor stands to benefit from it in

¹⁵ The concept “in advance” has been explained in par 1.1 above.

¹⁶ Scholtz (ed) par 9.5.3.1.

¹⁷ Scholtz (ed) par 9.5.2.1.

¹⁸ Nagel (ed) *Commercial Law* (2006) par 9.74.

respect to his earnings from interest and other credit costs. Pro-creditor agreements contain clauses that protect the creditor's interests such as a forfeiture clause, cancellation clause, acceleration clause, penalty clause *etcetera*.¹⁹ These clauses are designed or framed in a manner that favours the creditor in the event of breach of the contract by the debtor or in the event of changes to market conditions.²⁰

Now coming to the important principles for purposes of my discussion, in a situation where the future date for payment of a debt (especially a debt that is interest-bearing) is set in favour of the creditor or in favour of both parties, the debtor may not prepay the debt without the creditor's consent.²¹ According to the general principles, the debtor may only prepay the whole debt if he also pays all the future interest charged by the creditor.²² More often than not, these agreements are meant to secure the interests of the creditor. Consequently, where the debtor has committed a breach of contract, the creditor will be entitled to cancel in terms of the provision to this effect (*lex commissoria*) contained in the contract.²³ Also, it is a permissible practice to include a variable interest rates clause (discretionary-rate clause) in a mortgage agreement, which in turn, allows the creditor provider to unilaterally change the interest rate as and when the interest rate changes (fluctuates) in the market.²⁴

2.4 The common law principles in respect to the early termination of agreements

2.4.1 Introduction

The credit agreement is a specific type of contract and for that reason it is regulated by the principles of contract. Therefore, credit agreements, like all other contracts, come into existence as a valid and binding contract when the parties reach consensus, have contractual capacity *etcetera*. Credit agreements may also be terminated in numerous ways and for diverse reasons. They may *inter alia* terminate because both parties to the contract have performed in accordance with the terms of their

¹⁹ Nagel (ed) pars 9.68-9.75.

²⁰ Kelly-Louw (assisted by Stoop) *Consumer Credit Regulation in South Africa* (2012) par 9.10.4, in connection with variable interest rates clauses.

²¹ Otto and Otto 78.

²² Scholtz (ed) par 9.5.3.1. Otto and Otto 78.

²³ Scholtz(ed) par 9.5.1. See Kelly-Louw par 8.5.1.

²⁴ Kelly-Louw 221 and 250.

agreement.²⁵ At common law, there are five forms of breach of contract, namely *mora debitoris*, *mora creditoris*, positive malperformance, repudiation and the prevention of performance.²⁶ The same forms of breach of contract naturally apply to credit agreements. Also, in the context of credit agreements, there are certain established general principles that govern various situations wherein the debtor can terminate the credit agreement early. These principles are discussed fully in the ensuing paragraphs.

2.4.2 Cancellation of contract by consumer/debtor

Broadly, under the common law, a party who has entered into a contract may not unilaterally terminate the contract without the consensus of the other party to the contract. Thus common law does not allow any party to a valid contract to unilaterally set aside a contract simply because he has changed his mind.²⁷ The party or debtor cancelling the contract needs a valid reason for resorting to such a harsh remedy, for instance, there must be a material breach of contract committed by the other party to warrant the termination of the contract.²⁸ The right or power to cancel or terminate a contract is considered to be an extra ordinary remedy.²⁹ Depending on certain circumstances, it is also implicit that the right to cancellation of a contract gives rise to a reciprocal duty to return whatever was received in terms of the contract.³⁰ Therefore, the debtor will be entitled to unilaterally terminate the credit agreement only when there is a material breach of the terms of the contract by the credit provider.³¹ Stated differently, unilateral termination could result in a credit agreement being terminated early by the debtor where it is proven that there is a fundamental breach of the terms of the credit agreement by the creditor.³²

²⁵ Kelly-Louw 195 and 222.

²⁶ Van Huysteen, Van Der Merwe and Maxwell *Contract Law in South Africa* (2010) 161-163.

²⁷ Otto and Otto 76. Scholtz (ed) par 9.5.2.1.

²⁸ Scholtz (ed) par 9.5.2.1. Van Huysteen, Van Der Merwe and Maxwell par 387 state that “a breach per se does not result in termination of the contract. The contract may be cancelled by a contractant only when the breach is serious enough, or as it is often put, when it is ‘fundamental’ or goes to the ‘root of the contract’ or in terms of a cancellation clause in the contract.”

²⁹ Van Huysteen, Van Der Merwe and Maxwell 179.

³⁰ *Ibid.*

³¹ Otto and Otto 76.

³² *Ibid.*

2.4.3 Early settlement by the consumer (advanced payment of debt)

In terms of the common law, prepayment of amounts or the early settlement of a credit agreement is not possible without the creditor's consent. The common law principles apply to different scenarios where the debtor can prepay the debt early and consequently terminate the credit agreement.

Firstly, under the rules of the common law, a debtor is allowed to prepay his debt in advance when the date of payment was deferred in his favour in terms of the provisions of the credit agreement.³³ In this regard, a debtor can only prepay his debt where the future date has been fixed for his benefit alone.³⁴ Therefore, the credit agreement will terminate upon the date on which the debtor has elected to prepay the debt.

Secondly, the common law principles also govern the situation where the future date for payment of a debt (especially a debt that is interest-bearing) is set in favour of the creditor or in favour of both the parties. Under these circumstances, the debtor cannot prepay the debt without the creditor's consent.³⁵ According to the general principles, the debtor can only prepay the whole debt if he also pays all the future interest.³⁶ In addition, the debtor has no latitude to negotiate for the decrease of the interest in terms of the credit agreement and, to a certain extent, the parties can even agree that the debtor is unable to repay the debt in advance.³⁷ Once the credit provider consents to the prepayment by the debtor, then the credit agreement will only terminate upon the payment of the debt including all interest attributable to the debt.³⁸

³³ Otto and Otto 78.

³⁴ See *Credit Law Service* 9-4. See also Otto "Vervroegde betaling van 'n kontraktuele skuld" 2006 *THRHR* 175, wherein it is submitted that in general, the parties to the credit agreement may agree that the debtor may not perform in advance and by inference, the debtor has to wait for the date agreed upon in order to make the payment. However, where doubt exists as to the date of payment, it is accepted as a general rule in South African law and other European systems that the debtor may advance his performance. In other words, where the date for payment is unclear or there is no specific date for payment, the debtor is entitled to advance payment of the debt.

³⁵ Otto and Otto 78. See also Otto 2006 *THRHR* 175 where he points out typical examples of credit agreements where the creditor's permission would be required for the debtor to make advance payment. In this regard, loans and instalment sales are such examples where the creditor's consent is required in that the creditor has an interest in the credit agreement reaching its full maturity as it enables him, as the investor, to fully recoup the interest attributable to the full period of the debt.

³⁶ Scholtz (ed) par 9.5.3.1. See also *Credit Law Service* 9-4.

³⁷ See *Credit Law Service* 9-4.

³⁸ Otto and Otto 78.

2.5 Conclusion

With reference to the above-mentioned discussion of the common law principles in respect to the early termination of agreements, and more in particular credit agreements, it is clear that it is possible for a debtor (consumer) to terminate a credit agreement early in terms of the common law. However, in so far as the unilateral termination of an agreement is concerned, the debtor is, to a certain extent, confined to a material breach by the creditor in order to successfully terminate the agreement early. The debtor is required to advance a valid reason for the unilateral termination of the credit agreement. Thus mere breach of contract is not a sufficient reason for termination of the agreement.³⁹

Similarly, where the agreement is in the interest of the creditor or both parties to the agreement, the debtor requires the creditor's consent to prepay the debt in advance and thereby terminating the agreement. However, where the date of payment is unclear, the debtor is entitled to advance payment of the debt.⁴⁰

It has already been mentioned that the National Credit Act also makes provision for the early termination of credit agreements.⁴¹ In the next chapter the NCA's rights to terminate a credit agreement earlier than agreed upon will be investigated, including the question under which circumstances they do apply. The question will also be answered whether or not the National Credit Act alters the common law principles pertaining to the early termination of agreements as were set out in this chapter.

³⁹ Par 2.4.2.

⁴⁰ Pars 2.3 and 2.4.3.

⁴¹ Par 1.1.

CHAPTER 3: THE EARLY TERMINATION OF CREDIT AGREEMENTS IN TERMS OF THE NATIONAL CREDIT ACT

3.1 Introduction

This chapter involves the investigation of a credit consumer's rights in terms of the National Credit Act to terminate credit agreements which are subject to the Act in advance. In essence, the National Credit Act sets out various processes or opportunities in terms of which the consumer is allowed to terminate his credit agreement early and these processes are being found in sections 121, 122, 125, 126 and 127 of the National Credit Act. For completeness sake, a credit provider is also entitled to terminate a credit agreement in advance,⁴² but only under circumstances where the consumer in terms of the particular credit agreement is in default in terms thereof. In what follows, the consumer's right to rescind a credit agreement or his so-called cooling-off right will be discussed,⁴³ followed by the right to settle the agreement, the right to early payments and the crediting of payments as well as the right to surrender goods.

3.2 Section 121 - The consumer's right to rescind a credit agreement

Section 121 of the National Credit Act sets out the operation of the consumer's cooling-off right as follows:

- (1) This section applies only in respect of a lease or an instalment agreement entered into at any location other than the registered business premises of the credit provider.
- (2) A consumer may terminate a credit agreement within five business days after the date on which the agreement was signed by the consumer, by-
 - (a) delivering a notice in the prescribed manner to the credit provider; and
 - (b) tendering the return of any money or goods, or paying in full for any services, received by the consumer in respect of the agreement.
- (3) When a credit agreement is terminated in terms of this section, the credit provider-
 - (a) must refund any money the consumer has paid under the agreement within seven business days after the delivery of the notice to terminate; and

⁴² In terms of s 123 NCA.

⁴³ Par 3.2.

- (b) may require payment from the consumer for-
 - (i) the reasonable cost of having any goods returned to the credit provider and restored to saleable condition; and
 - (ii) a reasonable rent for the use of those goods for the time that the goods were in the consumer's possession, unless those goods are in their original packaging and it is apparent that they have remained unused.
- (4) A credit provider to whom property has been returned in terms of this section, and who has unsuccessfully attempted to resolve any dispute over depreciation of that property directly with the consumer and through alternative dispute resolution under Part A of Chapter 7, may apply to a court for an order in terms of subsection (5).
- (5) If, on an application in terms of subsection (4), a court concludes that the actual fair market value of the goods depreciated during the time that they were in the consumer's possession, a court may order the consumer to pay to the credit provider a further amount not greater than the difference between-
 - (a) the depreciation in actual fair market value, as determined by the court; and
 - (b) the amount that the credit provider is entitled to charge the consumer in terms of subsection (3)(b).

Section 121(1) of the National Credit Act accordingly provides that a consumer has the right to a cooling-off period. To cool-off or to rescind an agreement means that the consumer has the right to cancel the agreement without having to provide any reasons and of course without committing breach of contract.

The cooling-off right in terms of the National Credit Act can be exercised in respect of a lease⁴⁴ or an instalment agreement⁴⁵ only. Therefore, as far as the type of credit agreement is concerned, the ambit of the Act's cooling-off right is extremely narrow. It is interesting to note that in terms of both the agreements susceptible to rescinding by the consumer, the lease and the instalment agreement, the consumer becomes the owner of the goods, in the case of the lease absolutely⁴⁶ or upon compliance with a condition or conditions⁴⁷ and in the case of an instalment agreement upon the latter. Therefore, in terms of the definition of the lease in terms of section 1, if the consumer has to return the leased goods to the credit provider upon the expiration of the leasing

⁴⁴ S 1 of the National Credit Act defines a "lease" as an agreement in terms of which-

- (a) temporary possession of any movable property is delivered to or at the direction of the consumer, or the right to use any such property is granted to or at the direction of the consumer;
- (b) payment for the possession or use of that property is-
 - (i) made on an agreed or determined periodic basis during the life of the agreement; or
 - (ii) deferred in whole or in part for any period during the life of the agreement;
- (c) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred; and
- (d) at the end of the term of the agreement, ownership of that property either-
 - (i) passes to the consumer absolutely; or
 - (ii) passes to the consumer upon satisfaction of specific conditions set out in the agreement.

⁴⁵ S 1 of the National Credit Act defines an "instalment agreement" as a sale of movable property in terms of which-

- (a) all or part of the price is deferred and is to be paid by periodic payments;
- (b) possession and use of the property is transferred to the consumer;
- (c) ownership of the property either-
 - (i) passes to the consumer only when the agreement is fully complied with; or
 - (ii) passes to the consumer immediately subject to a right of the credit provider to re-possess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and
- (d) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred.

⁴⁶ Such as the lease of a cell-phone instrument.

⁴⁷ Eg, where goods are leased in terms of a residual value financial lease. Upon payment of the residual value at the expiration of the contract, the consumer becomes the owner of the leased goods.

term, the contract is not a lease for purposes of the Act. The condition that has to be fulfilled in the case of an instalment agreement is usually that the consumer has to pay the final instalment in order to become the owner of the goods bought. It is interesting to note that there are other contracts falling under the NCA in terms whereof the consumer becomes the owner of the goods, such as in the case of a credit facility as a contract of purchase and sale.⁴⁸ However, in this instance the consumer cannot rescind the contract.

The next requirement for the cooling-off right to apply concerns the place the lease or instalment agreement was entered into. In order for the right to be applicable, the particular contract must have been entered into at a place other than the registered business premises of the credit provider.⁴⁹ The first aspect of importance here is therefore that in order for the cooling-off right to apply, the particular credit contract must have been concluded away from the credit provider's registered place of business. The opposite is also true. Where the contract was entered into at the registered business premises, the right is not available to the consumer. The underlying reason is probably that in the latter case, the consumer has enough time to make up his mind whether or not to enter into the credit agreement and no unnecessary pressure is exerted on the consumer by the credit provider or his agent. However, in the former instance, for instance where the credit contract is entered into at the consumer's home or workplace, the exertion of pressure on the consumer by a door-to-door salesperson is a real possibility.⁵⁰ Take for instance the situation where an elderly person sits in her flat and, desperate for company, invites a door-to-door salesperson in, resulting in the former buying something she cannot afford nor use. The cooling-off right was primarily aimed at situations like this.

The concept "business premises" is not defined in the Act. Questions for instance arise as to the applicability or not of the cooling-off right where the credit agreement was entered into at a stall at a show. Whether or not the contract was entered into at the

⁴⁸ See s 8(3) for the definition and different types of credit facilities under the Act.

⁴⁹ S 121(1). See also Kelly-Louw 223; Otto and Otto 77 and *Standard Bank v Mbuyiseni Dlamini* 2013 (1) SA 219 (KZD) (hereinafter "*Dlamini*").

⁵⁰ S 75 of the NCA prohibits the advertising of credit or the entering into credit agreements at the consumer's private dwelling or workplace, probably also in an attempt to protect the consumer in respect to door-to-door sales. However, s 75 does not contain a sanction for the non-compliance therewith.

credit provider's business premises, is therefore a factual question that will have to be answered by a court or the National Consumer Tribunal⁵¹ having to determine whether or not the consumer is entitled to rescind from the credit agreement. However, it is submitted that any formal place of business of the credit provider in the form of a permanent or semi-permanent structure or premises could qualify as the credit provider's "registered place of business". The reason is that "premises" in terms of section 1 includes land, or any building, structure, vehicle, ship, container, etcetera. Further, any branch of a dealership for instance will probably also be registered as its place of business and will thus qualify as the "registered place of business". Be that as it may, the place of entering into a credit agreement is relevant as far as the cooling-off right is concerned and can be a factor excluding its availability.

Assuming that the cooling-off right can be exercised by the consumer, in other words a lease or an instalment agreement was entered into at another place than the credit provider's registered place of business, the consumer in terms of section 121(2) may withdraw or terminate the credit agreement within five business days⁵² of signing such a credit agreement.⁵³ A few remarks need to be made here. The first is that the legislature has imposed a serious time restriction on the period within which the cooling-off right has to be exercised in terms of the NCA. Five business days affords a very short time span. Secondly, if the consumer does not exercise the right to rescind in time, he forfeits the right to cool-off and will be bound to the credit agreement. This can have far reaching consequences for the consumer and/or his legal representative. Thirdly, the Act provides that the contract must be rescinded within five business days of signing the particular agreement. The problem with the requirement is that there is no definite requirement in the National Credit Act that a credit agreement has to be in writing and signed by the parties to the contract. However, where the agreement in question was not signed by the parties, it is submitted that the cooling-off right could

⁵¹ Established in terms of s 26. Hereafter "the Tribunal".

⁵² S 2(5) of the National Credit Act provides that when a particular number of business days is provided for between the happening of one event and another, the number of days must be calculated by- (a) excluding the day on which the first such event occurs; (b) including the day on or by which the second event is to occur; and (c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b) respectively. Business days are therefore working days and, when having to calculate a number of business days between the happening of two events, the LIFO principle applies. This means that the last day is in and the first day is out.

⁵³ Kelly-Louw 223; Scholtz (ed) par 9.5.2.2; Otto and Otto 77 and *Dlamini* par 36.

be exercised within five business of entering into the contract. The important moment is therefore the moment when consensus was reached.

Supposing the consumer can rescind his credit agreement, the question arises as to how the consumer should go about to effectively cool-off. In terms of section 121(2)(a) the consumer must deliver a notice in the prescribed manner to the credit provider informing the latter that the consumer rescinds the contract. A written notice to the credit provider is therefore required in terms of the NCA to rescind a credit agreement and cooling-off orally will not be effective. In the “prescribed manner” means in the manner stipulated in the NCA Regulations and regulation 37 is relevant in this instance. The latter first of all confirms that the notice of rescission must be in writing and determines further that the written notice to rescind must be delivered to the credit provider by hand, fax, e-mail or registered mail to an address specified in the credit agreement, alternatively to the credit provider's registered address. When considering the methods of delivery of the notice of rescission in terms of regulation 37, it becomes clear that, when using one of these methods, the consumer will be able to produce proof of delivery. These methods are therefore “safe” and that was probably the reason for prescribing them. Thus, in the absence of a written notice to the credit provider delivered in one of the prescribed manners, the credit agreement will not be considered to have been validly terminated by the consumer and as such the credit agreement will remain in force.

A consumer who wants to validly cancel the lease or instalment agreement by giving the written notice to the credit provider as prescribed, is further required to tender the return of any money or goods which has been received from the credit provider and must pay in full for services received in respect of the credit agreement.⁵⁴ The tendering of money or goods seems to be a prerequisite to terminate the credit agreement. This becomes clear from the wording of section 121(2)(b) that “[a] consumer may terminate a credit agreement... by tendering...”. Further, the legislature wanted to cover all bases with the wording of section 121(2)(b). The reason I say this is that when considering the types of credit agreements covered by section 121(1), the lease and instalment agreement, only the return of goods by the consumer would be

⁵⁴ S 121(2)(b) of the National Credit Act. Scholtz (ed) par 9.5.2.2.

involved when the consumer rescinds the agreement, and not the return of money or the payment for services. The cooling-off right at present is not applicable to money loans or contracts for the rendering of services.

Section 121(3)(a) provides that when a credit agreement is terminated, the credit provider must refund any money the consumer has paid under the agreement. This has to be effected within seven business days after delivering the notice of termination. When reading section 121(2)(b) with section 121(3)(a), it becomes clear that the exercising of the cooling-off right in terms of the Act results in an important consequence, namely reciprocal restitution. Neither party to the cancelled credit agreement is permitted to keep the goods or money.

Section 121(3)(b) provides that the credit provider may require payment from the consumer for (i) the reasonable cost of having the goods returned to the credit provider and to restore the goods into a saleable condition and (ii) reasonable rent for the use of the goods for the time they were in the consumer's possession.⁵⁵ Section 121(4) and (5) contains provisions to regulate the situation should there be a dispute between the credit provider and the consumer in respect to depreciation of the goods.

Now considering the application of the aforementioned principles in accordance with case law. It is important to note that, depending on certain factors, the requirement of a written notice under section 121(2) of the National Credit Act is not rigidly applied, and as such courts are allowed to apply common law tests when they are called upon to decide whether or not there was compliance with section 121 of the National Credit Act. In *Dlamini*, the defendant (hereafter referred to as "Mr Dlamini") bought a motor vehicle on credit from the applicant (Standard Bank, hereinafter referred to as "the Bank") for R85 745.02 on 3 June 2010. Starlight Auto Sales, a second hand car dealership, acted as the Bank's agents to facilitate the Bank's financing of the purchase of the vehicle. Four days later Mr Dlamini returned the vehicle to the dealership. Mr Dlamini informed the salesman at Starlight Auto Sales that the vehicle

⁵⁵ The exception is where the goods are still in their original packaging and were not used by the consumer.

malfunctioned and that he does not want it or any other vehicle from the dealership. Consequently, he demanded a refund of his deposit.⁵⁶

The Bank, in its claim against Mr Dlamini, relied on clause 10.6 in its credit agreement which provided that if the agreement was not entered into at the Bank's registered business premises, Mr Dlamini could within five days after signing the agreement, terminate the agreement on notice to the Bank's vehicle and asset division head office at a specified fax number and return or tender the return of the vehicle. The agreement also recorded that if Mr Dlamini terminates the agreement by giving notice through fax he will be obliged to pay the rental for the use of the vehicle for the time that he had it in his possession and any reasonable costs the Bank could incur to have the vehicle returned or restored to a saleable condition. However, the agreement did not record that Mr Dlamini was entitled to a refund in terms of section 121(3)(a) of the National Credit Act.⁵⁷

The Bank argued that since Mr Dlamini did not notify the bank of the termination in the manner prescribed by clause 10.6 of the agreement (or section 121 of the National Credit Act read with regulation 37), the termination constituted a voluntary surrender contemplated in section 127 of the National Credit Act.⁵⁸

In his defence, Mr Dlamini, argued that he was unaware that he had to notify the Bank of the termination of the agreement in the prescribed manner. Mr Dlamini denied that anybody explained the terms of the agreement to him. He further contended that if he had known that he had to telefax notice to the Bank at the number provided in the agreement informing the Bank that he terminated the agreement and tendered the vehicle he would have complied.⁵⁹

It was common cause that Mr Dlamini did not notify the Bank of the termination of the agreement by fax as prescribed in the agreement, therefore the only issue in dispute on the facts was whether or not Mr Dlamini knew and understood the terms of the

⁵⁶ *Dlamini* par 1.

⁵⁷ *Dlamini* par 3.

⁵⁸ *Dlamini* par 4. "Surrender of goods" is discussed in par 3.4 below.

⁵⁹ *Dlamini* par 7.

agreement.⁶⁰ In dealing with this question, the court considered the fact that Mr Dlamini was functionally illiterate and does not understand English. On the available facts, the court found that Mr Dlamini terminated the agreement by returning the vehicle because it was so defective that it could not be driven. A voluntary surrender is usually triggered by a consumer's inability to comply with the credit agreement. In this case, not a whiff of evidence suggested that Mr Dlamini was unable to pay for the vehicle or that he returned the vehicle for any reason other than it being incapable of being driven. Thus the Bank failed to establish a factual basis for any finding that the termination was a voluntary surrender. Therefore, Mr Dlamini's mere non-compliance with the procedural formality of faxing notice of termination does not lead to the inference that he terminated the agreement by means of the voluntary surrender of the vehicle.⁶¹ As Mr Dlamini was unaware of the prescribed notice requirements in terms of the credit agreement, there was no mutual consent as regards this important term in the agreement.⁶² The court ordered that Mr Dlamini cancelled the credit agreement with the Bank in terms of the provisions of section 121.⁶³

To re-iterate, when a credit agreement is validly terminated in terms of section 121(1), the credit provider has to refund any money or deposit which the consumer has paid under the credit agreement within seven business days after the delivery of the written notice to terminate such credit agreement.⁶⁴ Once the consumer has returned the goods to the credit provider, the credit provider may require payment from the consumer for the reasonable cost of having any goods returned to the credit provider and restored to a saleable condition as well as a reasonable rent for the use of the goods for the time that the goods were in the consumer's possession, unless the goods are still in their original packaging and it is clear that they have not been used.⁶⁵ Thus

⁶⁰ *Dlamini* par 8.

⁶¹ *Dlamini* par 25.

⁶² *Dlamini* par 64.

⁶³ *Dlamini* par 80.

⁶⁴ S 121(3)(a) of the National Credit Act. See Kelly-Louw 224 and Otto and Otto 77. In *Dlamini* par 41, it was pointed out that non-disclosure of section 121(3)(a) of the National Credit Act violates the right of consumers to education and information in terms of s 3 of the National Credit Act.

⁶⁵ S 121(3)(b). See Otto and Otto 77. In Scholtz (ed) par 9.5.2.2 it is submitted that "the basis on which the consumer will be charged the costs of restoration to saleable condition and the reasonable rent that the credit provider has to be paid for the use of the goods must be set out in the pre-agreement quotation in the case of intermediate or large agreements. In the case of small agreements the document that records the agreement must stipulate the rent payable by the consumer. The determination of the reasonable rent by the credit provider should be a relatively simple exercise. It would suffice, it is submitted, for the agreement to provide that the rent payable will be the same as that charged by a

the purpose of section 121(3)(a) and (b) of the National Credit Act is to balance the rights of the consumer and credit provider when a credit agreement is terminated in terms of section 121 of the National Credit Act.⁶⁶ Lastly, the credit provider may also claim compensation for the depreciation of goods that were returned by the consumer.⁶⁷ The goods must have depreciated during the time that they were in the consumer's possession. However, the amount payable for depreciation may not exceed the difference between the depreciation in actual fair market value as determined by the court and, on the other hand, the amount of the cost of restoration and the rent that the consumer has to pay.⁶⁸

To conclude the part on the consumer's right to rescind a lease or an instalment agreement in terms of the NCA, from the discussions above it immediately becomes apparent that the National Credit Act altered the general rule or principle in terms of the law of contract that a party may not unilaterally terminate a contractual agreement simply because he wishes to do so. There must be a valid reason for such a drastic step.⁶⁹ However, the alteration and protection that has been ushered by section 121 of the National Credit Act is applicable only to a limited extent as far as the type of contract, place of conclusion of the contract and time period within which the right to cool-off has to be exercised by the consumer are concerned.

An outstanding positive aspect of this consumer right is that reciprocal restitution takes place. Therefore, yes, the consumer forfeits the goods, but has the benefit that any money he has already paid to the credit provider must be returned to him. Other benefits of the cooling-off right is that the consumer who has for instance over-hastily bought or leased something on the spur of the moment can get rid of the contract without committing breach of contract, without having to proffer reasons for the cancellation and, at the same time, ridding himself of an interest-bearing credit debt.

specific third party. On the other hand, it is inconceivable how the credit provider can determine *beforehand* in the agreement the basis for the costs of restoring the goods to as saleable condition at a later stage".

⁶⁶ *Dlamini* par 37. Further, at par 39, it is stated by the court that the rescission of an agreement referred to in the heading of section 121 of the National Credit Act aims to restore the contracting parties to the status ante quo. In other words, the credit agreement between the contracting parties would be revoked or withdrawn.

⁶⁷ S 121(5)(a) and (b).

⁶⁸ S 121(5)(a) and (b) read with s 121(3)(b). See *Otto and Otto* 77.

⁶⁹ Par 2.4.2 above. *Otto and Otto* 76.

As a final remark, it is interesting to note that section 121 forms part of Chapter 5 Part F of the Act, entitled “Rescission and termination of credit agreements” and that the same holds for section 122 entitled “When consumer may terminate agreement”. However, as will be seen hereafter, the rights afforded to the consumer in terms of section 122 to terminate the agreement are being set out in a different chapter and parts of the Act.

3.3 Section 122 - When consumer may terminate agreement

Section 122 of the National Credit Act is a quick prelude to sections 125 and 127 of the National Credit Act in that it summarily and provisionally points out that a consumer may terminate a credit agreement firstly by paying the settlement amount to the credit provider at any time (in accordance with section 125) and secondly by surrendering the goods (in terms of section 127) if the credit agreement involved is an instalment agreement, secured loan⁷⁰ or a lease of movable property. In the latter event the consumer must pay to the credit provider any remaining amount demanded in terms of section 127(7). Thus, under section 122 of the National Credit Act the legislature has provided the consumer with two useful options (as alternatives to the cooling-off right) which he can consider in the event where he wants to terminate a credit agreement before the time agreed upon in the credit agreement for the expiration thereof. These options will be discussed next.

3.3.1 Section 125 - The consumer’s or guarantor’s right to settle the agreement

Section 125 of the Act sets out the next right the consumer has to terminate a credit agreement in advance, namely the right to settle the agreement. This right is contained in chapter 6 Part A entitled “Collection and repayment practices”. By means of an

⁷⁰ S 1 of the National Act defines "secured loan" as an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person-

- (a) advances money or grants credit to another, and
- (b) retains, or receives a pledge to any movable property or other thing of value as security for all amounts due under that agreement.

introduction, settlement means to settle or pay the total outstanding debt still owed to the credit provider. Say for instance that a consumer after year two of a four year credit contract still owes R500 000 to the credit provider, the consumer can terminate the particular credit agreement by paying the outstanding amount in terms thereof. In my example the consumer cuts the period the credit agreement would have lasted had it run its course in half. I will return to this later. Section 125 provides as follows:

- (1) A consumer or guarantor is entitled to settle the credit agreement at any time, with or without advance notice to the credit provider.
- (2) The amount required to settle a credit agreement is the total of the following amounts:
 - (a) The unpaid balance of the principal debt at that time;
 - (b) the unpaid interest charges and all other fees and charges payable by the consumer to the credit provider up to the settlement date; and
 - (c) in the case of a large agreement-
 - (i) at a fixed rate of interest, an early termination charge no more than a prescribed charge or, if no charge has been prescribed, a charge calculated in accordance with sub- paragraph (ii); or
 - (ii) other than at a fixed rate of interest, an early termination charge equal to no more than the interest that would have been payable under the agreement for a period equal to the difference between-
 - (aa) three months; and
 - (bb) the period of notice of settlement if any, given by the consumer.

The National Credit Act thus specifies that a consumer can at any time terminate a credit agreement by paying the settlement amount before the date specified in the credit agreement.⁷¹ The consumer is not required to give the credit provider an advanced notice to the effect that he intends to settle the credit agreement early.⁷² Thus the consumer has the freedom to settle the credit agreement early with or without notice to the credit provider so long as he pays the settling amount.⁷³ It is therefore

⁷¹ S 125(1). It should be noted that in terms of section 113(1) of the National Credit Act, the consumer or guarantor may request a statement of settlement, free of charge, from the credit provider of the amount required to settle a credit agreement, as calculated in accordance with section 125, as of a date specified in the request. Further, section 113(2) provides that the statement of settlement amount must be provided within five business days to the consumer and may be delivered orally, in person or by telephone. The statement may also be provided in writing, either to the consumer in person or by sms, mail, fax or email or other electronic form of communication, to the extent that the credit provider is equipped to offer such facilities, as directed by the consumer when making the request.

⁷² S 125(1).

⁷³ Kelly-Louw par 11.3.1. Otto and Otto 78.

the consumer's choice whether or not to give advance notice of settlement to the credit provider. The settlement amount that is required from the consumer to settle a credit agreement is the total amount that is attained by adding⁷⁴ the unpaid balance of the principal debt⁷⁵ at that time;⁷⁶ (b) the unpaid interest charges and all other fees and charges payable by the consumer to the credit provider up to the settlement date;⁷⁷ and (c) an early termination charge in the case of large agreement. I return to this below. To summarise the provisions of section 125(1) and (2) and the amount that has to be paid by a consumer in order to settle any other credit agreement than a large credit agreement: in the case of a small⁷⁸ or an intermediate⁷⁹ credit agreement and irrespective of whether or not any advance notice was supplied to the credit provider informing the latter of the consumer's intention to settle the credit agreement, the consumer will have to pay the outstanding balance of the principal debt owing at the time of settlement and the interest and other credit costs already due and payable to the credit provider up to the date of settlement. The consumer therefore only has to pay "arrear" interest and other costs and is exempted from paying any interest and other costs that would have been payable in future, had the contract ran its course. It is important to note that in the case of a small or an intermediate credit agreement and

⁷⁴ S 125(2). Otto and Otto 78-79 and Kelly-Louw par 11.3.1.

⁷⁵ S 1 defines "principal debt" as the amount calculated in accordance with section 101(1)(a). Simply put, the principal debt is the main debt payable in terms of a credit agreement. If a consumer therefore buys something on credit and the purchase price (excluding interest and other costs) is R10 000, the principal debt is R10 000. The same principle applies where the consumer borrows an amount of R10 000 in terms of a money lending agreement.

⁷⁶ The usage of the wording "at that time", is assumed to be referring to the outstanding principal debt at the date of termination or settlement of the credit agreement by the consumer. For example, where the consumer decides to pay the settlement amount before the date specified in the credit agreement without notice, the consumer, it appears, is entitled to immediately pay the outstanding principal debt as at the date of termination of the credit agreement. Where a consumer gives a month's notice that he wants to pay a settlement amount, then the consumer will be required to pay the principal debt which is outstanding on the last date of the notice. S 125(2)(a) of the National Credit Act.

⁷⁷ The settlement date is taken to be a reference to the date of termination of the credit agreement. S 125(2)(b).

⁷⁸ In terms of s 9(2) read with the Threshold Regulations a credit agreement is a "small agreement" if it is a pawn transaction or any other credit transaction (except a mortgage agreement) with a principal debt of R15 000 or less. The same holds for a credit facility with a credit limit of R15 000 or less and any credit guarantee concluded in connection with any one of the aforementioned agreements. The "pawn transaction" and "mortgage agreement" are defined in s 1, the "credit facility" in s 8(3) and the "credit guarantee" in s 8(5). S 8(4) contains the list of other credit transactions, all of them defined in s 1 (with the exception of the so-called "other agreement" which is defined in s 8(4)(f)).

⁷⁹ In terms of s 9(3) read with the Threshold Regulations a credit agreement is an "intermediate agreement" if it is a credit transaction (except a pawn transaction or a mortgage agreement) with a principal debt of between R15 000 and R250 000. The same holds for a credit facility with a credit limit of between R15 000 and R250 000 and any credit guarantee concluded in connection with any one of the aforementioned agreements.

irrespective of whether or not any advance notice was given to the credit provider, no penalties for settling are payable by the consumer.⁸⁰

The situation seems to be different in the case of a large agreement.⁸¹ In this instance the consumer also has to pay the outstanding balance of the principal debt owing at the time of settlement and the interest and other credit costs already due and payable to the credit provider up to the date of settlement. However, depending on the fact whether or not and when any advance notice of the intention to settle on a future date was given to the credit provider, the consumer could be required to pay a so-called “early termination charge” in addition to the aforementioned amounts in the event of a large agreement.⁸² As no early termination charges have been prescribed in respect of the NCA Regulations for large agreements at a fixed rate of interest, the principles I am now going to discuss in relation to early termination charges are the same in connection with all large agreements.⁸³ In terms of section 125(2)(c)(ii) in the case of a large credit agreement an early termination charge is payable by the consumer in order to settle the particular credit agreement which is equal to the interest that would have been payable under the credit agreement. Early termination charges are therefore nothing else than interest, meaning that where the contract provides for 14% interest per year, the early termination charges payable by the consumer, if any, will also be calculated at 14% per year. The question remains as to the period over which the payment of the early termination charges has to be calculated. In terms of the aforementioned sub-sub-sub section the period is equal to the difference between the settlement-notice period and three months. This means that the reference or departure point to calculate the period is always three months. From the latter should be

⁸⁰ Otto and Otto 79 and Kelly-Louw fn 35 at 280. Under s 125 of the National Credit Act there is no specific reference to a settlement charge being applicable to a small or an intermediate credit agreement.

⁸¹ In terms of s 9(4) read with the Threshold Regulations a credit agreement is a “large agreement” if it is a mortgage agreement or any other credit transaction (except a pawn transaction) with a principal debt of R250 000 or above. The same holds for any credit guarantee concluded in connection with any one of the aforementioned agreements. See also Otto and Otto fn 131 at 79 and Kelly-Louw fn 35 at 280.

⁸² S 125(2)(c).

⁸³ Whether at a fixed rate of interest or not. The distinction in s 125(2)(c)(i) and (ii) is therefore irrelevant at the moment – Otto and Otto 79. The NCA does not define what the concept “fixed rate of interest” entails. However, if the interest rate is fixed, eg at 18% per year, it should mean that the consumer will pay 18% interest per year throughout the duration of the agreement, irrespective what happens to eg the prime lending rate or any other reference rate. If the rate is not fixed, the consumer’s rate should go up or down, depending on what happens to the reference rate agreed upon in the credit agreement.

detracted any notice period, if any, by the consumer indicating the consumer's intention to settle the credit agreement at a chosen future date. Therefore, where the consumer has not given any prior notice of settlement to the credit provider, the consumer is obligated to pay early termination charges of interest calculated at the rate as per the credit agreement over a period of three months⁸⁴ in addition to the settlement amount to compensate the credit provider for early payment of the debt.⁸⁵ Accordingly, a credit provider is not allowed to levy an early settlement charge that is more than three months' interest against the consumer. In the case where the consumer has given a notice of settlement to the credit provider, the notice period will reduce the three months' early settlement charge by the same time period as the time period of the notice.⁸⁶ At the end of the day, and in spite of the provisions of section 125(2)(c) in respect to large agreements, it is my submission that irrespective of whether or not prior notice of settlement is provided by the consumer, the latter will pay the same amount of interest (including early termination charges). Where the consumer for instance provides three months' notice of the intention to settle and then settles on the elected date in his notice, he will still pay interest up to the date of settlement.⁸⁷ On the other hand, where the consumer gives no prior notice of the intention to settle and merely settles, he will still have to pay three months' early termination charges (interest).

In conclusion, settlement in terms of section 125 changes the common law principles. In terms of the latter early settlement of a credit agreement is not possible without the credit provider's consent.⁸⁸ Section 125 of the National Credit Act gives the consumer the right to settle the whole account without any prior consent and without having to pay any penalty for doing so.⁸⁹ Also, according to the general principles the consumer may prepay the whole debt only if he pays all the future interest.⁹⁰ In terms of section 125 of the National Credit Act the consumer only has to pay interest charges and all other fees up to the settlement date.

⁸⁴ Three minus zero.

⁸⁵ Otto and Otto 79. Scholtz (ed) par 9.5.3.2.

⁸⁶ Where two months prior notice of settlement is given, early termination charges will be calculated over a period of one month (three minus two) etc.

⁸⁷ S 125(2)(b).

⁸⁸ Pars 2.3 and 2.4.3 above.

⁸⁹ Otto and Otto 76.

⁹⁰ Par 2.4.3 above.

As far as restrictions on the right to settle are concerned, there are none. The right can be exercised by the consumer irrespective of the type of credit agreement involved, the place of conclusion or the duration of the credit agreement.

The right to settle holds advantages from the consumer's perspective. The latter is afforded an opportunity to terminate a credit agreement which is interest bearing in advance and can therefore save on interests and other costs, Early termination also has the benefit that the consumer, as soon as the outstanding balance of the principal debt and therefore the final instalment is paid, becomes the owner of the goods in terms of an instalment agreement immediately.⁹¹ Naturally no restitution takes place in instances of settlement.

3.3.2 Section 126 - Early payments and the crediting of payments

Section 126(1) and (2) which also falls under chapter 6 Part A entitled "Collection and repayment practices" provides for the consumer's right to effect early payments in terms of his credit agreement. Section 126(3) which concerns the crediting of payments by the credit provider, is not relevant for this dissertation. Sections 126(1) and (2) determines as follows:

- (1) At any time, without notice or penalty, a consumer may prepay any amount owed to a credit provider under a credit agreement.
- (2) A credit provider must accept any payment under a credit agreement when it is tendered, even if that is before the date on which the payment is due.

The National Credit Act accordingly empowers a consumer to pay any amount in advance which is outstanding under a credit agreement. This can be done at any time and the consumer is not required to give the credit provider notice that he intends to effect any prepayments. Further, the consumer cannot be penalised for the prepayment of any the amount owing under a credit agreement.⁹² The credit provider is required to accept any payment under a credit agreement when it is tendered, even if the payment or amount is not due.⁹³ In essence, the credit provider may not refuse

⁹¹ See par 3.2 above in respect to the "instalment agreement".

⁹² S 126(1).

⁹³ S 126(2). See also Kelly Louw par 11.3.2.

to accept an advance payment tendered by the consumer or impose a penalty against the consumer for paying a debt in advance, that is, before the due date.⁹⁴

Early payments should be distinguished from the right to settle a credit agreement as discussed above.⁹⁵ In the case of early payment the consumer does not settle the total outstanding amount in terms of the credit agreement, but only effect a payment or payments earlier than agreed on. For instance, where the consumer has to pay his credit instalments in terms of his credit agreement by the end of each month, the consumer is entitled in terms of section 126 to pay his instalments or an instalment on the twentieth or any other day of a month. If the consumer effects earlier payments, that will have an impact on the duration of the credit agreement. It will also result in the consumer saving interest and other costs. The reason is that any amount paid by a consumer in respect of his credit agreement has to be taken into consideration by the credit provider on the day of the payment.⁹⁶ That in turn means that the principal debt which is used as a basis amount for the calculation of interest⁹⁷ has to be reduced immediately, meaning that the consumer will pay less interest and other costs.

A question which is related to early payments concerns bigger payments than agreed on. In other words, is a consumer allowed to effect bigger instalments than agreed on in his credit agreement, because if that is the case, it will once again result in savings and the shortening of the duration of the credit agreement as a result of regulation 39(1)(b)? The National Credit Act contains no specific consumer right to pay bigger instalments. However, the payment of a bigger instalment amounts to the early payment of part of the instalment and is therefore permissible.⁹⁸

⁹⁴ S 126(2) of the National Credit Act. Otto and Otto 79.

⁹⁵ Par 3.3.1.

⁹⁶ Reg 39(1)(b). In terms of this sub-reg the deferred amount is reduced by any amount paid towards the settlement of the deferred amount, or an amount credited to the deferred amount, at the time that such payment is made, or credit falls due.

⁹⁷ In terms of reg 39(1)(b) "deferred amount" is defined as any amount payable in terms of a credit agreement, the payment of which is deferred and upon which interest is calculated, or any fee, charge or increased price is payable by reason of the deferment,

⁹⁸ See also Kelly Louw par 11.3.2. S 126(1) refers to "any amount" and therefore this demonstrates that the legislature did not confine the consumer only to the prepayment of the amount that is due under the credit agreement. In Scholtz (ed) par 9.5.3.3, it is stated that "the National Credit Act itself has no provision dealing with a reduction in interest should a consumer make bigger or earlier payments on his account. The regulations dealing with the calculation of interest should not be left out of consideration though. Interest is calculated by multiplying the deferred amount for the day by the interest rate, and dividing the result by the number of days in a year. The deferred amount is, according to the regulations under the Act, reduced every time an amount is credited to the account or an amount is

In terms of common law principles, prepayment of amounts in arrears under a credit agreement is not possible without the creditor's consent and the debtor has no latitude to negotiate for the decrease of the interest and to a certain extent, the parties could even agree that the debtor is unable to repay the debt in advance.⁹⁹ Section 126 of the National Credit Act has transfigured the common law principles in that the consumer may, at any time without notice or penalty, prepay any amount owed to a credit provider under a credit agreement. Section 126, as discussed above, can in an indirect manner result in the early termination of a credit agreement.

3.3.3 Section 127 - Surrender of goods

Section 127 entitled "Surrender of goods" is in its own part in the National Credit Act, Part B of chapter 6. However, section 127, similarly to sections 121 and 125 discussed above,¹⁰⁰ also affords the consumer the opportunity to terminate a credit agreement in advance. The wording of section 127 is quite lengthy and therefore it will be quoted where after I will make general remarks and explain the process in my own words. The time periods provided for in the various sub-sections of section 127 will not receive any further attention in what follows hereafter. Section 127 provides as follows:

- (1) A consumer under an instalment agreement, secured loan or lease-
 - (a) may give written notice to the credit provider to terminate the agreement; and
 - (b) if-
 - (i) the goods are in the credit provider's possession, require the credit provider to sell the goods; or
 - (ii) otherwise, return the goods that are the subject of that agreement to the credit provider's place of business during ordinary business hours within five business days after the date of the notice or within such other period or at such other time or place as may be agreed with the credit provider.
- (2) Within 10 business days after the later of-
 - (a) receiving a notice in terms of subsection (1)(b)(i); or
 - (b) receiving goods tendered in terms of subsection (1)(b)(ii),

paid towards settlement of the deferred amount. It is submitted that the interest payable ought to be reduced accordingly and proportionately every time the consumer makes an early payment or a payment greater than the required amount". See also Otto and Otto 79.

⁹⁹ Par 2.4.3 above.

¹⁰⁰ See pars 3.2 and 3.3.1 respectively.

a credit provider must give the consumer written notice setting out the estimated value of the goods and any other prescribed information.

- (3) Within 10 business days after receiving a notice under subsection (2), the consumer may unconditionally withdraw the notice to terminate the agreement in terms of subsection (1)(a), and resume possession of any goods that are in the credit provider's possession, unless the consumer is in default under the credit agreement.
- (4) If the consumer-
 - (a) responds to a notice as contemplated in subsection (3), the credit provider must return the goods to the consumer unless the consumer is in default under the credit agreement; or
 - (b) does not respond to a notice as contemplated in subsection (3), the credit provider must sell the goods as soon as practicable for the best price reasonably obtainable.
- (5) After selling any goods in terms of this section, a credit provider must-
 - (a) credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale less any expenses reasonably incurred by the credit provider in connection with the sale of the goods; and
 - (b) give the consumer a written notice stating the following:
 - (i) The settlement value of the agreement immediately before the sale;
 - (ii) the gross amount realised on the sale;
 - (iii) the net proceeds of the sale after deducting the credit provider's permitted default charges, if applicable, and reasonable costs allowed under paragraph (a); and
 - (iv) the amount credited or debited to the consumer's account.
- (6) If an amount is credited to the consumer's account and it exceeds the settlement value immediately before the sale, and-
 - (a) another credit provider has a registered credit agreement with the same consumer in respect of the same goods, the credit provider must remit that amount to the Tribunal, which may make an order for the distribution of the amount in a manner that is just and reasonable; or
 - (b) no other credit provider has a registered credit agreement with the same consumer in respect of the same goods, the credit provider must remit that amount to the consumer with the notice required by subsection (5)(b), and the agreement is terminated upon remittance of that amount.
- (7) If an amount is credited to the consumer's account and it is less than the settlement value immediately before the sale, or an amount is debited to the consumer's account, the credit provider may demand payment from the consumer of the remaining settlement value, when issuing the notice required by subsection (5)(b).
- (8) If a consumer-
 - (a) fails to pay an amount demanded in terms of subsection (7) within 10 business days after receiving a demand notice, the credit provider may commence proceedings in terms of the Magistrates' Courts Act for judgment enforcing the credit agreement; or

- (b) pays the amount demanded after receiving a demand notice at any time before judgment is obtained under paragraph (a), the agreement is terminated upon remittance of that amount.
- (9) In either event contemplated in subsection (8), interest is payable by the consumer at the rate applicable to the credit agreement on any outstanding amount demanded by the credit provider in terms of subsection (7) from the date of the demand until the date that the outstanding amount is paid.
- (10) A credit provider who acts in a manner contrary to this section is guilty of an offence.

I am going to start at the end. The legislature regarded compliance with section 127 by the credit provider as so important that non-compliance constitutes an offence.¹⁰¹ As a side remark, the National Credit Act does not contain a general offence constituting provision and there are only a few sections in the Act the non-compliance of which creates an offence.

Section 127, on the face of it, creates a unique procedure by which a consumer may unilaterally terminate certain prescribed credit agreements before the time agreed on in the credit agreement.¹⁰² In *ABSA vs De Villiers and Another Fourie J* expressly pointed out that "[s]ection 127 confers an extraordinary right on the consumer, whereby he can rid himself of an instalment agreement by unilaterally returning the goods that are the subject of the credit agreement to the credit provider".¹⁰³ In essence section 127 provides for a two-step process to put its provisions into operation and to effect the cancellation of the particular credit agreement, namely (a) a written notice to the credit provider to terminate the agreement and (b) the return or surrender of the goods forming the subject of the agreement¹⁰⁴ to the credit provider.¹⁰⁵ The exception is where the credit provider is already in possession of the goods, for whatever reason. In this instance the consumer must request the credit provider in the written notice to

¹⁰¹ S 127(10).

¹⁰² Kelly-Louw 282–284 and Scholtz (ed) par 9.5.4.

¹⁰³ 2009 (5) SA 40 (C) par 22 (hereinafter "*De Villiers*"). See also *SS Mapeka v Wesbank* Case No: NCT/29/2009/128(1)(P) (hereinafter "*Mapeka*") par 35 quoting *De Villiers*.

¹⁰⁴ Coetzee "Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005" 2010 (73) *THRHR* 572 submits that as "goods" are not defined in the National Credit Act nor the regulations, then goods should bear its ordinary meaning, being a referral to movable property. Coetzee further points out that section 127 only applies to instalment agreements, secured loans and leases, all of which concern only movable property.

¹⁰⁵ S 127(1)(a) and (b)(ii). The goods have to be returned to the credit provider's place of business (or another place agreed with the credit provider) during ordinary business hours. In *Mapeka* par 28 the Tribunal pointed out that from the reading of section 127, it is clear that it contemplates both a written notice of termination of the agreement and the return of the goods that are the subject of the agreement. The mere return of the goods to the credit provider is not sufficient to invoke the section 127 process to be followed by the credit provider – *Mapeka* par 36.

sell the goods.¹⁰⁶ The consumer therefore initiates the section 127 process. Another important aspect of section 127 is that certain consumers, those that are not yet in default under the credit agreement when they decide to surrender the goods, have the right to reconsider their decision and to withdraw the notice to terminate the credit agreement. At this point it is important to take note that the consumer may use his right to surrender the goods, regardless of whether he is in default or not.¹⁰⁷ A prescribed procedure must be followed by the credit provider after the receipt of the surrendered goods.¹⁰⁸

The point of departure is section 127(1)(a) of the National Credit Act providing that a consumer who has entered into an instalment agreement, secured loan or lease can terminate the credit agreement by providing the credit provider with a written notice. Two aspects are important here. The section 127 right to surrender has limited application as far as the type of credit agreement is concerned and it only applies in the case of an instalment agreement, lease or secured loan.¹⁰⁹ Further, for the credit agreement to be validly terminated, the consumer is required to submit a written notice to the credit provider.¹¹⁰ As a result, the assessment of whether there was a written notice of termination by the consumer is a factual inquiry into the written communications exchanged between the consumer and the credit provider.¹¹¹

In *Mapeka*, the applicant (consumer) entered into an instalment agreement with the respondent (credit provider) to purchase a motor vehicle. On 1 July 2008 the applicant returned the vehicle to the respondent's place of business. However, in a hand written letter addressed to the respondent the applicant specifically expressed

¹⁰⁶ S 127(1)(b)(i).

¹⁰⁷ A consumer who is in default will obviously surrender because he can no longer pay his credit instalments and wants to sidestep legal action being taken against him. A consumer who is not in default may surrender for various reasons, such as to buy a newer model on the market or to rid himself of a credit debt costing him money.

¹⁰⁸ *Edwards v FirstRand Bank Limited t/a Wesbank* (20734/14) [2016] ZASCA 144 (30 September 2016) par 37 (hereinafter "*Edwards*"). Coetzee 2010 (73) *THRHR* 572 states that "the voluntary surrender of property is initiated by the consumer giving notice to terminate the agreement and surrendering the goods to the credit provider where after the credit provider is obliged to follow meticulously the prescribe procedure contained in section 127". See also Scholtz (ed) par 9.5.4.3.

¹⁰⁹ All these agreements are defined in s 1. See pars 3.3.1 and 3.2 above.

¹¹⁰ *Mapeka* par 28. The Tribunal made it clear that section 127 entails a voluntary surrender process. In *Dlamini* par 25 the court indicated that voluntary surrender is usually triggered by the consumer's inability to comply with his credit agreement.

¹¹¹ *Mapeka* pars 30–31.

the wish to return the vehicle to the respondent for safe storage until such period when his employment issues have been resolved with his employer. The applicant also indicated in a hand written letter that he was prepared to proceed with the payment of his instalments once the employment matter was resolved.¹¹² The applicant's evidence during the hearing was that he never intended to terminate the agreement. The Tribunal found that the applicant's written notice given to the respondent when he returned or surrender the vehicle did not terminate the instalment agreement as contemplated in section 127(1)(a) of the National Credit Act.¹¹³ As indicated above, the written notice must be accompanied by the surrender of the goods or the request to the credit provider to sell the goods, in instances where the credit provider is already in possession of the goods.

The next important step is that in terms of section 127(2) the credit provider must notify the consumer in writing of the estimated value of the goods. The section 127(2) notice follows upon the termination, by written notice, of the relevant credit agreement by the consumer and the surrender of the goods to the credit provider.¹¹⁴ At this stage it must be remembered that a consumer who is in default or a consumer who is not in default may decide to surrender the goods in terms of his credit agreement. Upon receipt of the section 127(2) notice, the consumer who is not in default may unconditionally withdraw the notice to terminate the credit agreement and resume possession of the goods in the credit provider's possession.¹¹⁵ Such a consumer will then merely continue with his credit agreement.

The clear purpose of the credit provider's written notice in terms of section 127(2) is to place the consumer (who is not in default) in a position to consider whether or not to withdraw the termination notice and resume possession of the goods.¹¹⁶ In other words, section 127(2) of the National Credit Act affords the consumer a second chance as the consumer may unconditionally withdraw the notice to terminate the agreement and resume possession of the surrendered goods, as long as he is not in default under

¹¹² *Mapeka* pars 37–38.

¹¹³ *Mapeka* pars 41-42.

¹¹⁴ *Baliso v Firstrand Bank Limited t/a Wesbank* [2016] ZACC 23 par 25 (hereinafter "*Baliso*").

¹¹⁵ S 127(3).

¹¹⁶ *Edwards* pars 37 and 43 and *Baliso* par 25.

the credit agreement.¹¹⁷ The consumer who will probably withdraw the termination notice is the consumer who upon receipt of the section 127(2) notice providing an estimated value of the goods realises that there will probably be a shortfall when the goods are sold by the credit provider. The section 127(2) notice accordingly serves a very important function in this whole process. The consumer can only exercise the choice to withdraw the notice of termination in terms of section 127(3) after he has received the section 127(2) notice.¹¹⁸

In *Edwards* the court pointed out that “[f]ailure to comply with s 127(2) by the credit provider is detrimental even to the credit provider because the recovery of damages by way of the shortfall cannot be pursued. Therefore the importance of complying with s 127(2) is beneficial to both the consumer and the credit provider.”¹¹⁹ Consequently, once the latter consumer has surrendered, the section 127 process will run its course.

The section 127(3) right to unconditionally withdraw the notice of termination and to resume possession of the goods does not apply if the consumer is in default under the credit agreement.¹²⁰ Thus, a consumer who is in breach of the credit agreement is not

¹¹⁷ *Baliso* par 25.

¹¹⁸ *Baliso* par 50. Similarly, in *Baliso* par 29 it is stated that section 127(3), which gives the consumer the vitally important choice to unilaterally withdraw her earlier termination of the credit agreement, provides that this step may be taken “after receiving a notice under subsection (2)”.

¹¹⁹ *Edwards* par 11. In *Baliso* par 27 it is pointed out in the majority judgment by Froneman J that “[t]he section 127(2) notice setting out the estimated value of the goods thus provides the consumer with vital information about whether she is likely to benefit from the sale of the goods, or will still be liable for payment of some money to the credit provider after the sale. Without proper notice the consumer is deprived of the opportunity of making the choice of whether to withdraw the termination of the agreement. But it works to the detriment of the credit provider too. If no proper notice is given, the provisions allowing for the sale of the goods become inoperative and the credit provider’s claim for repayment of outstanding monies in the case of a shortfall on the settlement value of the goods will fail. If a sale follows upon an invalid notice, a credit provider risks losing its claim for repayment of outstanding monies. Put differently, an invalid notice to the consumer may provide a consumer with substantive, not only dilatory, grounds to resist repayment under those circumstances.” Similarly, in *Baliso* at par 54, it is stated in the minority judgment by Zondo J that “[i]t seems to me that, where a court concludes, after the credit provider has sold the goods, that there was no compliance with section 127(2), this is fatal to the credit provider’s action against the consumer. It is fatal because it means that the credit provider can no longer put right its failure to comply with section 127(2) since that compliance is required to precede the sale of the goods. It cannot be effected after the goods have been sold.”

¹²⁰ Coetzee 2010 (73) *THRHR* 574 submits that “the words ‘unless the consumer is in default’ in section 123(7) of the National Credit Act do not mean that such consumer was *never* in default. Section 127(3) could well be interpreted that if such a consumer was in default, the default was remedied in that the consumer brought payments up to date and has thereby cancelled the default. It is, however, clear that a consumer may not withdraw the consumer’s notice of termination whilst the consumer *is* in default”. I concur with Coetzee. The critical point is that, at the time of withdrawal of the written notice, the consumer must not be in default under the credit agreement.

entitled to the extraordinary right of continuing with the credit agreement despite his own earlier notice to terminate it.¹²¹

In terms of section 127(4) of the National Credit Act, the legislature has created mandatory obligations for compliance by the credit provider. Firstly, section 127(4) imposes an obligation on the credit provider to return the goods to a non-defaulting consumer who has opted to exercise the right of withdrawal of the termination notice as contemplated in section 127(3).¹²² Secondly, section 127(4) of the National Credit Act requires the credit provider to sell the goods at the best price reasonably obtainable if the consumer has not responded to the written notice in terms of section 127(3) of the National Credit Act.¹²³

The question arises as to the liability of the consumer where the credit provider is in the process of selling the goods returned but the credit provider is not finding the best reasonable price or the sale is not materialising as swiftly as possible.¹²⁴ It appears from *De Villiers* that the settlement value of the agreement for purposes of the realisation process is determined immediately before the date of the sale of the goods by the credit provider.¹²⁵ Thus the consumer will remain liable for the settlement value of the goods returned, however, the cut-off date for such liability is the day immediately before the sale of the goods by the credit provider. This question will implicitly be addressed below in the dissertation when dealing with sections 127(5)(a), 127(6)(b), 127(7) and 127(8)(b) of the National Credit Act.¹²⁶ However, in terms of section 128 of

¹²¹ Scholtz (ed) par 9.5.4.3.

¹²²S 127(4)(a). Coetzee 2010 (73) *THRHR* 571.

¹²³ S 127(4)(b). *Edwards* pars 37 and 43 and *Baliso* par 26.

¹²⁴ In *De Villiers* par 33 the judge reasoned that “[a]lthough section 127(4)(b) provides that the goods are to be sold as soon as practicable, such a sale may, especially in difficult financial times, take some time to eventuate. This would mean that the consumer, although having being dispossessed of the goods, will remain liable for payment of the instalments which have fallen due since the date of the repossession of the goods. Once again, it seems to me that the legislature, who, by means of this legislation, intended to promote and advance the social and economic welfare of South Africans, would not have intended the consumer to be prejudiced in this manner.”

¹²⁵ See par 33.

¹²⁶ In terms of section 127(5)(a) of the National Credit Act the credit provider is allowed to deduct any expenses reasonably incurred by the credit provider in connection with the sale of the goods returned by the consumer. Coetzee 2010 (73) *THRHR* 574 reasons that “the agreement is not terminated upon the provision of the consumer’s written notice of termination as sections 127(6)(b) and 127(8)(b) clearly provide that the agreement is only terminated upon remittance of a surplus amount to the consumer in the case where section 127(6)(b) is applicable, or when the consumer remits the shortfall to the credit provider in circumstances to which section 127(8)(b) applies”. It appears that the consumer will be liable for costs or amount outstanding under the credit agreement until the sale of goods is completed.

the National Credit Act, where it is found that the credit provider has not sold the goods as soon as reasonably practicable, or for the best price reasonably obtainable, the Tribunal may order the credit provider to credit and pay to the consumer an additional amount exceeding the net proceeds of sale.¹²⁷

To come back to the main process in terms of section 127, once the credit provider has sold¹²⁸ the goods to a third party and a proceeds has been obtained from the sale, a mere realisation process has to be followed. Section 127(5)(a) states that after selling the goods the credit provider must credit or debit the consumer's account with a payment or charge that is equivalent to the proceeds of the sale and deduct its expenses in connection with the sale of the goods.¹²⁹ It is envisaged, under section 127(5)(a) of the National Credit Act, that the credit provider is entitled or permitted to deduct any expenses reasonably incurred by the credit provider in connection with the sale of the goods returned by the consumer.¹³⁰

Thereafter, the credit provider must in terms of section 127(5)(b) furnish written notice to the consumer of the relevant details regarding the determination of the settlement figure.¹³¹ The written notice should contain the following:

- (a) the settlement value of the agreement immediately before the sale;
- (b) the gross amount realised on the sale;

However, where there is a surplus amount the consumer will be paid the remaining balance by the credit provider. Similarly, where there is shortfall the consumer is liable to pay for the shortfall amount to the credit provider.

¹²⁷ Otto and Otto 81 and Kelly-Louw 285.

¹²⁸ The goods cannot be said to have been sold in terms of section 127 of the National Credit Act if there was non-compliance with section 127(2) of the National Credit Act. See *Baliso* par 51.

¹²⁹ See also *Edwards* par 38 and *Baliso* par 26.

¹³⁰ Coetzee 2010 (73) *THRHR* fn 25 at 571, submits that the consumer's account will be debited where the proceeds of the sale could not entirely extinguish the costs of the sale.

¹³¹ *Edwards* par 38.

- (c) the net proceeds of the sale after deducting the credit provider's permitted default charges,¹³² if applicable, and reasonable costs allowed under section 127(5)(a)¹³³; and
- (d) the amount credited or debited to the consumer's account.

In a situation where a surplus remains after crediting the consumer's account and another credit provider has a registered credit agreement with the same consumer in respect of the same goods, the credit provider must remit the excess amount to the Tribunal, which may order for the distribution of the amount in a manner that is just and reasonable.¹³⁴ However, if no other credit provider has a registered credit agreement with the same consumer in relation to the same goods, the credit provider must remit the excess amount to the consumer when delivering the compulsory notice in terms of section 127(5)(b) and the agreement is terminated upon such remittance.¹³⁵

It should be noted that where a shortfall remains¹³⁶ after an amount was credited to the consumer's account or when an amount was debited to the consumer's account, the credit provider may further demand payment from the consumer of the remaining settlement value (outstanding balance), when issuing the compulsory notice detailing the sale information as prescribed by section 127(5)(b) of the National Credit Act.¹³⁷ In the event that the consumer fails to pay the outstanding settlement amount after receiving a demand notice,¹³⁸ the credit provider may commence with enforcement proceedings in terms of the Magistrates' Courts Act in order to obtain a judgment enforcing the credit agreement.¹³⁹ However, if the consumer pays the amount demanded after receiving a demand notice at any time before judgment is obtained in

¹³² Default charges are not defined in the National Credit Act. However, s 1 provides that "default administration charge" means a charge that may be imposed by a credit provider to cover administration costs incurred as a result of a consumer defaulting on an obligation under a credit agreement. An example being the cost of an arrears letter sent by the credit provider where the consumer was in default. Kelly-Louw fn 69 submits that it is assumed that "default charge" would refer to a similar charge that was incurred by the credit provider to cover the costs incurred by the credit provider where the consumer was in default.

¹³³ Discussed above.

¹³⁴ S 127(6)(a) of the National Credit Act. See also Coetzee 2010 (73) *THRHR* 571 and Kelly-Louw 284.

¹³⁵ S 127(6)(b). Coetzee 2010 (73) *THRHR* 571 and Kelly-Louw 284.

¹³⁶ That is where the amount is less than the settlement value immediately before the sale.

¹³⁷ S 127(7) of the National Credit Act read with section 127(5). Kelly-Louw 284 and Coetzee 2010 (73) *THRHR* 571.

¹³⁸ Coetzee 2010 (73) *THRHR* 572 argues that the demand notice is in fact the section 127(7) notice.

¹³⁹ S 127(8)(a). Kelly-Louw 284-285 and Coetzee 2010 (73) *THRHR* 572.

terms of section 127(8)(a) of the National Credit Act, the agreement is terminated upon settlement of that amount.¹⁴⁰ In either of the events contemplated in section 127(8) of the National Credit Act, interest is payable by the consumer at the rate applicable to the credit agreement on any outstanding amount demanded by the credit provider in terms of section 127(7) of the National Credit Act from the date of the demand until the date that the outstanding amount is paid.¹⁴¹

In *De Villiers Fourie J* summarised the prescribed procedure set-out under section 127(2) to (9) of the National Credit Act by stating that “when section 127(2) to (9) is read with the changes required by the context, it regulates the execution and realisation procedures to be followed by the credit provider after cancellation of the instalment agreement. The consumer is protected from disadvantageous practices during the realisation process, by the measures introduced by section 127(2) to (9), which provide for the orderly sale of the goods which are the subject of the instalment agreement.”¹⁴²

To conclude, although section 127 has a restricted application as far as the type of credit agreement involved is concerned, the consumer is afforded the opportunity to terminate his credit agreement in advance. This is irrespective of whether or not the consumer is in default and the credit provider’s consent is not required. Section 127 thus amends the common law principles discussed above.¹⁴³ Section 127 provides a procedure that is fair to both the parties to the credit agreement. The credit provider receives the principal debt in terms of the contract, part thereof by means of paid instalments (up to the date of surrender) and the other part by means of the proceeds of the sale (plus the shortfall paid by the consumer or minus the difference between the outstanding principal debt and the proceeds of the sale remitted to the consumer). The consumer can terminate his credit agreement in advance without having to pay

¹⁴⁰ S 127(8)(b) See Kelly-Louw 285 and Coetzee 2010 (73) *THRHR* 572.

¹⁴¹ S 127(9).

¹⁴² See par 31. It should also be noted that in terms of s 128 of the National Credit Act a consumer who is not satisfied with the sale of goods is not without a remedy. In terms of s 128(1) a consumer who has unsuccessfully attempted to resolve a disputed sale of goods in terms of s 127 directly with the credit provider, or through alternative dispute resolution under Part A of Ch 7, may apply to the Tribunal to review the sale. Lastly, if the Tribunal is not satisfied that the credit provider has sold the goods as soon as reasonably practicable, or for the best price reasonably obtainable, the Tribunal may order the credit provider to credit and pay to the consumer an additional amount exceeding the net proceeds of sale.

¹⁴³ Pars 2.3, 2.4.2 and 2.4.3.

the full contract price himself and can thus rid himself of an interest-bearing debt. If the consumer is in default, he can also sidestep legal action being taken against him. In the case of surrender in terms of section 127, no restitution occurs.

3.4 Conclusions

The National Credit Act affords a variety of early termination rights to the credit consumer subject to the Act and in all of these instances the credit provider's consent is not required. The Act therefore amends the common law principles discussed earlier in this dissertation. However, as was seen above,¹⁴⁴ the aforementioned rights differ as far as the restrictions on their scope of application, their advantages and their disadvantages are concerned. Accordingly, if a consumer wants to make use of the Act's rights to terminate a credit agreement in advance, he should be correctly advised, ensure that he opts for the correct right (if applicable to his situation) and adhere to the prescriptions of the NCA.

¹⁴⁴ Pars 3.2, 3.3, 3.3.1, 3.3.2 and 3.3.3.

CHAPTER 4: FINAL CONCLUSIONS AND RECOMMENDATIONS

The amendment of the common law in terms of the National Credit Act pertaining to a credit consumer's right to terminate a credit agreement early is to be welcomed. It must be remembered that one of the main aims of the NCA in terms of section 3 is to protect the consumer and I submit that this is achieved by the different consumer rights in terms of the Act discussed in this dissertation.¹⁴⁵ The latter is illustrated by the fact that the consumer, in contrast to the general principles of our law,¹⁴⁶ can terminate a credit agreement without having to obtain the credit provider's consent first. The same holds for the fact that the consumer may not be penalised for exercising his statutory early termination rights. A major advance of all these rights is that it affords South African credit consumers a statutory right to rid themselves of interest-bearing debts, which can of course be very expensive, depending on the type and size of the particular credit agreement. Other advantages were pointed to as well, such as becoming the owner of the goods immediately when settling the contract.¹⁴⁷ However, it has to be reiterated that the NCA statutory rights are only available to credit consumers in instances where the NCA, in terms of its own provisions, apply to the credit agreement in question. Where this is not the case, the consumer has no other option than to rely on the common law principles of early termination. And in those instances where the National Credit Act does apply, it will depend on the facts whether or not the consumer can achieve his goal in terms of the NCA's statutory termination rights. For instance, the only right discussed resulting in restitution, is the cooling-off right, which has a very restricted application.¹⁴⁸ Thus, if the latter right does not apply, restitution cannot be obtained for instance of money already paid by the consumer.

It is accepted that the drafters of the National Credit Act had good reasons for imposing limitations on the early termination rights.¹⁴⁹ However, I am of the opinion that the restrictions on the cooling-off right are too severe. It should be considered when future legislative amendments to the NCA are effected to for instance extend the cooling-off

¹⁴⁵ Pars 3.2, 3.3, 3.3.1, 3.3.2 and 3.3.3.

¹⁴⁶ Ch 2.

¹⁴⁷ Par 3.3.1.

¹⁴⁸ Par 3.2.

¹⁴⁹ The only exception is the right to settle, which has no limitations in respect to the type of credit agreement, the place of conclusion of the agreement or the time period within which the right has to be exercised. See par 3.3.1.

right to include more types of credit agreements and to extend the period the consumer has within which to exercise this right. This said, the approach by the courts, for instance in *Dlamini*,¹⁵⁰ to for instance look after the interests of an illiterate consumer, ensures that the provisions of the NCA, in spite of the limitations, are effectively applied.

Overall, the rights afforded to the consumer in terms of the National Credit Act to terminate a credit agreement in advance, and in particular the new right in the Act to surrender the goods, must be endorsed. But there is always room for improvement.

¹⁵⁰ Par 3.2.

BIBLIOGRAPHY

BOOKS

Nagel CJ (ed) *Commercial Law* 2006 3rd Edition, Durban: LexisNexis

Kelly-Louw M and Stoop PN *Consumer Credit Regulation in South Africa* 2012 Cape Town: Juta & Co. Ltd

Otto JM and Otto R-L *The National Credit Act Explained* 2016 4th Edition, Durban: Lexis Nexis

Otto JM *Credit Law Service* (1991), with updates (last update 2006) Durban: LexisNexis

Scholtz JW (ed) "Commentary" *Guide to the National Credit Act* (2008), with updates (last update 2016) Durban: LexisNexis

Van Huysteen LF, Van Der Merwe SWJ and Maxwell *Contract Law in South Africa* 2010 Kluwer Law International

JOURNALS

Coetzee H "Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005" 2010 *THRHR* 569

Otto JM "Vervroegde betaling van 'n kontraktuele skuld" 2006 *THRHR* 175

LEGISLATION

Credit Agreements Act 75 of 1980.

Usury Act 73 of 1968.

National Credit Act 34 of 2005.

CASE LAW

ABSA vs. De Villiers and Another 2009 (5) SA 40 (C)

Baliso v Firstrand Bank Limited t/a Wesbank 2016 ZACC 23

Edwards v FirstRand Bank Limited t/a Wesbank 2016 ZASCA 144

Standard Bank v Mbuyiseni Dlamini 2012 ZAKZDHC 64

SS Mapeka v Wesbank NCT/29/2009/128(1)(P)