DISSERTATION

ASPECTS OFTHE

DEBT ENFORCEMENT IN TERMS OF THE NATIONAL CREDIT ACT 34 OF 2005: A CRITICAL EVALUATION

by

ELIZABETH CHILESHE CHABALALA

Student No 10434926

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1 GENERAL INTRODUCTION

1 1 Introduction

In day to day lives of every South African, debt is inevitable and something that one cannot completely avoid. Otto and Otto submitted that "it is also a fact of life that people commit breach".[1] Consequently the issue of debt enforcement becomes imperative. The consumer credit industry began in the 1940's, however, the lack of proper credit legislation often led to exploitation of consumers by unscrupulous credit providers as they often included unreasonable provisions in their credit agreements which were to the consumer's detriment.[2] In order to protect the consumer as well as to regulate the debt enforcement procedures a number of consumer credit enactments[3] were enacted containing provisions that curtailed the creditor's common law remedies.[4] In this dissertation, consumer credit legislation will be divided into two parts. That is, (a) consumer credit legislation prior to the National Credit Act and (b) the consumer credit currently applicable, Alienation of Land Act[5] and the National Credit Act.

As stated above, prior to the National Credit Act,[6] as a general rule, consumer credit legislation contained provisions that curtailed the credit provider's remedies. It was required that in the event of breach of contract by the consumer, the credit provider had to send a notice informing the consumer of the breach. However, due to poor drafting of the Acts, there were problems in regard to the interpretation of the provisions, in particular those dealing with debt enforcement notices.[7] One of the issues was whether the notice had to reach the consumer in order to be effective.

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[1] Otto and Otto (2013) 106.
[2] Taylor (2009) *De Jure* 104.
[3] Hire-Purchase Act 36 of 1942, hereafter the Hire-Purchase Act. The Credit Agreements Act 75 of 1980, hereafter the Credit Agreements Act and the Sale of Land on Instalments Act72 of 1971, hereafter the Sale of Land on Instalments Act.
[4] See Nagel *ed* (2011) para 9.45-9.52, where common law remedies are listed as claims for specific performance, claims for damages and cancellation of the contract. See also Otto and Otto (2013) 106.
[5] 68 of 1981, hereafter the Alienation of Land Act.
[6] 34 of 2005, hereafter the National Credit Act or the NCA.
[7] See s 12(b) of the Hire-Purchase Act; s 11 of the Credit Agreements Act and s 13(1) of the Sale of Land on Instalments Act discussed in paras 2 2-2 4.

The National Credit Act devotes the entire Part C of Chapter 6 to debt enforcement and matters incidental thereto. The legislature endeavoured to provide procedures to be complied with by credit providers prior to debt enforcement. In particular, section 129 read with section 130 require that the credit provider delivers a notice to the consumer before an overdue debt is enforced. Therefore, similar questions that arose in respect of its predecessors[8] arise pertaining to the debt enforcement provisions in terms of the NCA. The terminology used in the NCA's provisions has not been defined and therefore give rise to court decisions.

1 2 Research statement

The problem statement of this study is to discuss and evaluate the debt enforcement provisions of the National Credit Act, with particular reference to the debt enforcement notice required in terms of section 129(1) of the Act. The main focus centres on the question whether the section 129(1)(a) notice has to reach the credit consumer in order of be effective.

1 3 Research objectives

With reference to the abovementioned research statement, research objectives have been formulated in order to define and restrict the scope of this dissertation. These are as follows:

(a) An overview of the historical development of the consumer credit legislation in South African prior to the National Credit Act will be provided to establish whether the debt enforcement provisions under the old legislation can profitably be considered for purposes of recommending improvements to the NCA's provisions.
(b) The debt enforcement processes in terms of the consumer credit legislation currently in operation with reference to debt enforcement notices will be evaluated. This will be done *inter alia* having regard to case law.
(c) Final conclusions and recommendations will be made.

[8] Hire-Purchase Act; Credit Agreements Act and the Sale of Land on Instalments Act.

1 4 Delineation and limitations

Although this dissertation refers to debt enforcement processes it is only limited to provisions dealing with notices that are required to be sent by the credit providers to the consumer prior to enforcing an overdue debt. Therefore, as far as the NCA is concerned, its focus is on the pre-court procedures in terms of section 129 and not on the in-court procedures. This dissertation does not focus on the application of the enactments to be considered. However, a very brief overview of the scope of application of each Act will be provided. It should be noted that the research is only based on South African Law as at June 2013.

1 5 Structure of dissertation

This dissertation is divided into 4 paragraphs of which the first deals with the introduction to and overview of the dissertation. Paragraph 2 provides an overview of the historical development of consumer credit legislation in South Africa prior to the National Credit Act with reference to debt enforcement notices. In meeting the objective of paragraph 2 repealed consumer credit legislation as well as relevant case law are considered. Paragraph 3 provides an overview of the consumer credit legislation currently applicable in South Africa, with particular reference to debt enforcement notices. Further, it discusses the challenges faced in regard to these notices as well as the cases that have been decided on the issues raised. The fourth and final paragraph of this dissertation contains the overall conclusions and recommendations in regard to the research conducted in this study with reference to the research statement and objectives formulated in paragraphs 1 2 and 1 3.

1 6 Terminology

In this dissertation the concepts “consumer”, “debtor” and “credit receiver” will be used interchangeably. The same holds for the concepts “credit provider”, “creditor” and “credit grantor”. “Consumer” and “credit provider” are defined in paragraph 1 7 below.

1 7 Key terms, references and definitions

For purposes of this dissertation the singular shall include the plural and any reference to the male will include the female gender. For clarity purposes, the definitions[9] of general terms that will be used throughout this dissertation are quoted hereafter:

"agreement" includes "an arrangement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties".

"credit", when used as a noun, means—

(*a*) a deferral of payment of money owed to a person, or a promise to defer such a payment; or
(*b*) a promise to advance or pay money to or at the direction of another person.

"credit agreement" means "an agreement that meets all the criteria set out in section 8".

"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;

"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.

[9] As defined in s 1 of the NCA.

1 8 Reference Techniques

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

2 AN OVERVIEW OF THE HISTORICAL DEVELOPMENT OF CONSUMER CREDIT LEGISLATION IN SOUTH AFRICA PRIOR TO THE NATIONAL CREDIT ACT WITH REFERENCE TO DEBT ENFORCEMENT NOTICES

2 1 Introduction

This paragraph entails an overview of the historical development of the consumer credit legislation that preceded the National Credit Act, with the focus on the notices required to enforce the debt in terms of a credit agreement. Reference will in particular be had to the Hire-Purchase Act, the Credit Agreements Act and the Sale of Land on Instalments Act. As will be seen below,[10] these Acts, similarly to the NCA, contained provisions requiring that the credit provider should provide the consumer with a notice[11] prior to debt enforcement. The aims with the mentioned historical overview in relation to debt enforcement notices are to

(a) give an indication of the development that occurred under South African consumer credit legislation;
(b) indicate the extent of the protection that was afforded to credit consumers prior to the NCA; and
(c) compare the provisions of the NCA with that of its predecessors and, where applicable, to recommend improvements to the NCA.

When addressing each piece of legislation, its scope of application will be briefly considered. In order to indicate the development of the credit legislation provisions by the courts, relevant case law will also be considered.

2 2 The Hire-Purchase Act[12]

2 2 1 General

[10] Paras 2 2-2 4.
[11] "Enforcement"will be used interchangeably with "letters of demand".
[12] Act 42 of 1936 as amended by Act 73 of 1972. The said Act was repealed by the Credit Agreements Act 75 of 1980.

The Hire-Purchase Act became effective on 1 May 1942.[13] Its initial purpose was *inter alia* "to protect the poor against their own improvidence and folly".[14] It applied to hire-purchase agreements, instalment sale agreements and a particular type of lease.[15] "Hire-purchase agreement" was defined[16] as "any agreement whereby goods are sold subject to the condition that ownership in such goods shall not pass merely by the transfer of the possession of such goods…"[17] It was further required that the purchase price in question was to be paid in at least two instalments after the transfer of the goods.[18] "Instalment sale agreement" was defined similarly to the hire-purchase agreement, except that in terms of the former ownership was passed upon delivery.[19]

The said agreements had to be in relation to movable property of which the purchase price was not over R4000 and in respect of which the state was not the seller.[20]

With the developments in the credit market,[21] hire-purchase agreements became popular with consumers, which led to them being exploited by credit providers due to the bargaining power imbalance between the two.[22] For instance, to avoid the cumbersome common law procedure of justifying cancellation of a contract,[23] the credit provider would incorporate a *lex commissoria* in the contract which would enable him to cancel the contract without having to prove that the breach was material.[24] Grové and Otto[25] equally argued that for quick recourse most of the credit grantors included the remedies in the actual agreements. Therefore, in order to protect the consumer, the legislature included provisions in the Hire-Purchase Act restricting the credit provider's debt enforcement rights where the agreement

[13] Diemont, Marais and Aronstam (1978) 269. See also Flemming (1974) 17.
[14] Belcher (1972) 166 and Taylor (2009) *De Jure* 106.
[15] Diemont and Aronstam (1982) 33-48 and Belcher (1972) 167.
[16] S 1(1) of the Hire-Purchase Act.
[17] See Diemont and Aronstam (1982) 33 fn 12. They submitted that the Act did not apply to agreements in terms of which ownership would never pass to the consumer.
[18] S 2(1). It is therefore submitted that cash transactions were excluded.
[19] S 1(1). See also Diemont and Aronstam (1982) 36.
[20] S 2(1). For a detailed discussion on the scope and application of the Hire-Purchase Act, see Diemont *et al* (1982) 33-48 and Otto Commentary (1991) para 6.
[21] Grové and Otto (2002) 4.
[22] Otto Commentary (1991) para 3. See also Grové and Otto (2002) 2-3.
[23] See *Working Paper 46* (1993) 340 where it was submitted that "it's generally accepted law that cancellation of contract remains an abnormal remedy…the breach has to be material…". In this regard, see also Hutchison *et al* (2009) 322-323.
[24] Grové and Otto (2002) 41. See also *Working Paper 46* (1993) 340 and Belcher (1972) 167.
[25] Grové and Otto (2002) 43. They submitted that because in terms of common law, cancellation was only permitted for serious breaches, creditors escaped through *lex commissoria* clauses and hence the necessity for debt enforcement processes.

in question fell within the ambit of the Act.[26] Of importance was the provision contained in section 12(b). It should be noted that section 12, discussed below, was to be complied with in instances where the credit provider desired to enforce remedies such as an acceleration clause, claims for specific performance, damages and forfeiture or penalty clauses in terms of the contract.[27]

2 2 2 The Hire-Purchase Act: debt enforcement measures

Section 12(b)[28] of the Hire-Purchase Act determined as follows:

> No seller shall, by reason of any failure on the part of the buyer to carry out any obligation under any agreement, be entitled to enforce any provision in the agreement for the payment of any amount as damages, or for any forfeiture or penalty, or for the acceleration of the payment of any instalment, unless he has by letter handed over to the buyer or sent by registered post to him at his last known residential or business address, made to the buyer to carry out the obligation in question within a period stated in such demand, not being less than ten days and the buyer has failed to comply with such demand.

It is apparent from the above provision that, where the credit provider wished to enforce a credit agreement in terms of the contract, it was obligatory that he complied with the following requirements before he could proceed with debt enforcement:

(a) He needed to deliver a letter of demand before he could (i) claim immediate payment of all amounts due as per the acceleration clause; (ii) claim any amount for damages; or (iii) claim any forfeiture or penalty.

(b) The letter had to be handed over to the buyer[29] or sent by registered post to him at his last known residential or business address.[30]

(c) In the letter of demand, the seller had to state the overdue obligation that needed to be carried out and demand that the buyer complied with same within a period of not less than ten days.[31]

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[26] See Grové and Otto (2002) 40-47. See also Otto and Otto (2013) 2.

[27] Diemont and Aronstam (1982) 183-190. They also submitted that a claim for cancellation of an agreement and return of the goods sold involved a claim for forfeiture within the meaning of s 12(b). It was therefore submitted that a credit provider, despite the absence of specific mention of cancellation in s 12, could not cancel the agreement without first sending the letter of demand as cancellation without forfeiture or damages was of no benefit to him.

[28] As amended by the Hire-Purchase Amendment Act 30 of 1965.

[29] Diemont, Marais and Aronstam (1978) 136 submitted that for effective compliance in this regard, the letter had to be handed over to the buyer personally.

[30] As amended by Act 30 of 1965.

In terms of section 12(b), the credit provider could therefore either hand over the letter to the buyer or send it by registered mail. The challenge that credit providers encountered was the issue of whether, in instances where registered post was utilised, the letter had to reach the consumer for effective compliance.[32] Further, it was an issue as to how the "ten day period" had to be calculated.

2 2 3 Case law

2 2 3 1 *Weinbren v Michaelides*[33]

In the abovementioned case of *Weinbren,* the letter of notice was sent to the buyer's last known address via registered post but was returned to the credit grantor with the note "gone away". The credit provider's contention was that despite the letter not reaching the consumer it had nonetheless complied with the agreement entered into between the parties. The said agreement contained a provision to the effect that the posting of a letter of demand via registered post would serve as a notice in terms of section 12(b). The consumer argued that the provision in the agreement was of no force and effect as section 20 of the Hire-Purchase Act provided *inter alia* that "[n]o waiver by any buyer of any right under this Act shall be of any force or effect".[34]

Based on the wording of the original section 12(b) of the Hire-Purchase Act, the Court held that it was necessary for a section 12(b) notice to reach the consumer in order for it to be effective.[35] The Court further stated that the "seller ought to have taken due care to ensure that the letter of demand which he was required to give under section 12(*b*) reached the person who was entitled to receive it".[36] The Court based its decision on the wording of section 12(b). Accordingly, it was held that because the notice was required to be in writing and the consumer had ten days in which to comply with the demand, it meant that the notice had to reach the consumer.[37] The Court further pointed out that in regard to section

[31] Diemont and Aronstam (1982) 181-182.
[32] See paras 2 2 3 1-2 2 3 2 below where some of the decided cases on the issue are discussed.
[33] Hereafter the *Weinbren*-case.
[34] See the *Weinbren*-case 102.
[35] The *Weinbren*-case 102. This decision was followed in other cases such as *John Roderick's Motors Ltd v Viljoen* 1958 (3) SA 575 (O) and *Forsdick Motors Ltd v Mohamed* 1957 (3) SA 133.
[36] The *Weinbren*-case 103. See further *Sebola v Standard Bank* 2012 (5) SA 142 (CC) 128 where Zondo AJ quoted the same statement with approval.
[37] The *Weinbren*-case 102.

20, the respondent's interpretation of the intention of the legislature was correct and holding otherwise would have meant that

> [a] perfectly honest buyer might change his address and might use the statutory right which is given to him of giving a fortnight's notice of that change, using the fortnight after he had changed his address within which to give his notice and during that period a letter demanding that he carry out his obligations might be delivered to his old address.[38]

2 2 3 2 *Fitzgerald v Western Agencies*[39]

The abovementioned case of *Fitzgerald* came on appeal before the Transvaal Provisional Division in 1967 after the amendment to section 12(b) by Act 30 of 1965. The facts were that the plaintiff had sent a letter by registered mail to the defaulting defendant to his last-known address, as was required by the amended section 12(b) of the Hire-Purchase Act, notifying him of the breach and that he had to comply with the demand within the period specified (being not less than ten days). As in the *Weinbren*-case, the letter was returned with the note that it could not be delivered as the defendant had changed addresses without notifying the plaintiff of his new address. The defendant raised an exception to the summons.

The Court considered the *Weinbren*-case as well as the amended section 12(b). It held that the notice had been served effectively as it was sent via registered post to the buyer's last-known address and actual receipt was not required.[40] The Court remarked that the change in the wording of the provision to indicate how the notice could be delivered clearly indicated the intention of the legislature to do away with the requirement of receipt of the notice for it to be effective.[41]

The Court further referred to the *Weinbren*-case where it was stated that had section 20 not prohibited the waiver of the consumer's rights under the Act,[42] his decision would have been different. Based on this remark, the Court concluded that the need to amend section

[38] The *Weinbren*-case 103.
[39] [1968] 1 All SA 366 (T), hereafter referred to as the *Fitzgerald*-case.
[40] *Fitzgerald*-case 369C.
[41] *Fitzgerald*-case 369G.
[42] See the *Weinbren*-case 102 where the court stated that "[i]f it were permitted to the buyer to contract out of s 12 then I think Mr. *Merber's* argument would be a good one, but I have no doubt that Mr. *Kentridge* is right when he argues that s. 20 of the Act prevents a contracting out of the provisions of s. 12."

12(b) was as a result of the remarks made by the Court in the *Weinbren*-case.[43] Diemont, Marais and Aronstam[44] also agreed that the *Weinbren*-decision[45] brought about the need for the amendment in order to make provision for those cases where a consumer had failed to notify the credit provider of a change of address.

Based on the reasoning above, the Court of Appeal came to the conclusion that the Court of first instance was correct in dismissing the exception as section 12(b) was deemed to have been complied with despite the notice not having reached the consumer.[46]

2 2 4 Conclusion

In conclusion in respect of the Hire-Purchase Act, it is submitted that during the period that this Act was in force, the credit grantor could not just enforce his remedies as envisaged in the contract.[47] He had to show that he had complied with section 12(b) and that the consumer had nonetheless failed to comply with his demand in terms of the letter sent to him. It is submitted that section 12(b) read with section 12(a),[48] was a restriction on the rights of the credit provider and to some extent this protected the consumer.[49] It was settled that the letter was deemed to have been delivered if it was sent in the prescribed method even if it was not received. It is further submitted that it is, however, only to "some extent" that the consumer was protected as ten days could not have been sufficient to enable the consumer to rectify the default. It can be argued that this could have been one of the reasons why it was increased to thirty days in the Credit Agreement Act.[50]

In reference to the *Weinbren*-case, having regard to the wording of section 12(b), it is submitted that the Court's decision was correct. As stated earlier,[51] one of the purposes of inserting the section 12 provisions which curbed the rights of the credit providers was to

[43] See para 2 2 3 1.
[44] Diemont, Marais and Aronstam *(*1978) 137 fn 38.
[45] See para 2 2 3 1 above.
[46] See *Fitzgerald*-case 368F. It should be noted that this decision was based on the amendment of the Act by the Amendment Act 30 of 1965.
[47] Such as specific performance, cancellation of the contract or a claim for damages. See also Diemont and Aronstam (1982) 178 for a detailed discussion of the creditor grantor's remedies.
[48] Which provided that a certain number and percentage of the instalments had to be met before enforcing an acceleration clause.
[49] Grové and Otto (2002) 42. See also para 2 2 2 above for a discussion on s 12(b).
[50] See para 2 3 2 below for a discussion of the provisions of the said Act.
[51] See para 2 2 1 above.

protect the consumer. It is the author's point of view that to have decided otherwise would have been unreasonable and unjust because the credit provider was aware of the fact that the letter had not been received by the consumer. It is further submitted that it would have been different if the letter had not been sent back because in that case it would have been reasonable for the credit provider to have assumed that the letter had been received. As much as consistency is vital in deciding cases, it should be noted that each case should be decided on its own merits. In addition, it should be tested on a balance of probabilities whether the letter was delivered or not.

Moreover, as reasoned by the Court, the purpose of the notice was to remind the consumer of the breach and to allow him to rectify same in ten days. It would have been impossible for the consumer to rectify the breach where the notice was not received. It is also worth mentioning that the case the *Weinbren*-case was decided on the original wording of section 12(b),[52] which did not prescribe the method of delivery but only required that "written demand" be made to the consumer. As stated above,[53] section 12(b) was later amended by section 11 of Act 30 of 1965.[54]

From the discussion of the provisions of the Hire-Purchase Act, it is apparent that the wording of legal provisions are of significant importance as they have a great impact on the court's interpretation of a particular section. The *Weinbren*-case and the *Fitzgerald*-case were decided differently because of the difference in the wording of section 12(b) before and after its amendment.

As much as the Hire-Purchase Act was *inter alia* intended to protect consumers, it had short-comings. For instance, its application was limited to a small number of transactions which were also restricted to a value of R4000.[55] Further, it was not applicable to all leases

[52] S 12(b) that was considered in this case was prior to the 1965 amendment, and provided that "no seller shall, by reason of any failure on the part of the buyer to carry out any obligation under any agreement, be entitled to enforce—(*b*) any provision in the agreement for the payment of any amount as damages, or for any forfeiture or penalty, or for the acceleration of the payment of any instalment, unless he has made written demand to the buyer to carry out the obligation in question within a period stated in such demand, not being less than ten days, and the buyer has failed to comply with such demand". It did not prescribe method of delivery.
[53] See Para 2 2 2 above.
[54] S 11 included the phrase..."by *letter handed over to the buyer* (own italics) or posted to him at his last known residential address or business address".
[55] Otto and Otto (2013) 2.

and the rendering of services.[56] In terms of debt enforcement procedures, it is submitted that the ten day period in which the consumer had to rectify the default was too short.

2 3 The Credit Agreements Act

2 3 1 General

The Credit Agreements Act was enacted in 1980 and became effective on the 2 March 1981,[57] thereby repealing the Hire-Purchase Act.[58] While the Sale of Land on Instalments Act and the Alienation of Land Act applied to credit agreements relating to immovable property, the Credit Agreements Act only applied to credit agreements involving movable property.[59]

In terms of section 1 of the Credit Agreements Act, the Act applied to a credit agreement which was defined as (a) a "credit transaction" or a "leasing transaction" and (b) a transaction or combination of transactions having the same import as a transaction in (a). Diemont and Aronstam[60] summarised a credit transaction as one in terms of which "goods were sold or a service rendered and payment (in money) was at a stated or ascertainable future date".[61] A leasing transaction was defined as a "transaction whereby movable goods were let to a lessee by a lessor against payment of a stated and ascertainable sum of money which was payable at a stated or determinable future date or in whole or in instalments over a period in the future".[62] The specific type of credit agreements and leases to which the Act applied was determined by the relevant Minister provided *inter alia* that the State was not the credit grantor and the purchase of goods was not solely for the purpose of selling or leasing them or using them in connection with mining, engineering, construction, road building or manufacturing process.[63]

[56] Otto Commentary (1991) para 6.
[57] Diemont and Aronstam (1982) 43.
[58] Otto Commentary (1991) para 20.
[59] Scholtz in Scholtz *ed* (2008) para 1.3.3.
[60] Diemont and Aronstam (1982) 43.
[61] See Diemont and Aronstam (1982) 43-46 for a detailed definition of the credit transactions.
[62] S 1. See Grové and Jacobs (1993) 15; Otto Commentary (1991) para 7 and Renke LLD Thesis (2012) 371.
[63] S 2(1). See Diemont and Aronstam (1982) 48.

From the preceding paragraph, it is submitted that the Credit Agreements Act applied to a number of contracts and not only the hire-purchase agreement as was the case under its predecessor.[64] As was submitted above,[65] it is common cause that where there is a contract there is always a possibility that a breach of contract may occur hence the "default clauses".[66] Consequently, in instances where there was a breach of contract, before the aggrieved party could enforce the debt or contract,[67] he had to determine whether the Act was applicable or not. If it was, certain steps had to be taken as provided for in section 11. It is this provision that will be focused on next. For practical purposes, reference will also be made to cases decided under the aforementioned provision.

2 3 2 The Credit Agreements Act: debt enforcement measures

2 3 2 1 General

Similarly to its predecessor, the Hire-Purchase Act,[68] the Credit Agreements Act contained a provision which curbed the credit provider's right to enforce an agreement. Due to the importance of section 11, it is quoted in full. Section 11 provided that

> [n]o credit grantor shall, by reason of the failure of the credit receiver to comply with any obligation in terms of any credit agreement, be entitled to claim the return of the goods to which the credit agreement relates unless the credit grantor by letter, *handed over* to the credit receiver and for which an *acknowledgement of receipt* has been obtained or posted by prepaid registered mail to the credit receiver at his address stated in the credit agreement in terms of section 5(1)(b) or the address changed in accordance with section 5(4), has *notified* the credit receiver that he so failed and has required him to comply with the obligation in question within such period, being not less than 30 days *after the date of such handing over* or *such posting*, as may be stated in the letter, and the credit receiver has failed to comply with such requirement...[69]

[64] Otto Commentary (1991) para 6. Application was extended to other credit agreements such as leases, rendering of services, contracts of purchase and sale for which the value involved was not more than R500 000 provided the consumer was a natural person. The scope of application of the Credit Agreements Act is wider despite not being automatic to every transaction that qualified as a credit agreement i.e. it had to fall within the categories as specified by the minister in the *GG*. For a detailed discussion of the scope of application see Renke LLD Thesis (2012) 369 -372; Grové and Jacobs (1993) 15 and Kelly-Louw (2008) *SA Merc LJ* 203.
[65] See para 2 2 1.
[66] Otto Commentary (1991) para 3; Grové and Otto (2002) 41.
[67] Specifically if he wished to claim the return of goods.
[68] See para 2 2 2.
[69] Own italics were used to indicate possible differences between s 12(b) and s 11 of the Credit Agreements Act.

It is evident that where the credit grantor wished to claim that the goods in terms of the credit agreement be returned to him, he had to comply with the provisions of section 11. It should be noted that the section 11 notice was *inter alia* unnecessary in instances where the goods were already in possession of the credit grantor, the credit grantor wished to enforce an acceleration clause[70] or wished to cancel the contract.[71]

The notice to the debtor had to entail the following:[72]

(a) The nature of the debtor's breached obligations.
(b) The steps to be taken to rectify the breach.
(c) A specific period of time in which to comply with the letter of demand. In terms of section 11 the said period could not be less than 30 days after the date of handing over or posting of the letter and not from the date of the letter.[73]
(d) Notification of the intention to cancel the contract and claim the return of the goods should the debtor fail to remedy the breach.

The credit grantor had to deliver the written notice in the specified manner, failing which the notice would not be enforceable.[74] The creditor grantor had a choice between delivery of the letter by hand or by registered mail.[75] Where the former was elected, the credit provider was required to hand over the letter to the consumer personally and for which an acknowledgement of receipt had to be obtained.[76] The issue that existed in section12(b) of

[70] Grové & Otto (2002) 43. The acceleration clause was only enforced if it was part of the contract. It is a provision which allows for the credit grantor to claim the entire outstanding balance in a single amount. It is therefore common in contracts, however, it was to the detrimental of the credit receiver. Hence, the Hire-Purchase Act included it in s 12 so that before it could be enforced, a notice had to sent to the credit receiver. It is unfortunate that this was not done in the Credit Agreements Act, because without the restriction of acceleration clause enforcement, the credit grantor could easily claim for the whole outstanding amount upon commission of any breach without sending a notice. See Otto (1993) *TSAR* 328. See also Otto Commentary (1991) paras 40-42.
[71] Grové and Jacobs (1993) 38.
[72] Diemont and Aronstam (1982) 162-164; Otto Commentary (1991) para 29; Grové and Jacobs (1993) 36-37 and Grové and Otto (2002) 43-44.
[73] See Grové and Otto (2002) 44. They submitted that the period depended on the manner of delivery. However, in terms of s 11 it is from the day following upon the day of posting or hand delivery. What is clear though is that most of the writers were of the view that it should be from date of posting and not upon receipt. See Diemont and Aronstam (1982) 163.
[74] Diemont and Aronstam (1982) 163.
[75] S 11. Otto Commentary (1993) para 29 and Diemont and Aronstam (1982) 163 argued that it could be sent via certified mail also as this would have been sufficient in that the addressee would have signed the delivery card.
[76] Grové and Otto (2002) 44. They agreed with the decision in *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 (4) SA 994 (AD) as discussed in para 2 4 3 2 below, where the Court held that delivery by hand had to be to the credit receiver himself.

the Hire-Purchase[77] in regard to how the 30 day period had to be calculated in instances where delivery was via registered post seemed to have been rectified by section 11 which provided that the credit receiver had a period, "...not less than 30 days after the date of such handing over or such posting...".[78] This inclusion in the Act made it clear that the crucial point of calculating the 30 day period was after the date of posting. Accordingly, Grové and Otto[79] were of the opinion that this should begin on the day following upon the day of posting or handing over. The other issue was whether or not for effective compliance with section 11 the notice had to reach the credit receiver.[80] For instance, what was the position where the letter was returned undelivered? There were conflicting views in this regard,[81] and it is on this issue that the following paragraph will focus. As stated above,[82] this issue also existed under the Hire-Purchase Act.

2 3 2 2 Was actual receipt of the notice by the consumer a requirement for effective compliance under the Credit Agreements Act?

There were conflicting views in regard to the question as to whether the default notice had to in fact reach the consumer or not in order to be effective. The section 11 provisions are similar to section 12(b) of the Hire-Purchase Act discussed above.[83] In this regard, Grové and Otto[84] submitted that it was not necessary for a notice that had been sent in the prescribed manner to reach the credit receiver in order for it to be effective. Accordingly, Otto[85] stated that

> [i]t cannot be laid down as an absolute rule that the notice must under all circumstances reach the credit receiver. Where the credit grantor has meticulously followed the technical requirements of the section, even though the notice may not reach the credit receiver, unless the credit grantor is aware of the fact that the notice did not reach its destination, and is still

[77] S 12(b) of the Hire-Purchase Act did not have the specification on how the 30 day period was to be calculated and hence the various contentions.
[78] See the provisions of s 11 above.
[79] Grové and Otto (2002) 44.
[80] Grové and Otto (2002) 44.
[81] For a detailed discussion of the issues, see para 2 3 1 above.
[82] See para 2 2 above for a discussion on the Hire-Purchase Act.
[83] See paras 2 2 2 and 2 2 3 above, specifically the cases of *Weinbren a*nd *Fitzgerald.*
[84] Grové and Otto (2002) 44.
[85] Otto Commentary (1991) para 29, See also Harms (1989) 86 is of the view that were notice is required (claim for return of goods) credit grantor need not allege or prove that such notice reached the credit receiver.

> capable of effecting postal or personal service thereof...all the law should expect from him is to act reasonably to bring the notice to the credit receiver's attention.

This view was also supported by De Jager.[86] However, Flemming[87] was of the opinion that non-receipt could only be condoned where it was impossible for the credit grantor to deliver the notice. The former was the more favourable view in that the word "notify" is different from the word "inform" which was used in the initial version of section 12(b) of the Hire-Purchase Act and was approved by the Court in *Marques* v *Unibank*.[88]

2 3 2 3 Case law

2 3 2 3 1 Marques v *Unibank*[89]

In the aforementioned case of *Marques,* the High Court made it clear that a section 11 notice did not need to come to the attention of the credit receiver but that it merely needed to be proven by the credit grantor that it was sent or dispatched to the credit receiver in terms of the Credit Agreements Act. [90]

The facts of the case were briefly that the appellant bought a motor vehicle from the respondent. He breached the agreement by failing to make the scheduled payments on time. The respondent then claimed cancellation of the contract and the return of the said motor vehicle. Notice in terms of section 11 was sent via registered mail, however, the notice was returned marked "unclaimed". It was on this basis that the appellant argued that section 11 had not been complied with since he had not received the notice.

The Court held that it was not necessary for the section 11 notice to reach the consumer in order to be effective.[91] It based its decision on the wording of section 11 which provided that "[t]he consumer must be notified..."[92] Accordingly, the Court remarked that the word "notify"

[86] De Jager (1981) 72.
[87] Flemming (1982) 318.
[88] [2000] 4 All SA 146 (W), discussed in para 2 3 2 3 1 below.
[89] [2000] 4 All SA 146 (W), hereafter the *Marques*-case
[90] See the *Marques*-case 151.
[91] *Marques*-case 158.
[92] *Marques-case 155.*

meant "sending of a notice" whereas the word "inform" implied "imparting of knowledge".[93] The Court further stated that the fact that the method of delivery by hand required that the notice should come to the attention of the credit receiver, did not *per se* necessarily mean that where the notice was posted, it had to have the same effect.[94] The Court went on to state that the fact that section 11 stated when the 30 day period would commence (that is from date of handing over or posting), the argument that actual receipt would be necessary for purposes of knowing fell away.[95] It remarked that if the legislature had required proof of receipt, it would not have been necessary to add the requirement that registered post be used.[96] According to the court, requiring repeated attempts to ensure that a defaulting credit receiver is given actual notice to remedy the default would only result in further delay and prejudice to the credit grantor.[97]

2 3 3 Conclusion

Having regard to the Court's decision in *Marques* v *Unibank* above, it is submitted that the Court interpreted section 11 on the meaning of the word "notify". It is further submitted that the Court considered the interests of the credit grantor by stating that the actual receipt would delay debt enforcement. However, it should be noted that one of the objectives of the Credit Agreements Act was to protect the consumer.[98] This cannot be ignored. Although Otto is of the view that actual receipt is not necessary, he nonetheless states that

> [i]f the credit grantor becomes aware of the fact that the notice did not reach its destination (it is returned for instance), all that the law should expect from him is to act reasonably to bring the notice to the credit receiver's attention.[99]

It is the author's point of view that, from Otto's statement above, it is indeed so that it cannot be laid down as a hard and fast rule that the credit receiver cannot plead the exception of non-receipt regardless of the reasons why he did not receive the letter. The credit grantor is expected to act reasonably. It is therefore submitted that, where the credit

[93] *Marques*-case 156.
[94] *Marques*-case 151.
[95] *Marques*-case 154.
[96] *Marques*-case 153.
[97] *Marques*-case 155.
[98] See para 2 3 1.
[99] Otto Commentary (1991) para 29.

grantor has shown that he sent the notice but the receiver alleges that he did not receive the notice, in the interest of fairness and a purposive approach, the court should allow the credit receiver to prove on a balance of probabilities why he alleges that he did not receive the notice. For instance, excuse should be considered reasonable in the position where the consumer had not seen the notice because he had been on holiday and only returned after 30 days (after expiration of the period). In such a case surely he ought not to be prejudiced as it is not required of him to inform the creditor grantor when he goes away. The onus should, however, be on the credit receiver to prove on a balance of probabilities that he genuinely did not receive the notice.[100]

In conclusion of this paragraph, it is submitted that generally, as shown above, the resulting need to protect the consumer who concluded other types of contracts which were not included in the Hire-Purchase Act, was to "some extent" satisfied with the coming into operation of the Credit Agreements Act.[101] The scope of application of the Credit Agreements Act was much wider as it covered more contracts.

2 4 Sale of Land on Instalments Act[102]

2 4 1 General

The Sale of Land on Instalments Act came into effect on the 1 January 1972.[103] Its long title stipulated that the Sale of Land on Instalments Act was enacted "to regulate contracts of purchase and sale of certain kinds of land under which the purchase price was payable in instalments over a period of one year or longer..."[104] It applied to contracts of sale of land to which the purchaser was a natural person and not a juristic person or the state.[105] For the

[100] Although not the same, the situation can be likened to instances where a default judgment is granted. The law allows the defendant application of recession of judgment if he has good reasons why he did not respond to the notices or summons.
[101] It is submitted that although the Credit Agreements Act had a wider scope of application, the protection was not completely satisfactory as it was later repealed by the National Credit Act 34 of 2005. See Kelly-Louw (2008) *SA Merc LJ* 203 and Otto and Otto (2013) 2.
[102] This Act is repealed by the Alienation of Land Act which is still applicable in South Africa.
[103] Deimont and Aronstam (1982) 365.
[104] Deimont and Aronstam (1982) 365.
[105] S 2(a) and (b) of the Sale of Land on Instalments Act.

Sale of Land on Instalments Act to be applicable it was also required that the land in question be situated in the prescribed area of jurisdiction.[106]

Similar to the legislation discussed above,[107] the Sale of Land on Instalments Act also restricted the rights of the sellers in relation to taking action in instances of default by the consumer. The next paragraph will look at the specific provisions that dealt with debt enforcement, particularly the ones that restricted the seller's rights to debt enforcement.

2 4 2 Sale of Land on Instalments Act: debt enforcement measures

The relevant provision in the Sale of Land on Instalments Act that stipulated the requirement to be complied with by the credit provider prior to taking action against a defaulting consumer was to be found in section 13(1). It provided that

> No seller shall, by reason of any failure on the part of the purchaser to fulfil an obligation under the contract, be entitled to terminate the contract or to institute an action for damages, unless he has by letter handed over to the purchaser and for which an acknowledgement of receipt has been obtained, or sent by registered post to him at his last known residential or business address, *informed* the purchaser of the failure in question and made demand to the purchaser to carry out the obligation in question within a period stated in such demand, not being less than 30 days, and the purchaser has failed to comply with such demand.

It is apparent from the above provision that where the consumer had failed to fulfil an obligation under the contract, before the credit provider could enforce the debt in question, he was required to

(a) inform the consumer of his failure to perform in terms of the contract by means of a letter; and
(b) he was required to demand that the consumer carry out the specific obligation within a period of not less than 30 days.

In terms of section 13(1), the said letter had to be delivered by means of two alternative methods. These were

[106] S 2 of the Sale of Land on Instalments Act.
[107] See para 2 2-2 3.

(a) personally handing over the letter to the credit receiver and acknowledgement of receipt had to be obtained from the purchaser; and

(b) the credit provider could send the letter via registered post to his last known residential address or business address.

Having regard to the preceding discussion of section 13(1), it is clear that the credit provider could not institute legal proceedings if the above was not complied with. However, what was controversial was the issue of whether the credit receiver needed to have received the letter in order for the credit provider to have complied with section 13(1). The Act did not provide the answer to this issue. In instances where the letter of demand was delivered by hand, the purchaser could not claim that he did not receive the notice as he would have provided an acknowledgement of receipt. However, where the letter of demand was sent via registered post, the credit receiver could claim that the letter did not reach him and therefore the credit provider could not enforce the debt. Further, it was also not clear as to when the 30 day period would begin to run. The case law surrounding these issues will be discussed next.

2 4 3 Case Law

2 4 3 1 *Maron v Mulbarton Gardens (Pty) Ltd*[108]

The problematic issue of how the 30 day period was to be calculated in terms of section 13(1) was addressed in the *Maron*-case. The Court held that actual receipt was necessary as the consumer was entitled to the "30 days" period in which he was required to remedy the breach.

The consumer had bought land on the instalment system. He fell into arrears and the credit grantor sent a letter on 15 May by registered post, which was received on 17 May. The consumer was granted 30 days to remedy the default, failing which the contract in question would have been cancelled without further notice. The consumer failed to remedy the default and on 15 June he was informed via a letter that the contract had been cancelled.

[108] 1975 1 All SA 32 (W), hereinafter the *Maron*-case.

The respondent's (consumer) attorneys raised several defences, *inter alia* that the credit grantor had not complied with section 13(1) of the Sale of Land on Instalments Act in that the 30 days had not lapsed as it was to be calculated from the 17th, the day the purchaser had received the said letter.[109] Their argument was based on the decision of the *Weinbren*-case in which it was held that for notice to be effective it was necessary that it reached the consumer.[110]

In reaching its decision, the Court considered the wording of section 13(1). It determined *inter alia* that the consumer had to be "informed" of the breach via registered post or by hand.[111] To the court the word "inform" signified that actual receipt was necessary.[112] Accordingly the court remarked that it was the legislature's intention that the consumer be given 30 days in which to remedy the breach.[113] The Court further stated that the method used by the credit grantor to inform the consumer should not be detrimental to the consumer, whether the letter was given by hand or posted by registered mail, the consumer should nonetheless have 30 days.[114] In essence his reasoning was that if actual receipt was not required, then where the credit provider decided to send the notice by mail, the consumer would be given less time as compared to the consumer who receives the notice by hand and that this could not have been the intention of the legislature.

The Court also considered section 7 of the Interpretation of Act,[115] which provides that where posting is an effective means of service of the notice, the effective time of the service is when the post would ordinarily be delivered.[116] This appears to mean that, if for instance notice is sent via registered post and the prescribed time of delivery is 2 days, the 30 day period would begin to run on the second day of posting. The Court referred to the *Weinbren*-case[117] with approval but, however, distinguished the *Fitzgerald*-case.[118]

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[109] *Maron*-case 33.
[110] See para 2 2 3 1 above.
[111] *Maron*-case 35.
[112] *Maron*-case 35. See also Van Heerden and Otto (2007) *TSAR* 663 where they refer to the said case in relation to the question "could the credit provider's claim be fended off by a defence, eg that the letter containing the notice got lost in the post"?
[113] *Maron*-case 35.
[114] *Maron*-case 35.
[115] 33 of 1957.
[116] *Maron*-case 36.
[117] Discussed in para 2 2 3 1 above.
[118] See 2 2 3 2 above. The Court in the *Maron*-case stated that the Court's focus in *Fitzgerald*-case was only whether sending notice via registered post was an effective method and not when the period of notice begins to run.

2 4 3 2 *Maharaj v Tongaat Development Corporation (Pty) Ltd*[119]

In the *Maharaj*-case, the Court was also faced with the legal question of when the 30 day period began to run. Similarly to the *Maron*-case discussed above,[120] the Court held that the period began to run upon receipt of the letter by the consumer. However, the Court did not base its decision on the word "inform" but premised its decision on the purpose of the 30 day period and the protection of the consumer by section 13(1).[121]

In summary,[122] the notice letter was dated 19 November, posted on 20 November and received on 21 November. Another letter dated 19 December purporting to cancel the contract was sent to the consumer. The consumer's attorneys argued that section 13(1) had not been complied with as the days given were less than 30 days.[123] In the Court of first instance it was held that the notice did not need to reach the consumer for it to be effective.[124] The consumer then appealed to the Appellate Division, as it was then.

The Appellate Division had to consider whether the period given in the first letter was sufficient to serve as notice in terms of section 13(1). The Court held that considering the provisions of section 13(1) where, for instance, the notice is served personally, an acknowledgement of receipt is required. Despite the second option of sending it via registered mail being provided for, it was still the intention of the legislature that the consumer should receive the notice and that the 30 days should be calculated from date of receipt.[125] The second option was only to make it convenient for the credit grantor but not to the detriment of the consumer.[126] The Court concluded that the decision in the *Weinbren*-case was correct and should be applied.[127] The 30 day period in which the consumer had to

[119] [1976] 4 All SA 618 (A), hereinafter the *Maharaj*-case. For a further discussion of the case, see also Van Heerden and Otto (2007) *TSAR 200.*
[120] See para 2 4 3 1 above.
[121] *Maharaj*-case 622. See also Van Heerden in Scholts *ed* (2008) 12-14.The authors submit that the Appellate Division on appeal favoured the view that the notice must reach the purchaser but did not base its decision on the meaning of "inform".
[122] See *Maharaj*-case 619-622 for a detailed discussion of the facts of the case.
[123] Maharaj-case 620.
[124] *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1972 (1) S.A 328 (W).
[125] *Maharaj*-case 621.
[126] *Maharaj*-case 621.
[127] *Maharaj*-case 621 where Wessels JA stated that "I am in respectful agreement with the finding of GALGUT J in *Maron's* case, that the seller is entitled to choose any one of the two alternative method".

comply with the demand ran from the date the consumer received the notice.[128] This case was quoted with approval in the *Sebola*-case where the Court remarked that[129]

> In enacting section 13(1), the overall intention of the Legislature was to afford reasonable protection to a purchaser who, by reason of a failure on his part to fulfil an obligation under a contract, faces a threat by the seller to terminate it or to institute an action for damages.

It can be deduced from the above discussion that the Court in the *Maharaj*-case was of the view that if the consumer did not receive the notice, his protection was diminished. It is submitted that the Court in interpreting section 13(1) also considered the purposive interpretation, to wit the Act's purpose of protecting the consumer.

2 5 Conclusion

In the preceding paragraphs regard was had to the relevant provisions of the Hire-Purchase Act,[130] the Credit Agreements Act[131] and the Sale of Land on Instalments Act.[132] Regard was also had to the applicable case law. It is clear that the wording of the relevant provision in a particular enactment is of crucial importance when considering the question whether the notice preceding debt enforcement has to reach the consumer in order to be effective. It is a matter of interpretation. For instance, in terms of section 12(b) of the Hire-Purchase Act, the word "inform" was used and based on its meaning, the Court interpreted it to mean that the credit receiver had to receive the notice for it to be effective.[133] Similarly, in respect of section 13(1) of the Sale of Land on Instalments Act, the word "inform" was interpreted to require actual receipt.[134] In section 11 of the Credit Agreements Act the word "inform" was changed to "notify". The Court interpreted this to mean that no actual receipt was required.[135] As there was also controversy as to when the notice period began to run, section 11 provided that it would run from the date of delivery or posting.

[128] See *Maharaj*-case 622 for other reasons why the court believed that the second method of serving was not to be to the detriment of the consumer.
[129] The *Sebola*-case 71-75. For a detailed discussion, see para 3 3 3 4 below.
[130] Para 2 2 above.
[131] Para 2 3 above.
[132] Para 2 4 above.
[133] See para 2 2 3 1 above.
[134] See para 2 4 above.
[135] See para 2 3 above.

3 AN OVERVIEW OF THE CONSUMER CREDIT LEGISLATION CURRENTLY APPLICABLE IN SOUTH AFRICA WITH REFERENCE TO DEBT ENFORCEMENT NOTICES

3 1 Introduction

This paragraph entails an overview of the consumer credit legislation that is currently applicable in South Africa. The two pieces of legislations in point are the Alienation of Land Act and the National Credit Act. However, the focus will be on the notices that are required to be complied with before a debt to which these Acts apply could be enforced. For this purpose relevant case law will be considered.

3 2 The Alienation of Land Act

3 2 1 General

The Alienation of Land Act, as amended,[136] came into force on 19 October 1982 save for section 26 which came into force on 6 December 1983.[137] Its purpose is to regulate the alienation of land in certain circumstances and to provide for the matters connected therewith.[138] This Act repealed the Sale of Land on Instalments Act and, as stated above, operates in conjunction with the NCA.

Chapter II of the Alienation of Land Act deals with the application of the Act. However, the applicability of the Alienation of Land Act is not specifically stated in the Act itself. It all depends on identifying the type of contract in question.[139] One has to look at the definitions of the words as defined in section 1 of the Act. However, generally it applies to contracts of exchange or donation of land and sale of residential land contracts where the purchase price is payable by means of three or more instalments over a period exceeding one

[136] By the Alienation of Land Amendment Act 51 of 1983; the Regional and Land Affairs Second General Amendment Act 170 of 1993; the Development facilitation Act 67 of 1995; the Abolition of restrictions on Jurisdiction of Courts Act 88 of 1996 and the Alienation of Land Amendment Act 103 of 1998.
[137] *GG* 8344 GN R148, 20 August 1982; *GG* 8918 GN R148, 7 October 1983. See also Kelly-Louw in *LAWSA* vol 5(1) para 182.
[138] Hutchison *et al* (2009) 76. See also the preamble of the Alienation of land Act.
[139] Hutchison *et al* (2009) 157.

year.[140] It should be noted that the National Credit Act may also apply to contracts of sale of land falling into its ambit and where the purchase price is deferred and interest, charges or fees are payable.[141] However, in terms of Schedule 1 of the National Credit Act it is specifically provided that in the case of conflict between the provisions contained in chapter II of the Alienation of Land Act and the provisions of the National Credit Act, the provisions of the National Credit Act will prevail to the extent of the conflict.[142]

3 2 2 The Alienation of land Act: debt enforcement measures

3 2 2 1 General

Section 19 of the Alienation of Land Act provides as follows:

> (1) No seller is, by reason of any breach of contract on the part of the purchaser, entitled
>
> (a) to enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other penalty stipulation in the contract;
> (b) to terminate the contract; and
> (c) to institute an action for damages unless he has by letter notified the purchaser of the breach of contract concerned and made demand to the purchaser to rectify the breach of contract in question, and the purchaser has failed to comply with such demand.
>
> (2) A notice referred to in subsection (1) shall be handed to the purchaser or shall be sent to him by registered post to his address referred to in section 23 and shall contain
>
> (a) a description of the purchaser's alleged breach of contract;
> (b) a demand that the purchaser rectify the alleged breach within a stated period, which, subject to the provisions of subsection (3), shall not be less than 30 days calculated from the date on which the notice was handed to the purchaser or sent to him by registered post, as the case maybe; and
> (c) an indication of the steps the seller intends to take if the alleged breach of contract is not rectified.
>
> (3) If the seller in the same calendar year has so handed or sent to the purchaser two such notices at intervals of more than 30 days, he may in any subsequent notice so handed or sent to the purchaser in such calendar year, make demand to the purchaser to carry out his obligation within a period of not less than seven days calculated from the date on which the notice was so handed or sent to the purchaser, as the case may be.

3 2 2 2 When is the notice required

[140] Kelly-Louw in *LAWSA* vol 5(1) para 189. See also Hutchison et al (2009) 159.
[141] See s 8(4)(f); Otto (2009) *De Jure* 166-171 and Otto in Scholtz *ed* (2008) para 8.6 fn 105.
[142] Kelly-Louw in *LAWSA* vol 5 (1) para 189.

It is clear that the credit provider is required to send a notice in terms of section 19 when there is a breach of contract to which the Alienation of Land Act applies and the credit provider wishes to

(a) claim all outstanding payments to be paid by a certain date (acceleration);
(b) enforce any penalty clause;
(c) cancel the contract; and/or
(d) claim damages suffered as a result of the breach.

3 2 2 3 Method of delivery

In terms of the method of delivery, section 19(2) provides that it has to be done either by hand or per registered post. As will be seen below, case law decided in terms of this section held that if the credit provider wishes to deliver by hand it has to be delivered personally to the credit receiver. Further, the section provides that where the notice is sent by mail, it has to be by registered post to the consumer's *domicilium citandi et executandi*.[143] It is then clear that where ordinary mail is used, such notice would be invalid.

3 2 2 4 Is actual receipt required for effective compliance?

Unlike the Credit Agreements Act[144] the Alienation of Land Act does not require that an acknowledgement of receipt should be received from the credit receiver. The question that then arises is whether the credit provider would be deemed to have complied with the notice if a notice is properly sent but not received by the credit receiver, for instance, it remains uncollected or is simply returned to the credit provider.

In the original version of section 19, before it was amended, the word used by the legislature was "inform", therefore it was interpreted to mean that actual receipt of the notice was a requirement.[145] However, the word "inform" was later amended[146] to the word "notify". It has been submitted that the amendment was an attempt to make receipt

[143] See s 23 of Alienation of Land Act.
[144] See para 2 3 2 1 above.
[145] See para 3 2 2 4 below.
[146] By the Alienation of Land Amendment Act 51 of 1983.

unnecessary.[147] Below follows a discussion of some of the cases that were decided under the amended provisions of the Alienation of Land Act.

3 2 3 Case law

3 2 3 1 *Holme v Bardsley*[148]

In the *Holme*-case the seller had sold certain immovable property to the purchaser and had subsequently applied to court for the cancellation of the contract and ejectment of the purchaser. The seller had sent a demand in terms of the original provisions of section 19 of the Alienation of Land Act to each of the two addresses chosen by the respondent (purchaser) in terms of section 23 of the Act. It was common cause that the letters were both returned marked "unclaimed" and because of this it was contended on behalf of the purchaser that the relevant letters of demand had not complied with section 19 of the Act.[149]

The *Maharaj*-case[150] was compared and applied. The Court remarked that section 19 was similar to section 12 of the Hire-Purchase Act, except that the acknowledgement of receipt of the letter was no longer required.[151] The Court further stated that from the reference to "sent", it could be inferred that the calculation of the 30 days period run from the date of posting.[152] The Court, however, held that the measure of protection remained the same whether letter was sent by post or was handed over to the consumer.[153] Consequently, held that since the notice had not reached the purchaser, the seller had not complied with section 19 and was therefore not entitled to cancel the contract or claim the ejectment of the purchaser from the property.[154]

3 2 3 2 *Marques v Unibank Ltd* [155]

[147] Otto Commentary (1991) para 62 and Van Heerden and Otto *TSAR* (2007) 663.
[148] 1984 1 SA 429 (W), hereafter the *Holme*-case.
[149] *Holme*-case 430.
[150] See para 2 4 3 2.
[151] *Holme*-case 431D.
[152] *Holme*-case 432E.
[153] *Holme*-case 432E.
[154] *Holme*-case 432G. See also Otto Commentary (1991) para 62. The *Holme* decision was rejected in the case of *Marques v Unibank Ltd* 2001 (1) SA 145 (W). For a detailed discussion of the *Marques*-case see para 3 2 3 2 below.
[155] 2001 (1) SA 145 (W). See also para 3 3 3 1 below.

In a later decision of *Marques v Unibank Ltd*, decided under section 11 of the Credit Agreements Act, the Court referred to the Alienation of Land Act and distinguished the case of *Maharaj.* The Court further stated unequivocally that the decision in the *Holme*-case was wrong to have followed the decision in *Maharaj*-case as the latter involved movable property while the former case involved immovable property with different Acts with different wording applying.[156] The Court remarked that "If the legislature required proof of receipt, it would not have been necessary to add the requirement that *registered* post be used".[157] The Court in conclusion held that the notice does not necessarily have to come to the attention of the credit receiver.[158]

3 2 3 Conclusion

Once again it is apparent from the provisions of the Alienation of Land Act that the courts consider the wording of the relevant provisions of the legislation when deciding cases. The word "inform" as used in the initial section 19 brought about uncertainty, as a result the legislature rectified the situation by amending the section to replace the word "inform" with "notify".

3 3 The National Credit Act

3 3 1 General

The National Credit Act came into force on 1 June 2006, 1 September 2006 and 1 June 2007.[159] The Act replaced the Credit Agreements Act 75 of 1980 as well as the Usury Act 73 of 1968.[160] Chapter 6 Part C[161] which is of relevance to this dissertation came into effect on 1 June 2007.[162]

[156] *Marques*-case 155.
[157] *Marques*-case 154.
[158] *Marques*-case 157 and Van Heerden and Otto (2007) *TSAR* 663.
[159] Proc 22 in *GG* 28824, 11 May 2006; Kelly-Louw (2008) *SA Merc LJ* 200, fn 31 and Renke, Roestoff and Haupt (2007) *Obiter* 229.
[160] S 172(4).
[161] Chapter C deals with collection, repayment, surrender and debt enforcement.
[162] Proc 22 in *GG* 28824, 11 May 2006. See also Scholtz in Scholtz *ed* (2008) para 2.1-2.2.

It has been submitted[163] on occasion that the National Credit Act covers a wide variety of credit agreements if compared to its predecessors.[164] The scope of application is dealt with in Chapter 1 Parts B and C of the Act. Generally the National Credit Act is applicable to every credit agreement, between parties dealing at arm's length[165] and when made within, or having an effect within, the Republic.[166] The main categories of credit agreements are to be distinguished, namely a credit facility, credit transaction, credit guarantee or combination thereof.

A credit facility entails contracts of sale of movable goods, service rendering contracts and money-lending in terms of revolving credit.[167]

Eight different credit transactions are listed in section 8(4) of the NCA, namely the (a) pawn transaction, (b) discount transaction, (c) incidental credit agreement, (d) instalment agreement, (e) mortgage agreement, (f) secured loan, (g) leasing transaction and (h) any other credit agreement. These transactions, with the exception of the section 8(4)(f) other agreement, which constitutes a catch all definition, are defined in section 1 of the NCA. [168]

An agreement is defined in section 8(5) as a credit guarantee if, "in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies".

Otto and Otto[169] submit that all credit agreements have two things in common: credit that is extended and a charge, fee or interest that is payable or a lower price that applies in the event of early payment.[170] If the Act is applicable, the debt enforcement procedures in terms of thereof have to be complied with.

[163] Otto and Otto (2013) 17.
[164] See paras 2 2-2 4 above in regard to the NCA's predecessors.
[165] See s 4(2)(b) for the meaning of this concept.
[166] See s 4(1) of the NCA. See also Van Zyl in Scholtz *ed* (2008) ch 4 and Otto and Otto (2013) ch 8.
[167] S 8(3)(a)-(b); Renke LLD Thesis (2012) 384 and Otto and Otto (2013) 20.
[168] See also Renke LLD Thesis (2012) 384-392 and Otto and Otto (2013) 20-28 for a detailed discussion of the 8 listed transactions.
[169] Otto and Otto (2013) para 44.
[170] (2006) 17.

3 3 2 The National Credit Act: debt enforcement measures

3 3 2 1 General

Similarly to its predecessors[171] and the Alienation of Land Act, the National Credit Act contains provisions that limit the credit grantor's rights when it comes to exercising his remedies.[172] The section in point is section 129(1) which is to be read with section 130.[173] Due to the importance of these provisions, they are quoted in full. Section 129(1) provides that

> [i]f the consumer is in default under a credit agreement, the credit provider—
>
> (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
>
> (b) subject to section **130(2)**, may not commence any legal proceedings to enforce the agreement before—
>
> (i) first providing notice to the consumer, **as** contemplated in paragraph **(a**), or in section **86(10)**, as the case may be; and
> (ii) meeting any further requirements set out in section 130.
>
> Section 130(1) provides that
>
> [s]ubject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days **and—**
>
> *(a)* at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section **86(9)**, or section **129(1)**, as the case may be; and
>
> *(b)* in the case of a notice contemplated in section **129(1)**, the consumer has
>
> (i) not responded to that notice; or
> (ii) responded to the notice by rejecting the credit provider's proposals.

For purposes of understanding the provisions of the above sections, it is imperative that they are considered in more detail.

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[171] The Hire-Purchase Act, Credit Agreements Act and the Sale of Land on Instalments; See also paras 2 2-2 4 above.
[172] Otto and Otto (2013) para 44 and Grové and Otto (2002) 41.
[173] Van Heerden and Boraine (2011) *SA Merc LJ* 45, submit that these two sections "play a pivotal role in the enforcement of credit agreement".

3 3 2 2 Meaning of the word "may"

Because the word "may" is used in section 129(1)(a), it is not clear whether the credit provider has a choice to draw the default to the credit receiver's attention prior to the debt enforcement litigation. In ordinary English, the word "may" would imply that the credit provider has a choice to opt out of sending the notice. However, as section 129(1)(b) read with section 130(1) prohibits debt enforcement litigation unless a notice has been provided as contemplated in either section 129(1)(a) or section 86(10), it has been submitted[174] that the section 129(1)(a) notice is a mandatory requirement for or a "gateway" to debt enforcement litigation. Otto and Otto[175] are equally of the point of view that the word "may" actually means "must", and further recommend that the legislature should consider an amendment to section 129 to reflect "must" instead of "may". The case law in this regard is discussed below[176].

3 3 2 3 Meaning of the word "enforce"

Section 129(1)(b) refers to the word "enforce". Like many other terms used in the National Credit Act, it is unfortunate that the word "enforce" is not defined. However, as suggested by authors,[177] it is submitted that the word "enforce" as used in the Act refers broadly to the enforcement of any of the remedies available to the credit provider.[178] This is the preferred interpretation because unlike its predecessors,[179] the objective of the National Credit Act is to provide wider protection to the consumer.[180] Therefore, if "enforce" does not encompass

[174] Van Heerden in Scholtz *ed* (2008) para 12 .4. 2 has argued that the use of the word "may" is misleading as it is clear that s 130(1)(b) states that no legal action can be entertained in court if the notice letter had not been sent for defaults of all agreements to which the NCA applies. Boraine and Renke (Part 2)(2008) *De Jure* 3, has also submitted that notice is part of the *facta probanda*. See also Van Heerden and Borraine (2011) *SA Merc LJ* 45.
[175] Otto and Otto (2013) 112. See Van Heerden and Boraine (2011) *SA Merc* LJ 45. See also Flemming (2010) 198. He is of the view that the word "may" has the same outcome as if the statute stated "must" and not "may".
[176] Para 3 3 3.
[177] See *inter alia* Van Heerden and Otto (2007) *TSAR* 655 and Boraine and Renke (Part 2) (2008) *De Jure* 2.
[178] This is the view that was approved in the case of *Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581 (SCA) para 12; Van Heerden and Boraine (2011) *SA Merc LJ* 51 share the same view.
[179] The Credit Agreements Act s 11 only applied to the case where the credit provider wished to claim return of goods. See para 2 3 1 above.
[180] Otto and Otto (2013) 113.

all remedies,[181] it would lead to exploitation of remedies, as credit providers could easily choose a remedy which would not require compliance with section 129.

3 3 2 4 Time periods in regard to the notice

Section 130(1)(a) provides that the credit provider may only approach the court for enforcement of the agreement if the consumer has been in default for at least 20 business days and 10 business days have elapsed since the delivery of the notice in terms of section 129(1)(a)[182]. In essence it seems that about 30 business days are required by the credit provider before commencing with legal action[183]. Unlike section 11 of the Credit Agreements Act,[184] which provided for 30 days within which the consumer was to remedy the default, the National Credit Act only provides for 10 business days.

3 3 2 5 Meaning of "delivery of notice"

As discussed above, the time period of 10 business days is calculated with reference to the date of "delivery". Further, it is also required that a "notice" be "delivered". However, once again, it is disappointing that despite the delivery of the notice being made a prerequisite to the enforcement of debts, the Act has not defined or stipulated how and to where the letter should be delivered.[185] It is not clear whether it requires that the letter be received or should reach the debtor, or simply be sent in a manner that would enable the credit provider to prove that notice was sent. This is similar to the issue of the method of notification that must be used as this is also not stipulated in section 129. Consequently, it is not clear as to how the notice should be sent or drawn to the attention of the consumer.

[181] Cancellation, specific performance and/or claims for damages. Otto "Commentary" (1991) para 44.1 is of the view that "it would not make sense to require credit providers to deliver a default notice to obtain payment but not when they exercise the more serious remedies… it goes against the grain of the Act".
[182] "Business days" in terms of s 2(5) 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".
[183] However, the credit provider may cause the periods to run concurrently. See Otto and Otto (2013) 119.
[184] See para 2 3 2 1 above for a detailed discussion on the Credit Agreements Act.
[185] Van Heerden and Boraine (2011) *SA Merc LJ* 48. See also Flemming (2010) 197.

It has been submitted by Boraine and Renke[186] that the notice should be delivered in terms of section 65(1). Section 65 deals with the right to receive and deliver documents. It states that every document that is required to be delivered to the consumer should be delivered in the prescribed manner[187]. In the absence of such prescription, the Act states that the credit provider must make the document available[188]

> *(i)* in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;
> *(ii)* by fax;
> *(iii)* by email; and
> *(iv)* by printable web-page.

In terms of section 65(2)(b) "the document has to be delivered to the consumer in the manner chosen by the consumer from the options above".

Although section 129(1)(a) cannot really be said to be a legal document but a legal notice,[189] it is submitted that in the absence of a prescribed method in the Regulations to the Act[190], the author is in agreement with Boraine and Renke[191] on their submission that section 65(2) be used to determine the method of delivery.[192] It is further submitted that it would be advisable to make use of registered post or certified mail as this would provide proof of delivery and would undoubtedly assist the credit provider should he need to institute legal action. [193]

3 3 2 6 Address for delivery of the notice

In addition to the submissions made in para 3 3 2 5 above, it is suggested that, what would be wise for both parties entering into a credit agreement, is to provide the common law

[186] Boraine and Renke (Part 2) (2008) *De Jure* 5. See also Otto and Otto (2013) 115 and Van Heerden in Scholtz *ed* (2008) para 12.4.4. However, Kelly-Louw (2005) *SA Merc LJ* 578 submits that s 129 is a legal notice and therefore s 96(1) should be used for purposes of interpreting "deliver". Van Heerden and Boraine (2011) *SA Merc LJ* 48 submit that s 168, which refers to service of documents, could also be considered.
[187] S 65(1).
[188] S 65(2)(a)(i)-(iv).
[189] Van Heerden and Otto (2007) *TSAR* 664.
[190] Regulations made in terms of the National Credit Act, 2005 (GN R489, GG 28864, 31 May 2006), hereafter the National Credit Regulations, 2006.
[191] Boraine and Renke (Part 2)(2008) *De Jure* 5.
[192] However, in the case of *Starita v Absa Bank Ltd* 2010 (3) SA 443 (GSJ), the Court recommended that s 168, which contains the word "serve", be used synonymous with the word "delivery".
[193] See also Van Heerden in Scholtz *ed* (2008) para 12.4.4 and the case law discussed in paras 3 3 3 1-3 3 3 8 below.

domicilium citande et executandi address and mode of delivery stipulated in the agreement. Van Heerden and Otto[194] submitted, and correctly so, that this would not be in contravention of section 90.[195] This would also be in line with section 96 which provides that the party giving notice must deliver that notice to the other party at the address as set out in the agreement.[196] Section 96 can also be used for notices that have to be delivered in terms of the National Credit Act. It is for this reason that it is suggested that it would be right to use this section to interpret "delivery". However, it is submitted that, since section 96 is silent on the mode of delivery, it should be read in conjunction with section 65(2)(a).[197]

3 3 2 7 Should the consumer in fact receive the section 129(1)(a) notice in order for it to be effective?

The question that still remains is whether the word "delivery" entails that the said notice should reach the consumer in order to be effective or whether mere sending of the notice by the credit provider in the prescribed manner would be sufficient.[198] As was seen above, the issue of whether actual receipt is required for effective compliance or not also existed in terms of the NCA's predecessors. In terms of the cases that were decided under the NCA's predecessors, the preferred view was that, if the notice was sent in terms of the Act's prescriptions, it was irrelevant whether the consumer actually received it or not.[199] In the *Marques*-case,[200] the Court rejected the decision of *Holme v Bardsley*[201] and held that it was not necessary for the notice to get to the attention of the consumer.

In terms of the NCA, there have been various contrasting judgments. The question is whether the matter has been settled by the Constitutional Court in the case of *Sebola and Sebola v Standard Bank*.[202]

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[194] Van Heerden and Otto (2007) *TSAR* 664. See also Kelly-Louw and Stoop (2012) para 13.2.1.1.3.
[195] S 90 deals with unlawful provisions of credit agreements.
[196] See s 96(1)(a).
[197] Discussed in para 3 3 2 5 above
[198] Otto and Otto (2013) 116, where they ask the question "must the default notice in fact reach the consumer for it to be effective?". See also in general Van Heerden in Scholtz *ed* (2008) para 12.4.4.
[199] See paras 2 2-2 4 above. See also the discussion of the *Fitzgerald-case* in para 2 2 3 2 above.
[200] See para 2 3 2 3 1 above.
[201] 1984 1 SA 429 (W). See also the discussion of the case in para 3 2 2 4 1 above.
[202] 2012 (5) SA 142 (CC).

3 3 3 Case law in relation to debt enforcement notices under the NCA

3 3 3 1 *Absa Bank Ltd v Proschaska t/a Bianca Cara Interiors*[203]

In the *Proschaska*-case a *domicilium* address was chosen by the respondent. However, when the credit provider sent a section 129(1)(a) notice, it had omitted certain words. The respondent filed a special plea submitting that section 129(1)(a) read with section 130(1) had not been complied with and therefore that the summons was pre-mature. In response, the applicant argued that section 129(1)(a) was not a prerequisite to the credit provider's right to enforce payment under a credit agreement.[204]

The Court stated that in section 129(1)(a) it is required that the default be drawn to the attention of the consumer in writing and that section 129(1)(b) requires that legal proceedings only be instituted after providing the notice.[205] The Court further indicated that the words "draw the default to the notice of the consumer", "providing notice" and "delivered a notice" cumulatively reflect an intention on the part of the legislature to impose upon the credit provider an obligation which requires "much more than the mere despatching" of the notice as contemplated by section 129(1)(a).[206] It concluded that the credit provider is required to bring the default to the attention of the consumer in a way which provides an assurance to a court, considering whether or not there has been proper compliance with the procedural requirements of section 129 and 130 of the Act, that the default has indeed been drawn "to the notice of the consumer".[207]

Although the Court seems to have stressed the purpose of the NCA as that of protecting the respondent than the applicant, its judgment would have favoured the applicant had it sent the notice to the correct address. It is submitted that the Court did not *per se* hold specifically that the notice has to reach the consumer. It simply emphasised that the credit provider had to elect the manner of drawing the default to the attention of the consumer in a way that he would be able to prove in court that he actually did deliver the notice. It is

[203] 2009 (2) SA 512 (D), hereafter the *Proschaska*-case. For a detailed discussion of this case and other cases leading to the SCA decision of *Rossouw and Another v Firstrand Bank Ltd* (discussed in para 3 3 3 3 below), see Van Heerden and Boraine (2011) *SA Merc LJ* 49.
[204] See the *Proschaska*-case para 4.
[205] *Proschaska*-case para 55.
[206] *Proschaska*-case para 55.
[207] *Proschaska*-case para 55.

therefore submitted that, had the applicant dispatched the notice to the correct address and via registered post with the tracking facility and shown that to the Court as annexures, the Court would have been satisfied. It is submitted that this would be the correct way of interpreting this case and sections 129(1) and 130(1), as it would be too burdensome to require confirmation of actual proof of receipt from credit providers.

3 3 3 2 *Munien v BMW Financial Services (Pty) Ltd*[208]

In the *Munien*-case, it was *inter alia* alleged that a section 129(1)(a) notice had been sent to a *domicilium citandi* (street address) via registered post. The applicant argued that notices sent by registered post to that street address would not be received because of the absence of a delivery service in that area.

The Court held that the manner of delivery to the consumer was prescribed in section 65(1), but the method of delivery was prescribed in the National Credit Regulations, 2006, where "delivered" was defined as opposed to section 65(2).[209] In terms of regulation 1 of the National Credit Regulations, 2006, it is provided that a document could be sent by hand, fax, e-mail or registered post and therefore, if sent by registered post to the address chosen by the consumer, it would be deemed as complied with irrespective of whether it actually came to the attention of the consumer or not.[210] The Court remarked that this is the sensible interpretation of the legislature's intention. If the legislature had intended actual receipt, he would have done so expressly.[211]

3 3 3 3 *Rossouw and Another v Firstrand Bank Ltd*[212]

In the *Rossouw*-case, the appellants had entered into a loan agreement with the respondents in 2006. In 2008 the appellants fell into arrears and the bank sent the section

[208] 2010 (1) SA 549 (KZN), hereafter the *Munien*-case. See Van Heerden & Coetzee (2009) *PER* 334 for a detailed discussion of the case.
[209] However, in the case of *Starita v Absa Bank Ltd* 2010 (3) SA 443 (GSJ), the court remarked that it is fallacious to apply a definition in the Regulations to an expression used in the National Credit Act. The Court then concluded that s 168 of the NCA, which deals with serving of documents, should be used.
[210] See the *Munien*-case para 12 where Wallis J remarked that whether it comes to the attention of the consumer or not is irrelevant as delivery is the sending of the document and not its receipt.
[211] See para 12 of the *Munien*-case.
[212] 2010 (6) SA 439 (SCA), hereafter the *Rossouw*-case . See Kelly-Louw and Stoop (2012) 440 for a discussion of the case.

129(1) notice. They attended debt counselling and a debt restructuring program was entered into. However, later, this plan was abandoned and they consequently fell into arrears again. In 2009, the bank allegedly delivered another section 129(1)(a) notice by registered post followed by summons.

The court stated that at the "heart of the issue is the precise method of delivery of the notice contemplated in section 129(1)(a) and whether it is necessary that it is actually received by the consumer".[213] In this regard the Supreme Court of Appeal agreed with the decision reached in the *Munien*-case,[214] stating that the Court was correct in holding that actual receipt is not necessary. The Supreme Court of Appeal, however, disagreed with the *Munien* Court's use of regulations set by a Minister to interpret the provisions of an Act, *in casu* the meaning of the word "delivery" as referred to in section 130(1) of the NCA.

The Court indicated that the fact that registered mail as chosen by the parties was used despite it not being one of the methods prescribed in section 65(2) could not harm either party's interest.[215] In fact, it is a more reliable method of delivery than delivery per ordinary mail. The Court concluded that "the legislature's grant to the consumer of a right to choose the manner of delivery inexorably points to an intention to place the risk of non-receipt on the consumer's shoulders".[216] That is, the consumer should bear the risk of non-receipt of the notice.[217]

As the above case was decided by the Supreme Court of Appeal, the issue of delivery of the section 129(1)(a) notice seemed to have been settled. However, another case with a similar issue was taken to the Constitutional Court which seems to have held differently.

3 3 3 4 *Sebola and Another v Standard Bank of South Africa Ltd and Another*[218]

The *Sebola*-case was heard in the Constitutional Court and therefore its decision is authoritative and binding on all the courts. The respondent purportedly sent a notice in

[213] *Rossouw*-case para 21.
[214] See para 3 3 3 2 above for a detailed discussion of the *Munien*-case.
[215] *Rossouw*-case para 9.
[216] *Rossouw*-case para 22. See also Van Heerden in Scholtz ed (2008) para 12.4.1 and Van Heerden and Boraine (2011) *SA Merc LJ* 59.
[217] Van Heerden and Boraine (2011) *SA Merc LJ* 59.
[218] 2012 (5) SA 142 (CC), hereafter the *Sebola*-case.

terms of section 129(1)(a) via registered mail, however, it was never received by appellants. The tracking and tracing record showed that the post office incorrectly delivered the notice at the wrong post office. Default judgment was granted against the appellants and the mortgaged property was attached.[219] As a result they appealed to the Constitutional Court. The Court stated that the main issue was whether section 129(1) and section 130 require that the debtor actually receives the notice.[220]

From the outset the Court indicated that section 129(1) should be understood in conjunction with section 130 which requires delivery of the notice.[221] The Court went on to explain that this is because "section 129 prescribes what a credit provider must prove before judgment can be obtained, while section 130 sets out how this can be proved (by delivery)."[222]

The Court interpreted the word "notice" to have two meanings. The first being "attention to the consumer" and the second to mean the "written notice itself".[223] It held that the legislature requires that the notice must come to the attention of the consumer. However, this does not require that the credit provider prove that the notice has actually come to the attention of the consumer, as that would ordinarily be impossible.[224] The credit provider only has to establish on a balance of probabilities, to the satisfaction of the court from which enforcement of a credit agreement is sought, that it delivered a notice to the consumer as contemplated in section 129(1)(a).[225]

In regard to the word "deliver" as used in section 130, after considering section 65(1) and (2), section 96 and section 168,[226] the Court concluded that the meaning of "deliver" in section 130 cannot be extracted by analysing the words of the statutes.[227] A broader approach must be used.[228] The credit provider ought to use a method that would provide him with proof that the notice in fact reached the consumer.[229] Consequently, the Court

[219] See *Sebola*-case paras 4–8 for detailed discussion of the facts.
[220] *Sebola*-case para 2.
[221] *Sebola*-case para 53.
[222] *Sebola*-case para 53.
[223] *Sebola*-case para 54.
[224] *Sebola*-case para 74.
[225] *Sebola*-case para 57. See also Otto and Otto (2013) 116.
[226] See the *Sebola*-case paras 61-73.
[227] *Sebola*-case para 74.
[228] *Sebola*-case para 74.
[229] *Sebola*-case para 74.

stated that registered mail with track and trace service should be preferred.[230] In addition, the Court remarked that "if in a contested proceedings the consumer asserts that the notice went astray after reaching the post office, or was not collected, or not attended to once collected, the Court must make a finding whether, despite the credit provider's proven efforts the consumer's allegations are true, and if so, adjourn the proceedings in terms of section 130(4)(b)".[231]

It was hoped that the *Sebola*-case would bring to an end the whole controversy in regard to notice. However, it has been submitted by Van Heerden,[232] that the majority judgment in the *Sebola*-case was not altogether clear as there have been a number of conflicting decisions in regard to the interpretation of the *Sebola*-case.[233] The question that has arisen is whether the *Sebola*-case overturned the decision in *Rossouw*[234] that placed the risk of non-receipt of the notice on the consumer. Some of the cases that have dealt with the aforementioned question are briefly discussed next.[235]

3 3 3 5 *Nedbank Ltd v Binneman and Thirteen Similar Cases*[236]

In *Nedbank Ltd v Binneman*, the notices were sent to the consumers via registered post and the "track and trace" print-outs indicating that the notices reached the correct post office were filed with the Court. However, the notices were returned to the credit provider (sender) as "unclaimed". The Court held that the decision in *Rossouw* was not overturned but that the *Sebola* judgment simply added that the sending of the notice via registered mail is insufficient on its own.[237] The credit provider must prove that the notice has reached the correct post office.[238] Consequently, the Court held that actual receipt of the notice is not required for effective compliance[239].

[230] *Sebola*-case para 75. See also Van Heerden in Scholtz *ed* (2008) para 12.4.4.
[231] *Sebola*-case para 79.
[232] Van Heerden in Scholtz *ed* (2008) para 12.4.4.
[233] For a detailed discussion of these decisions, see paras 3 3 3 5-3 3 3 8 below.
[234] Discussed in para 3 3 3 3 above.
[235] See in general the discussion by Otto and Otto (2013) 116 -118 as well as Van Heerden in Scholtz *ed* (2008) para 12.4.4.
[236] 2012(5) SA 569 (WCC), hereafter the *Binneman*-case. See also Otto and Otto (2013) 115 and Van Heerden in Scholtz *ed* (2008) para 12.4.4 for a discussion of this case.
[237] The *Binneman*-case para 6.
[238] The *Binneman*-case para 6. Otto and Otto (2013) 117 (fn 106) submit that the Court in this case held the same view as his, namely that the consumer who chose domicilium should bear the risk of the notice going astray.
[239] The *Binneman*-case para 8.

3 3 3 6 *Absa Bank Ltd v Mkhize and another and other related cases*[240]

In the *Mkhize*-case, there were four applications that were heard together. The track and trace reports revealed that the notices had reached the correct post office but were returned unclaimed.

The Court interpreted the decision of *Sebola* to be that section 129(1)(a) requires actual receipt of the notice by the consumer.[241] The Court remarked that the majority judgment in *Sebola* did not endorse the decision in *Rossouw* that the risk of non-delivery lies with the consumer.[242] The Court remarked further that, where there is conclusive proof that the notice did not reach the consumer, it cannot be concluded that section 129(1)(a) was complied with.[243] Consequently the Court held that where the notices are returned unclaimed, section 129(1)(a) is not complied with.

3 3 3 7 *Balkind v Absa Bank Ltd*[244]

In the *Balkind*-case a notice was sent to the applicant who had signed as surety in favour of the bank. A *domicilium* address was chosen, however, the applicant had changed addresses. Consequently, the notice never came to his attention.

According to the Court, the main issue in the application was the interpretation of the *Sebola*-judgment. The Court held that the *Sebola*-case established that the credit provider has to prove on a balance of probabilities that the section 129(1)(a) notice reached the consumer or came to the attention of the consumer.[245] The Court held that the *Sebola*-case overrules the case of *Rossouw.*[246] According to the Court the "degree of proof required by Sebola leaves room for a finding of fictional fulfilment of the principle that the section

[240] 2012 (5) SA 574 (KZN), hereafter the *Mkhize*-case.
[241] *Mkhize*-case para 53.
[242] *Mkhize*-case para 58.
[243] *Mkhize*-case para 53.
[244] 2013 (2) SA 486 (ECC), hereafter the *Balkind*-case.
[245] *Balkind*-case para 26.
[246] *Balkind*-case para 41.

129(1)(a) notice had come to the attention of the consumer".[247] It should be noted that the Court in this case referred to the *Mkhize*-case[248] with approval.

3 3 3 8 *Standard Bank of South Africa Ltd v Van Vuuren and several other matters*[249]

The *Van Vuuren*-case served before the South Gauteng High Court. It also concerned the issue of receipt of the notice as interpreted by the *Sebola*-case. The Court agreed with the decision in the *Mkhize*-case. It held that where the notices are returned to the sender unclaimed, it constituted non-compliance with section 129(1)(a).[250]

3 4 Conclusion

This paragraph reviewed the current statutory provisions in relation to debt enforcement as well the case law that has been decided under the relevant provisions. The legislation in point is the Alienation of Land Act and the National Credit Act. As submitted in the conclusion of paragraph 2 above, once again, it is clear that the wording of the relevant provision in a particular enactment is of crucial importance when considering the interpretation thereof. In the Alienation of Land Act, it has been shown that in the original version of section 19, the word "inform" was used and it was interpreted to require actual receipt of the notice by the consumer. This seemed not to have been the intention of the legislature and therefore section 19 was amended. Instead of "inform" the word "notify" is used.[251] According to the Court and Otto this was an attempt to make receipt of the notice unnecessary[252]. It is commendable that the legislature realised the controversy and amended the section accordingly.

However, it is unfortunate that the legislature overlooked the seriousness of impeccable drafting of legislation when it drafted the National Credit Act. Section 129, read with section

[247] *Balkind*-case para 47.
[248] See para 3 3 3 6 above.
[249] Unreported GSJ case nr 32874/2012, hereafter the *Van Vuuren*-case.
[250] Van *Vuuren*-case para 6 and 7.
[251] Para 3 2 2 4.
[252] Para 3 2 2 4 above.

130, requires that a notice be delivered to the credit receiver prior to debt enforcement[253]. However, unlike in the Alienation of Land Act, the legislature has not defined important words used and hence it is unclear as to what exactly is required. As a result, it is not clear what is *inter alia* meant by words such as "enforce", "delivery" and "may" as used in section 129 and 130. It is also not clear to which address the notice should be sent and how this should be sent.

Before the Constitutional Court decision in the *Sebola*-case, there were a number of conflicting decisions.[254] In 2010 the Supreme Court of Appeal was explicit in the *Rossouw*-case when it held that actual receipt of the notice was not required as long as it was properly sent as prescribed by the Act[255]. In 2012, the Constitutional Court in the case of *Sebola* was faced with the same question. However, it is unfortunate that it was not as explicit in its decision as compared to the *Rossouw*-case. The Court held *inter alia* that the credit provider had to prove on a balance of probabilities that the notice was sent[256]. The issue of what happens in instances where the notice is returned back to the sender unclaimed is still unclear. Because the decision is unclear, it has been subjected to conflicting interpretations by various courts in different provinces. After discussing the issue at hand, Otto has submitted that "consumer protection comes at a price, but the National Credit Act has set the price too high".[257]

[253] Para 3 3 2 1 above.
[254] Para 3 3 3 1-3 3 3 3 above.
[255] Para 3 3 3 3 above.
[256] Para 3 3 3 4 above.
[257] Otto and Otto (2013) 118.

4 CONCLUSION

4 1 General

This dissertation researched on debt enforcement processes with reference to default notices. It provided a historical development of credit legislation in relation to specific provisions dealing with default notices. It identified the problems that existed in the pre-NCA enactments. It further identified problems currently experienced with the interpretation of the National Credit Act and specifically with section 129(1) and section 130(1). Case law was discussed to show how the courts have dealt with the interpretational problems of the relevant provisions with the aim of determining whether recommendations can be made as far as possible amendments are concerned.

One problem in regard to notices that has existed over the years is on the question of whether the actual receipt of the notice was required for effective compliance. This dissertation showed that the wording of the relevant provision in a particular enactment is of crucial importance when considering this question. The interpretational problems encountered are due to lack of impeccable drafting of the Acts. Considering that some of the problems encountered in the NCA were dealt with previously, it shows that the legislature did not learn much from the previous legislation as well as the Alienation of Land Act. For instance, the Credit Agreements Act and the Alienation of Land Act prescribed/s the methods of delivery of the debt enforcement notice.[258] It is submitted that the same should have been done in section 129 of the NCA. Further, the issue of the address for delivery should also have been made clear, as was the case in the Hire-Purchase Act.[259] The crucial issue of whether actual receipt of the notice is required or not, had been a bone of contention over the years, therefore the legislature should have been clear whether this was a requirement or not instead of leaving it up to the judiciary for interpretation. It is unnecessary and costs both creditors and consumers money in legal suits. As it stands, the Constitutional Court's decision in *Sebola*[260] stands as law and is binding on all the courts, even though it has been subject to conflicting interpretations by various courts regarding the precise interpretation of section 129(1)(a).

[258] See paras 2 3 2 2 and 3 2 2 4 above.
[259] See 2 2 2 above.
[260] See para 3 3 3 4 above.

In regard to the protection of the consumers, it is clear that the NCA intends to protect the consumer. The scope of application is extended and from the Constitutional Court's interpretation of the Act in the *Sebola*-case,[261] the Court indicated that one of the purposes of the NCA is to protect the consumer. It is, however, submitted that the legislature should balance the rights of the consumer with those of the creditors for the sustainability of the consumer credit industry.

4 2 Recommendations

Seeing that the National Credit Act is currently subject to review, [262] it is disappointing that the issues highlighted in this dissertation have not be considered for amendments. The author is of the view that the following amendments should be incorporated in the National Credit Act Amendment Bill:

(a) The word "may" draw as used in section 129(1)(a) should be changed to "must", as it is clear from the research done in this dissertation that a default notice is a pre-requisite for debt enforcement in court. It is also seldom that the enforcement of debt does not eventually end up in court, therefore most notices are sent with the intention of instituting legal proceedings should all other interventions fail.

(b) The issue of address to be used when "providing the notice" as required by section 129(1)(b)(i) should be clarified by including the phrase "*domicilium* address" provided by the consumer.

(c) The issue of the method of "delivery", as provided for in section 130(1)(a), should be defined or clarified as to whether it should be read with section 65 or section 168. That is, it should be clear whether it should be sent via registered mail or whether mere ordinary mail would be sufficient. It is recommended that as per the *Sebola*-case registered mail is the better option as it would provide the proof of delivery and the track and trace printout.

Alternatively, delivery of the notice should be considered as a service of legal documents and hence served in a manner that summons and other legal notices are

[261] See para 3 3 3 4 above for full discussion of the case.
[262] See the Draft National Credit Act Policy Review Framework, 2013 and Draft National Credit Act Amendment Bill, 2013.

served. This would require the use of the Sheriffs as they would be able to provide the return of service which can be used as proof in court. However, considering the statistics that were provided by Absa in the case of *Mkhize* in regard to the number of default notices that it often dispatches, this method would not only be impractical but very costly to both the credit providers and the consumer.

(d) The word "enforce" as used in section 130(1)(a) should also be clarified as to indicate whether the credit provider must provide a notice for any remedy that he wishes to claim. For instance, is a notice required for cancellation of the contract as well or only in instances where the creditor wishes to claim specific performance.

(e) Finally, it should be made clear whether actual receipt of the section 129(1)(a) notice in order for it to be effective is required or not. As the law stands, it is subject to interpretation by the courts.

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