

**A PROCEDURAL FLAW ENCOUNTERED WITH DEBT ENFORCEMENT
IN TERMS OF THE NATIONAL CREDIT ACT**

by

ABRAHAM THOMAS WYNAND SMIT

Student No. 98104676

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ABSTRACT

The main purpose of this dissertation is to identify and address a certain procedural flaw encountered with the prescribed process of notification required in terms of the National Credit Act (hereafter the NCA), prior to the commencement of legal steps. At first glance it would seem that the legislature has succeeded in creating a flawless process but in practice it has come to light that said process is the cause of havoc, disarray and ultimately result in the loss of time and money. On numerous occasions over the years has the legislature aimed for a specific goal when creating legislation, and though its intent may have been pure, in some instances it has failed in the execution thereof. The NCA is no stranger to such failure, controversy and ambiguities.

It is evident that the NCA was drafted with a definite intent to protect consumers. The main problem that the legislature had to face was the balance between the rights of credit providers and consumers. Poor drafting in certain instances resulted in uncertainty as to what the legislature's intent was and subsequently the courts are tasked with interpretation of legislation that is unclear.

In order to fully assess the flaw and the practical predicament that it creates, the researcher had to reverse engineer the research problem and subsequently the dissertation starts off with an introduction and overview of the South African Credit industry. Building on this general platform the research is further confined by addressing the debt enforcement processes in terms of the common law and NCA with specific reference to the interrelation between debt enforcement and debt review.

The procedural flaw pertaining to the method of delivery against the backdrop of the requirements for delivery (or lack thereof) as found in sections 129 and 130 of the NCA is investigated with special reference to the section 65 requirements for general delivery of documents and notices in terms of the Act. An in depth investigation into

previous and current case law shed some light as to the train of thought followed by the courts.

In conclusion, this dissertation illustrates the importance of clarity when drafting tedious and complex legislation that impacts directly on the public. It exposes a procedural flaw encountered in the NCA and provides certain recommendations as to how the flaw may be remedied.

TABLE OF CONTENTS

1	GENERAL INTRODUCTION	1
1.1	Overview	1
1.2	Scope and objective of Research	2
1.3	Delineation and limitations	3
1.4	Significance of research	3
1.5	Structure of dissertation	3
1.6	Key references, terms and definitions	4
2	CONSUMER PROTECTION IN SOUTH AFRICA: A HISTORICAL OVERVIEW AND DISCUSSION OF CURRENT LEGISLATION	6
2.1	General	6
2.2	History of Consumer Credit Legislation	6
2.2.1	General	6
2.2.2	Who are the users of credit and what are their motives for utilizing credit?	7
2.2.3	General purpose of Consumer Credit Legislation	8
2.3	What is the aim and purpose of the NCA?	10
2.3.1	General	10
2.3.2	Section 3 of the NCA	11
2.3.3	Section 13 of the NCA	12
2.4	Application of the NCA	13
2.5	Conclusion	14

3	AN OVERVIEW OF THE DEBT ENFORCEMENT PROCESS IN TERMS OF THE COMMON LAW AND THE NCA	15
3.1	General	15
3.2	Debt Enforcement Procedure in terms of the Common Law	16
3.2.1	General	16
3.2.2	Remedies in terms of the Common law	17
3.2.3	Notification of breach: Letter of demand	18
3.3.	Debt Enforcement Procedure in terms of the National Credit Act	19
3.3.1	General	19
3.3.2	Remedies in terms of the NCA	19
3.3.3	Notification: Section 129(1)(a) notice	20
3.3.4	Time frames: Section 130	21
3.3.5	Debt Review	23
3.3.6	Debt Enforcement	23
3.3.7	Debt Review versus Debt Enforcement	24
3.3.7.1	General	24
3.3.7.2	Sections 86 and 88	25
3.3.7.3	Section 129	27
3.3.7.4	Interrelation between sections 86, 88 and 129	27
3.4	Nedbank Ltd and Others v The National Credit Regulator and Another	29
3.5	Conclusion	31

4	PROCEDURAL FLAWS PERTAINING TO DEBT ENFORCEMENT	33
4.1	General	33
4.2	Method of delivery	33
4.2.1	General	33
4.2.2	Sections 129 and 130 requirements for delivery	34
4.2.3	Section 65 requirements	35
4.2.4	Definition of “delivered”	36
4.3	Previous legislation and case law	37
4.3.1	Case law prior to the Supreme Court of Appeal and Constitutional Court decisions	37
4.3.2	The Supreme Court of Appeal decision in the matter of Rossouw and Another v Firstrand Bank Ltd	41
4.3.3	The matter pending before the Constitutional Court: Sebola and Sebola v Standard Bank of South Africa and Others	43
4.3.3.1	General	43
4.3.3.2	Consideration of the meaning of section 129 of the NCA	43
4.3.3.3	The impact of the Constitution	46
4.3.3.4	The Credit Agreement Enforcement Process	49
4.4	Conclusion	49
5	CONCLUSION	51
5.1	General	51



5.2	Summary of findings	51
5.3	Recommendations	52

1. GENERAL INTRODUCTION

1.1 Overview

The South African credit industry has since the passing of the Hire Purchase Act¹ in 1942 evolved in leaps and bounds but not without a fair share of obstacles that it had to overcome. Set against the backdrop of the Apartheid era the Credit Agreements Act² and the Usury Act³ has respectively regulated the contractual and financial legs of the South African credit industry for the better part of three decades. When the Constitution of the Republic of South Africa⁴ was passed, every South African citizen obtained various rights ranging from the freedom of religion, belief and opinion⁵ to the right to access to courts.⁶ The Constitution states that it recognises any other right(s) conferred on an individual whether it is by means of the common law, customary law or by legislation, as long as the said right(s) are consistent with the Bill of Rights.⁷ This posed an unforeseen problem as overnight, the majority of the South African public, who, up until then had no or limited access to credit, obtained access to a multi billion rand industry, yet were uneducated and ill equipped to converse in credit related matters. The legislation at the time was not drafted to make provision for end users that were uneducated in credit related matters and subsequently did not provide adequate protection for the said users.

It quickly became evident that the South African credit industry had a unique yet complex nature and given the ineffectiveness of the legislation at the time to properly deal with and regulate the said credit industry, the legislature had to step in. Subsequently the result was the passing of the National Credit Act⁸ during 2006. The NCA was introduced in three parts of which the last part came into operation on 1

¹ The Hire Purchase Act 36 of 1942.

² The Credit Agreements Act 75 of 1980.

³ The Usury Act 73 of 1968.

⁴ The Constitution of the Republic of South Africa, 1996.

⁵ S 15.

⁶ S 34.

⁷ S 39(3).

⁸ The National Credit Act 34 of 2005 (hereinafter the NCA).

June 2007. Implementing the NCA in three stages afforded credit providers enough time to comply with the variety of new requirements that it posed. The NCA refined certain well-established concepts and divided credit agreements into 3 sub categories namely, “Credit facilities”,⁹ “Credit transactions”¹⁰ and “Credit guarantees”.¹¹

The abovementioned concepts are further refined and in the case of a credit transaction for instance, the NCA lists no less than eight different types of credit transactions.¹² The NCA also introduced new, fresh concepts that have never been mentioned in any South African legislation, such as “incidental credit”.¹³ The overall “look and feel” of the NCA is much more focused on the protection and consideration of the consumer than the credit provider. This becomes evident when one considers the purposes of the NCA, which are summarised in section 3 thereof and is discussed in greater detail in paragraph 2 of this dissertation.

1.2 Scope and objective of research

The NCA introduced a wide variety of new legislative concepts aimed, for the most part, at protecting the consumer. One of these “new” concepts is in actual fact an old concept that has been retrofitted and labeled “debt enforcement”.¹⁴ The NCA dedicates an entire chapter to debt enforcement and consequently the procedures that accompany this concept. The origin of this dissertation is founded on one of these prescribed procedures, which in the view of the researcher, is flawed. Whilst the utmost care was taken when this piece of legislation was drafted, quite a number of practical and procedural flaws have crept into the NCA, none more so than the procedure relating to the section 129 notice which greatly impacts on the commencement of legal action by a credit provider. The objective of this dissertation is to identify a procedural flaw encountered with the process, which pertains to the

⁹ S 8(3).

¹⁰ S 8(4).

¹¹ S 8(5).

¹² S 8(4)(a)-(f).

¹³ S 1 and s 5(2).

¹⁴ Chapter 6, Part C of the NCA deals with debt enforcement.

section 129 notice and to provide certain practical recommendations that may assist in streamlining the process.

1.3 Delineation and limitations

The objective of this study pertains to chapter 6 of the NCA, more specifically to the pre-debt enforcement measures as found in sections 129 and 130 of the NCA. Given the specific focus of research, consideration is given to the debt review process in as far as it impacts on the inner workings of sections 129 and 130. “Collection and repayment practices”¹⁵ as well as “Surrender of goods”¹⁶ fall outside the ambit of the research. The research constraints of this study also pertain to the fact that the research is only based on South African legislation and South African court decisions.

1.4 Significance of research

The research’s value is best demonstrated in practice seeing as it would identify a flaw in the debt enforcement process and also recommend viable, practical solutions to the flaw created in theory.

1.5 Structure of dissertation

This dissertation is divided into 5 paragraphs of which the first deals with the introduction and overview of the dissertation. In paragraph 2 the history and purpose of consumer credit and consumer credit legislation in South Africa is discussed with specific reference to the reasons behind individuals utilising credit facilities as well as an overview of the aim and purposes of the NCA. Building on the platform of

¹⁵ S 124, s 125 and s 126.

¹⁶ S 127 and s 128.

paragraph 2, an overview of the debt enforcement procedure in terms of the common law as well as the debt enforcement procedure in terms of the NCA is provided in paragraph 3. The balance between the newly introduced concepts of debt review and debt enforcement is also investigated in paragraph 3 with specific focus on the impact of sections 129 and 130 of the NCA on the debt enforcement process. In paragraph 4 the procedural flaw encountered with the process pertaining to the section 129 notice is identified and discussed followed by an in-depth exploration of case law pertaining to the said procedural flaw. Lastly, in paragraph 5 the researcher aims to provide recommendations for possible practical solutions that the legislature may consider to ensure a more consistent interpretation of sections 129 and 130 of the NCA.

1.6 Key references, terms and definitions

For purposes of this dissertation the singular shall include the plural and any reference to the male gender will include the female gender. The following terms will be deemed to have the meaning as prescribed below:¹⁷

“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.

¹⁷ As found in s 1 of the NCA.

“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.

“reckless credit” means the credit granted to a consumer under a credit agreement concluded in circumstances described in section 80.

2. CONSUMER PROTECTION IN SOUTH AFRICA: A HISTORICAL OVERVIEW AND DISCUSSION OF CURRENT LEGISLATION

2.1 General

In this chapter, a brief overview of the history and purpose of consumer protection legislation is given as well as a discussion of the current legislation's purpose, aim and application.

2.2 History of consumer credit legislation

2.2.1 General

Consumer protection, even though it may be a refined concept in the modern age, is not by any measure a new or modern concept in the human race's history. According to Otto, legal rules protecting the vulnerable existed since the dawn of time.¹⁸ Some of the consumer protection rules that found its way into modern society is the regulation of usurious interest rates, warranties available to a consumer in an agreement of sale, benefits that a surety may rely on and the *voetstoots* clause.¹⁹ Otto²⁰ is of the opinion that the hire-purchase industry was the instigator of more consumer protection legislation than any other industry in the modern commercial world. The Roman-Dutch law did not provide for a contract where the purchase price was paid in instalments and ownership of the *merx* passed under an additional circumstance (for example payment of last instalment) and subsequently the hire-purchase contract was only introduced in the mid nineteenth century in Europe.²¹ The new hire-purchase craze resulted in a situation where consumers were utterly exploited by sellers. The standard hire-purchase contract curtailed a consumer's rights to the exclusive benefit

¹⁸ Otto in Scholtz (ed) *Guide to the National Credit Act* (2008-loose leaf) par 1.2.1.

¹⁹ *Ibid.*

²⁰ Otto in Scholtz (ed) par 1.2.2.

²¹ *Ibid.*

of a seller and before long these unethical practices of exploiting consumers justified legislation for protection of consumers.²²

2.2.2 Who are the users of credit and what are their motives for utilizing credit?

Before considering the general purpose of consumer credit legislation, it is first necessary to establish whom the users of credit is and also what their motives for doing so are. According to the Crowther Report,²³ natural persons who would normally fall into the lower to middle class income bracket that are buying/borrowing for personal or family use and not for business purposes are the most common users of credit. In certain instances small juristic persons will also fall in this bracket.

The Crowther Committee identifies the following criteria that may be motives for consumers to utilise credit:

- a) Practical convenience where credit enables the consumer to pay for the purchase of goods and/or services.²⁴
- b) Bridging the gap between the intervals of income and spending. A consumer can purchase goods/services for current consumption and pay over a longer period than normal intervals between income receipts.²⁵
- c) The consumer is able to purchase goods now at a lower cost than in the future with the potential benefit that the consumer's future income may be greater than its current income, which in turn will result in better affordability and greater customer satisfaction.²⁶

²² *Ibid.*

²³ Report of the Committee *Consumer Credit*, chaired by lord Crowther volume 1 Cmnd 4596 London (1971) (hereafter Crowther 1971).

²⁴ Crowther (1971) 117.

²⁵ *Ibid.*

²⁶ *Ibid.*

- d) Credit enables the consumer to purchase real and financial assets in excess of his own accumulated savings or earning capability. Credit enables the consumer to add to his capital equipment.²⁷

The Crowther Committee is of the view that credit provides both monetary and non-monetary benefits to a consumer and in doing so contributes to a more efficient allocation of resources by increasing both consumer satisfaction as well as economic efficiency.²⁸

2.2.3 General purpose of consumer credit legislation

According to the Crowther Committee²⁹ the purpose and function of protective legislation for consumers can be assessed under the following headings:

- a) To address the consumer's unequal bargaining power by³⁰
- i) requiring disclosure of essential information in the contract and advertisements of the *merx*. False and misleading information is naturally prohibited in this regard;
 - ii) providing consumers with certain standard contractual rights and limitations of liability, which cannot be excluded by mutual agreement of the parties;
 - iii) constricting contractual provisions, which are harsh.

²⁷ Crowther (1971) 117-118.

²⁸ Crowther (1971) 118.

²⁹ Crowther (1971) 234.

³⁰ *Ibid.*

- b) To curb malpractices in the commercial arena by prohibiting them and imposing of sanctions if the prohibition is not observed.³¹
- c) To curb the credit provider's remedies by restricting and prohibiting certain extra-judicial remedies such as enforcement of the right to repossess goods and by giving courts a discretion to order payment by instalments (and in doing so, allowing the debtor to remain in possession of the *merx*).³²

The Crowther Committee opines, “the law least protects those whom it is designed to serve most”.³³ This statement is based on the revelation that consumer protection legislation has a limit and therefore cannot be held to be the one and only measure to safeguard the vulnerable. The Crowther Committee believes that the effectiveness of consumer protection legislation lies in its ability to give a safe and economical platform to consumers who are ill equipped to state their own case.³⁴

Otto and Otto opines that measures that are implemented to ensure that consumers are protected are a common occurrence in most countries all over the world. Factors that would influence said measures or legislation are the needs, circumstances, resources, political agendas, economic philosophy and the history of a specific country.³⁵

It is submitted that the main purpose of consumer credit legislation is to protect uninformed consumers against exploitation by credit providers. It has been established that a certain percentage of society does not possess the skill and/or knowledge to engage, or be allowed to engage, in the economic arena without protective measures such as consumer credit legislation as an aid. These measures are

³¹ *Ibid.*

³² Crowther (1971) 235.

³³ Crowther (1971) 236.

³⁴ *Ibid.*

³⁵ Otto and Otto *The National Credit Act Explained* (2010) 1.

justified by a variety of reasons spanning from illiteracy to ignorance on the part of the consumer.³⁶

2.3 What is the aim and purpose of the NCA?

2.3.1 General

The South African population consists of a large percentage of previously disadvantaged individuals who, if not properly protected, may fall victim to over-indebtedness and exploitation. In many instances it has been established that the cost and affordability of credit are foreign concepts to consumers. The Legislature had to step in and provide certain protective measures to ensure that consumers that are illiterate and subsequently lack the economic know-how and skill be protected.

The NCA in conjunction with the Co-operative Banks Act,³⁷ the Draft Dedicated Banks Bill³⁸ and the Consumer Protection Act,³⁹ comprise legislation with a cumulative aim at greater protection of consumers where credit is more easily accessible.

The NCA repealed both the Credit Agreements Act⁴⁰ and the Usury Act⁴¹ and from the outset it was evident that the NCA was not just a mere amendment of previous legislation but also rather an extensive substitution of legislation that has governed the South African credit industry over the last thirty odd years.⁴²

³⁶ Crowther (1971) 119.

³⁷ Co-operative Banks Act 40 of 2007.

³⁸ Draft Dedicated Banks Bill, 2004.

³⁹ Consumer Protection Act 68 of 2008.

⁴⁰ *Supra* at fn 2.

⁴¹ *Supra* at fn 3.

⁴² Scholtz in Scholtz (ed) par 2.1.

2.3.2 Section 3 of the NCA

The purposes of the NCA are phrased in a lengthy manner in section 3 of the Act. Section 3 has an extremely important role in the NCA as its content impacts on the interpretation of the whole Act.⁴³ Section 3 of the NCA states that the purposes of the Act are “to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers”. It is stated in section 3 in what manner the purposes as mentioned in section 3 are to be accomplished. For purposes of this dissertation, only the purposes that impact on the procedural flaw will be listed.

- a) Promoting the development of an accessible credit market for all South Africans, especially those that hail from a previously disadvantaged background.⁴⁴
- b) Promoting responsible credit practices by encouraging avoidance of financial over-commitment and over-indebtedness, responsible borrowing and fulfillment of financial obligations. Also by discouraging credit granting by credit providers to consumers that cannot afford it as well as discouraging contractual default by consumers.⁴⁵
- c) Educating consumers regarding credit and consumer rights and in doing so correcting the imbalances in negotiation power between a credit provider and consumer.⁴⁶

⁴³ S 2(1) of the NCA provides that the Act must be interpreted in such a manner that effect is given to the purposes as set out in s 3 of the NCA.

⁴⁴ S 3(a); See also Otto and Otto 6-7; See also Scholtz in Scholtz (ed) par 2.3.

⁴⁵ S 3(c)(i)-(ii); See also Otto and Otto 6-7; See also Scholtz in Scholtz (ed) par 2.3.

⁴⁶ S 3(d); See also Otto and Otto 6-7; See also Scholtz in Scholtz (ed) par 2.3.

- d) Prevention of over-indebtedness and introduction of measures to resolve over-indebtedness based on the principle that the consumer satisfies all of its financial obligations.⁴⁷
- e) Providing a functional and easily accessible system for dispute resolution.⁴⁸
- f) Providing a system of debt restructuring, enforcement and judgment by balancing the rights and responsibilities of both the credit provider and the consumer and in doing so promoting an equitable credit market.⁴⁹

It is clear that the legislature did not intend for section 3 to be a hollow set of ideas with little to no impact. Otto and Otto is of the view that the purposes of the NCA should have a tangible effect on the manner and form in which courts are prepared to protect consumers and credit providers alike.⁵⁰ In *Firststrand Bank Ltd v Maleke*⁵¹ the court took into consideration and based its ruling on justice and the purposes of the NCA when it found that a High Court could terminate proceedings before it and refer the matter to a Magistrate's Court with competent jurisdiction. It is concurred with Otto and Otto's statement that said ruling was "groundbreaking".⁵² It is submitted that the ruling is tangible evidence that a new credit era has been entered and that courts will have a more comprehensive set of rules to apply in matters relating to credit and consumer protection.

2.3.3 Section 13 of the NCA

The NCA established various new offices and structures to ensure that the requirements of the NCA are feasible, deliverable and ultimately enforced. The most

⁴⁷ S 3(g); See also Otto and Otto 6-7; See also Scholtz in Scholtz (ed) par 2.3.

⁴⁸ S 3(h); See also Otto and Otto 6-7; See also Scholtz in Scholtz (ed) par 2.3.

⁴⁹ S 3(i); See also Otto and Otto 6-7; See also Scholtz in Scholtz (ed) par 2.3.

⁵⁰ Otto and Otto 7.

⁵¹ *Firststrand Bank Ltd v Maleke* 2010 1 SA 143 (GSJ).

⁵² Otto and Otto 7.

prominent of these new structures is the National Credit Regulator, which was established in terms of section 12 of the NCA.⁵³

Section 13 of the Act pertains to the development of an accessible credit market and in this regard the National Credit Regulator is responsible to ensure the development of a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market for

- a) historically disadvantaged persons;⁵⁴
- b) low-income persons and communities;⁵⁵
- c) remote, isolated or low-density populations and communities.⁵⁶

The NCA then proceeds to state that the National Credit Regulator's objectives in terms of section 13 of the NCA should be achieved in a manner consistent with the purposes of the NCA.⁵⁷

2.4 Application of the NCA

The NCA, as a general rule applies to every credit agreement made in, or having effect within, South Africa where the parties are dealing at arm's length.⁵⁸ The NCA does however provide for exceptions to the stated rule⁵⁹ such as agreements between family members who are co-dependent on each other or agreements between a juristic

⁵³ S 12(1)(a)-(f); See also Otto and Otto 33; See also Scholtz in Scholtz (ed) par 3.2.1.

⁵⁴ S 13(a)(i); See also Otto and Otto 33; See also Scholtz in Scholtz (ed) par 3.2.2.

⁵⁵ S 13(a)(ii); See also Otto and Otto 33; See also Scholtz in Scholtz (ed) par 3.2.2.

⁵⁶ S 13(a)(iii); See also Otto and Otto 33; See also Scholtz in Scholtz (ed) par 3.2.2.

⁵⁷ S 13(a); See also Otto and Otto 33; See also Scholtz in Scholtz (ed) par 3.2.2.

⁵⁸ S 4(1); See also Otto and Otto 17; See also Van Zyl in Scholtz (ed) par 4.1.

⁵⁹ *Ibid.*

person and an individual who holds the majority share or interest in said legal entity.⁶⁰ These agreements will not fall within the ambit of the NCA and therefore parties may not rely on any of the provisions as stated in the NCA.⁶¹ The NCA defines a credit agreement as either a credit facility or a credit transaction or a credit guarantee or a combination of last mentioned three transactions.⁶² If an agreement does not meet the defined requirements of section 8 of the NCA, it may be argued that such an agreement does not constitute a credit agreement for purposes of the NCA and therefore the NCA cannot apply to such an agreement. Clearly the interpretation of section 4 of the NCA may in some cases assist with the formulation of a defense for credit providers where it is more favorable if an agreement is not considered as a credit agreement and the requirements as set by the NCA is not brought into play. It is therefore essential to establish whether or not the NCA applies to an agreement or not.

2.5 Conclusion

It is submitted that the NCA has the enormous task of balancing the rights of consumers and credit providers, with the disadvantage that the consumers are for the most part uneducated, vulnerable and in need of protection against exploitation. It is also submitted that the NCA aims to create a distinct system for the regulation of credit in South Africa.⁶³

⁶⁰ S 4(2)(b); See also Van Zyl in Scholtz (ed) par 4.2.

⁶¹ S 4(1)(a)-(d); See also Otto and Otto 28.

⁶² S 8(1); See also Otto and Otto 17 -25; See also Otto in Scholtz (ed) par 8.2.

⁶³ Renke, Roestoff and Haupt “The National Credit Act: New parameters for the granting of credit in South Africa” 2007 *Obiter* 230.

3. AN OVERVIEW OF THE DEBT ENFORCEMENT PROCESS IN TERMS OF THE COMMON LAW AND THE NCA

3.1 General

In order to analyse the specific flaw pertaining to the section 129 notice within the debt enforcement process of the NCA, it is essential to have an understanding of the scope and application of the debt enforcement process both in terms of the NCA as well as in terms of the common law. In the initial part of this paragraph the reader will be given a general overview of the potential remedies that an innocent contracting party may have and the common law procedure to enforce an agreement will be discussed.

In the latter part of this paragraph the reader is introduced to the debt enforcement process as envisaged by the NCA. The researcher specifically focuses on the compliancy steps required prior to the commencement of legal action, which include but is not limited to a discussion on both section 129 and section 130 of the NCA. The latter discussion of this paragraph focuses on the sections in the NCA that impact on section 129 and its operation. It is essential for the reader to have a clear understanding of the symbioses between the process pertaining to the application for debt review⁶⁴ and the process of debt enforcement.⁶⁵

It is necessary to address and have an understanding of the operation of each process and more importantly under which circumstances each process commences. Depending on what process has been followed, the one may suspend operation of the other and *vice versa*. This will obviously impact greatly on both contracting parties.

⁶⁴ S 86(1); See also Otto and Otto 59-61; See also Van Heerden in Scholtz (ed) par 11.3.3.2.

⁶⁵ S 129(1)(b); See also Otto and Otto 100; See also Van Heerden in Scholtz (ed) par 12.3.

Once the interrelation between sections 86, 88 and 129 have been addressed, the reader will be in a position to assess and understand the procedural flaw pertaining to the method of delivery of the section 129 notice.

3.2 Debt enforcement procedure in terms of the common law

3.2.1 General

The South African common law has, at its foundation, a blend of Roman-Dutch law and English law that over an extended period evolved into the South African common law, as we know it today. The common law has specific principles and rules regarding the contractual relationship between parties and none more so than the procedure and remedies available to a contracting party (innocent party) in the event that the other contracting party (breaching party) is in breach of their agreement.

The Roman law of contract only provided for specific agreements, each with their own set of rules. An agreement that fell beyond the requirements for these specific agreements was deemed not to be an agreement at all.⁶⁶ It was the Roman-Dutch writers that took this concept and developed a general set of rules that could be applied to any agreement. In doing so, they extended the application of contractual remedies beyond the mere specific agreements as defined in Roman law,⁶⁷ into a set of rules that apply to current day agreements.

In order to assess the debt enforcement processes in terms of the common law and applicable legislation, it will be useful to have an understanding of the various remedies available to an innocent party. For purposes of this dissertation it is not necessary to venture into elaborated detail regarding the common law remedies. A basic understanding will suffice in light of the fact that the aim of this dissertation is rather to discuss certain flaws in the current credit legislation.

⁶⁶ Hutchison *et al* *The Law of Contract in South Africa* (2010) 12.

⁶⁷ *Ibid.*

3.2.2 Remedies in terms of the common law

Common law remedies are the standard remedies contained in any contract,⁶⁸ which remedies are for the benefit of both contracting parties but usually utilised by the innocent contracting party in the event of a breach of the terms of the agreement by the breaching party. The said remedies are

- a) specific Performance;⁶⁹
- b) damages;⁷⁰
- c) cancellation of the agreement;⁷¹
- d) interdicts;⁷²

Apart from the standard remedies available to contracting parties, the parties may also agree to include additional remedies (contractual remedies) in their agreement for added security, such as

- a) acceleration clauses;⁷³
- b) *lex commissoria*;⁷⁴

⁶⁸ As discussed by Otto and Otto 98.

⁶⁹ Hutchison *et al* 310; See also Van der Merwe *et al Kontraktereg Algemene Beginsels* (1998) 276.

⁷⁰ Hutchison *et al* 327-329; See also Van der Merwe *et al* 299.

⁷¹ Hutchison *et al* 322-323; See also Van der Merwe *et al* 289.

⁷² Hutchison *et al* 344-345.

⁷³ Hutchison *et al* 446.

⁷⁴ Hutchison *et al* 293; See also Van der Merwe *et al* 250 and 318.

Under normal circumstances a contracting party will only utilise its contractual remedies in the event that a breach of one or all of the terms of the agreement to which he is a party, has occurred. The first step in the process to utilise said remedies pertains to notification.

3.2.3 Notification of breach: letter of demand

The commencement of the process involved in exercising one's contractual remedies in terms of the common law, involves some form of notification to the breaching party.⁷⁵ A written agreement between two contracting parties will (in most cases) have a "breach" and/or "termination" clause which will deal with the process to be followed in the event that one contracting party is in breach of the terms of the agreement. Under normal circumstances a party in breach will be afforded a period of time within which he has to rectify said breach.⁷⁶

The process of informing a party in breach is usually set out in the "breach" clause and will, in most instances, comprise of correspondence that is sent to the breaching party's *domicilium* address.⁷⁷ The said correspondence will be drafted in the format of a demand and will state a date by which the breaching party should have rectified the breach. There is no prescribed period or time frame in terms of the common law that needs to lapse before the innocent party can send a letter of demand to the breaching party. In a standard "breach" clause the parties usually agree on a specific time frame. The rule of thumb is whether or not the time afforded to the breaching party is reasonable and fair.⁷⁸

Should the breaching party not comply with the aforementioned letter of demand, then and in that event the innocent party may proceed to exercise his remedies, be it in the form of a civil action or by means of the application process for an interdict. The

⁷⁵ Van Huyssteen, Van der Merwe and Maxwell *Contract Law in South Africa* (2010) 184; See also Hutchison *et al* 347.

⁷⁶ Van Huyssteen *et al* 184.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

letter of demand usually states the intention of the innocent party should the breaching party not adhere to the terms as stated in said letter.⁷⁹

3.3. Debt enforcement procedure in terms of the NCA

3.3.1 General

The concept of consumer legislation and consumer protection is not a new or foreign concept to the South African public. The purpose of this type of legislation is to limit the exercise of the common law remedies by the contracting party not in breach of the agreement and to protect the end users of credit. For purposes of this dissertation (unless otherwise stated) the agreement between parties pertains to some form of credit and the breaching party will be deemed to be the credit consumer and the innocent party, the credit provider.

3.3.2 Remedies in terms of the NCA

The credit provider has all the remedies as provided for in the common law⁸⁰ as well as the additional “agreed upon” remedies, if that is what the parties intended, but the legislator has limited the exercise of these remedies to the benefit of the credit consumer. The legislator has, in a manner of speaking, “codified” debt enforcement by way of required processes to be followed prior to exercising the credit provider’s contractual and common law remedies.⁸¹ The commencement platform for enforcement of a credit agreement is similar to the process in terms of the common law reason being that the NCA requires a credit provider to notify the credit consumer of his default. The notice should be drafted in the prescribed format as stated in section 129 of the NCA.

⁷⁹ *Ibid.*

⁸⁰ For a list of common law remedies see par 3.2.2 above.

⁸¹ Renke, Roestoff and Haupt 2007 *Obiter* 229.

3.3.3 Notification: section 129(1)(a) notice

The general principle as found in the common law, that the breaching party need to be notified of said breach, apply *mutatis mutandis* to agreements that are subject to the NCA. The Act prescribes the notification process in section 129(1), which reads as follow:

If 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.

One can simplify section 129(1)(a) by breaking it down into the following notification criteria:

- a) Notification of the consumer's default should be given to the consumer. It is important that the consumer be made aware of his default; and
- b) The notification should be in writing; and
- c) The notification should comprise a certain format, stating in no uncertain terms what the consumer's rights and options are; and

- d) The notification should disclose intent on the credit provider's front to reconcile and negotiate a plan to help the consumer out of his default.

Section 129(1)(b) adds to the abovementioned criteria by stating that:

- a) legal action may not be taken against a consumer in default if the notice as envisaged in section 129(1)(a) has not been delivered;⁸² and
- b) legal action may not be taken against a consumer should the requirements as stated in section 130 not be met.⁸³

Section 129(1)(b)(i) only states the words "providing notice" which phrase can obviously be interpreted in a many different ways. It is submitted that the interpretation of the mentioned phrase constitutes a flaw in the debt enforcement procedure and is discussed in greater detail in paragraph 4 of this dissertation. Taking last mentioned into account it is also clear that the legislature's intent with the provisions of section 129 as a whole was to ensure that a credit provider can only proceed against a credit consumer with legal action once the notification criteria have been met. This manner of drafting places an uncanny burden on the credit provider/innocent party to the agreement. It is submitted that an innocent party to an agreement should have a less troublesome route to exercise his contractual rights.

3.3.4 Time frames: section 130

Contrary to the common law position, the NCA also introduces the concept of time frames pertaining to the delivery of the letter of demand. Section 130(1) deals with said time frames and reads as follow:

⁸² S 129(1)(b)(i); See also Otto and Otto 100.

⁸³ S 129(1)(b)(ii); See also Otto and Otto 100.

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

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

In light of the above it would seem that the consumer must be in default for at least 20 business days and furthermore at least 10 business days must have elapsed since the credit provider delivered the section 129 letter of demand *before*⁸⁴ the credit provider may approach a court to enforce the agreement.

This new concept differs substantially from the process in terms of the common law and is a pre-requisite for the debt enforcement process in terms of the NCA. Non-compliance by a credit provider will result in a situation where the court can instruct the credit provider to first adhere to the prescribed time frames before he can enforce his rights in terms of the agreement. This may result in the loss of precious time and possibly lead to damages.

It has been established that for a credit provider to be able to exercise his remedies he must first comply with section 129 of the NCA. There is, however, other sections in the NCA that impacts directly on section 129 and subsequently on the credit provider's position to be able to enforce a credit agreement. In light of last mentioned it is necessary to discuss the interrelation between the process for debt review and the

⁸⁴ Own emphasis.

process for debt enforcement. As previously indicated the one may suspend operation of the other and *vice versa*.

3.3.5 Debt review

Debt review entails the process of assessing a credit consumer's financial situation pertaining to all the credit agreements that he is a party to, and if found to be over-indebted, to restructure the repayments in such a manner that it is more affordable and achievable to settle all the debt over a period of time.⁸⁵ A debt counsellor facilitates the debt review process. The office of debt counsellor is established in section 44(1) of the NCA and is a new concept that the legislature introduced in the NCA.⁸⁶ The rights, duties and obligations of a debt counsellor show many similarities to the office of an administrator.

3.3.6 Debt enforcement

The NCA introduces a new undefined concept to South African legislation namely, “enforce”, which in turn has left the interpretation of certain sections of the NCA open for discussion. Section 129(1)(b) for instance expressly states that one cannot proceed with legal action to *enforce*⁸⁷ a credit agreement if certain requirements are not met. Section 86(2) and section 88(3) also refers to the phrase “enforce” and moreover if said enforcement has commenced, excludes certain rights from either the credit provider or credit consumer, depending on the facts. One can safely say that it is essential to define the phrase “enforce” in order to establish certainty as to the commencement and outcome of the debt review and/or debt enforcement processes.

⁸⁵ Debt review is dealt with in section 86 and regulations 24, 25 and 26 of the NCA.

⁸⁶ In terms of reg 1 of the NCA “debt counselling” is defined as “performing the functions contemplated in section 86 of the Act.”

⁸⁷ Own emphasis.

The Oxford dictionary defines the phrase “enforce” as a transitive verb with the meaning: compel observance of (a law etc.).⁸⁸ Otto and Otto⁸⁹ is of the view that against the backdrop of legal parlance, the ordinary meaning of enforcement would be the enforcement of a payment and/or other obligations. Van Heerden⁹⁰ concurs with this point of view. Otto and Otto⁹¹ takes this statement a step further and opines that in the context of the NCA, the phrase “enforce” may well refer to a credit provider exercising his remedies under a credit agreement.

In *ABSA Bank Ltd v De Villiers*⁹² it was held that the phrase “enforce” should be used in a wider sense, to include any remedies that can or may be exercised by a credit provider. It is submitted that debt enforcement entails the exercising of all available remedies to and by the credit provider. In practice this would be done through civil litigation.

3.3.7 Debt review versus debt enforcement

3.3.7.1 General

In chapter 5, part D of the NCA the legislature not only introduces the concept of debt review but also two new possible defenses available to a credit consumer namely reckless credit and over-indebtedness. The NCA defines an agreement as being reckless under the following circumstances:

- a) The credit provider has neglected to conduct a financial assessment of the potential credit consumer’s situation before entering into the agreement,⁹³ or

⁸⁸ Fowler *The Concise Oxford Dictionary of Current English* (1992) 388.

⁸⁹ Otto and Otto 103.

⁹⁰ Van Heerden in Scholtz (ed) par 12.1.

⁹¹ Otto and Otto 103.

⁹² *ABSA Bank Ltd v De Villiers* 2009 5 SA 40 (C).

⁹³ S 80(1)(a); See also Otto and Otto 77; See also Campbell in Scholtz (ed) par 6.5.4; See also Van Heerden in Scholtz (ed) par 11.4.3.

- b) The credit provider conducted a financial assessment and even though he found that the credit consumer did not understand the risks and costs pertaining to the credit;⁹⁴
- c) or could not afford the credit, still entered into a credit agreement with the consumer.⁹⁵

The NCA qualifies that a consumer is over-indebted, having regard to the consumer's financial means, prospects, obligations and history of debt repayment,⁹⁶ when he is or will be unable to satisfy all of his obligations under all the credit agreements to which he is a party.⁹⁷ Section 79 does not refer to a specific time frame⁹⁸ as qualification for a consumer to be regarded as over-indebted but rather refer to the words "timely manner".⁹⁹ In the event that a credit consumer is party to a credit agreement that meets the requirements as set out in sections 79 and/or 80 of the NCA, then and in that event the credit consumer will be entitled to apply for debt review in accordance with section 86 of the NCA.¹⁰⁰

3.3.7.2 Sections 86 and 88

Section 86 pertains to the debt review process and in section 86(1) the NCA states the credit consumer's right to apply to a debt counsellor to be declared over-indebted. The process of being assessed and potentially declared over-indebted is a timeous process and the legislature foresaw that a credit provider, once informed of a credit consumer's intent, may attempt to enforce his rights in terms of the credit agreement prior to the final outcome of the debt review process. The legislature therefore incorporated section 88 in to the NCA in order to protect the interests of credit consumers.

⁹⁴ S 80(1)(b)(i); See also Otto and Otto 77; See also Van Heerden in Scholtz (ed) par 11.4.3.

⁹⁵ S 80(1)(b)(ii); See also Otto and Otto 77; See also Van Heerden in Scholtz (ed) par 11.4.3.

⁹⁶ S 79(1)(a).

⁹⁷ S 79(1)(b).

⁹⁸ Eg 30 or 40 days.

⁹⁹ S 79(1)(b).

¹⁰⁰ S 86(1); See also Otto and Otto 59-61.

Section 88(3) states that a credit provider that

- (i) is informed of the suspension of a credit agreement based on reckless credit and/or over-indebtedness; or
- (ii) is informed of debt review proceedings instituted by the credit consumer;

may not proceed to enforce the agreement, or security under that agreement, until the credit consumer is in default under the credit agreement;¹⁰¹ and

- (a) the application for debt review has been rejected by the debt counsellor;¹⁰²
- (b) the credit consumer is found by the court not to be over-indebted;¹⁰³
- (c) the credit consumer's obligations have been rearranged either by agreement between the parties or by order of court and all of the credit consumer's obligations under the rearrangements have been fulfilled;¹⁰⁴
- (d) the consumer defaults on any obligation in terms of a rearrangement.¹⁰⁵

Section 86(2) then proceeds and states that a credit consumer may not apply for debt review if at the time of application the credit provider has proceeded with the enforcement steps as envisaged in section 129 of the NCA.

¹⁰¹ S 88(3)(a); See also Otto and Otto 101; See also Van Heerden in Scholtz (ed) par 11.3.3.4.

¹⁰² S 88(3)(a)(i); See also Otto and Otto 101; See also Van Heerden in Scholtz (ed) par 11.3.3.4.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ S 88(3)(a)(ii); See also Otto and Otto 101; See also Van Heerden in Scholtz (ed) par 11.3.3.4.

3.3.7.3 Section 129

Section 129(1)(a) provides the content and format¹⁰⁶ of the notice that is to be sent to a credit consumer in default. Section 129(1)(b) puts a moratorium on the enforcement of an agreement by way of instituting legal action if notice is not given to the credit consumer in accordance with section 129(1)(a) or section 86(10) and any requirements as envisaged in section 130 are not met.

3.3.7.4 Interrelation between sections 86, 88 and 129

It is clear from the content of sections 86, 88 and 129 that the debt review process and the debt enforcement process cannot function simultaneously. One can deduce from the phrasing of section 86(2) that it was the legislature's intent to prevent a credit consumer to apply for debt review after he has received a section 129(1)(a) notice. Boraine and Renke¹⁰⁷ however opined that this train of thought is unpractical and makes little sense especially if one considers the fact that the section 129(1)(a) notice expressly states the consumer's right to refer the agreement to a debt counsellor. They are of the view that only when summons is issued will an application for debt review be stayed. Otto and Otto states that the purpose of referral to a debt counsellor in terms of a section 129(1)(a) notice has nothing to do with debt review but rather to resolve disputes and/or establish a repayment plan to settle the outstanding debt.¹⁰⁸ It is submitted that the key to unlocking the problem lies in the phrase "has proceeded with the enforcement steps as envisaged in section 129".

It is concurred with Otto and Otto¹⁰⁹ that the reference to section 129 in section 86(2) is not a specific reference to the notice in terms of section 129(1)(a) but rather a reference to the enforcement steps that follow after delivery of said notice *and*¹¹⁰ once

¹⁰⁶ For a discussion on the content and format of the section 129 notice see par 3.3.3 above.

¹⁰⁷ Boraine and Renke "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005" (Part 2) 2008 *De Jure* 9, fn 186.

¹⁰⁸ Otto and Otto 100.

¹⁰⁹ *Ibid.*

¹¹⁰ Own emphasis.

the time frames as provided for in said notice has been complied with. It is submitted that in practice the enforcement steps as referred to above are those steps taken when one commences with legal action, for example, the issuing of summons.

The question that inevitably follows is whether the mere issuing of summons will suffice to stay the debt review process, or should said summons be delivered? The court decided in the case of *Standard Bank of South Africa v Hales*¹¹¹ that the mere issuing of a summons will stay an application for debt review. The court based its decision on the provisions of section 86(2). Boraine and Renke¹¹² are also of the view that mere issuing will do the job but Van Heerden¹¹³ submits that it was the legislature's intent that the debt review process be available to the credit consumer up and until the date that the credit provider served a summons upon the credit consumer. It is submitted that the view of Van Heerden¹¹⁴ and also Coetzee,¹¹⁵ that in order to successfully stay an application for debt review, summons should not only be issued but also delivered to the credit consumer, is correct.

The researchers' opinion is based on one of the main purposes of the NCA, which is to inform credit providers and credit consumers to a greater degree of all aspects relating to credit and how it may affect them. Based on the aim and purpose of the NCA,¹¹⁶ it is submitted that it was the legislature's intent that a credit consumer be informed of all matters relating to the credit agreement, which include but is not limited to, pending legal action. Should mere issuing of a summons be enough to satisfy the requirement of section 86(2), it would be submitted that the Act has failed in its aim and purpose. It is essential that that the credit consumer is made aware of the fact that he cannot apply for debt review anymore. The researcher is of the view that, issuing summons and successfully delivering it to the credit consumer is the only means to do this.

¹¹¹ *Standard Bank of South Africa v Hales* 2009 3 SA 315 (D) 324E-F.

¹¹² Boraine and Renke 2008 *De Jure* 9.

¹¹³ Van Heerden in Scholtz (ed) par 11.3.3.2(d).

¹¹⁴ *Ibid.*

¹¹⁵ Coetzee, *The Impact of the National Credit Act on Civil Procedural Aspects relating to Debt Enforcement* (LLM dissertation University of Pretoria 2009) (hereafter Coetzee LLM dissertation) 88.

¹¹⁶ S 3.

Section 88(3) is the proverbial flipside to the coin and ensures that once a credit consumer has given proper notice via a debt counsellor of its intention to proceed with the debt review process, a credit provider may not *enforce*¹¹⁷ the terms of that specific credit agreement. The word “enforce” as stated in section 88(3) is deemed to have the same meaning as the one found in section 86(2) and section 129(1)(b). Should this be the case, the credit provider may not deliver a section 129 notice to commence with the enforcement process and even if the credit provider has delivered said notice, such a notice will be deemed not to have met the requirements for the process of enforcement. The Supreme Court of Appeal clarified the interrelation between sections 86 and 129 of the NCA in the matter of *Nedbank v The National Credit Regulator*.¹¹⁸

3.4 *Nedbank Ltd and Others v The National Credit Regulator and Another*

In the matter of *Nedbank Ltd and Others v The National Credit Regulator and Another*¹¹⁹ the Supreme Court of Appeal had to rule on a declarator sought by the National Credit Regulator (NCR) that the reference in section 86(2) to a step taken in terms of section 129 to enforce a credit agreement, was in actual fact a reference to the commencement of legal action as provided for in section 129(1)(b) and also that said reference did not include the steps provided for in section 129(1)(a).¹²⁰ The Court analysed sections 129 and 86 and came to the following conclusions:

- a) The section 129(1)(a) notice deals with a specific credit agreement and not every credit agreement to which a credit consumer is a party (if it is more than one) and therefor cannot be interpreted in the same manner as sections 86 and 87 to provide a *general*¹²¹ debt restructuring platform.¹²²

¹¹⁷ Own emphasis.

¹¹⁸ *Nedbank Ltd and Others v The National Credit Regulator and Another* 2011 3 SA 581 SCA.

¹¹⁹ 2011 3 SA 581 SCA.

¹²⁰ At par 4.

¹²¹ Own emphasis.

¹²² At par 9.

- b) The process in terms of section 86 is more general in nature and has a blanket effect in the sense that it includes all credit agreements to which a credit consumer is a party.¹²³
- c) The grammatical construction of section 86 indicates that it was the legislature's intent to provide for the possibility of debt review where a specific credit agreement could still be excluded from said debt review process.¹²⁴
- d) Even in the event that a specific credit agreement falls outside the impact of the debt review process, section 85 provides that a court may still refer a matter where a credit agreement is being considered to a debt counsellor for an evaluation and recommendation on over-indebtedness and/or reckless credit.¹²⁵
- e) The purpose of a section 129(1)(a) notice is to resolve any existing disputes and to settle any unpaid debt in terms of a specific credit agreement.¹²⁶
- f) The section 129(1)(a) notice, even though it is a step prior to the commencement of legal action, is still the first step to be taken when enforcing a credit agreement. The notice will only exclude the specific agreement to which it pertains from the debt review proceedings.¹²⁷
- g) The phrase “has proceeded to take the steps”¹²⁸ is discussed against the backdrop of the definitions of the words “steps” and “proceeded”. It was held

¹²³ *Ibid.*

¹²⁴ At par 11.

¹²⁵ *Ibid.*

¹²⁶ At par 14.

¹²⁷ *Ibid.*

¹²⁸ Abstract from s 86(2).

that by making use of said words, a continuing process is specified in terms of which the section 129(1)(a) notice is the initial step.¹²⁹

- h) Giving notice in terms of section 129(1)(a) is the only explicitly stated step in the process prior to the commencement of any legal steps. By giving notice in terms of section 129(1)(a) a credit provider has proceeded with the *steps*¹³⁰ to enforce a credit agreement and such steps will suffice to stay any debt review proceedings pertaining to the credit agreement that was the subject of said notice.¹³¹

- i) The Appeal was dismissed.¹³²

3.5 Conclusion

To conclude this paragraph it is submitted that debt enforcement in terms of the common law differs from debt enforcement in terms of the NCA as far as notification to a party in breach is concerned. The NCA requires a specific format in which the letter of demand should be drafted and also prescribes certain time frames that need to be adhered to in order to successfully comply with the pre-debt enforcement requirements of the NCA. These pre-debt enforcement requirements are, in the view of the researcher, the breeding ground for several procedural flaws, one of which is the absence of a prescribed method of delivery of the section 129(1)(a) notice. The result of said absence is that should these pre-debt enforcement requirements not be met and the credit provider proceeds with issuing of summons, it may be argued that

¹²⁹ At par 14.

¹³⁰ Own emphasis.

¹³¹ At par 14.

¹³² At par 15.

said summons is excipiable based on the fact that no cause of action has been disclosed.¹³³

¹³³ Van Heerden and Coetzee “Marimuthu Munien v BMW Financial Services (SA) (Pty)Ltd Unreported case no 16103/08 (KZD)” 2009 *PELJ* 12 (4) 334.

4. A PROCEDURAL FLAW PERTAINING TO DEBT ENFORCEMENT

4.1 General

In this paragraph a procedural flaw found in the debt enforcement chapter of the NCA is identified and assessed. The flaw pertains to the method of delivery of the section 129 notice.

4.2 Method of delivery

4.2.1 General

It has been established in paragraph 3 that in order to enforce the terms of a credit agreement, the section 129(1)(a) notice should be sent in the correct format, prior to the commencement of debt review proceedings.¹³⁴ Section 130(1)(a) of the NCA was also discussed in paragraph 3 with specific reference to the prescribed time frames. In terms of the said section the credit consumer had to be in default for a period of no less than 20 (twenty) business days¹³⁵ and 10 (ten) business days¹³⁶ should have elapsed since the credit provider delivered the section 129(1)(a) notice.¹³⁷

Otto and Otto¹³⁸ states that the section 129(1)(a) notice is a *sine qua non* for enforcement of a debt. It is submitted that said notice is one of the fundamental building blocks in the debt enforcement process. Taking into account the importance of the said notice and how it impacts on the rights of both the credit provider and credit consumer, it is essential to establish under which circumstances a section

¹³⁴ For a discussion pertaining to section 129 see paragraph 3.3.3 and 3.3.7 above.

¹³⁵ S 130(1); See also Otto and Otto 109.

¹³⁶ S 130(1)(a); See also Otto and Otto 109.

¹³⁷ *Ibid.*

¹³⁸ Otto and Otto 103.

129(1)(a) notice will be deemed to have been delivered. The question therefore pertains to the requirements for proper service and/or delivery and ultimately the method of delivery. The first step of investigation would be the source of the possible requirement being sections 129 and 130 of the NCA.

4.2.2 Sections 129 and 130 requirements for delivery

In section 129 and section 130 of the NCA, the following regarding notification and delivery of the section 129(1)(a) notice is stated:

- (i) “...may draw the default to the notice of the consumer...”¹³⁹
- (ii) “...first providing notice to the consumer...”¹⁴⁰
- (iii) “...since the credit provider delivered a notice to the consumer...”¹⁴¹

Section 129 only states that notice should be “drawn”. Section 130 then proceeds to incorporate the element of delivery but refrains from stating a definition for the concept “delivered”.

In the absence of conclusive answers the next step would be to investigate the NCA’s sections regarding general delivery of documents, which is addressed in section 65 of the Act.

¹³⁹ Abstract from s 129(1)(a).

¹⁴⁰ Abstract from s 129(1)(b).

¹⁴¹ Abstract from s 130(1)(a).

4.2.3 Section 65 requirements

Section 65 of the NCA deals with the right to receive and deliver documents. Section 65(1) states that every document that is required to be delivered should be delivered in the prescribed manner. Where no method for delivery has been prescribed, section 65(2) states that a credit consumer may elect to be informed in one or more of the following manners:

- (i) In person at the business premises of the credit provider or any other location chosen by the credit consumer, at his expense.¹⁴²
- (ii) By ordinary mail.¹⁴³
- (iii) By fax.¹⁴⁴
- (iv) By e-mail.¹⁴⁵
- (v) By printable web-page.¹⁴⁶

Section 65 makes no mention of registered mail as a prescribed form of delivery and furthermore Otto and Otto is also of the view that the NCA prefers ordinary mail above registered mail as a method of delivery.¹⁴⁷ It is submitted that this view is odd especially if one considers the fact that registered mail will, even though it is still flawed, provide a platform where the credit provider at least will have proof that he sent the section 129(1)(a) notice and in doing so, indicate that the credit provider had the intent to inform the credit consumer of its breach.

¹⁴² S 65(2)(a)(i); See also Otto and Otto 57; See also Campbell in Scholtz (ed) par 6.2.7.

¹⁴³ *Ibid.*

¹⁴⁴ S 65(2)(a)(ii); See also Otto and Otto 57; See also Campbell in Scholtz (ed) par 6.2.7.

¹⁴⁵ S 65(2)(a)(iii); See also Otto and Otto 57; See also Campbell in Scholtz (ed) par 6.2.7.

¹⁴⁶ S 65(2)(a)(iv); See also Otto and Otto 57; See also Campbell in Scholtz (ed) par 6.2.7.

¹⁴⁷ Otto and Otto 105 at fn 68.

It has been established in paragraph 3.5 that section 129 does not prescribe the manner in which the section 129(1)(a) notice should be delivered and therefore section 65(1) cannot apply.¹⁴⁸ This then only leaves section 65(2), which, in the researcher's opinion, is far too limiting and subsequently do not address the problem at hand. It would seem that the Act does not provide a definite answer and therefore an investigation into the Regulations may be useful. Chapter 1 of the Regulations states certain definitions amongst which that of "delivered".

4.2.4 Definition of "delivered"

In regulation 1 of the NCA the following definition is given to the word "delivered":

"...unless otherwise provided for, means sending a document by hand, by fax, by e-mail, or registered mail to an address chosen in the agreement by the proposed recipient, if no such address is available, the recipient's registered address..."¹⁴⁹

It would seem that the Legislature has again neglected to indicate under which circumstances a section 129(1)(a) notice is deemed to have been delivered. The problem presented here is that no measure of confirmation pertaining to the delivery of the notice under discussion is formulated and/or required and therefore a loophole is created when one is confronted with a defense of non-receipt of the section 129(1)(a) notice.

Does the word "delivery" entail that the said notice should reach the credit consumer or will mere sending of the notice by the credit provider suffice. Otto and Otto asks the question whether the notice should *reach*¹⁵⁰ the consumer to be effective.¹⁵¹

¹⁴⁸ The statement is based on the interpretation of the content of section 65(1).

¹⁴⁹ Abstract from reg 1.

¹⁵⁰ Own emphasis.

Should a court find that a section 129(1)(a) notice has not been delivered in accordance with the provisions of the NCA, it could result in a situation where the credit consumer can argue that he was not properly informed which in turn could result in the credit provider being halted from further enforcement proceedings until such time as the notice is properly delivered to the credit consumer. Van Heerden and Coetzee¹⁵² opined that under last mentioned circumstances a summons issued would be excipiable due to non-disclosure of a cause of action.

In the absence of any provision in the NCA that directly deals with the question at hand, the researcher focused his investigation on previous legislation and case law for a potential answer or indication of what measures would suffice.

4.3 Previous legislation and case law

4.3.1 Case law prior to the Supreme Court of Appeal and Constitutional Court decisions

In *Fitzgerald v Western Agencies*¹⁵³ the court had to rule on the interpretation of the amended section 12(b) of the Hire Purchase Act.¹⁵⁴ Section 12(b) required the seller to demand from the purchaser that he fulfill his obligations in terms of the agreement prior to enforcement of the agreement. The amended section required that said demand should be posted to the purchaser at his last known residential or business address. The court found that a notice, sent in terms of the Hire Purchase Act, which did not reach the intended recipient, would have been deemed delivered and therefor effective if the notice had been sent in accordance with the provisions of the Act.¹⁵⁵ In

¹⁵¹ Otto and Otto 105.

¹⁵² Van Heerden and Coetzee 2009 *PELJ* 12 (4) 334.

¹⁵³ *Fitzgerald v Western Agencies* 1968 1 SA 288 (T).

¹⁵⁴ Act 36 of 1942.

¹⁵⁵ 1968 1 SA 291 (T).

*Maron v Mulbarton Gardens (Pty) Ltd*¹⁵⁶ the court had to rule whether or not the seller complied with the requirements of section 13(1) of the Sale of Land on Instalments Act.¹⁵⁷ The said section required that prior to the termination of a contract that was the subject of the Act,¹⁵⁸ a seller had to inform the purchaser of its failure to fulfill its obligation in terms of the agreement and demand of the purchaser to rectify said failure within a period not less than 30 days.¹⁵⁹ It was held that the word “inform” could only be interpreted to have the meaning that the notice had to reach the purchaser.¹⁶⁰

In *Holme v Bardsley*¹⁶¹ the court had to rule on the interpretation of sections 19 and 23 of the Alienation of Land Act.¹⁶² The applicant sent the section 19 notices to the addresses chosen by the respondent in terms of section 23 of the Act.¹⁶³ It was common cause that the respondent did not receive the letters of demand.¹⁶⁴ The court held that the correct interpretation was that the notice had to reach the purchaser in order to be effective.¹⁶⁵ Otto and Otto¹⁶⁶ however is of the opinion that the ruling in *Holme v Bardsley*¹⁶⁷ was wrong. They favor a more practical angle where, if the credit provider has fastidiously complied with the specific requirements of a section in legislation, it would be deemed that he has complied for purposes of said legislation even though the notice may not have reached the intended recipient.¹⁶⁸

In *Marques v Unibank Ltd*¹⁶⁹ the court had to rule on the “delivery” of the section 11 notice in terms of the Credit Agreements Act.¹⁷⁰ Section 11 of the Act provides for two methods of delivery being personal delivery (“handing over of a letter”) or by

¹⁵⁶ *Maron v Mulbarton Gardens (Pty) Ltd* 1975 4 SA 123 (W).

¹⁵⁷ Act 72 of 1971.

¹⁵⁸ *Ibid.*

¹⁵⁹ 1975 4 SA 123 (W) 124E.

¹⁶⁰ 1975 4 SA 123 (W) 125D.

¹⁶¹ *Holme v Bardsley* 1984 1 SA 429 (W).

¹⁶² The Alienation of Land Act 68 of 1981.

¹⁶³ 1984 1 SA 429 (W) 430A.

¹⁶⁴ 1984 1 SA 429 (W) 430E.

¹⁶⁵ 1984 1 SA 429 (W) 432A-F.

¹⁶⁶ *Otto and Otto* 106.

¹⁶⁷ 1975 4 SA 123 (W).

¹⁶⁸ *Otto and Otto* 106.

¹⁶⁹ *Marques v Unibank Ltd* 2001 1 SA 145 (W).

¹⁷⁰ Act 75 of 1980.

registered mail.¹⁷¹ It was held that the result achieved by personal delivery does not need to be the same result with registered mail in order for the notice to be effective.¹⁷² The court therefor rejected the position held in *Holme v Bardsley*¹⁷³ and ruled that the notice does not have to come to the attention of the credit consumer.¹⁷⁴ In *Mercedes Benz Finance (Pty) Ltd v Coster*¹⁷⁵ the court had to rule on the same legal question pertaining to the statutory requirements for a section 11 notice in terms of the Credit Agreements Act.¹⁷⁶ The court came to a similar conclusion as the one in *Marques v Unibank Ltd* and found that for the credit provider to be compliant in terms of the legislation, actual receipt of the notice by the credit consumer was not necessary.¹⁷⁷

In the more recent case of *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors*¹⁷⁸ the court had to rule on the requirements imposed on a credit provider for pre-debt enforcement proceedings, being compliancy with sections 127, 129 and 130 of the NCA.¹⁷⁹ It is submitted that the court scrutinized the fact that the NCA differed from its predecessor¹⁸⁰ in various ways and that the new legislation imposed an obligation on the credit provider to “draw the default to the notice of the consumer in writing”,¹⁸¹ yet refrained from stating a practical solution as to how this should be done. The court elaborated on the meticulous processes introduced by the new legislation and found that there was more than enough justification to interpret the NCA in a stricter sense.¹⁸² This “stricter” interpretation evidently rejects the notion that the mere posting of a notice would suffice as compliancy by the credit provider to “notify” the credit consumer of his default. The court emphasized the fact that the credit consumer had to have knowledge of his default and that it was the credit provider’s task to

¹⁷¹ 2001 1 SA 145 (W) 145I.

¹⁷² *Ibid.*

¹⁷³ 1984 1 SA 429 (W).

¹⁷⁴ 2001 1 SA 145 (W) 157E.

¹⁷⁵ *Mercedes Benz Finance (Pty) Ltd v Coster* 2000 JOL 6191 (N) 1.

¹⁷⁶ Act 75 of 1980.

¹⁷⁷ 2000 JOL 6191 (N) 7-8; See also *Otto and Otto* 106 at fn 88.

¹⁷⁸ *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D).

¹⁷⁹ 2009 2 SA 512 (D) 512C.

¹⁸⁰ Act 75 of 1980.

¹⁸¹ 2009 2 SA 512 (D) 524D-525B.

¹⁸² 2009 2 SA 512 (D) 525C.

ensure that the credit consumer be informed.¹⁸³ With this view the court rejected the ruling in *Marques v Unibank Ltd*¹⁸⁴ and proceeded to state that the credit provider had to notify the credit consumer in such a manner of his default, that the manner in itself would provide assurance to the court considering the matter that the default has indeed been brought to the attention of the credit consumer.¹⁸⁵ Unfortunately the court did not rule as to what method of notification would suffice in order for a credit provider to be deemed to be compliant in terms of the NCA. It can therefore be concluded that the court acknowledges the fact that the legislator intended for a credit consumer to be notified of his default, but refrains to elaborate as to *how*¹⁸⁶ this should be done.

In *Munien v BMW Financial Services (SA) (Pty) Ltd and Another*¹⁸⁷ the court had to rule on the question whether a section 129 notice in terms of the NCA has to reach the consumer in order to meet the requirements of compliancy with the NCA. The court reiterated the fact that the section 129(1)(a) notice is a prerequisite in the event that a credit consumer is of the intent to enforce a credit agreement.¹⁸⁸ The court further ruled that the section 129(1)(a) notice would be deemed delivered if it was sent in accordance with the method that the credit consumer initially chose in the credit agreement.¹⁸⁹ Said method should obviously be in line with the methods as provisioned for in the NCA.¹⁹⁰ The court ruled that the onus of the risk is placed on the credit consumer, which in turn result in the consumer not being able to raise non-delivery as a defense if the credit provider has indeed sent the section 129(1)(a) notice in accordance with the method and to the address as chosen by the credit consumer.¹⁹¹

¹⁸³ 2009 2 SA 512 (D) 524E.

¹⁸⁴ 2001 1 SA 145 (W).

¹⁸⁵ 2009 2 SA 512 (D) 524H.

¹⁸⁶ Own emphasis.

¹⁸⁷ *Munien v BMW Financial Services (SA)(Pty)Ltd and Another* 2010 1 SA 549 (KZD).

¹⁸⁸ 2010 1 SA 549 (KZD) 550I-J.

¹⁸⁹ 2010 1 SA 549 (KZD) 556E.

¹⁹⁰ The court referred to the provisions of s 65(2) and reg 1 of the NCA.

¹⁹¹ 2010 1 SA 549 (KZD) 557F-558G; See also *Otto and Otto* 108.

Lotz, Nagel and Joubert¹⁹² opined that the court effectively ruled that sending of the section 129(1)(a) notice is equivalent to the delivery of said notice and therefore receipt of said notice becomes redundant.

In the matter of *Standard Bank of South Africa v Rockhill*¹⁹³ the court followed the ruling in *Munien v BMW Financial Services (SA) (Pty) Ltd and Another*¹⁹⁴ and ruled that non-receipt of the section 129(1)(a) notice was not a defense that would suspend the steps taken to enforce a credit agreement.¹⁹⁵ Boraine and Van Heerden¹⁹⁶ are of the view that the ruling of the court in *Rossouw and Another v Firstrand Bank Ltd*¹⁹⁷ resolved the controversy pertaining to the delivery and method of delivery of the section 129(1)(a) notice.¹⁹⁸

4.3.2 The Supreme Court of Appeal decision in the matter of *Rossouw and Another v Firstrand Bank Ltd*

In *Rossouw and Another v Firstrand Bank Ltd*¹⁹⁹ the court had to rule on the meaning ascribed to section 130(2) of the NCA regarding mortgage agreements²⁰⁰ and whether the appellants were given proper notice as envisaged in sections 129(1) and 130(1) of the NCA.²⁰¹ For purposes of this dissertation, only the latter question is investigated. It was held that the definition of the word “delivered” as stated in regulation 1 of the NCA should have no impact on the interpretation of section 129(1)(a) and specifically any reference to delivery of the section 129(1)(a) notice.²⁰² The court favored the view that delivery, against the backdrop of section 129 should occur in accordance

¹⁹² Lotz, Nagel and Joubert *Specific Contracts in Court* (2010) 125; See also Boraine and Van Heerden “The Conundrum of the Non-compulsory Compulsory Notice in terms of Section 129(1)(a) of the National Credit Act” 2011 *SAMLJ* 49 at fn 26.

¹⁹³ *Standard Bank of South Africa v Rockhill* 2010 5 SA 252(GSJ).

¹⁹⁴ 2010 1 SA 549 (KZD).

¹⁹⁵ 2010 5 (SA) 252 (GSJ) 258D-F.

¹⁹⁶ Boraine and Van Heerden 2011 *SAMLJ* 45.

¹⁹⁷ *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA).

¹⁹⁸ Boraine and Van Heerden 2011 *SAMLJ* 50.

¹⁹⁹ 2010 6 SA 439 (SCA).

²⁰⁰ 2010 6 SA 439 (SCA) 443H.

²⁰¹ 2010 6 SA 439 (SCA) 447C.

²⁰² 2010 6 SA 439 (SCA) 449B.

with the provisions of section 65(2) of the NCA as well as the provisions relating to delivery and method of delivery that the credit provider and credit consumer agreed upon in the credit agreement.²⁰³ The court ruled that the fact that the Legislature enabled the credit consumer to choose the manner in which delivery of *any*²⁰⁴ notice in terms of the NCA should be delivered indicate an intention to place the burden of risk of potential non-receipt of the section 129(1)(a) notice on the credit consumer.²⁰⁵ This would imply that receipt of the section 129(1)(a) notice is now the credit consumer's burden.²⁰⁶ Boraine and Van Heerden²⁰⁷ are of the view that where a section 129(1)(a) notice is sent to a credit consumer in accordance with the provisions of regulation 1 of the NCA and also to the address as chosen by the credit consumer, but was not received by the credit consumer, such delivery will not constitute non-compliance in terms of the NCA. In the event that the incorrect address was used by the credit provider, such as an address other than the address chosen by the credit consumer, then it would constitute non-compliance.²⁰⁸

The ruling in *Rossouw and Another v Firstrand Bank Ltd*²⁰⁹ was made by the Supreme Court of Appeal and one can therefor deduce that it is the current law regarding the question of delivery and method of delivery of the section 129(1)(a) notice. There is, however, a new case where the Applicants approached the Constitutional court in order to obtain a ruling as to the impact of the section 129(1)(a) notice on an individual's constitutional rights. The Constitutional court has not yet ruled but the arguments put to court by the applicants and the First Amicus Curiae is food for thought.

²⁰³ 2010 6 SA 439 (SCA) 450C.

²⁰⁴ Own emphasis.

²⁰⁵ 2010 6 SA 439 (SCA) 450C-D.

²⁰⁶ 2010 6 SA 439 (SCA) 450A-C.

²⁰⁷ Boraine and Van Heerden 2011 *SAMLJ* 52.

²⁰⁸ *Ibid.*

²⁰⁹ 2010 6 SA 439 (SCA).

4.3.3 The matter pending before the Constitutional Court: *Sebola and Sebola v Standard Bank of South Africa and Others*

4.3.3.1 General

In the matter of *Sebola and Sebola v Standard Bank of South Africa and Others*²¹⁰ the First Amicus Curiae²¹¹ posed the following two questions to court:²¹²

- (i) Should an issued section 129(1)(a) notice actually come to the credit consumer's attention?
- (ii) If the answer in (i) above is affirmative, how does this affect the procedure to be adopted by the credit provider for purposes of enforcement of a credit agreement before court?

In order to address both questions counsel for the First Amicus Curiae structured its submissions into four categories. For purposes of addressing the specific flaw under discussion, three of the categories will be considered.²¹³

4.3.3.2 Consideration of the meaning of section 129 of the NCA

Counsel upon considering the plain text of section 129 argued as follow:

²¹⁰ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC).

²¹¹ The Socio Economic Rights Institute of South Africa.

²¹² Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 5-6.

²¹³ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 9-10.

- (a) The section requires not only that the credit consumer’s default but also the credit provider’s proposals relating to alternative dispute resolution be brought to the attention of the credit consumer.²¹⁴

- (b) Legal proceedings may not commence until such time as the notice of the credit consumer’s options is provided to him. Counsel differentiates between the words “provided” on the one hand and “served”, “delivered” and “sent” on the other. Counsel argues that the word “provided” reflects intent of the legislature that the credit consumer had to be aware of both the default of and options available to him/her prior to the commencement of any legal action.²¹⁵

- (c) Section 129 places an additional burden of compliancy on the credit provider by joining it to section 130. Section 130 refers to the notice in terms of section 129(1)(a) being “delivered”.²¹⁶

Taking the above into account, counsel argued that the NCA envisages actual receipt of the section 129(1)(a) notice to such an extent that the credit consumer is

- (a) fully aware of his default;²¹⁷ and

- (b) fully aware of the options available to him/her in order to avoid cancellation and enforcement of the credit agreement.²¹⁸

²¹⁴ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 12.

²¹⁵ *Ibid.*

²¹⁶ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 12-13.

²¹⁷ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 13.

²¹⁸ *Ibid.*

Counsel referred to sections 65 and 168 of the NCA and stated that even though the word “delivered” is not explicitly defined against the backdrop of section 129, one cannot conflate the meaning thereof with the meanings given to the word in said sections.²¹⁹ Counsel argued that if it was the legislature’s intent that the words “...draw attention to in writing...” should be construed to have the exact same denotation as the word “delivered” then the word “delivered” would have been used in section 129(1)(a).²²⁰ Counsel effectively argued that the difference found in the phrasing of the sections is an indication that there is indeed a difference in the meaning of the words, which in turn would result in a drastic difference in legal result.²²¹

Counsel quoted Murphy J in the matter of *Firststrand Bank v Dhlamini*²²²

“...the primary and substantive requirement enacted by the provision [is] that the default be brought to the notice of the consumer. Bringing something to a person’s notice requires that it be brought to his or her attention.”

Murphy J, in the same matter,²²³ stated:

“But it would seem to me to be wrong to elevate a procedural mechanism action for determining the time period within which action may be commenced to a standard eclipsing the primary and substantive requirement enacted by the provision.”

Counsel for the First Amicus Curiae agreed with Murphy J and argued that section 130 merely sets out the procedure to be followed to dispatch the section 129(1)(a) notice prior to the commencement of legal action.²²⁴ Counsel argued that section 130

²¹⁹ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 16.

²²⁰ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 17.

²²¹ *Ibid.*

²²² *Firststrand Bank v Dhlamini* 2010 4 (SA) 531 par 24.

²²³ *Ibid.*

- (a) does not state if receipt of the section 129(1)(a) notice is required;²²⁵
and
- (b) does not state how to assess whether a credit consumer has received the section 129(1)(a) notice.²²⁶

4.3.3.3 The impact of the Constitution

Counsel opined that in the event that the enforcement of a credit agreement results in a party being deprived of his property, such a step would always have the potential to invade Constitutional rights.²²⁷ The process adopted or statute that regulates said process must comply with

- (i) the standards of procedural fairness and non-arbitrariness as set out in section 25(1) of the Constitution;²²⁸ and
- (ii) the standard of proportionality as set out in section 26(1) and 36 of the Constitution.²²⁹

Counsel structured his argument against the backdrop of section 25(1) of the Constitution in the following manner:

²²⁴ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 18.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 21.

²²⁸ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 22.

²²⁹ *Ibid.*

- (a) Section 25(1) states that no one may be deprived of property except if such deprivation is done in accordance with legislation and furthermore legislation may not permit arbitrary deprivation of property.²³⁰
- (b) Deprivation of property is defined as “any interference with the use, enjoyment or exploitation of private property”.²³¹
- (c) Deprivation will be deemed to be arbitrary if said deprivation is done without proper cause or reason and in a manner that is “procedurally unfair”.²³²
- (d) In *Joseph v City of Johannesburg*²³³ the court ruled that one of the essential elements of procedural fairness is that notice of the impending infringement of a right is given to the individual to be affected.²³⁴
- (e) Section 130(3)(a) of the NCA permits a court to proceed with the enforcement of a credit agreement (which enforcement can include execution steps against the property of a credit consumer) even if the section 129(1)(a) notice has not come to the attention of the credit consumer.²³⁵
- (f) By permitting a court to enforce a credit agreement in the manner as stated in (e) above and by considering the ruling in *Joseph v City of Johannesburg* against the backdrop of section 25(1) of the Constitution, counsel argued that section 130(3)(a) permits a procedurally unfair and arbitrary deprivation of property.²³⁶

²³⁰ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 23.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Joseph v City of Johannesburg* 2010 4 SA 55 (CC).

²³⁴ 2010 4 SA 55 (CC) par 47 and 76.

²³⁵ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 24.

²³⁶ *Ibid.*

Counsel referred to *Jaftha v Schoeman*²³⁷ to establish his point that any form of deprivation of property or access to property will inevitably impact on an individual's Constitutional rights.²³⁸

Counsel then proceeded to explore the impact of section 39(2) of the Constitution on the section 129(1)(a) notice of the NCA. Counsel argued as follows:

- (a) Currently there are two schools of thought, one that deems a notice to be delivered once sent and another, requiring actual receipt by the credit consumer. The Court had to decide which interpretation of section 129(1)(a) is the correct one.²³⁹
- (b) Every Court has the duty when interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights.²⁴⁰
- (c) Section 39(2) requires an interpretation of a statute that “better” promotes the spirit, purport and objects of the Bill of Rights.²⁴¹
- (d) Taking the above into account, counsel submitted that the requirement for a credit consumer to actually *receive*²⁴² the section 129(1)(a) notice prior to the enforcement of the credit agreement (i.e. execution against property) “better” promotes the spirit, purport and objects of the Bill of Rights.²⁴³

²³⁷ *Jaftha v Schoeman and Others*; See also *Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC).

²³⁸ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 25.

²³⁹ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 27.

²⁴⁰ S 39(2) of Act 108 of 1996.

²⁴¹ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 28.

²⁴² Own emphasis.

²⁴³ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 29.

4.3.3.4 The Credit Agreement Enforcement Process

Counsel argued that should it be found that the section 129(1)(a) notice should not only be sent by the credit provider but also *received*²⁴⁴ by the credit consumer, the impact of such interpretation on the enforcement process would be, apart from being more fair and arbitrary, relatively minor.²⁴⁵ Counsel rejected the argument that the proposed interpretation of section 129(1)(a) would result in onerous and expensive forms of delivery.²⁴⁶ It was argued that section 130(3)(a) of the NCA only requires a Court to be “satisfied” that the requirements of section 129 has been complied with in order to be able to proceed with enforcement of the credit agreement.²⁴⁷ By phrasing its argument in this manner, Counsel draws the attention away from the notion of receipt. Counsel did however add, as an after thought, the statement “...and there is no suggestion that the notice has not reached the consumer...”²⁴⁸ This phrase impacts greatly on the enforcement process and try as counsel may, it cannot be down played in the manner that counsel proposed.

4.4 Conclusion

The NCA requires that a credit provider communicate to a consumer not only that he is in breach of their agreement but also what the consumer’s various options are to remedy the breach. The concept is in line with the purposes of the Act but lacks the refined finishing that would ensure smooth practical implementation. It is evident from this paragraph that neither sections 65, 129, 130 nor regulation 1 of the NCA provide a required method of delivery for the section 129(1)(a) notice. The absence of a prescribed method of delivery places the burden of interpretation of this specific problem on the Courts. The result is a variety of opinions on the matter and a

²⁴⁴ Own emphasis.

²⁴⁵ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 29.

²⁴⁶ Heads of Argument on behalf of the First Amicus Curiae in the matter *Sebola and Sebola v Standard Bank of South Africa and Others* case no 98/2011 (CC) 30.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

Supreme Court ruling that, for now, is the law. The position as it stands may also change in the immediate future when the Constitutional Court rule in the *Sebola*-matter.

5. CONCLUSION

5.1 General

In this dissertation the researcher investigated the pre-debt enforcement process as envisaged in section 129 with specific focus on the procedural flaw pertaining to the method of delivery of the section 129(1)(a) notice. It is evident that the legislature intended to protect the consumer with the NCA to such a degree that some may argue it is to the detriment of credit providers. The purposes of the Act are, for the most part, clear and favor the consumer but due to poor drafting of the Act, the legislature's intent is obscured and left open for debate in many instances. The fact that the NCA does not provide for a definite form or method of delivery of the section 129(1)(a) notice is exposed. Unfortunately, at the stage that a section 129(1)(a) notice comes into play, it can be deduced that the relationship between the parties have begun to deteriorate and having a prescribed process which in some instances is unclear, only adds fuel to the confrontational fire. It is extremely important that a section of the NCA that impacts on both credit providers and consumers in such an enormous manner should be crystal clear.

In this paragraph the researcher will conclude the research pertaining to the procedural flaw and provide certain recommendations as to how the position can be remedied.

5.2 Summary of Findings

It has been established that the NCA, against the backdrop of consumers that are for the most part uneducated and vulnerable, is tasked with balancing the rights of consumers and credit providers alike. In this regard it is evident that consumers are better catered for in the NCA than credit providers. The NCA introduced new

concepts and procedures such as debt enforcement and debt review, which concepts differ from debt enforcement in terms of the common law as far as notification to a party in breach is concerned. One can even argue that the NCA codified the format of a letter of demand in terms of the NCA by setting the requirements in section 129.

It is submitted that the legislature created a procedural flaw in the debt enforcement process by not properly formulating the method of delivery of the section 129 notice. The result is that a variety of methods for delivery are available to a credit provider yet very few methods has as an end result an informed consumer. An evaluation of section 65 as well as regulation 1 of the Act proved to be futile as a remedy to the problem. In the absence of a prescribed method, the interpretations of the courts are the only viable option for a potential remedy to the problem. As was indicated in paragraph 4, this option is also flawed, reason being that the courts have to interpret a piece of legislation that was poorly drafted. The end result is a variety of opinions on the subject yet no concrete answer as to the correct method to be followed.

5.3 Recommendations

Having regard to the research conducted it is evident that the legislature need to step in and amend the NCA to provide for a definite method of delivery. It is opined that that the first amendment should pertain to the address for delivery of the section 129(1)(a) notice. It is submitted that if the legislature requires the consumer to provide a *domicilium* address of his choice, and the section 129(1)(a) notice was sent to said address, the only potential issue left would be the method of delivery.

Taking last mentioned into account it is submitted that the second amendment should pertain to the method of delivery of the section 129(1)(a) notice. It is submitted that there are two viable options for delivery of the section 129(1)(a) notice namely, registered mail or by means of service by the Sheriff.

The first option would be to make delivery of the section 129(1)(a) notice through service by the sheriff mandatory. This method of delivery ensures that the consumer is placed in possession of the section 129 notice and if required, the sheriff can explain the content of said notice to the consumer. The credit consumer would also be able to prove beyond reasonable doubt that the consumer received the section 129(1)(a) notice. The flipside to this method is that it will place an additional financial burden on the credit provider, which in turn, may escalate the cost of credit. The issue with this method not only pertains to the financial implication associated with this method but also to the practical implications. In the event that the sheriff is unsuccessful with service of the section 129(1)(a) notice, it would bar the credit provider from proceeding with legal action against the consumer until such time as positive service is established. What would happen to a credit consumer's claim in the event that the consumer cannot be found? It is submitted that such a process would not make sense unless the legislature provides additional measures available to a credit provider to circumvent situations as stated above.

The second option is obviously less expensive but cannot guarantee a court that the notice has indeed reached the consumer and that he is aware of the content thereof. A variety of opinions were quoted on this point and it is submitted that should the legislature make it mandatory for a consumer to provide a *domicilium* address in a credit agreement, such provision in conjunction with the requirement that the section 129(1)(a) notice should be sent to said address by way of registered post, would suffice. Should this method be followed the burden will not be on the shoulders of the credit provider exclusively and will the consumer also share some responsibility.

It is submitted that the second option not only makes economical but also practical sense.