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The influence of the National Credit Act 34 of 2005 on the general principles of the South African law of contract

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Preface

The need for legislation simply means that common law challenges still persisted within the society. When the legislator drafts a piece of legislation, the reasonable inference that can be draw is that common law does not offer sufficient protection to the public. This means that during the enactment of the National Credit Act 34 of 2005 consumers were still not fully protected by the then existing credit laws. The question that begs the answer is, did the Act alter the common law and, if so, to what extent.

This dissertation seeks to discuss the influence of the National Credit Act 34 of 2005 on the general principles of common law of contract. Focus will be on the common law requirements for a valid contract. To avoid any confusion, the words "general principles of the common law of contract" and "common law" will be used interchangeably, one referring to other.

Note should be taken that this dissertation discusses the law as it is available up to November 2011.

I say thank you to God (Almighty), my patient supervisor, Mr Stefan Renke and Mum for guidance and support in this dissertation. I would also like to thank University of Pretoria library assistants for their aid regarding sources.

List of abbreviations

CAA	Credit Agreements Act
Ch	Chapter(s)
NCA	National Credit Act
Par	Paragraph(s)
Reg	Regulation(s)
S	Section(s)
Ss	Subsection(s)

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Chapter one - Introduction

1 General introduction

The National Credit Act 34 of 2005[1] has enjoyed much publicity and much has been written about its content, the impact of the national credit act on specific company transactions and interaction with other areas of law.[2] Little has been written so far, about its impact on common law of contract. After this chapter the reader should be able to visualise the whole picture of this dissertation. This chapter will provide a brief background of South African credit laws, problem statement, object and structure of this dissertation.

1 1 Background information

When the Act came into full force and effect on 1 June 2007[3], it repealed, among others, the Credit Agreements Act[4] and the Usury Act[5], its predecessors.[6] The Act regulates legal concepts previously regulated by its predecessors.[7] Common law and former South African consumer credit legislations[8] protected the vulnerable parties in credit transactions.[9] For example common law affords warranty against latent defects and *in duplum* rule to prevent

1 Hereinafter "the Act".

2 Lombard and Renke "The Impact of the National Credit Act on Specific Company Transactions" 2009 21 *SA Merc LJ* 486–508. See also Renke, Roestoff and Bekink "New Legislative Measures in South Africa Aimed at Combating Over-Indebtedness – Are the new proposals sufficient under the Constitution and law in general?" 2006 *International Insolvency Review* 91.

3 *Nedbank v The National Credit Regulator* (662/2009) [2011] ZASCA 35 (28 March 2011) (unreported) par 1.

4 75 of 1980 (hereafter "the Credit Agreements Act").

5 73 of 1968 (hereafter "the Usury Act).

6 S 172 (1). See in this regard the remark in *ABSA Bank Ltd v Prochaska tla Bianca Cara Interiors* 2009 (2) SA 512 (0) at par 16. See also Scholtz**,** Otto**,** Van Zyl**,** Van Heerden and Campbell **(**hereafter Scholtz *et al*) *Guide to the National Credit Act* (2011 Update) par 2.2; Otto and Otto *The National Credit Act explained* (2010) 3; Joubert *et al LAWSA* Vol 5 Part 1 (2010) par 1.

7 Credit Agreements Act and Usury Act. See Scholtz *et al* par 18.9. 25; Renke, Roestoff and Bekink 2006 *International Insolvency Review* 91.

8 *Ibid.*

9 Scholtz *et al* par 1.1 and 2.1.

the interest to accrue more than the capital.[10] Common law protections can be excluded by the creditor in a through an exemption and *voetstoots* clauses. The weaknesses in consumer credit laws were the main reason that led to the introduction of the Act.

1 2 Problem statement and purpose of this dissertation

The Act contains provisions that govern the relationship between the credit provider and consumer, and credit agreements that are excluded from its application. Transactions that are excluded from the application of the Act will be governed by common law.[11] It is obvious that there was great expectation that the Act will have an impact of the common law principles of the law on contract.

The rule of interpretation is that a statutory provision should not be interpreted so as to alter the common law more than is necessary unless the intention to do so is clearly reflected in the enactment, whether expressly or by necessary implication. The objective of this dissertation is to discuss the provision of the Act which evidences a plain intention on the part of the legislature to alter the general principles of the common law of contract. This dissertation will also briefly discuss relevant case law by our courts.

1 3 Structure of the thesis

This dissertation consists of five chapters. Chapter one deals with the general introduction of this dissertation. Chapter two discuss the basic requirements for a valid contract in terms of the common law principles of the law of contract. Chapter three discusses the influence of the Act on the general principles of common law of contract as discussed in chapter two. Chapter four deals with case law study. Chapter five provides the conclusion of this dissertation.

10 Scholtz *et al* par 10.6.4.

11 Scholtz *et al* par 1.1 and 18.4.4.

Chapter two - Requirements for a valid contract in terms of the common law principles of law of contract

2 Introduction

This chapter discusses briefly the requirements for the formation of a valid contract in terms of common law principles of the law of contract, forms of breach of contract and remedies for breach of contract. The common law requirements for a valid contract are consensus, contractual capacity, legality, physically possibility, performance and formalities.[12]

2 1 Consensus

Consensus is an agreement between the parties concerning all the material terms of the contract. Consensus is achieved by offer and acceptance.[13] Consensus is reached by means of actual agreement, ostensible agreement and the operation of law.[14] Actual agreement is an actual meeting of minds of the contracting parties.[15] Ostensible agreement is reasonable belief by one of contracting parties that there was consensus.[16] An example of presumed consensus is in cases of tacit terms or ticket contracts.[17] Consensus reached through the operation of law occurs where legislation or common law requires the contract to contain certain stipulations.[18] Factors influencing consensus are error, fault, misrepresentation, duress or undue influence.[19] Consequently, if consensus is absent, there is no contract.[20]

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12 See Nagel *et al Commercial Law* (2006) chs 3 – 7; Otto and Otto *National Credit Act Explained* (2010) 43.

13 Nagel *et al* par 4.11 and 12.

14 See in this regard Nagel *et al* par 4.61 – 71; Van der Merwe *et al Contract* 117.

15 See Nagel *et al* par 4.61.

16 See Nagel *et al* par 4.64; Van der Merwe *et al* 23.

17 Nagel *et al* par 4.68.

18 *Ibid*.

19 See Christie and Bradfield *Christie's the Law of Contract in South Africa* (2011) 281, 313 and 327; Nagel *et al* pars 4.72- 4.103; Van Aswegen *et al Law of Contract* (2004) 49; Van der Merwe *et al* 19.

20 The contract will be void if the mistake is material. See Nagel *et al* par 4.72. See also Van der Merwe and Van Huyssteen "The Force of Agreements: Valid, Void, Voidable, Unenforceable?"1995 *THRHR* 549.

2 2 Contractual capacity

Contractual capacity is the competence to perform a juristic act.[21] The parties to a contract must be legally capable of performing a particular juristic act.[22] In terms of common law there is a rebuttable presumption that every contracting party has contractual capacity to enter into such contract.[23]

Persons with full contractual capacity to enter into a valid contract are juristic person and persons over the age of 18 years.[24] Persons with limited contractual capacity are, among others, minors between the age of 7 and 18 years, married persons, insolvent persons and prodigals.[25] Persons with no contractual capacity are, among others, minors under the age of seven, mentally unfit and intoxicated person.[26]

In this paragraph focus will on minors and mentally unfit persons. Minors attain age of majority by turning 18 years of age, conclusion of a valid marriage or through court order.[27] Minors under the age of 7 years must represented by their guardian or parents.[28] Minors over the age of 7 years must assisted by their guardian or parents.[29]

In terms of common law or legislation a minor is in certain exceptional circumstances allowed to conclude contracts without the assistance.[30] In terms of common law minor may enter into a contract where the minor obtains a right only and not obligations from the contract and where he/she has been emancipated.[31]

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21 Hutchison *et al* par 5.2.

22 Christie and Bradfield 235.

23 Christie and Bradfield 256.

24 Hutchison *et al* par 5.3.3; Nagel *et al* pars 5.44 and 5.45.

25 Hutchison *et al* par 5.3.2; Nagel *et al* pars 5.12 – 5.43.

26 Christie and Bradfield 235; Hutchison *et al* par 5.3.1; Nagel *et al* pars 5.04 – 511.

27 S 17 of the Children's Act 38 of 2005.

28 S 80 of the Administration of Estate Act 66 of 1965.

29 S 87(1) of the Banks Act 94 of 1990; S 129 of the Children's Act 38 of 2005. See Nagel *et al* 68.

30 Fouche *et al Legal Principles of Contract and Commercial Law* (2007) 68 - 74.

31 Christie and Bradfield 235.

In common law a minor is emancipated when he/she is fully independent from his/her parents, in other words, when the guardian or parent allows the minor to conduct his/her own business or practice an occupation.[32] The words "unemancipated or emancipated minor" is not defined in any legislation, however, in terms of common law, a minor to be emancipated, must be financially independent.[33] In common law a contract is voidable were a party to the contract was an unemancipated minor at the time of the conclusion of contract.[34] If the minor enters into a contract with the assistance of his or her parents, such a minor is liable and the agreement is fully enforceable by and against the minor.[35] The parent will only be liable for the debts of the minor if the debt in the contract was incurred for the maintenance of the minor, if the parent did not disclose the fact that he or she was acting for and on behalf of the minor, the parent stood surety for the debt of the minor or the minor acted as the parent's representative.[36] In terms of common law of contract, a minor is liable if she or he fraudulently misrepresents the other party that he has contractual capacity to act and the other party enters into a contract under such misrepresentations.[37]

In cases of the mentally unfit persons, the Mental Health Act[38] applies.[39] In common law every person is presumed to be of sound mind, unless someone who alleges insanity or mental deficiency brings proof to the contrary. Mental unfit person must be represented by an appointed curator.[40] Contracts entered into by mentally unfit persons are void *ab initio* and therefore cannot be ratified i.e. validated, whether the other party was aware of the

32 *Dickens v Daley* 1956 (2) SA 11 (N); *Sesing v Minister of Police* 1978 (4) SA 742 (W).

33 *Dama v Bera* 1910 928 (TPD). See also Boberg "Emancipation and the Attainment of Majority" 1975 *SALJ* 183.

34 See Christie and Bradfield 239; Davel and Jordaan *Law of Persons* (2005) 75 – 90. See also Jacobs *et al* "Fundamental consumer rights under the Consumer Protection Act68 of 2008: a critical overview and analysis" *PER* 2010 (13) 3 347.

35 *Van Vyk v South African Railways and Harbours* 1956 (4) SA 410 (W). See Boezaart *Law of Persons* (2010) 65.

36 *Ibid.*

37 See Boezaart 80.

38 17 of 2002.

39 See Christie and Bradfield 255 and Nagel *et al* par 5.06.

40 Fouche *et al* 55.

mental incapacity or not.[41] The innocent party cannot enforce the agreement and since the transaction is void for want of capacity. Restoration must take place.[42]

Consequently, persons who have no contractual capacity cannot conclude a contract at all. If at the time of entering into a contract one of the parties to a contract did not have capacity to enter into such contract, the contract will be void for lack of contractual capacity.

2 3 Legality

Legality means that a contact must not be forbidden by the statute or common law.[43] A contract which is prohibited by rule of law is illegal. In terms of common law an illegal contract is void and unenforceable.[44] The general rule is that no one can claim from an illegal contract. There are authorities which accept that illegal contract constitute a valid contract, but unenforceable.[45] Another view holds that there is no contract since illegal agreements are invalid.[46] They base their argument on the maxim *ex turpi causa non oritur* applies to illegal contracts and therefore one cannot sue on the contract.[47] According to the latter view enforceability of the contracts that are void as a result of statutory illegality will not be granted and the parties cannot claim specific performance, payment, damages or aedilian relief.[48] Both views cannot be correct.[49] With respect, the latter view is correct and in line with the decision of the appeal court.[50] If the agreement is illegal neither of the parties may institute a claim on the contract.[51] The common law maxim that gives effect to this

41 See South African Law Commission Working Paper 105, project 122, "assisted decision making: adults with impaired decision-making capacity" par 4.10 (hereafter Working Paper 105).

42 Working Paper 105 par 4.8.

43 Nagel *et al* pars 6.03 - 6.14; Van der Merwe *et al* 192.

44 Joubert *et al LAWSA* Vol 5 Part 1 (1994) par 165.

45 See Nagel *et al* par 6.03 – 6.37; Van der Merwe *et al* 191 - 201.

46 See Joubert *et al* 214 for Support on this view and where the authors emphasis that conclusion of a contract may be prohibited by statute or common law.

47 This will include unreasonable restraints of trade, wagers and wilful misconduct. See Joubert *et al* par 166; Christie and Bradfield 391; Van der Merwe *et al* 192.

48 See above.

49 See Van der Merwe and Van Huyssteen 1995 (58) *THRHR* 549 at 561 – 562.

50 *Reeves v Marfield Insurance Brokers CC* 1996 (3) SA 766 (A) at 775J - 776F. See Christie and Bradfield 361.

51 *Ibid.*

submission is known as *ex turpi causa non obitur actio.*[52] This rule has no exceptions but our courts will often give effect to illegal contract.[53]

The case of *Sasfin (Pty) Ltd v Beukes*[54] is the leading authority on the modern law of legality or unenforceability of contracts by common law.[55] The court found that Public policy favours the utmost freedom of contract. An underlying principle of the common law of contract is that, agreements seriously concluded, should be enforced.[56] This principle is supported by the fact that in our constitution there is so-called freedom of contract.[57] The courts are allowed to sever the illegal part of the contract.[58] Where the parties have not equally contributed to the unlawfulness of the contract, the court may apply the *par delictum* rule.[59] This means that the court can relax this rule in order for the innocent party to recover performance already rendered if the court finds that simple justice between man and man demands it.[60] The courts are allowed to sever the illegal part or provision in the contract from the rest of the contract.[61]

2 4 Physical possibility of performance

Possibility of the performance means that it must be objectively and subjectively possible for the parties to perform the rights and duties arising from the contract.[62] The contract will be valid if parties reach consensus on who must perform, to whom must performance be rendered, what must be rendered as performance and manner in which performance must be

52 See Joubert *et al* par 169.

53 *Jajbhay v Cassim* 1939 AD 537 at 545. See Christie and Bradfield 407.

54 1989 (1) SA 1 (A) at 71J - 9A-C.

55 Christie and Bradfield 17 and 483.

56 See Kerr 219 and Nagel *et al* par 6.35 – 6.37.

57 *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) at par 23 and 24; *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 782J - 783B; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) par 94; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) par 8.

58 Christie and Bradfield 358.

59 See Christie and Bradfield 407; Van der Merwe *et al* 207.

60 *Jajbhay v Cassim* 1939 537 (AD). See, Kerr 219; Nagel *et al* par 6.35 – 6.37; Van der Merwe *et al* 207.

61 Christie and Bradfield 401.

62 Havenga and Havenga *General Principles of Commercial Law* (2009) 50.

rendered, place where performance must be rendered and time and date of performance.[63] Performance must be possible, certain and lawful for a contract to be valid.[64] If performance agreed upon is not objectively and subjectively possible, the contract is invalid.[65]

2 5 Formalities

In terms common law formalities are not the requirement for the conclusion of a valid contract.[66] A contact is valid if concluded in a written or oral form.[67] There are two types of formalities: those prescribe by legislation and those prescribed by the parties themselves.[68] Where the provisions of the legislation prescribe certain formalities, the parties must adhere to the prescribed formalities.[69] The parties to a contract may agree that they will only be liable once their contract is in writing, and signed by both of them.[70] In such instances, if the contract is not in writing, there are no formalities and neither of them can claim the existence of valid contract.[71] Consequently, non-compliance with prescribed formalities, whether prescribed by law or by the parties, renders the agreement void.[72]

2 6 Forms of breach of contract

In these paragraph forms of breach of contract be will discussed. There are five forms of breach of contract, namely: default by the consumer (*mora debitoris*), default by the credit

63 See Van Aswegen *et al* 119.

64 *Barkhuizer v Napier* 2007 (5) SA 323 (CC) and for full discussion on the concept of impossibility see Zimmermann 686 - 692.

65 Christie and Bradfield 419.

66 Christie and Bradfield 109; Nagel *et al* par 7.03. Zimmermann advocates that a contract is an agreement that is based on the consent of the parties and the contract does not as a rule require compliance for any formalities for its validity. See also Zimmermann 546.

67 Scholtz *et al* par 9.1.1.

68 For example, s 3 (1) (k) of the Deeds Registries Act 47 of 1937and s 2(1) of Alienation of land Act 68 of 1981. See also in this regard Nagel *et al* par 7.05 – 7.09 and in general Christie and Bradfield 109 and 110.

69 Van der Merwe *et al* 195.

70 Nagel *et al* par 70.07.

71 Christie and Bradfield 109.

72 *Legator McKenna Inc and another v Shea and Others* 2009 (1) ALL SA 45 (SCA). See also Christie and Bradfield 133.

provider (*mora creditoris*), repudiation, positive mal-performance, and rendering performance impossible.[73] *Mora debitoris* is failure of the debtor to perform in time.[74] *Mora creditoris* is failure of the creditor to receive performance when tendered by the debtor.[75] Repudiation occurs when any of the parties to the contract give notice that he or she is no longer bound or will not comply with one or more of his or her obligations in terms of the contract.[76] Rendering performance impossible means that one of the parties, by his conduct, has caused performance to be impossible.[77] Positive mal- performance occurs when the debtor renders defective or incomplete performance.[78]

2 7 Remedies

In this paragraph various forms of remedies in terms of common law will be discussed briefly. Remedies are either by operation of law or as agreed upon by the parties.[79]

2 7 1 Remedies available by operation of law

Where one of the parties breach a contract, the innocent party may through the operation of law claim specific performance, cancellation of the contract, damages suffered and /or interdict.[80] Specific performance is a remedy available to the aggrieved party who seek fulfilment of the contract.[81] Cancellation is not available in all instances.[82] Cancellation is available only when material term of the contract has been breached and the contract contains a cancellation clause.[83] The remedy for damages is available irrespective of whether the contract is upheld or cancelled and signifies the money to be paid to the aggrieved party as a result of breach of contract. Interdict is a court order preventing

73 See Fouche *et al* 113 and Hutchison *et al* par 276.

74 See Hutchison *et al* par 12.2 and Nagel *et al* par 9.06.

75 See Christie and Bradfield 533; Hutchison *et al* par 12.3; Nagel *et al* par 9.14.

76 See in general on this form of breach Nagel *et al* par 9.31 and Hutchison *et al* par 12.5.

77 Fouche *et al* 117 and Hutchison *et al* par12.6.

78 Hutchison *et al* par 12.4.

79 Nagel *et al* par 7.05 and 7.07.

80 See Van der Merwe *et al* 325.

81 Christie and Bradfield 543.

82 Christie and Bradfield 544.

83 See Nagel *et al* par 9.70 and Van der Merwe *et al* 380.

someone to continue breaching the contract.[84] The court will only grant interdict in urgent circumstances and where all other remedies have been exhausted.[85]

2 7 2 Remedies agreed upon by the parties

The parties to a contract may agree on certain remedies.[86] Agreed remedies are among others, an acceleration clause, cancellation clause and penalty clause.[87] The parties may agree in terms of acceleration clause that in the event of a breach of contract by one of them, the innocent party will generally have a claim specific performance. Cancellation means termination of the consequences of the contract. Innocent party is entitled to cancel where the breach goes to the root of the contract, contract provides for a right to cancel and restitution is possible.[88] Cancellation is only available if the innocent party will restore what was received or if unable to do so, he/she is not to blame for the inability to restore what was to have been restored. In terms of penalty clause the parties may agree that in the event of a breach of contract by one of them, guilty party will pay of deliver to the innocent party a certain amount of performance or will forfeit a particular benefit.[89]

The effect of the agreed remedies is that it eliminates many problems and strengthens the obligations it relates to. Remedies agreed upon by the parties are usually intended to exclude or replace the common law remedies.[90]

84 Christie and Bradfield 554.

85 See Fouche *et al* 124 and Christie (2006) 532.

86 See Nagel *et al* par 9.45 for a full exposition of these remedies.

87 Van Aswegen *et al* 239.

88 Christie and Bradfield 561.

89 See Fouche *et al* 124; Van der Merwe *et al* 325.

90 Boraine and Renke "Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005 (Part 1)"2007 *De Jure* 232.

Chapter three - Influence of the National Credit Act on the common law principles of the law of contract

3 Introduction

The main objective of this chapter is to discuss the provisions of the Act that influences the general principles of the common law of contract.[91] The previous chapter discussed the requirements for a valid contract, forms of breach of contract and remedies. This chapter discuss the influence of the Act on the general principles of the common law of contract.

3 1 The influence of the National Credit Act on consensus

It was stated in chapter two that the parties must reach consensus in order for the contract to be valid. In paragraph, 2 2 above it was emphasised that for the contract to be valid, the parties to the contract must have the intention to be legally bound by the contract and the parties must reach a clear and unambiguous agreement on the material facts of the contract.[92] Applying the Act to this common law general principle regarding consensus, it is evident that the legislator extended the common law in that where the credit provider is approached by the potential consumer there are number of thing on which both the credit provider and the consumer must have a mutual understanding. The credit provider and the consumer must reach consensus, among others, on the following:

(a) Name and address details of both the consumer and the credit provider.[93]

(b) The principal debt under the agreement and a description of the security to be provided by the consumer.[94]

(c) The type of the agreement.[95]

(d) The date on which the consumer's obligations will be fully satisfied if the agreement is fully complied with.[96]

(e) The legal capacity to enter into the proposed transaction.[97]

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91 See par 1 2 above.

92 See Van der Merwe *et al* 23.

93 S 69(2) (a) - (c) read with reg 31(2) (b).

94 S 69(2) (e) (i) read with reg 31(2) (c).

95 Reg 31(2) (a).

96 S 69(2) (e) (iv).

The above mentioned appear to be the essential minimum requirements to be included in the contract. The parties must reach express consensus on the above listed characteristics.[98] The Act extended the common law regarding basic information to be in the contract. The legislator however did not put a sanction regarding the failure of the credit provider to include the required information in the contract. This is one of the major defects in the Act.

In common law consensus is a prerequisite for an agreement to come into existence. In terms of the Act certain credit agreements will automatically come into existence without the parties reaching consensus.[99] Incidental agreements are deemed to have been made only after 20 business days between the parties.[100] The parties might not have the opportunity to negotiate thoroughly all the terms and conditions of the agreement. This means the parties will not either expressly or through conduct reach consensus regarding certain stipulations of the incidental credit agreement.[101] The credit agreement comes into existence through the operation of law, without any declaration of intent by the parties.[102] The Act is so far the only legislation to my knowledge that brings a contract into being by operation of law. The worse part regarding incidental credit agreement is the fact that the consumer may have no intention to create a credit agreement if he was not willing to default. In terms of common law the intention of the parties takes precedent before the court can enforce any credit agreement. In this regard the legislature had done away with the common additional requirement for intent.

3 2 The influence of the National Credit Act on contractual capacity

The competence to perform and understand the obligations in the credit agreement is known as capacity. Juristic persons and adult natural persons have capacity.[103] Persons with limited

97 S 60(1).

98 See Nagel *et al* 53.

99 *JMV Textiles (Pty) Ltd v De Chalain Spareinvest* 14 CC 2010 (6) SA 173 (KZD).

100 S 1. See also Scholtz *et al* par 4.4.1 and 8.2.33; Otto and Otto 19.

101 See Nagel *et al* par 4.64.

102 See par 2 above.

103 See Otto and Otto 56; Nagel *et al* par 5.02.

capacities are minors, mentally unfit persons, insolvents and those who are intoxicated.[104] In this paragraph focus will be on minors and mentally unfit patients.

The Act makes a credit agreement to be unlawful if at the time the agreement was made the consumer was an unemancipated minor and unassisted by a legal guardian.[105] Although the definition "unemancipated minor" is not provided for in the Act or any other legislation, in terms of common law, a minor to be emancipated must be financially independent.[106] In terms of common law a minor is required to have his own business or residence.[107] Whether a minor is emancipated is question of fact which must be decided after consideration of all the factors.[108] The word emancipation or the status of emancipation has potential to be subjected to abuse. During the stage of consensus a minor can claim to be emancipated in order to receive services or good on credit and when the time arrive to honour the obligations such a minor raises a defence of lack of contractual capacity.

In terms of common law any credit agreement between a mentally incapacitated and the credit provider is null and void.[109] In terms of the Act such credit agreement is unlawful despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that the credit agreement is void as from the date the agreement was entered into.[110] The consequences are that the credit provider must refund to the consumer and rights of the credit provider in terms of that agreement are either cancelled and forfeit to the State, unless if the credit provider or person acting on behalf of the debtor, directly or indirectly, by an act or omission induced the creditor to believe that the debtor had the legal capacity to contract.[111] There is no guideline in section 89 regarding the steps the creditor needs to follow in order to establish the contractual capacity of the debtor.

104 *Ibid.*

105 S 89(2) (a) (i).

106 *Dama v Bera* 1910 928 (TPD).

107 See above par 2 2.

108 *Ibid.*

109 S 89(5). See Nagel *et al* par 5.04; Christie and Bradfield 283.

110 S 39(1) (a). See Davel and Jordaan 75 – 90; Otto and Otto 46.

111 Scholtz *et al* 16.3.5.

3 3 The influence of the National Credit Act on legality

The words unlawful and illegal carry the same meaning and will be used interchangeably in this paragraph. Chapter two mentioned that common law prohibit contracts that are contrary to good moral or public policy. The influence of the Act on the unlawful credit agreement and unlawful provisions in the credit agreement will be discussed.

3 3 1 Unlawful credit agreements

As mentioned hereinbefore if the formation and performance of a contract is illegal, the contract is void. The Act in section 89 has developed the common law and among others, provides that a credit agreement is unlawful if the consumer is an unemancipated minor or person who is declared mentally unfit by court order or under administration in terms of the magistrate court Act or credit provider is unregistered.[112] If a credit agreement is unlawful despite any provision in common law, any other legislation or any provision of an agreement to the contrary, a court must order that the credit agreement is void as from the date the agreement was entered into.[113] The legislature created a closed list of those instances that the court will declare credit agreements void. The introductory part of section 89 has a direct impact on the common law because it expressly states that despite any provision of common law, the contract is void. This means that common law cannot be applied. The parties cannot enforce the agreement in terms of common law. Once the court decides that the contract is in contravention of section 89, the principles applied in Cherengani as discussed below will apply. The Act has a great impact on common law with respect to unlawful credit agreement, but to the extent that the Act applies.

3 3 2 Unlawful provisions in the credit agreement

The previous chapter discussed that when a contract is unlawful the contract void. This chapter now discuss influence of the unlawful provisions in terms of the Act on common law. Certain clauses or provisions that are commonly included in commercial contract are

112 S 89(2). See Scholtz *et al* par 9.3.2; Nagel *et al* par 22.22 and 20.24.

113 Boraine and Van Heerden 2010 *THRHR* 650 par 3.1.

prohibited in credit agreements by the Act.[114] A provision of a credit agreement is unlawful if is a:

3 3 2 1 Provision generally defeating the purpose of the Act

In terms of common law the parties have freedom of contract and this mean that they can model their agreement as they wish.[115] The freedom, include also the fact that an individual is free to decide whether, with whom, and on what terms to contract.[116] Each party to a transaction may give the transactions a different label, but the label used is not decisive.[117] The parties may each give a transaction a different name, for example the consumer may regard the transaction as instalment sale and the credit provider hold that it is a lease. The court will look at the nature of the transaction and not its object.[118] Despite the label, the court must look at the nature of the transaction and not its object and the court in ascertaining the nature of the contract must have regard mainly to its substance and not merely its form.[119]

The legislature in the Act limited the rights of the parties. If the parties freely enter into credit agreement containing any provision that defeat the purpose of the Act, such provision will be declared unlawful.[120] Where the Agreement is not drafted to frustrate the object of the Act the court will hold the agreement to be valid. The legislature has decided that common law agreement not providing for the deferral of an amount owed should not be hit by the Act, unless the consumer raises a defence that the agreement is a simulation and that the true inwardness of the contractual relationship between the parties is that it is a credit

114 S 90. See Nagel *et al* par 20.24.

115 Include also the fact that an individual is free to decide whether, with whom, and on what terms to contract.

116 Ss 22 and 26(1) of the Constitution of the Republic of South Africa.

117 *Ibid.*

118 *Tucker v Ginsberg* 1962 (2) SA 58 (W) at 62f.

119 *Absa Technology Finance Solutions (Pty) Ltd v Viljoen t/a Wonderhoek Enterprises* (2008/28978) [2010] ZAGPPHC 10 (2 March 2010) at 27.

120 See the Preamble to the Act. See also for a full discussion of direct and indirect measures aimed at preventing and resolving over-indebtedness see Stoop 'South African Consumer Credit Policy: Measures indirectly Aimed at Preventing Over indebtedness' (2009) 21 *SA Merc LJ* 365.

transaction in terms of the Act. Parties to a transaction are fully entitled to regulate their affairs to take advantage of this legislative decision.

3 3 2 2 Provision deceiving the consumer[121]

In terms of common law, a contract induced by fraudulent or innocent misrepresentation that tend to deceive a party to a contract cannot be treated as binding on the credit provider and the consumer.[122] In terms of common law a contract which existed as a result of misrepresentation is merely voidable.[123] The Act provides that if the quotation is vague or misleading the consumer, the credit agreement will be unlawful and void. In terms of the Act the provisions that cause deceptions or misrepresentation to the consumer are void and not voidable.[124] The common law option to ratify a voidable contract was wiped out by the legislature. If the provision that causes misrepresentation is material, consensus was not reached and therefore, whole agreement being declared void on the ground of lack of consensus. On the other hand, if the provision that causes misrepresentation is not material, but it cannot be severed, the whole agreement being declared void on the ground of unlawfulness. [125]

3 3 2 3 Provision directly or indirectly purporting to waive common law rights[126]

In terms of common law the parties to the contract have freedom to waive any right in the contract. For example in a contract of suretyship there are common law exceptions or rights that can be included in the agreement when a party to an agreement is required in terms of

121 S 90(2) (a) (ii).

122 See par 2 1 above.

123 See Delpoort *South African property practice and law* (1987) 214. It is a general principle in law of contract that the parties may not cancel or terminate the agreement without consent of the other party. See also Otto and Otto *National Credit Act Explained* (2011) 56.

124 S 90(2) (a) (ii) read with S 90(4) (b) and 89(5).

125 *Ibid.*

126 S 90(2) (c).

such agreement to fulfil his obligation.[127] In a mortgage agreement, a mortgagor may upon request by mortgagee, be required to renounce the benefits of these exceptions.

In terms of the Act, a provision of a credit agreement is unlawful if it purports to waive any common law rights that may be applicable to the credit agreement.[128] The Minister as required by the Act has prescribed particular common law rights that are not susceptible to waiver by the consumer in a credit agreement. The common law rights or remedies that must not be waived in a credit agreement by the consumer are *exceptio errore calculi, exceptio non numeratae pecuniae and exception non causa debiti*.[129] The waiver of any of the above three listed exceptions by the consumer will result in such waiver in the agreement being unlawful. Only unlawful provisions will be void and not the whole agreement.[130] The Act directly impacts on the above mentioned common law exceptions.

3 3 2 4 Provision authorising credit provider to do anything that is unlawful in terms of the Act[131]

In terms of common law ultra *in duplum* rule, arrears and unpaid interests may not exceed the outstanding capital sum. A contract whereby the capital sum is payable together with the interest at a determined rate, the accrued interest will stop running once it attains the amount of capital outstanding.[132] The Act enacts the *in duplum* rule, but it takes the definition further than the common law definition of the *in duplum* rule, specifying that not only interest stops

127 The exceptions that may be taken are among others: *non numeratae pecuniae, non causa debiti, error in calculi, de duo bus vel pluribus reis debendi, beneficium ordinis seu excussionis, beneficium divisionis*. See Roux *Centre for Conveyancing Practice* (2008)18 (unpublished notes).

128 In terms of s 90 (2) (c) of the Act and have been prescribed in terms of subsection (5). Same provision was contained in s 22 of the Credit Agreement Act.

129 See reg 32 of the Act. See also Le Roux 19 and http://www.ghostdigest.co.za/code/A_1312.html.

130 *Ibid.*

131 S 90(2) (b) (iv).

132 *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd* 1998 (1) SA 811 (A). See Scholtz *et al* par 10 who refers to the codified *in duplum* rule and See also Kelly-Louw "Better Consumer Protection under the Statutory *In Duplum* Rule" 2007 19 *SA Merc LJ* 337 who refers to the "statutory" *in duplum* rule. See also Otto and Otto 87.

running when the unpaid interest equals the outstanding capital.[133] Any clause that allows the creditor to charge extra interest or penalty will be allowing the credit provider to do something unlawful and therefore such provision will also be unlawful.[134] The Act directly impacts on the common law freedom of contract. The parties can no longer agree on the excessive interest in favour of the creditor even though the debtor is will to conclude a contract irrespective of the high interest rate in the contract.

3 3 2 5 Provision purporting to exempt the credit provider from liability[135]

In common law the parties may in their instalment sale agreement expressly exclude the warranty against latent defect, which may be achieved by waiver of rights, for example *voetstoots* clause or exemption clause.[136] An exemption clause is another term in which the credit provider can excludes or limits presents or future liability.[137] In common law a clauses excluding the liability on the part of one person is usually incorporated into an agreement or in a notice displayed on the premises.[138] The Act has an influence on what the parties may agree to include or exclude in their credit agreement. The Act specifically prohibits clauses that exclude any guarantee or warranty that would, in the absence of such clause be implied in a credit agreement. One must bear in mind that the Act will apply only on the credit agreement and not on the goods sold on credit agreement.[139] Should the credit provider purport to exclude himself/herself from liability for any act, omission or representation, the credit agreement will be void.[140] In fulfilling the main objective of the Act, the legislature has wiped out the common law exemption clause in the credit agreement.

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133 See above. See also Campbell "The In Duplum Rule: Relief for Consumers of Excessively Small Credit Legitimised by the National Credit Act" 2010 22 *SA Mere LJ* 1 4 and Kelly-Louw 2007 19 *SAMLJ 337*-345.

134 S 90(2) (b) (iv) read with s 103(5).

135 S 90(2) (g).

136 See *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A); *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) 683H - 684A; *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd and another* 2002 (2) SA 447 (SCA) at 465J. See also Christie and Bradfield 164-166.

137 *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA). See also Otto and Otto 48.

138 http://www.deneysreitz.co.za/index.php/tools/print/disclaimers_exemption_clauses_indemnities/news

139 S 90 (2) (g) (ii) read with s 49 of the Consumer Protection Act 68 of 2008. Jacobs *et al* 3. See also Melville and Palmer "The applicability of the Consumer Protection Act 2008 to credit agreements" (2010) 22 *SA Merc LJ* 272–278.

140 S 90 (3).

3 3 2 6 Provision expressing forfeiture of any money by the consumer[141]

Penalty clause is a remedy which the contracting parties agreed upon during the initial stages of consensus. In common law the parties may agree that in the event of a breach of contract or termination of the contract by one of them, the guilty party will pay or deliver to the innocent party a certain amount of performance or will forfeit a particular benefit. The Act prohibits clauses that allow the consumer to forfeits a benefit. In common law the penalty clause applies only if the contract is terminated unlawfully. The Act does not make distinction of the situation when the contract was terminated lawfully and those instances when it was terminated unlawfully. For example, termination in terms of section 121 is not unlawful termination. The Act influence on common law in that the consumer will no longer forfeit any benefit whether the agreement was terminated lawfully or unlawfully. However, penalty clause was not wiped out, but it must be in line with the Act.

3 4 The influence of the National Credit Act on possibility of performance

The Act makes no mention of the situation where one of the parties cannot perform at the time of the conclusion of the contract. The might have an influence on the possibility of performance, but currently such influence is not observable in the Act.[142]

3 5 The influence of the National Credit Act on formalities

The Act has a little influence on the formalities for the formation of a contact. Unlike its predecessor, the Act does not expressly prescribe any formalities for the validity of the contract.[143] The Act does not expressly provide that credit agreement must be in writing. The Act however requires the creditor to deliver, without charge, a copy of the credit agreement

141 S 90(2) (i).

142 For full discussion on this see Nagel *et al* par 3.89.

143 S 5 of the Credit Agreement Act.

to the consumer, or to send it, in printable electronic form, to the debtor.[144] The fact that a copy of the credit agreement should be delivered to the consumer create an assumption that the credit agreement should be in writing.[145]

Any amendments to a document recording a credit agreement after it has been signed by or delivered to the consumer is void, unless the changes reduces the consumer's liabilities under the agreement.[146] Any amendments must be recorded in writing. If the amendments are made orally, they must be recorded electronically and subsequently reduced to a written form. The debtor is required to sign or initial the amendment in the margin opposite the change.[147]

In terms of common law, cancellation is effected once the notice of cancellation reaches the other party.[148] In terms of the Act, a consumer may terminate a credit agreement within five business days after the date on which the agreement was signed by the consumer, by delivering a notice in the prescribed manner to the credit provider.[149] The Act influence on the common law in that there must be a written notice, whereas in common law there is no need for the notice to be in writing. Although, the Act is silent on the fact that credit agreement must be in writing, the requirement for a credit agreement to be in writing and signed by the debtor personally strengthens our common law and protects the consumer

3 6 The influence of the National Credit Act on Remedies

In this paragraph the influence of the Act of the remedies for breach of contract will be discussed. Should any of the parties breach one of the essential terms agreed upon during

144 Kelly-Louw "The Prevention and Alleviation of Consumer Over-indebtedness" (2008) 20 *SA Merc LJ* 200 at 213 - 214.

145 Boraine and Renke (Part 1)"2007 *De Jure* 235.

146 S 116. Nagel *et al* par 20.28.

147 *Ibid.*

148 Nagel *et al* par 20.20.

149 S 121. Delivery take place by post or any other prescribed manner or formalities prescribed in the Act and failure to comply with the formal requirements, the cancellation is not properly executed.

consensus, the innocent party may claim one or more of remedies available by operation of law and agreed remedies.[150]

3 6 1 Remedies available by operation of law

It has been discussed above that a prerequisite for remedies is that the guilty parties must have committed one of the forms of breach of contract. The aggrieved party may cancel the agreement and claim specific performance or damages.[151]

As mentioned before, remedies available by operation of law are claim for specific performance, cancelation of the contract and damages. The Act does not have influence on the common law remedy for specific performance. In terms of common law cancellation of a contract is a unilateral juristic act as results of which the consequences of a contract are terminated. In terms of the common law, a creditor can cancel the agreement with the debtor when the debtor is in breach of one of the material terms of the contract.[152] In terms of common law the credit provider can prevent the consumer to cancel the credit agreement if what she or he has received became impossible to be restored. The Act does not address the situation where the consumer loses or forfeits his or her right to rescission as a result of restitution being impossible. The Act has an influence on the cancelation in terms of common law.[153] The Act amends the common law and states that credit agreements can only be cancelled in terms of section 129 and 130.[154] This alters the common law position that an agreement can be cancelled and the creditor can be claimed immediately without any notice to the debtor.[155]

150 Grové and Otto 41; Otto and Otto 98; Nagel *et al* par 9.45. See also Boraine and Renke (Part 1) 2007 *De Jure* 222-235 par 222.

151 In *Renier Nel Inc and Another v Cash on Demand* 2011 (5) SA 239 (GSJ) the applicant, who was the respondent in this appeal, relied on a contractual undertaking to seek specific performance in the payment of certain sums of money and the court granted the relief.

152 See par 2 6 above.

153 See par 4 3 below.

154 Ss123, 129 and 130.

155 http://www.floor-inc.co.za/news/article.asp?newsID=189.

Consequently, as far as damages are concerned, the credit provider has this remedy in terms of both common law and National Credit Act.[156] The creditor may claim all actual or reasonable cost for goods depreciation, goods returned and restored to a marketable condition.[157]

3 6 2 Remedies agreed upon by the parties.

In this paragraph the popular agreed remedies as discussed in chapter two, namely: acceleration clause, cancellation clause and penalty clause will be discussed.

Acceleration clause is a clause which provides that in the event that the debtor defaults in any single payment then the entire debt will become due and payable. This means that the credit provider is allowed to claim the whole outstanding balance at once.[158] The credit provider's common law claim for specific performance or an acceleration clause in the contract is limited by the Act. The Act also prescribed certain pre-enforcement formalities and requirements to which the credit provider must adhere to acquire a right to cancel prior to cancellation a credit agreement.[159] The Act has an influence on cancellation in that before a creditor can cancel the contract, including any acceleration clauses, must comply with the prerequisite of termination in Chapter 6 Part C of the Act. Act has done away with the common law automatic acceleration of outstanding payment.

The issue in most cases is a cancellation of the agreement by reason of a *lex commissoria*.[160] In terms of common law the credit provider is entitled to cancel where the breach by the consumer goes to the root of the contract, the contract provides for a right to cancel and restitution is possible. If *lex commisoria* is inserted in the contract, the creditor may cancel the contract even though the breach does not go to the root of the contract.[161] In *ABSA Bank Ltd v Havenga* it was submitted that where the contract is silent about the right to cancel, the allegations in the particulars of claim or founding affidavit that the credit provider had

156 S 132(1).

157 See Nagel *et al* par 9.68; Scholtz *et al* 9 – 22; Boraine and Renke (Part 1) 2007 *De Jure* 222 par 2 1.

158 Christie and Bradfield 436 – 437 and 540.

159 S 129(1) read together with s 130 (1).

160 See *ABSA Bank Ltd v Havenga* 2010 (5) SA 533 (GNP).

161 *Ibid.* See also Otto and Otto par 44.1.

complied with the provisions of sections 123 and 129 of the National Credit Act were sufficient to found an action for cancellation because, those provisions created, and afforded the credit provider, a right of cancellation. The court held that sections 123 and 129 of the Act do no such thing. The right to cancel an agreement arises out of an application of the rules of the law of contract. Sections 123 and 129 are procedural in their nature.[162] From this decision one can conclude that the Act does not alter the common law cancelation of contract.[163]

As a form of agreed remedy the credit provider in the event of breach of contract may require the consumer to pay or deliver certain amount or performance or forfeiture of certain benefit.[164] The creditor may claim any damage or penalty agreed upon in the credit agreement, but the relevant clause must comply with the Act or only to the extent permitted by law.[165] The provisions of the Act prevail over those of Conventional Penalties Act to the extent that such provisions conflict.[166]

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162 *Ibid.*

163 See below par 4 3 for further discussion on this aspect.

164 See Grové and Otto 48 – 52 and Otto *Credit law service* par 42 for an exposition of the legal position regarding penalty and forfeiture clauses in credit agreements.

165 S 92 of the Act read with regs 28 and 29.

166 S 172(1). See Christie and Bradfield 585.

Chapter four - Case law study

4 Introduction

There are a lot of decisions so far on the Act. This chapter will briefly discuss case law that is relevant to common law and the Act. This chapter will discuss an unreported decision of *Cherangani Trade and Investment 107 (Pty) Ltd v Mason NO and others*[167] in relation to the consequences of illegal or unlawful agreements. The case of *Ditshego and others v Brusson Finance (Pty) Ltd and Others*[168] will be discussed regarding the simulated credit agreement or disguise agreement created to deceive the purpose of the Act. The decision of *BMW Financial Services SA v Donkin*[169] will be discussed regarding the power to reinstate a cancelled agreement. The Court's decision in *ABSA Bank v De Villiers*[170] will be discussed regarding the question whether or not the enactment of the Act by the legislature altered the common law principles. This chapter will conclude with the decision of *SA Taxi Securitisation v Chesane*[171] with respect to common law remedies and more specifically the question whether the court may grant an interim attachment order in respect of a credit agreement to which the Act applies.

4 1 *Cherangani Trade and Investment 107 (Edms) Bpk v Mason N.O. and Others*

4 1 1 Summary of the facts and decision

Mason borrowed more than R2 million from Cherangani. Manson defaulted and Cherangani applied for orders to enforce the agreements. Manson's first defence was that the agreement is void because it is against morality and public policy. Manson's second defence and that the agreement, is illegal and void as the total amount exceeded the threshold in the Act. Cherangani was not a registered credit provider.[172] The court held that the agreement, being a credit transaction in accordance with the provisions of the Act was declared illegal and

167 Case No. 6712/2008 & 287/2009, Free State High Court, Bloemfontein, 12 March 2009 (Unreported).

168 Case No. 5144/2009 [2010] ZAFSHC 68 (22 July 2010) (Unreported).

169 2009 (6) SA 63 (KZD).

170 2009 (5) SA 40 (C).

171 2010 (6) SA 557 (SGJ).

172 S 42 (3) (b). Scholtz *et al* par 5.3.1.

void. The Court further declared all Cherangani's rights and certain obligations incurred by Mason in terms of an agreement forfeit to the state.

4 1 2 Analysis

Firstly in common law, one of the essentials for a valid contract between the credit provider and consumer is that both parties must have the necessary contractual capacity at the time when the contract was entered into. The Act requires that a person must apply for registration as a credit provider if the total debt owed to him under all outstanding credit agreements exceeds the threshold prescribed in terms of section 42 (1).[173] Credit providers will have limited contractual capacity to act when they fail to register as such while required to do. The Act influences common law requirement for contractual capacity in that as soon as the credit agreement reach the prescribed threshold, the credit provider loses his contractual capacity to enter into further credit agreements. A credit agreement is unlawful if the credit provider on the stage when the agreement had to be registered but not registered before.[174] An agreement by a credit provider must be registered and if not, it is an unlawful agreement and void to the extent provided in section 89.[175]

Secondly the agreement between Cherangani and Mason was illegal in accordance with the provisions of the Act. Since the court found that a credit agreement is void it was called upon to order Cherangani's right to request reimbursement or payment from Mason to be cancelled unless the court finds that Mason by such order is unjust enriched. Unjust enrichment is the source of obligation and means that one person will have a claim against another if the latter has obtained an asset to the prejudice of the former without a valid legal ground. The test is whether the enrichment and the impoverishment were justified.[176] There was no doubt that Mason will be unduly enriched and the court ordered that Cherangani's rights be forfeited to the State. The court's decision is supported by the Otto who correctly points out that where the consumer is enriched, the court have no option but to order

173 The threshold prescribed in terms of section 42 is currently R500 000, 00.

174 S 89 (2) (d).

175 S 40 (4).

176 Nagel *et al* 1.27.

forfeiture to the State.[177] In this regard the court extended common law principle of unjust enrichment.

Thirdly in common law the contract must not be against good moral or public policy.[178] An illegal contract is void in law, and no court will enforce it is contrary to statutes or the common law.[179] Mason argued that the relevant credit agreement was void because it is against morality and public policy. The court referred to the decision of *Sasfin* and held that in light of the findings in this case, even though Mason's argument seem to hold water, the court will not lightly overturn an agreement.[180] The effect of the judgment *Sasfin (Pty) Ltd v Beukes* on the illegality is that the courts must direct their attention on the seriously considered public opinion in the general sense of justice.[181] In terms of common law, contractual provisions that are *contra bonos mores* are unenforceable but the court will develop them in order to do justice between man and man only if they are clearly not against the basic principles of the Bill of Rights.[182]

In this case it was obvious that both parties were equally quilt. The court did not apply the case of *Jajbhay v Cassim* because the rule does not apply to a party who his or her blameworthy status was in a lesser degree than the other party. The reference to any common law provision or precedent will not hold water because the Act expressly state that "... despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that the credit agreement is void...'.[183] This means that the courts have no discretion. Section 89(5) directly impacts on common law in

177 Lotz "Law of Purchase and Sale" *Annual Survey South Africa* (2009) 1035.

178 Christie and Bradfield 399.

179 Support for this view is in Joubert *et al* 214.

180 *Cherangani Trade and Investment 107 (Edms) Bpk v Mason* at Par 26 were the following decisions were applied: *Sasfin (Pty) Ltd v Beukes*1989 (1) SA 1 (AD) and *Botha (Now Griessel) And Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (AD).

181 Christie and Bradfield 259. The effect of *Sasfin* case is set out by Christie in a series prepositions and among other, the court favours utmost freedom of contract and court will declare a contract to be contrary to public policy in clearer cases.

182 The courts in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 (SCA) rejected the good faith in favour of public policy, making the *Sasfin* case the leading case for testing enforceability of contracts. See Christie and Bradfield 361.

183 S 89(5).

that it does not allow the court to exercise its own discretion. The decision in *Sasfin (Pty) Ltd v Beukes* and *Jajbhay v Cassim* will only be followed or applied where the provisions of the Act does not apply. This consequence according to Otto is harsh as the agreements envisaged in section 89 are not immoral or illicit.[184] Otto's argument is persuasive and convincing, but must keep in mind that a contract is illegal if against common law or statute. In this case the any agreement in section 89 is against the Act (statute). In common law such agreement is void and fortunate enough the legislature prescribed a clear and unambiguous sanction similar to the one in common law. With all respect section 89(5) is the well-drafted part of the Act.

Lastly Otto suggests further that voidness and criminal offence should be the appropriate sanctions and the court should be fettered with discretion to apply *par delictum* rule.[185] With respect, this suggestion is defeating the whole purpose of section 89 and in line with the common law before the Act. Previously if the agreement is void, the court had discretion to apply the *par delictum* rule and that did not withstand the force of credit provider to enter into illegal contract. The relaxation of the *par delictum* rule made an ordinary person in the street vulnerable and when the man in the street is vulnerable, the legislature becomes uncomfortable. The provisions of section 89 are created mainly to protect the little man in the street and *par delictum* rule will find application in those credit agreements that the Act does not apply. Christie and Bradfield also support this submission by stating the *Sasfin* case will not guide the court in agreements were the Act applies.[186] The time may be overdue for consideration of the *Sasfin* rule.[187] Another point raised by Otto was that the appropriate sanction should be to impose criminal offence.[188] This will never be an appropriate sanction especially because most credit providers are juristic person. It will impractical to send a company to jail and if you impose a fine, the company will always pay. The whole purpose of making the credit provider forfeit his rights and obligations was to take out the consumer out of the transaction improperly entered into.

184 Lotz *Annual Survey South Africa* (2009) 1036.

185 *Ibid.*

186 Christie and Bradfield 361.

187 S 90(2) (c) read with regulation 32: GNR 489 of 31 May 2006 as amended. See *Society of Lloyd's v Romaln* 2006 (4) SA 23 (C) at par 125. See also Christie and Bradfield 361.

188 Lotz *Annual Survey South Africa* (2009) 1036.

4 2 *Ditshego and others v Brusson Finance (Pty) Ltd and Others*

4 2 1 Summary of the Facts and decision

Brusson advertised credit and Ditshego reacted to Brusson's advert. Brusson arrange mortgage bond with the institutions (investors) on behalf of Ditshego. Getting a loan from Brusson involved signing three contracts for the Ditshego:

- An offer to purchase, giving effect to the sale of their home to an investor with a clean credit record that Brusson would source; (first agreement)
- A deed of sale, giving effect to the "repurchase" of the property by the Ditshego from Brusson; (second agreement) and
- A memorandum of agreement between Brusson, the Ditshego and the investor. The small print allowed Brusson to later buy the house for a fraction of its value.

When Ditshego defaulted in the loan agreement, then Brusson in terms of the third agreement which provided that the investor must cancel the re – purchase agreement with the borrower, and the investor has to sell the property to Brusson for the original purchase price. The NCR sought a declaratory relief that the Brusson scheme was contrary to the provisions of the Act and offended common law in South Africa. Brusson contended that, it was permissible to enter into separates agreement, which were linked and interdependent. Court held that Brusson was in partnership with the investors and lent money to borrowers. That interdependent agreements purport to be valid agreements of sale, but it was not clear. The true nature of the agreements was indeed a simulated credit transaction.

4 2 2 Analysis

In our law the court will not be deceived by the form of a transaction. The courts will give effect to the substance of the contract as opposed to its form.[189] This means that the courts will only enforce the real contract.[190] Common law maxim is well known as *Plus valet quod*

[189] *Commissioner, South African Revenue Service v Motion Vehicle Wholesalers (Pty) Ltd* [2007] 4 All SA 1207 (SCA) at par 11, it was held, that the transactions were modified with the intention of circumventing the Act and that such modification was a sham.

[190] Bhana *at al* 27.

agitur quam guod simulate conciptur.[191] Where a court is confronted with an alleged simulation, it is entitled to take into account all the surrounding circumstances.[192]

In case the court was asked to determine the essence and nature of the transaction. The court applied the decision in *Maize Board v Jackson*[193] where it was held that:
"The true enquiry in a matter such as this is to establish whether the real nature and the implementation of these particular contracts are consistent with their ostensible form. In pursuit of that enquiry one must strive to ascertain, from all the relevant circumstances, the actual meaning of the contracting parties. It therefore becomes necessary to examine in greater detail the agreements in question and the manner in which they were implemented."

According to the court, the aforesaid leads to only one reasonable conclusion, namely that the real intention was that Ditshego obtain a loan from Brusson against the security of their property. Held further that, the agreements were simulated transactions. It is clear that Brusson was in partnership or association with so-called investors. Brusson had effective control of the whole transaction and entitled to obtain ownership of the property. The whole scheme amounts to an unlawful *pactum commissorium*.[194]

The effect of this decision was that if the parties enter into transactions that defeat the purpose of the Act, the court will look at the nature of the transaction and not its object to decide whether it's a credit agreement or not. The court in ascertaining the nature of the contract will have regard mainly to its substance and not merely its form.[195] The creditor will end up facing the harsh part of the section 89 while trying to conceal the true nature of the transaction. The court in this case applied the Act and also extended the common law maxim *Plus valet guod agitur quam guod simulate conciptur.*

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191 Christie and Bradfield 203.

192 *Ibid*. *Erf 3183/1 Ladysmith (Pty) Ltd v Commissioner for Inland Revenue* 1996 (3) SA 942 (A) at 950I-952C; *Maize Board v Jackson* 2005 (6) SA 592 (SCA) par 1.

193 2005 (6) SA 592 (SCA) at 596 par 8.

194 *Ditshego and others v Brusson* par 24.

195 See *Absa Technology Finance Solutions (Pty) Ltd v Viljoen t/a Wonderhoek Enterprises* (2008/28978) [2010] ZAGPPHC 10 (2 March 2010) (unreported) at 27.

4 3 *Absa Bank Ltd v De Villiers and another*

4 3 1 Summary of the facts and decision[196]

Absa approached the Magistrates' Court for the district of Simon's Town, for an order that the vehicle it had sold to De Villiers be returned to it. The Magistrate considered the provisions of the Act and concluded that since Absa had not cancelled the agreement, it was not in the circumstances of the case entitled to the return of the vehicle. The Magistrates refused an application brought by Absa. Absa brought for an application in the Cape High Court for a review of and setting aside the Magistrate's decision. The Court held that before a credit provider becomes entitled to claim a final order authorising attachment of a motor vehicle, the creditor must first cancel the relevant agreement with the consumer. [197] Court concluded that that the Act did not alter the common law principles as far as cancellation of an agreement prior to repossession of goods

4 3 2 Analysis

In terms of the common law, a creditor can cancel the agreement with the debtor when the debtor is in default and claim the amount owing and penalty upon default and breach. It was previously mentioned that before one can cancel an agreement, there has to be right vesting in the credit provider to do so. In common law when the agreement does not contain *lex commissoria*, the appropriate allegations must be made that the credit provider requires confirmation for cancellation of the contract.[198] To avoid the burden of having to acquire the right to cancel a contract, the parties may insert a special clause (*lex commissoria*) in the contract allowing for the cancellation thereof in the event of breach of contract.[199] Sections 123 and 129 are procedural steps before enforcement and enforcement means exercise of any legal remedy.[200]

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196 See also Van Heerden "Debt Counselling v Debt Enforcement: Some Procedural Questions Answered: BMW Financial Services (SA) (Pty) Ltd v Donkin 2009 6 SA 63 (KZD)" 2010 *Obiter* 756.

197 *Absa Bank Ltd v De Villiers* pars 19, 28, 32, 42 and 43.

198 See Borraine and Renke (part 1) 2007 *De Jure* 222 par 2 2 1.

199 *Ibid* par 224.

200 S 129(1) (b) (i). See *ABSA Bank Ltd v De Villiers* par 14; ABSA *Bank Ltd v Prochaska tla Bianca Cara Interiors* par 27. See also Van Heerden 2010 *Obiter* 756 at 773.

In this case the court has established that the Act did not alter the common law principles as far as cancellation of an agreement prior to repossession of goods is concerned. In terms of the Act a process needs to be followed when a debtor is in default and in breach of an agreement. The Act states that credit agreements can only be cancelled in terms of section 129 and 130.[201] Absa convincingly argued that the provision of the Act which deals with repossession and surrender of goods, automatically entitle a credit provider to obtain a final order of attachment of the goods upon default of the consumer.[202] The credit provider is obliged to realize the goods in accordance with the provisions of the Act, and that the Act have the effect of introducing a procedure at variance with the common law.[203] In terms of the Act where the agreement contains no cancellation clause, it was submitted that the allegations that the credit provider had complied with the provisions of sections 123 and 129 of the Act were sufficient to found an action for cancelation.[204] The submission will afford the credit provider, a right of cancellation.

Suggestion in this dissertation is that Absa was correct to make submissions that the Act change common law. The Act changes the process of common law and contains provisions regarding the cancellation of agreements, specifically by regulating the time period and the requirement for formal notice.[205] The Act's predecessor had similar provision.[206] The Act prescribed procedural steps by way of formal notice. In common law contract can be cancelled verbally or informally as long as the creditor has acquired the rights to cancel. Consequently the Act does not change the common law with regard to the fact that the contract must be cancelled before repossession. [207] However, the Act changes common law

201 S 123.

202 Ss 123, 129 and 130.

203 http://www.hg.org/article.asp?id=6779.

204 Van Heerden "The money or the box: perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (unpublished paper).

205 Ss 123, 129 and 130.

206 S 11 of the Credit Agreements Act.

207 *Absa Bank Ltd v De Villiers* par 19, 28, 32, 42 and 43. This decision was referred to in *ABSA Bank v Havenga and similar cases* 2010 (5) SA 533 (GNP), the court held that in a credit agreement where credit provider is claiming enforcement, Cancellation of agreement is a requirement before attachment can be claimed. Credit provider must show right of cancellation in his Particulars of claim and founding affidavit to reflect actual

with regard to the procedural steps before cancellation. Therefore the Act has an influence on the common law cancellation procedure of a contract.

4 4 *BMW Financial Services v Donkin*

4 4 1 Summary of the facts and decision[208]

In this case the question the court had to consider was whether it is possible for the court consider the possibility of a duly-cancelled credit agreement being reinstated. The court held that the argument that a credit agreement may be reinstated cannot be sustained. Reason for this was that the Act does not expressly provide for this possibility and that the consumer's rights of reinstatement fall away once the agreement has been lawfully cancelled.[209]

4 4 2 Analysis

In common law, when a contract is terminated, it is not susceptible to be re-instated. The parties who seek to re-instate their rights and obligations must do so through entering into a new contract based on same terms and conditions. However, the debtor has a right of redemption and this right entitle the mortgagor to tender full payment due under the bond and demand that the mortgage bond be cancelled.[210] This right can only be exercised before the property is actually sold at sale in execution by the mortgagee. It is not clear that the right of redemption has the effect of re-instating a credit agreement that is already cancelled.

The Act entitles the consumer who is in default to re-instate a credit agreement by paying all overdue amounts to the credit provider at any time before the latter has cancelled the agreement.[211] The Act is silent on the argument that it is possible for a court to make an order that will result in the agreement being reinstated, which in turn will result in the

agreement and specific cancellation clause. Use of general template insufficient and mere allegations of compliance with sections 123 and 129 of National Credit Act is insufficient.

208 See comprehensive summary of all the facts in Van Heerden 2010 *Obiter* 75.

209 S 129(4) (c).

210 Badenhorst *et al Silberberg and Schoeman's the Law of Property* (2006) 381.

211 S 129(3).

restoration of the defendant's right of possession.[212] Borraine and Renke correctly submit that it is difficult to understand how an agreement can be re-instated if it was not cancelled.[213] This interpretation was before the decision of this case and the court was of the same view.

Section 129 should be amended to read are as follows.

Section 129(3) needs to be amended as follows:-

129 (1)...

(2)...

(3) Subject to subsection (4), a consumer may -

(a) at any time after[214] the credit provider has cancelled the agreement and prior to any court order re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and-

(b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider prior to any court order.

Subsection (4) should provide as follows:

"A consumer may not re-instate a credit agreement after –

(a) surrender of property in terms of section 127 or

(b) the execution of any other court order enforcing that agreement

In conclusion, both common law and the Act does not provide for the possibility of a duly cancelled credit agreement to be reinstated. The consumer can only re-instate the agreement if the agreement has not been cancelled yet. This decision has cleared up confusion and if the legislator intended the contract be re-instated after cancellation, the proposed amendments or amendment along the above proposal should be effected. Consequently the Act has no influence on the common law principles regarding re-instatement of a cancelled agreement.

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212 Otto and Otto 112.

213 Boraine and Renke 2008 *De Jure* 1 at par 4 6 3.

214 The underlining here are the author's emphasis.

4 5 *SA Taxi Securitisation v Chesane*

4 5 1 Summary of the Facts and decision

SA Taxi Securitisation instituted an action against Chesane in which it claimed cancellation of the lease agreements and return of the leased vehicles. SA Taxi Securitisation brought an interlocutory application for the interim attachment of two motor vehicles for safekeeping pending the finalisation of a trial. The question was whether the applicant's right to obtain the relief sought is affected by the provisions of the Act. Court held that as the agreements of lease appear to have been validly terminated the applicant is not precluded from obtaining an order for the interim attachment of the vehicles.

4 5 2 Analysis

Firstly, interdict is a court order either preventing someone to continue breaching the contract. At common law the interim attachment of goods pending the outcome of the case is well-established.[215] The purpose of an interim attachment order is not the permanent return of the goods but attachment in order to put them in safe custody until the case between the parties was finalised on the return date. The court will only grant interdict in urgent circumstances and where all other remedies have been exhausted.[216] To succeed in this application the applicant is required to establish and satisfy the well-established requirements for the granting of an interim or final interdict. It is required to show clear right, grounds of irreparable harm, balance of convenience favours the granting of interim relief and that interdict is the last resort.[217] Secondly, in terms of section 19(1) (a) (iii) of the Supreme Court Act[218] our courts have common law powers to make declaratory orders. Our courts have discretion to enquire into and determine remedy or obligation at the instance of any interested person, despite the fact that such a person cannot claim any relief as a result of such determination.[219]

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215 *Van Rhyn v Reef Developments (Pty) Ltd* 1973 (1) SA 488 (W) at 492.

216 See Christie and Bradfield 55 – 557; Fouche *et al* 124.

217 *SA Taxi Securitisation v Chesane* 2010 (6) SA 557 (SGJ) par 11. See Nagel *et al* par 9.53.

218 59 of 1959.

219 Hutchison *et al* 345.

Lastly, The Act is silent as to whether a registered credit provider may obtain an order for the interim attachment of goods. There is no express indication in the Act that the common law remedy has been abrogated. The Act makes express reference to attachment orders but it is unclear whether these include orders for the interim attachment of goods pending the outcome of vindicatory or *quasi* vindicatory proceedings.[220] Unlike the Act, the Credit Agreements Act[221] provided that a credit grantor was only entitled to claim return of the goods after 30 days had elapsed since the credit receiver was notified of his breach of contract and failed to rectify the breach.[222] Section 11 of the Credit Agreements Act did not relate to cancellation of the agreement.[223] The entire credit provider has showed before the court was that he notified the consumer of the breach and the consumer is ignored hm.

Consequently, where provisions of a statute are of doubtful meaning there is a presumption against an alteration in the common law. A statute must be construed in conformity with the common law rather than against it, except where the statute is clearly intended to alter the common law.[224] The court has already decided that, the Act did not alter the common law principles as far as cancellation of an agreement prior to repossession of goods is concerned.[225] In this case the court made submissions that will grant interdict if the agreement in question was cancelled.[226] In the present case, the court ruled on whether the creditor has to cancel the agreement before interim attachment can be granted. The court developed common law in that creditor must cancel the credit agreement before claiming return of goods. Cancelation must comply with both common law and the Act.

220 Ss 129(3) (b), 129(4) (a) and 130(2) (a) (ii).

221 Section 11 of the Credit Agreements Act.

222 *Santam Bank Bpk v Dempers* 1987 (4) SA 639 (O). See Otto and Otto 116; see also Borraine and Renke 2007 *De Jure* 222.

223 Otto *Credit law service* par 29 and Borraine and Renke *De Jure* 222 at par 2 2 1.

224 *SA Taxi Securitisation v Chesane* at par 8.

225 *ABSA Bank Ltd v De Villiers supra* 49; Van Heerden and Coetzee 2010 *OBITER* 756 at 774. See Otto "Attachment of Goods Sold in Terms of Instalment Agreement without Cancellation of Contract – Sanctioned by National Credit Act? – *Absa Bank Ltd v De Villiers*" 2009 *THRHR* 473.

226 *Steyns Foundry (Pty) Ltd v Peacock* 1965 (4) SA 549 (T); *First Consolidated Leasing and Finance Corporation Ltd v N M Plant Hire (Pty) Ltd* 1988 (4) SA 924 (W).

Chapter five – Conclusion

5 1 Conclusion

In conclusion, chapter one has given the picture of this dissertation, which after reading chapters two to four and this chapter, it should be a clear picture.

Chapter two has examined the common law general principle law of contract regarding the requirements for a valid and binding contract. Firstly, for a contract to be valid there must be consensus, in other words, the meeting of minds concerning all the terms of the contract. Secondly, parties to a contract must have contractual capacity to enter into a contract. In terms of common law, a minor is in certain circumstances allowed to contract without assistance, for example where he obtains rights only or emancipated. Insane person have no contractual capacity and cannot contract. Thirdly, the contract will be illegal if is contrary to public policy or *contra bonos mores*. Fourthly, performance must be objectively and subjectively possible. Performance must also be legal and certain. Fifthly, Common law requires no formalities for the making of an enforceable credit agreement, so written, oral and tacit contract are valid. Lastly, Failure to perform in terms of the contract amounts to breach and innocent party may make use of remedies available by operation of law or agreed remedies.

Chapter three discussed the impact of the Act on the above mentioned general principle law of contract. The Act has direct influence consensus. It was revealed the Act exclude consensus by making an incidental credit agreement a valid credit agreement without the parties agreeing on the terms and conditions thereto. The legislator extended common law in that the credit provider and consumer must reach consensus on, among others, on the details of both the consumer and the credit provider, principal debt under the agreement, description of the security to be provided by the consumer, the amount of the credit to be provided under the agreement and the Total charge and repayable amount.

The Act has direct influence on contractual capacity. The Act in section 89 has developed the common law and among others, provides that a credit agreement is unlawful if the consumer is an unemancipated minor or person who is declared mentally unfit by court

order or under administration in terms of the magistrate court Act or credit provider is unregistered. There is no guideline in section 89 regarding the steps the credit provider needs to follow in order to establish the contractual capacity of the consumer.

The Act does not have much influence on the possibility of performance, except that in terms of common law the credit agreement contains acceleration clause the credit provider may automatically enforce the agreement without demand to bring it in operation and such acceleration clause in a form of specific performance must comply with the Act.

The Act has great impact on legality. Firstly, if a credit agreement is unlawful despite any provision in common law, any other legislation or any provision of an agreement to the contrary, a court must order that the credit agreement is void as from the date the agreement was entered into. The introductory part of section 89 has a direct impact on the common law because it expressly states that despite any provision of common law, the contract is void. This means that common law cannot be applied. In light of the above, the Act has a great impact on common law with respect to unlawful credit agreement, but to the extent that the Act applies. Secondly, it was mentioned before that certain clauses or provisions that are commonly included in commercial contract are prohibited in credit agreements by the Act. A provision of a credit agreement is unlawful if, among other, its general purpose or effect is to defeat the purposes or policies of the Act, deceive the consumer, directly or indirectly purports to waive or deprive a consumer of a right set out in this Act, purports to waive any common law rights, it purports to exempt the credit provider from liability or limit such liability. In any credit agreement, a provision that is unlawful in terms of the Act is void. The court may sever that unlawful provision from the agreement, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the agreement as a whole or declare the entire agreement unlawful as from the date that the agreement. The courts may also amended agreement and make any order that is just and reasonable in the circumstances to give effect to the principles of section 89(5) with respect to that unlawful provision or entire agreement.

The Act has a little impact on the formalities for the formation of a contact. Common law requires no formalities for the making of an enforceable credit agreement, so written, oral and tacit contract are valid. The Act does not expressly prescribe any formalities for the

validity of the contract. The Act however requires the credit provider to deliver, without charge, a copy of the credit agreement to the consumer, or to send it, in printable electronic form, to the consumer. The fact that a copy of the credit agreement should be delivered to the consumer create an assumption that the credit agreement should be in writing.

The Act has an impact on the remedies for breach of contract. The Act does not have direct influence on the common law remedy for specific performance. The Act impact on specific performance in that creditor may exercise acceleration clause in a form of specific performance. The Act has an influence on common law in that before a creditor can cancel the contract, must comply with the prerequisite of termination in section 129 read with 130. This alters the common law position that an agreement can be cancelled and the creditor can be claimed immediately without any notice to the debtor. The creditor may claim damages in terms of common law and the Act for all actual or reasonable cost for goods depreciation, goods returned and restored to a marketable condition.

The Act has an influence on agreed remedies. The Act has an influence on common law in that before a creditor can exercise the cancellation clause in the contract, including any acceleration clauses, must comply with the prerequisite of termination in chapter 6 part C. Act has done away with the common law automatic acceleration of outstanding payment. The creditor may claim any penalty agreed upon in the credit agreement, but the relevant clause must comply with the Act or only to the extent permitted by law.

Chapter four discussed the case law. The decision of *Cherangani Trade and Investment 107 (Pty) Ltd v Mason* has an influence on the Act and common law. In this case after credit transaction was declared illegal and void, the rights and obligations of creditor in terms of an agreement were forfeited to the state. The common law principles in the leading case of *Sasfin (Pty) Ltd v Beukes*[227] and *Jajbhay v Cassim*[228] were not applied. This decision is correct and in line with the provisions of section 89. The decision of *Ditshego and others v Brusson* extend the common law principle that the court will look at the true nature of the agreements. The court held that the true nature of the interdependent agreements was indeed a simulated credit transaction. The court applied the Act applies to the agreements and

227 1989 (1) SA 1 (A).

228 1939 AD 537.

declared them illegal in terms of section 40. In *BMW Financial Services SA v Donkin* it was held that creditor cannot reinstate a cancelled agreement. In *ABSA Bank v De Villiers* the principle was the Act did not alter the common law principles as far as cancellation of an agreement prior to repossession of goods is concerned. In ABSA *v Havenga*[229] the court referred to *ABSA Bank v De Villiers* and added that creditor still need to cancel the contract before repossession. The Act prescribes certain pre-enforcement requirements which must adhere prior to enforcing a credit agreement. In *SA Taxi Securitisation v Chesane* the court dealt with interim attachment orders and ruled that the creditor must cancel the credit agreement before claiming return of goods.

Consequently, the Act seeks not only to amend the common law rule but also to extend it. Both the Act and common regulate the same subject matter but the Act does not deal with all aspect of the common law rule. The Act should not be treated as a replacement of common law, but rather as an extension of the weakest part of common law. There are however certain provisions of the Act that expressly alter common law. For example, the wording in sections 89, 90 and 103(5) of the Act, supported by the decision in Cherengani case, do alter common law significantly.

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